

*Hall v. Maple Grove Farms, Inc. (August 8, 1995)*

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

ROLAND HALL                    )   STATE FILE NO. E-6641  
                                      )  
                                      )   By: David J. Blythe  
v.                                 )   Hearing Officer  
                                      )  
                                      )   For: Mary S. Hooper  
MAPLE GROVE FARMS, INC.    )   Commissioner  
                                      )  
                                      )   Opinion No: 33-95WC

*Hearing held at Montpelier, Vermont on January 12, 1995.  
Record closed on February 6, 1995.*

APPEARANCES

*Mark L. Stephen, Esq. for Claimant  
Stephen D. Ellis, Esq. for Defendant and for The Traveler's Insurance  
Co. (Defendant's workers compensation insurance carrier).*

ISSUES

*1. Is Claimant entitled to any additional temporary total disability  
(TTD) compensation after:*

*(a) October 9, 1992, the date upon which Claimant's treating  
physician placed Claimant at medical end result; or*

*(b) December 24, 1992, the date upon which the Department of Labor  
and Industry received the Form 27 (Notice of Intention to Discontinue  
Benefits) submitted by The Travelers Insurance Co. (hereinafter,  
"Travelers").*

*2. Is Claimant entitled to any permanent partial disability (PPD)  
compensation in addition to those already advanced by The Travelers  
based  
upon the impairment ratings provided by Claimant's treating physician?*

*3. Is Claimant entitled to any medical benefits in addition to those*

*already paid by or on behalf of Defendant?*

*4. Is Claimant entitled to recover attorneys fees under 21 V.S.A. §678(a)?*

*5. Is Claimant entitled to recover any costs under 21 V.S.A. §678(a)?*

*6. Is Claimant's claim for additional compensation barred by a failure or refusal to obtain reasonable medical treatment?*

## **EXHIBITS**

*Joint Exhibit A - Medical Records*

*Defendant's Exhibit 1 - Treatment Notes of W. Thomas Turek, D.C.*

## **WITNESSES**

*For Claimant: Roland Hall (Claimant)  
Bonnie Hall  
W. Thomas Turek, D.C.*

*For Defendant: Bradford R. Towle, D.C.*

## **STIPULATIONS**

*1. On or about September 27, 1991:*

*(a) Defendant Maple Grove Farms, Inc. ("Defendant") was Claimant's employer within the meaning of 21 V.S.A. §601, and The Travelers was its workers compensation insurance carrier; and*

*(b) Claimant Roland Hall was employed by Defendant as a maintenance worker.*

*2. Judicial notice may be taken of the following forms in the Department's files:*

*(a) Form 22 - Agreement for Permanent Partial Disability Benefits relating to May 1986 injury (state file No. X-22522)*

- (b) 10/9/91 - Form 1 - First Report of Injury;*
  - (c) 10/14/91 - Form 25 - Wage Statement;*
  - (d) 10/24/91 - Form 10 - Certificate of Dependency;*
  - (e) 01/02/92 - Form 21 - Agreement for Temporary Total Disability Benefits;*
  - (f) 12/17/92 - Form 27 - Notice of Intention to Discontinue Benefits;*
  - (g) 12/17/92 - Form 22 - Agreement for Permanent Partial Disability Benefits (not signed by Claimant); (received by Department on February 1, 1993);*
  - (h) 7/7/93 - Form 6 - Notice and Application for Hearing signed by Claimant;*
  - (i) 3/14/94 - Form 6 - Notice and Application for Hearing signed by Claimant's counsel, Mark Stephen, Esquire;*
  - (j) letters from Jean Perrigo dated April 27 and May 24 1994.*
- 3. Judicial notice may also be taken of the existence and contents of the American Medical Association Guides for the Evaluation of Permanent Impairment, 3rd and 4th Editions ("Guides").*

#### *FINDINGS OF FACT*

- 1. Stipulation No. 1 is true.*
- 2. On or about May 5, 1986, while employed by a different employer, Claimant injured his lower back during the course of and arising out of his employment. He filed a claim (No. X22522) with the Department of Labor & Industry ("Department") and received workers' compensation in connection with that claim.*
- 3. W. Thomas Turek, D.C., a chiropractic physician, was Claimant's treating physician in connection with the 1986 injury.*
- 4. In October 1987, Dr. Turek determined that Claimant had sustained a permanent impairment to his spine as a result of the 1986 injury. Dr. Turek gave an impairment rating of 15% of the spine and 12% of the lower extremity (Form 22 filed in connection with 1986 claim).*

5. Claimant's back condition was essentially stable for a period of three or more years prior to September 1991, although Claimant did report to Dr. Turek in February 1988 that he had lower back pain following a lifting incident at his then-current employment with Marstan Industries.

