STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

RAYMOND NADEAU	)	State File No. C-13594
	)	
v.	)	By: Christopher McVeigh, Contract Hearing Officer
	)	
ATLAS VAN LINES	)	
	)	For: Barbara G. Ripley, Commissioner
	)	
	)	Opinion No. 12-93WC

APPEARANCES:

Harry A. Black, Esq. for the Claimant
John P. Riley, Esq. for the Defendant

ISSUES:

1. What is the appropriate average weekly wage by which the claimant's benefits should be determined?

2. Whether the claimant has reached a medical end result.

3. If the claimant has reached a medical end result, what is his degree of permanent partial impairment, if any?

4. Whether the claimant's benefits were property terminated in April 1991, for allegedly failing to cooperate in a work-hardening program.

WITNESSES:

For the Claimant: Raymond Nadeau

For the Defendant: Greg Leroy of Comprehensive Rehabilitation Associates

EXHIBITS:

The parties agree to submit a joint exhibit notebook containing the following joint exhibits:

Joint Exhibit A - Including Exhibits A1 through A16 contains vocational rehabilitation reports from General Rehabilitation Services, Inc.;

Joint Exhibit B - Including Exhibits B1 through B3 contains reports from Comprehensive Rehabilitation Associates, Inc.;

Joint Exhibit C - Medical records from Alexian Brothers Hospital of Elizabeth, New Jersey, dated 11/17/89;

Joint Exhibit D - Including Joint Exhibits D1 through D18, includes various physical therapy notes, evaluations, and reports;

Joint Exhibit E - Dr. Charles Rust's June 19, 1990 medical report;

Joint Exhibit F - Including Joint Exhibits F1 through F12, includes office notes and letters from Leland Hall, M.D., MRI report from Dartmouth Hitchcock Department of Radiology; office notes of William Abdu, M.D.; bone scan of October 21, 1991, office notes of Robert Rose, M.D.;

Joint Exhibit G - Including Joint Exhibits G1 through G5, includes consultation, progress notes, and letters generated by Daniel Robbins, M.D., of Orthopaedic and Hand Surgery, P.C.;

Joint Exhibit H - Including Joint Exhibits H1 through H3, evaluation, discharge evaluation, and letter from Southwestern Vermont Medical Center Back to Work Program;

Joint Exhibit I - Including Joint Exhibits I1 through I4, evaluation and letters generated by Philip Gates, M.D.;

Joint Exhibit J - Including Joint Exhibits J1 through J4, notes and evaluation from the University Health Center; and

Joint Exhibit K - Including the following miscellaneous items:

K1 - Contract between Raymond Nadeau and Atlas Van Lines, dated May 10, 1989;

K2 - June 11, 1990, letter to Raymond Nadeau from Certified Van Lines with Form 1099;

K3 - 1989 Federal Tax Return for Raymond Nadeau;

K4 - Claimant's 1989 State Tax Return; and

K5 - Receipts of the claimant to paid laborers.

Defendant admitted the following exhibits:

Defendant's 1 - Attorney Riley's March 9, 1993, summary of the benefits paid to date.

Judicial notice shall also be taken of all filings with the Department of Labor and Industry.

FINDINGS OF FACT:

1. On May 10, 1989, the claimant and Certified Van Lines executed a contract entitled "Household Goods Contractor Agreement" which controlled their business relationship.

2. Under this agreement, the claimant provided both his services and the operation of his tractor to the defendant for transporting household furniture.

3. Under this agreement, the defendant assigned sundry moving jobs to the claimant to perform utilizing his tractor and the defendant's trailer.

4. The defendant paid the claimant a percentage of the carrying cost it charged its customers for his job performance.

5. The claimant paid all his own expenses relating to the operation of his truck, including gas, oil, and general maintenance, and also paid expenses associated with loading and unloading the transported furniture such as hired hands for loading and unloading the trailer.

6. The claimant also paid his own expenses associated with travel such as food, lodging, and entertainment.

7. The defendant, however, paid the claimant's fuel and road tax, and also paid his insurance on his truck, the cost of which was subsequently deducted from the revenues paid to the claimant.

