

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Kim P. Lussier)	State File No. D-18975
)	
v.)	By: Jill Broderick
)	Hearing Officer
R.H.Creed Ice, Co.)	
)	For: Barbara G. Ripley
)	Commissioner
)	
)	Opinion No. 20-93WC

Heard in Montpelier, Vermont on July 22, 1993
Record Closed: October 8, 1993

APPEARANCES

Attorney for Claimant - Michael F. Hanley, Esq.
Attorney for Defendant - John P. Riley, Esq.

PROCEDURAL HISTORY

This case was heard before the Department of Labor and Industry on June 26, 1992. The findings and conclusion are codified in Opinion #29-92WC. The case was remanded for the purpose of taking additional evidence on the Claimant's disability caused by his post traumatic stress disorder.

THE CLAIMANT SEEKS

1. Permanent partial disability compensation.
2. Vocational rehabilitation.
3. Payment of outstanding medical bills.
4. Attorney's fees and costs.

ISSUES

1. What is the extent of the Claimant's permanent disability caused by his post traumatic stress disorder?
2. What is the extent of the Claimant's entitlement to vocational rehabilitation?

STIPULATIONS

The parties have stipulated to the following:

1. The treatment received by the Claimant for his physical

and psychological work related injuries and the charges for such treatment are reasonable; however, the Defendant does not so stipulate with respect to the hypnotherapy and acupuncture.

2. It is not appropriate for the Claimant to attempt to return to employment in the field of refrigeration.

3. As part of his training at Emery Aviation, in 1992, the Claimant flew from Colorado Springs to Aspen to Montrose and back to Colorado Springs.

4. On July 1, 1992 the Claimant's weekly compensation was increased to \$442.29.

5. Effective July 1, 1993 the Claimant's weekly compensation was increased to \$466.17.

6. For purposes of attorney's fees only the parties have stipulated that St. Paul offered to make available to the Claimant the amount of \$6500.00 for vocational rehabilitation services of his choosing, the amount identified in Michael Hanley's letter of June 24, 1993 as the complete cost of the program at New Hampshire Technical College to obtain training as an air frame and power plant mechanic.

The following exhibits were admitted without objection:

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| Claimant's Exhibit 18 | Notes of Joan Freeman dated July 10, 1992 - June 4, 1993. |
| Claimant's Exhibit 19 | Letter from M. Hanley to John Riley dated June 24, 1993 re: rehab plan. |
| Claimant's Exhibit 20 | Notes of Mark Steinman |
| Claimant's Exhibit 21 | Report of Mark Steinman |
| Claimant's Exhibit 22 | Academic record from Emery Aviation |
| Claimant's Exhibit 23 | Report from Dr. James Reinhard. |
| Claimant's Exhibit 24 | Notes and letter from Emily Hardy. |
| Claimant's Exhibit 25 | Notes from Dr. Henry Dantzig. |
| Claimant's Exhibit 26 | Claimant's unpaid travel expenses. |
| Claimant's Exhibit 27 | Unpaid medical expenses for hypnotherapy. |
| Claimant's Exhibit 28 | Unpaid medical expenses for acupuncture. |

Claimant's Exhibit 29	Unpaid flight instruction and training expenses.
Claimant's Exhibit 30	Unpaid educational expenses.
Claimant's Exhibit 31	Unpaid education expenses: Emery Aviation.
Claimant's Exhibit 32	Decision of Department of Labor and Industry dated December 17, 1992.
Claimant's Exhibit 33	Airman written tests.
Claimant's Exhibit 34	Claimant's pilot's license.
Claimant's Exhibit 35	Statement of attorney's fees.
Claimant's Exhibit 36	Statement of costs.
Claimant's Exhibit 37	Medical records from Dartmouth Hitchcock.
Claimant's Exhibit 38	Letters from Drs. Dantzig, Carr and Savage.
Claimant's Exhibit 39	Affidavit of Axel Gruel.
Defendant's Exhibit 6	Stipulation dated April 13, 1992 regarding advance of funds.
Defendant's Exhibit 7	Claimant's FAA medical records.