6. In April 1988, Claimant began working for Defendant as a maintenance worker.

7. On or about September 27, 1991, Claimant injured his lower back while working on a forklift, as he removed and carried several 4x4 pieces of lumber which he had used to support the forklift while he worked on it. This activity was in the course of Claimant's employment with Defendant.

8. After resting and attempting to return to work, Claimant found his back pain so severe that he was unable to perform his duties. On October 7, 1991, Claimant sought treatment with Dr. Turek, for the first time since November 23, 1988. Dr. Turek has been Claimant's treating physician with regard to his back injury from September 1986 through and including all times relevant to this claim.

9. The fact that the September 27, 1991 back injury and resulting need for medical/chiropractic treatment, at least through October 9, 1992, and the liability of Defendant in connection therewith, are not in dispute.

10. Dr. Turek treated Claimant regularly from October 7, 1991 through October 9, 1992, at which time Dr. Turek placed Claimant on a "prn basis", meaning that Claimant would seek treatment as needed

11. On February 27, 1992, at Dr. Turek's referral, Claimant was examined by Gale Ford, D.O., an osteopathic physician, who found physiological basis for Claimant's symptoms. Dr. Ford's notes suggest that she was not convinced that Claimant's pain and limitation of movement were genuine. However, Dr. Ford's "observations" are the exception to the body of other medical/chiropractic evidence, and are not dispositive.

12. On June 8, 1992, Dr. Turek diagnosed Claimant as having "back pain (724.2) secondary to facet syndrome (839.20) and Myalgia (728.85)" (Joint Exhibit A, Tab A).

13. On October 9, 1992, Dr. Turek placed Claimant at a point of maximum medical improvement (MMI) with regard to the September 27, 1991 injury. (Id.)

14. On October 16, 1992, Claimant was examined at Defendant's request by Philip E. Gates, M.D. an orthopedic surgeon. Dr. Gates had previously examined Claimant on March 3, 1992. Dr. Gates concurred with Dr. Turek that Claimant had reached MMI.

15. Following his October 16, 1992 IME of Claimant, Dr. Gates wrote to Defendant's insurance carrier that Claimant "clearly has a lot of signs and symptoms that go along with myofascial syndrome,,,,," (Joint Exhibit A, Tab F).

16. On December 3, 1992, Dr. Turek provided his impairment rating, based upon his examination of Claimant on 10/9/92. Dr. Turek gave Claimant a permanent impairment rating of 14% whole person or 23% back/spine and 16% lower extremity. Subtracting Claimant's previous impairment of 9% whole person or 15% back/spine and 4% lower extremity, Dr. Turek gave Claimant a final impairment rating of 5% whole person or 8% back/spine and 4% lower extremity. Dr. Turek's rating was based on the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition 1988. (Joint Exhibit A, Tab A), of which judicial notice has been taken. Dr. Turek's report states that "an MRI performed 10/26/92 at Dartmouth Hitchcock Medical Center revealed a mild disc bulge at L5-S1, with no evidence of frank herniated nucleus pulposus or nerve root compression." (Joint Exhibit A, tab A).

17. On December 24, 1992, The Travelers filed a Form 27 (Notice of Intention to Discontinue Benefits) with the Department.

18. On January 21, 1993, Claimant was examined by Lloyd L. Thompson, MD. At that time, Dr. Thompson noted that "I don't see that there is any way he could go back to work." (Joint Exhibit A, Tab J). Dr. Thompson recommended "very aggressive" physical therapy, and prescribed medication for Claimant's symptoms. However, The Travelers refused to pay for the physical therapy, and Claimant did not receive any physical therapy.

19. By this time, Claimant had begun to experience pain in his mid and upper back, which Dr. Turek diagnosed as being directly related to Claimant's September 27, 1991 injury.