8. Once the claimant completed a moving job, he returned the business papers and any payment made to him directly to the defendant.

9. The defendant then calculated the claimant's earnings and deposited them directly into the claimant's account.

10. On November 17, 1989, the claimant was in Newark, New Jersey on a moving assignment for the defendant. To prevent damage to an automobile that had been loaded onto the trailer, the claimant attempted to bounce the automobile towards the center of the trailer. During this maneuver, the claimant heard a crack in his back, which immediately caused severe pain and forced him to seek medical attention.

11. The claimant promptly went to the Alexian Brothers Hospital in Elizabeth, New Jersey, where he was x-rayed, with no significant finding, provided medication, and released.

12. Upon release and pursuant to medical instructions, the claimant returned to his truck where he slept for the next eight hours. The claimant then drove to Stafford, Connecticut, where he delivered his trailer. He then drove to his mother's house in Connecticut, where he spent the evening. The next day the claimant returned to his home in South Londonderry, Vermont.

13. After returning to Vermont, the claimant began treating with Dr. Steven Baumrucker at the Mountain Valley Health Center in Londonderry, Vermont. Dr. Baumrucker treated the claimant's back injury conservatively by referring the claimant to physical therapy. Although physical

therapy improved the claimant's condition, it did not relieve it completely.

14. Dr. Baumrucker subsequently referred the claimant for a bone scan which proved negative and then referred him to Dr. Leland Hall at the Dartmouth Hitchcock Medical Center.

15. Dr. Hall examined the claimant on February 26, 1990, and suspected that claimant's symptoms might be related to a bulging disk at the L5/S1 level. Dr. Hall recommended additional physical therapy for the claimant and in an April 14, 1990, letter concluded that the claimant should have been able to return to his usual occupation by April 1, 1990. The claimant, however, did not return to his usual occupation by that point in time.

16. Starting in August 1990, Rosemary Fordham, R.N., of General Rehabilitation Services, Inc., started managing the claimant's medical care. She noted that despite his physical therapist's recommendation to get walking sneakers, the claimant still used old cowboy boots as his walking footwear.

17. Ms. Fordham noted the improvement the walking sneakers made once they had been procured for the claimant and the improvements the claimant seemingly made in his physical therapy program up to November 1990, when he had an appendectomy. After the appendectomy, however, the claimant reverted to a general non-active, non-walking lifestyle.

18. Ms. Fordham noted the claimant's failure to set realistic return-to-work goals and his apparent low tolerance for pain. In addition, she noted the claimant's tendency to cancel appointments with medical care providers for reasons such as confusion about appointment dates. Throughout Ms. Fordham's management of the claimant's medical care, he did not progress despite several opportunities available to him including access to a work-hardening program and physical therapy sessions. Ms. Fordham's medical management ceased in November 1991.

19. On September 25, 1990, the claimant began treating with Dr. Robbins of Bennington, Vermont. Dr. Robbins concluded that the L5/S1 disk bulge was not clinically significant. He diagnosed the claimant with mechanical low back pain with facet hypertrophy; he also suspected possible internal disk derangement at the L5/S1 level, a diagnosis Dr. William Abdu eventually ruled out. Dr. Robbins also concluded that the claimant had previously received inadequate conservative treatment.

20. Upon Dr. Robbins' recommendation, the claimant started a work hardening program at Southwestern Vermont Medical Center in March 1991. Participation in the program increased the claimant's low back pain which interrupted his sleep and caused a one-week break in the program to allow prescription medication for the sleep problem to reach therapeutic levels.

21. Upon returning to the work-hardening program, the staff noted that when reliving past trucking experiences, the claimant could sit without symptomatic pain and that he would often lay down and fall asleep unless supervised. Further, it developed that the claimant had high blood pressure and Dr. Robbins medically advised that he should be discharged from the program if the problem persisted for three consecutive days, which it did.