FINDINGS

Based on the evidence and testimony presented at the hearing, I find:

1. The stipulations set forth above are true and the exhibits listed above are admitted into evidence.
2. Dr. James Reinhard, a psychiatrist, testified regarding the extent of permanent partial disability due to the Claimant's post traumatic stress syndrome.
3. Dr. Reinhard is the director of the Forensic Psychiatric Evaluation Services of Dartmouth-Hitchcock Medical Center and [B]practices at the Veterans Administration Hospital in White River Junction, Vermont, which is the national center for the treatment of post traumatic stress disorder for the Veterans Administration.

4. Dr. Reinhard regularly sees and evaluates patients suffering from post traumatic stress disorder.

5. Dr. Reinhard examined the Claimant on March 30, 1993 and April 20, 1993, and conducted a general forensic psychiatric evaluation.

6. Dr. Reinhard testified that the Diagnostic and Statistical Manual of Mental Disorders (Third Edition-Revised) ("DSM III-R") is the standard treatise for the definition of mental diseases and disorders.

7. The DSM III-R requires a mental health practitioner to classify a patient on the Global Assessment of Function scale, which quantifies a person's ability to deal with the ordinary problems of everyday life.

8. Dr. Reinhard opined that the Claimant was functioning at a level of 55 on the Global Assessment of Function scale, which is "in the range of moderate symptoms and moderate difficulty in social, occupation or school functioning."

9. The AMA Guide to the Evaluation of Permanent Impairment, Third Edition, suggests assessment in four areas of psychiatric functional limitation: the activities of daily living; social functioning; concentration, persistence, or pace; and adaptive functioning in response to stress.

10. Dr. Reinhard concluded that as a result of the Claimant's work-related injury, the Claimant suffers from moderate impairment of his activities of daily living; moderate impairment of his social functioning; no impairment of his concentration, persistence, or pace; and mild impairment in the area of adaptive functioning in response to stress. Dr. Reinhard noted, however, with respect to the last category, that the Claimant might experience more marked impairment when exposed to stimuli specific to his trauma.

11. Using the DSM III-R and the AMA Guide, Dr. Reinhard concluded that the Claimant has a fifty percent impairment of the whole person due to his post traumatic stress disorder.

12. The Claimant desires to obtain training as an airframe and powerplant mechanic and certification as a flight instructor.

13. Mark Steinman, a vocational rehabilitation counselor for the State of New Hampshire, prepared an Individualized Written Rehabilitation Program ("IWRP") for the Claimant.

13. Mr. Steinman recommended that the Claimant attend a five semester course at the New Hampshire Technical College in Nashua, New Hampshire for training as an airframe and powerplant

mechanic. The cost of the mechanic course is \$6500.

14. Mr. Steinman believed that the Claimant would successfully complete the mechanic training program and stated that the Claimant had an reasonable chance of obtaining employment as a mechanic. He testified that as an airframe and power plant mechanic, the Claimant would earn at least his preinjury salary of \$25,000 to \$30,000 per year.

15. Mr. Steinman believed that it was appropriate for the Claimant to continue his training to be a certified flight instructor.

16. The Claimant testified that the stump on his right leg hurts every day, but he does not take pain medication because he will not be allowed to pilot an aircraft and continue with his flight instructor training.

17. The Claimant has undergone acupuncture and hypnotherapy treatments and believes these treatments have helped reduce both his leg pain and the anxiety associated with his post traumatic stress disorder.

18. Henry Dantzig, M.D. has worked with hypnosis in his medical practice for approximately fifty years. He treated the Claimant with hypnotherapy between January 8, 1993 and June 18, 1993 on thirteen occasions. The charge for each forty-five minute session was \$85.00, which is a reasonable and customary fee for such service.

19. Dr. Dantzig stated that while the sessions did not completely eradicate the Claimant's complaints associated with post traumatic stress syndrome, they did diminish the symptoms somewhat.