22. The Southwestern Vermont Medical Center's discharge summary noted that the claimant exhibited "several signs of a [sic] an individual with symptom magnification syndrome," in that he could not negotiate with his symptoms, that his symptoms control him, that he could not accept responsibility for change related to his condition, and that he lacked specific return-to-work goals.

23. The claimant treated with Dr. Robbins until June 14, 1991, when he failed to show up for a pre-operative evaluation precedent to a discography. Dr. Robbins had scheduled the discography because other conservative treatments had apparently failed to improve the claimant's condition. In his June 14, 1991, note, Dr. Robbins stated, "the patient obviously does not want discography and has not made any effort in terms of care

for his back. I highly doubt the patient's willingness to care for himself and set appropriate goals."

24. In September 1991, Barbara Torstenson, R.N., B.S.M., of Comprehensive Rehabilitation Associates, Inc., began providing medical management for the claimant. On her initial visit with the claimant, she noted that he wore cowboy boots on the hard slate floor of his home. Ms. Torstenson's medical management of the claimant's care lasted until January 1992, she also noted the claimant's unwillingness or inability to accept his medical condition and the limitations it placed on him.

25. On October 3, 1991, the claimant began treating with Dr. William Abdu of the Dartmouth Hitchcock Medical Center. In his examination, including a review of the claimant's February 1991 MRI, Dr. Abdu noted that the claimant had no disc herniation and appeared to have normal degeneration for his age at the L3/4, L4/5, and L5/S1 levels. The claimant's back pain was to the left side of the low back. Dr. Abdu found no neurological deficit and ruled out internal disk derangement as inconsistent with the claimant's pain symptoms.

26. Dr. Abdu subsequently recommended injection therapy for the claimant; this therapy, however, did not improve the claimant's condition. In November 1991, Dr. Abdu also ruled out surgical intervention because of the claimant's failed injection therapy. In March 1992, Dr. Abdu rated the claimant with an 8 percent permanent partial impairment of the whole body due to spondylolysis; he noted that the claimant's range of motion fell within normal limits. An 8 percent permanent partial disability of the whole person converts into a 13.5 percent impairment of the spine.

27. On December 19, 1991, Dr. Philip Gates examined the claimant noting that "he really shows remarkably normal physical examination." Also, reviewing the claimant's previous diagnostic test, Dr. Gates noted the normal MRI performed on February 13, 1991, the normal October 21, 1991, bone scan, the normal October 21, 1991, x-rays, and the limited October 31, 1991, CT films which showed a left sided pars defect.

28. In light of his examination of the claimant and review the claimant's medical history, Dr. Gates recorded his diagnostic impression as "chronic low back pain syndrome, apparently with a significant element of symptom magnification." Dr. Gates explained to the claimant that the tests did not show an acute vertebral fracture, as the claimant supposed. Dr. Gates also noted that the claimant, "has clearly been resistant to attempts at rehabilitation through physical therapy and work hardening," and that his then functional status was the best it would probably be. After placing the claimant at a medical end result on January 9, 1992, Dr. Gates provided the claimant with a 26.5 percent permanent impairment of the spine.

29. On February 27, 1992, Dr. Rowland Hazard examined the claimant noting that he suffered from situational depression in the moderate range. Dr. Hazard also recommended a quantitative functional evaluation to assess the claimant's physical capabilities.

30. Five months later, on June 14, 1992, the claimant underwent a quantitative functional evaluation from which Dr. Hazard recommended that "functional restoration with behavioral support may be helpful if the [claimant] is willing to participate and clarify his goals." Dr. Hazard again reached this conclusion after an August 26, 1992, visit with the claimant.

31. In a final December 21, 1992, visit, Dr. Hazard again stated that the claimant needed to set some new rehabilitation goals before an appropriate treatment approach could be decided upon. Dr. Hazard also noted that since September 1992, the claimant had still not completed his vocational interest test.

32. Between May 10, 1989, when the claimant first started working for the defendant, and November 17, 1989, when he hurt his back, the claimant earned $45,830.39. The defendant used the federal tax Form 1099 for miscellaneous income in notifying the claimant of his earnings for 1989.

33. In his 1989 federal income tax return, the claimant listed gross receipt of $54,743 which included receipts

from employment prior to his May 1989, contract with the defendant. After deducting expenses, the claimant listed a profit of $5,002 which he recorded as his taxable income. H&R Block prepared the claimant's 1989 tax return for him.

34. Greg Leroy, a rehabilitation specialist with Comprehensive Rehabilitation Associates, offered testimony on the earning potential of long-distance truck drivers for various furniture moving companies. Mr. Leroy's statistical evidence ranged from hourly moving company employee drivers to independent truck drivers contractually bound to a mover. Based on Mr. Leroy's testimony, I find that an independent contractor with the claimant's level of experience working in the same district as the claimant would average $37,500 per year as earned income.

CONCLUSIONS OF LAW:

1. In a workers' compensation action, the claimant has the burden of establishing all facts essential to the rights asserted, including the character and extent of the injury and disability. Goodwin v. Fairbanks, Morse and Co., 123 Vt. 151 (1962); Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950), overruled on other grounds; Shaw v. Dutton Berry Farm, Vt. Sup. Ct. No. 92-267 dated June 11, 1993.

2. The claimant must establish by sufficient, competent evidence the character and extent of the injury as well as the causal connection between the injury, the medical treatment for the injury, and the employment. Rothfarb v. Camp Awanee, Inc., supra.

3. When the claimant's injury is an obscure one so that a layperson could have no well-grounded opinion as to its causation or duration, expert medical testimony is the sole means of laying the foundation for an award. Jackson v. True Temper Corporation, 151 Vt. 592, 596 (1989); Egbert v. The Book Press, 144 Vt. 367 (1984).

4. It must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incident complained of was the cause of the

injury and the inference from the facts proven must be at least the more probably hypothesis. Jackson v. True Temper Corporation, supra; Burton v. Holman and Martin Lumber Co., 112 Vt. 17, 19 (1941).

5. A claimant is entitled to temporary total disability compensation when she or he is totally disabled from work, and temporary total disability compensation terminates when the claimant reaches a medical end result or successfully returns to work. Merrill v. Town of Ludlow, 147 Vt. 186 (1986); Orvis v. Hutchins, 123 Vt. 18 (1962).

I. AVERAGE WEEKLY WAGE

1. The claimant's average weekly wage "shall be computed in such manner as is best calculated to give the average weekly earnings of the worker's during the twelve weeks preceding his [or her] injury." 21 V.S.A. § 650(a).

2. Where, however, "the terms of the employment" make it "impracticable to compute the rate of remuneration, regard may be had to the average weekly earnings which, during the twelve weeks previous to the injury, were being earned . . . by a person in the same grade, employed in the same class of employment and in the same district." 21 V.S.A. § 650(a).

3. Although the Commissioner has the discretion to examine the conduct of a sole proprietorship to determine whether profits are the functional equivalent of wages; generally profits from a business are not the functional equivalent of wages and are not a substitute for wages for the purpose of establishing an average weekly wage. Hotaling v. St. Johnsbury Trucking Company, 153 Vt. 581, 585 (1990).

4. A Form 21 agreement for temporary total disability benefits constitutes a contractual agreement between the parties and the parties are deemed to have agreed to have accepted the terms of that agreement. Compare Craig v. Alpine Vanity, Opinion No. 8-93WC, dated July 15, 1993. (Form 15 constituted a contractual agreement between the parties and its terms are accepted as agreed upon by the parties.)

5. From 1989 through the termination of benefits on October 1, 1992, the defendant has been paying weekly compensation benefits at the maximum statutory level, based on an average weekly wage of $1,062.

6. The defendant now challenges this average weekly wage figure arguing that it inaccurately reflects the claimant's average weekly wage because it fails to account the claimant's status as an independent contractor and sole proprietor whose earnings or remuneration are necessarily, because of operating costs and expenses, less than his gross receipts, which the average weekly wage of $1,062 reflects. The claimant contends otherwise, that his average weekly wage has properly been calculated as $1,062, his gross receipts. The claimant argues that because the defendant did not reimburse him for operating expenses, his earnings include anything of value received from the employer, i.e., anything of real economic gain, and that profits do not equal wages for determining average weekly wage. Additionally, the claimant contends that the defendant paid its premium payments for workers compensation insurance based on the claimant's gross receipts.