20. Axel Gruel, a licensed acupuncturist, has administered a course of acupuncture therapy for the Claimant since February, 1993. He stated that the therapy was medically necessary for relief of the Claimant's chronic pain and that the fees charged were reasonable and customary.

21. Dr. Charles Carr, an orthopedic surgeon, stated that conventional methods for relieving the Claimant's leg pain were not working and that the hypnotherapy and acupuncture were beneficial to the Claimant.

22. Dr. Seddon Savage, director of the Dartmouth Hitchcock Pain Clinic, stated that it was appropriate for the Claimant to use acupuncture to reduce his leg pain; however, he did not recommend continuing with such treatment if the Claimant did not experience persistent relief after eight or ten sessions.

23. Claimant's attorney spent 250 hours on this case. Given the circumstances, that is found to be a reasonable amount of time.

CONCLUSIONS

Based on the foregoing findings of fact, I conclude the following:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. King v. Snide, 144 Vt. 395 (1984). There 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. Burton v. Holden and Martin Lumber Company, 112 Vt. 17 (1941). Where the claimant's injury is obscure and a layman could have no well-grounded opinion as to its causation, expert testimony is the sole means of laying a foundation for an award. Lapan v. Berno's, Inc. 137 Vt. 393 (1979).

2. Dr. Reinhard's testimony regarding the Claimant's post traumatic stress disorder is credible and uncontroverted. Therefore, I conclude that the Claimant has a fifty percent whole person impairment due to his post traumatic stress disorder.

3. The Claimant seeks payment by the Defendant both for training as an airframe and powerplant mechanic and as a certified flight instructor. However, the record indicates that the mechanic training alone is sufficient to restore the Claimant to suitable employment. Therefore, the Defendant is obligated to pay only for the mechanic training. 21 V.S.A. §641(b); Workers' Compensation.

4. The acupuncture and hypnotherapy treatments are reasonable and related to the Claimant's work-related physical and psychological injuries. The fees charged for such treatments are also reasonable. Therefore, the Defendant is liable for payment of such treatments.

5. In administrative proceedings before the Department of Labor & Industry, the Commissioner "may allow the Claimant to recover reasonable attorneys' fees when he prevails." 21 V.S.A. §678(a).

6. In Hodgeman v. Jard Company, 157 VT 461 (1991), the Supreme Court upheld the Commissioner's award of attorneys' fees "solely on the basis that the Plaintiff had prevailed and was not responsible for any delay." 175 VT at 465.

7. Under the authority granted the Commissioner by the Act, 21 V.S.A. §602, the Department of Labor & Industry has adopted Rule 10, regarding fees which may be charged and awarded in contested cases at the department level.

Rule 10, provides, in pertinent part, that attorney fees awarded not exceed:

1. The charge of not more than \$35.00 per hour, supported by an itemized statement, or
2. A contingency fee to cover all legal services not to exceed 20% of the compensation award, or \$3,000.00, whichever is less.

8. The "whichever is less" language of Subparagraph (2) is intended to modify only the alternatives contained in that Subparagraph and does not limit the amount of attorneys' fees which may be awarded at the rate of \$35.00 per hour.

9. Therefore claimant's attorney is awarded fees for 250 hours at \$35.00 per hour.

ORDER

Therefore, based on the foregoing CONCLUSIONS and FINDINGS the Defendant or in the event of its default The St. Paul Insurance Company is hereby ORDERED to:

1. Pay the Claimant 165 weeks of permanent partial compensation for his 50% whole person impairment due to post traumatic stress disorder.

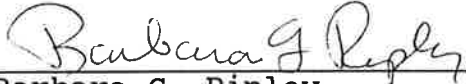
2. Pay the Claimant's medical bills related to treatment of his post traumatic stress disorder, including acupuncture and hypnotherapy.

3. Pay the \$6500 cost of the course at the New Hampshire Technical College for training as an airframe and powerplant mechanic.

4. Pay attorneys fees in the amount of \$8,750.00.

5. Pay the Claimant his costs.

DATED at Montpelier, Vermont this 21st day of October, 1993.



Barbara G. Ripley
Commissioner