7. The average weekly wage should reflect the employee's actual earnings and "anything of value received as consideration for the work . . . [which constitutes] real economic gain to the employee." 2 Larson's, Workmen's Compensation Law, § 60.12(a) at 10-648.

8. When faced with the factual circumstances strikingly similar to those presented here, courts have rejected the claimant's argument that his gross receipts are wages for the purposes of calculating an average weekly wage. In D&C Express, Inc. v. Sperry, 450 N.W.2d 42, 844-45 (Iowa 1990), the claimant, an owner/operator of a semitrailer truck, injured his back when he fell from his tractor trailer. The claimant had leased his truck to D&C with terms similar to those here. While the claimant paid maintenance cost, insurance, and for other help he needed, the defendant paid the claimant for his services a percentage of the gross revenues of the freight hauled. These payments equaled $955 per week, without reduction for expenses and costs, for 13 weeks (Iowa's formula) preceding his injury. Although the

industrial commissioner used this $955 figure, the court reversed that determination and held that the expenses the claimant incurred must be deducted so that an accurate average weekly wage could be determined.

9. Other courts have reached conclusions similar to those reached by the Sperry Court. See Backus v. Murphy Freight Lines, 442 N.W.2d 326, 327 (Minn. 1989) (claimant-tractor trailer owner leased it to defendant; claimant received percentage of revenue earnings; court held that wage computation had to reflect the return of capital investment, which did not constitute wages); Florida Timber Products v. Williams, 459 So.2d 422, 423 (Fla. App. Dist. 1 1984) (where claimant was independent contractor, business expenses, including depreciation, should have been deducted from gross receipts to determine proper average weekly wage); Wright v. Wright, 411 S.E.2d 829, 830 (S.C. Ct. App. 1991) (claimant self-employed sole proprietor, mileage deduction, like other business expenses not included to determine average weekly wage); Coles v. Gainesville Bonded Warehouse, 409 So.2d 1205, 1206 (Fla. App. Dist. 1 1982) (claimant independent contractor-truck driver for furniture mover; average weekly wage determined by subtracting business expense from gross receipts); Herrin v. Georgia Casualty Company, 414 So.2d 1323, 1328 (La. App. 1982) (claimant independent wood hauler paid per cord hauled, earnings deemed return on labor and not capital, proper average weekly wage computed by deducting business expenses from gross earnings/receipts). But see Suwannee Lumber Company v. Fitzgerald, 322 S.E.2d 347, 348-49 (Ga. App. 1984) (claimant independent contractor sold pulp wood to defendant; production costs not deductible for determining average weekly wage). Based on these authorities, I conclude that the claimant's weekly gross receipts of $1,062 do not present an accurate picture of his actuate average weekly wage and would, if used, provide the claimant with an unwarranted windfall. Nor do I find, as the defendant tepidly urges that the claimant's average weekly wage should be based on his stated profit of $5,002 contained in his 1989 tax return. Not only did the claimant rely upon another, H&R Block, to prepare his returns, the tax returns are not dispositive of wage determinations. See e.g. Arthur Shelley Trucking Company v. W.C.A.B., 538 A.2d 604, 606

(Pa. Cmwlth. 1988) (failure to report advance on tax return not dispositive of whether advance constituted wages).

10. Additionally, the Vermont Supreme Court has held that profits are generally not equated with wages. See Hotaling v. St. Johnsbury Trucking, supra.

11. Since "the terms of the employment" make it impracticable to determine the claimant's own twelve-week work history, I shall use the average weekly wage of "a person in the same grade employed in the same class of employment and in the same district," as the claimant to determine his average weekly wage. See 21 V.S.A. § 650(a).

12. Based on Greg Leroy's testimony, I find that the yearly average wage earning for an independent truck driver with the claimant's years of experience performing work similar to the claimant in the same district is $37,500. Therefore, the claimant's average weekly wage for the purpose of determining his compensation rate is $37,500 divided by 52 weeks which equals $721.15 as an average weekly wage. This average weekly wage yields a weekly compensation rate of $482.72.

13. Since this compensation rate should have been calculated in November 1989, it shall be adjusted to reflect the yearly July 1 adjustments. Applying these adjustments, the claimant's 1992-1993, compensation rate is $538.98, and is $568.08 for 1993-1994.

14. Although the defendant seeks credit for allegedly overpaid benefits on the basis of the previously improperly calculated average weekly wage, the credit for the erroneous average weekly wage shall not be awarded. Through its representative, Gallagher Bassett Services, the defendant as recently as November 4, 1991, entered into a Form 21 agreement for temporary total disability compensation with the claimant in which it agreed that "according to the employer's records, the average weekly wage is "$1,062.00." In addition, as recently as July 10, 1992, Gallagher Bassett Services, Inc., submitted a Form 28 in which it again noted that

the claimant's average weekly wage was $1,063 at the time of his injury.

15. The defendant is contractually bound by this previous agreement however mistaken it may be. Compare Cf. HLJ Management Group, Inc. v. Kim, 804 P.2d 250, 253 (Col. App. 1990) (employer's mistaken average weekly wage not retroactively altered where no fraudulent mispresentation by claimant).

16. Although the defendant contends that in January 1992, it requested the claimant's 1989 tax returns which the claimant delayed in providing until October 1992, that circumstance does not alter the legal significance of the defendant's previous contractual arrangement concerning the average weekly wage. The defendant undoubtedly knew, because it was not paying, that the claimant incurred expenses in operating and maintaining his tractor trailer used to transport furniture for the defendant. In addition, the critical information gleamed from the tax returns, i.e., that the claimant made approximately $5,002.00 does not translate into the claimant's average weekly wage.

17. For these reasons, the defendant's claim for credit for overpayment based on an incorrect average weekly wage shall be denied. Therefore, any prospective award shall use a $712.15 average weekly wage for the claimant which translates into a 1992-93 weekly compensation rate of $538.98, and a $568.08 1993-94 rate.

II. MEDICAL END RESULT/PERMANENT PARTIAL DISABILITY

1. Based on the medical evidence presented, I find that the claimant reached a medical end result by January 9, 1992, as stated by Dr. Philip Gates. Although provided numerous opportunities, the claimant did not fully pursue treatment programs designed to improve his condition. Rather, he performed the minimal amount of activity, if that, required by his treatment program. Therefore, I find that Dr. Gates' assessment of a medical end result as of January 9, 1992, is an accurate one.

2. Although Dr. Rowland Hazard saw the claimant subsequent to Dr. Gates' assessment, Dr. Hazard's opinion spoke only of possible improvement. Additionally, the length of time between the appointments with Dr. Hazard, as well as the claimant's failure to complete even the vocational interest test, amply demonstrate the claimant's pattern of resistance to active treatment designed to improve his condition.

3. Therefore, the claimant reached a medical end result as of January 9, 1992, since it is not likely that his current condition will improve.

4. While Dr. Gates rated the claimant with a 26.5 percent permanent partial impairment to the spine, Dr. William Abdu rated him with a 13.5 percent impairment of the spine. Dr. Abdu and Dr. Gates both assessed the claimant with an 8 percent impairment of the whole person based on recurrent pain and his spondylolysis.

5. Dr. Gates provided additional permanency for the claimant's reduced range of motion, which Dr. Abdu did not. Although Dr. Abdu saw the claimant more times than did Dr. Gates, I find Dr. Gates' rating more persuasive because it was issued closer in time to its actual examination of the claimant (Dr. Abdu rendered his permanency rating several months after last seeing the claimant) and it encompassed the claimant's loss of range of motion. Therefore, I find that the claimant has suffered a 26.5 percent permanent partial impairment of his spine which entitles him to 87.45 weeks of benefits.

6. Beginning in June 1991, under Department order and otherwise, the defendant sent weekly benefits to the claimant. These benefits continued up until October 1, 1992, and for several weeks beyond that point. Although the claimant is entitled to temporary total disability benefits until January 9, 1992, when he reached a medical end result, the defendant is entitled to a credit against permanent partial disability benefits for the number of weeks of benefits advanced beyond January 9, 1992. Making this calculation, I find that the claimant's current entitlement to permanent partial disability benefits is 37.19 weeks, which represents the

87.45 week less the 50.26 weeks of benefits previously advanced by the defendant.

7. From October 6, 1991, through October 6, 1992, the defendant advanced weekly benefits to the claimant. Thereafter, pursuant to Department order, the defendant advanced an additional 3.47 weeks of benefits. All told, the defendant advanced 50 weeks and 2 days worth of weekly benefits beyond the medical end result date of January 9, 1992, for which it shall receive credit in weeks and days. Therefore, the claimant is entitled to additional permanent partial disability benefits for 37.19 weeks commencing November 1, 1992, until July 19, 1993, for a total permanent partial disability award currently due and owing of $20,175.15.

III. UNREASONABLE REFUSAL TO PARTICIPATE IN WORK-HARDENING PROGRAM

1. On April 19, 1991, the defendant terminated the claimant's temporary total disability benefits based on the claimant's alleged uncooperativeness in participating in Southwestern Vermont Medical Center's work-hardening program.

2. Under Vermont's Workers' Compensation Act, the claimant has the responsibility to actively participate in his or her medical care and cannot unreasonably refuse to participate or cooperated in a medical regimen designed to improve his or her condition. See e.g., Luther v. General Electric, Opinion No. 9-93WC, dated July 29, 1993; Knights v. Ames Department Store, Opinion No. 1-93WC.

3. The reasonableness of a claimant's refusal to undergo a medical regimen or participate in a program is measured by balancing the risk the program proposes against the likelihood and significance of benefit likely to be achieved. See Luther, supra.

4. Although the facts here present a close case, the defendant has failed to demonstrate that the claimant unreasonably failed to cooperate in the work-hardening program.

5. The claimant's general pattern or behavior does demonstrate an indifference to improving his physical condition. For example, he continued to wear cowboy boots as footwear even after medical care providers had explained the detrimental effect to his back that this footwear posed and had secured suitable walking sneakers for him. Additionally, the claimant has manifested a tendency to miss or cancel doctor's appointments for no legitimate reason.

6. Yet, while participating in the work-hardening program, the claimant's blood pressure came elevated to a point where his treating physician recommended that he discontinue the program. Although the claimant's effort at this program was minimal, I cannot find that he unreasonably failed to cooperation in the program, particularly given his blood pressure condition.

7. Therefore, the defendant's claim that the claimant unreasonably refused to participate in the Southwestern Vermont Medical Center's work-hardening program is denied.

Therefore, I find, and it is ordered that:

1. The claimant reached a medical end result on January 9, 1992;

2. That the claimant has suffered a 26.5 percent permanent partial impairment of the spine which yields entitlement to 87.45 weeks of benefits;

3. That the claimant's average weekly wage is $721.15;

4. That the defendant is not entitled to any credit for benefits previously overpaid as a result of an incorrect average weekly wage; the defendant is, however, entitled to a credit for advancement for the number of weeks of benefits beyond the January 9, 1992, medical end result date;

5. The claimant's compensation rate for the 1992-1993 year is $538.98;

6. Claimant is currently titled to 37.19 weeks of benefits which represent his entitlement to permanent partial disability benefits less the number of weeks the defendant has already advanced to the claimant; the number of weeks when multiplied by the applicable compensation rate yields a currently owed benefit of $20,175.15.

7. The claimant may submit a request for an attorney's fee and supportive documentation within 10 days of receipt of this decision for consideration. The defendant shall have 5 days to respond after receiving the claimant's request.

DATED this 16th day of September, 1993, at Montpelier, Vermont.

Barbara G. Ripley
Commissioner