20. On March 15, 1993, Claimant resumed regular treatments with Dr. Turek. Throughout April, May and June 1993, Dr. Turek documented

*Claimant's pain in his mid and upper back. (Joint Exhibit A, Tab A).*

*21. On June 25, 1993, Claimant was involved in a motor vehicle accident, in which he struck his head and injured his rib cage. Claimant continued to treat with Dr. Turek thereafter.*

*22. On August 24, 1993, Claimant was examined at Defendant's request by Bradford R. Towle, D.C., a chiropractic physician. Following a review of medical/chiropractic records and his examination of Claimant, Dr. Towle opined that there was a causal relationship between Claimant's lower back injury and the later development of "a full blown case of fibromyalgia through the thoracic and cervical musculature . . ." (Joint Exhibit A, Tab C). This is consistent with Dr. Turek's diagnosis and is not contradicted by any other evidence.*

*23. In a follow-up examination and report, Dr. Towle noted that Claimant failed to inform him of the June 1993 motor vehicle accident, which Dr. Towle considered "the missing element in [his previous] report as far as why Mr. Hall had deteriorated [sic] over the past several months..." However, Dr. Towle specifically noted that "it is my professional opinion that only the headache represent a more significant problem following the accident." Dr. Towle was clearly of the opinion, following the second examination and being made aware of the motor vehicle accident, that Claimant's mid and upper back problems were causally related to his lower back injury. (Joint Exhibit A, Tab C). Dr. Towle concluded that the motor vehicle accident represented a temporary set-back in Claimant's recovery, but "not an increase in permanency or disability." (Id.)*

*24. Dr. Turek and Dr. Towle both testified that chiropractic treatment of the nature which Claimant's condition required and which Claimant received from Dr. Turek specifically requires and relies upon direct physical contact between doctor and patient and upon an awareness on the part of the doctor of the feel, reactions and functioning of the patient's body.*

*25. Claimant's condition and disability after June 25, 1993 (the date of the Motor vehicle accident) are not at issue in this claim, and no compensation is sought in connection therewith.*

*26. On January 26, 1994, Claimant was examined at Defendant's request by Daniel C. Wing, M.D. Following his examination of Claimant, Dr. Wing wrote that "as far as his motor vehicle accident is concerned, I don't*

*believe he has any impairment related to it according to the AMA Guides to the Assessment of Permanent Impairment, and I don't believe he has any functional disability, at least in excess of the functional disability he had previously." (Joint Exhibit A, Tab D).*

*27. On February 16, 1994, Dr. Turek re-evaluated Claimant for permanent impairment. In his report of that date, Dr. Turek assigned to Claimant a permanent impairment of the spine of 21% using the Guides. This impairment rating is due exclusively to the mid and upper back condition, and is in addition to any impairment already attributed to the lower back. Defendant challenged the methodology of the rating and Dr. Turek's ability to do an assessment of permanent impairment as Claimant was before the motor vehicle accident by examining Claimant several months after the accident.*

*28. Dr. Towle specifically testified at the hearing that he would not disagree that Claimant could have returned to his June 1993 pre-motor vehicle accident "baseline condition" by January 1994.*

*29. In summary, Claimant's treating physician (Dr. Turek) and Defendant's two IME physicians (Drs. Wing and Towle) all agree that the June 1993 motor vehicle accident did not substantially affect Claimant's disability or permanent impairment relative to his lower, mid or upper back.*

*30. With regard to the issue of whether an examination and permanency assessment conducted six months after the point at which permanency is sought to be established, both Dr. Turek (for Claimant) and Dr. Towle (for Defendant) testified at the hearing that it was possible to do so under the circumstances of this claim.*

*31. Dr. Turek's methodology is not in strict conformance with the procedures set forth in the Guides. However, despite calling the methodology into question, Defendant did not establish that Dr. Turek's variation from the protocols established in the Guides invalidated his assessment. Defendant's expert, Dr. Towle, did not specifically dispute Dr. Turek's findings, and under all of the circumstances of Claimant's various treatments and examinations, Dr. Turek is found to be correct in his assessment. Therefore, Claimant is found to have sustained additional permanent impairment to his spine of 21% due to the increased pain and limitation of motion in his mid and upper back, which is causally related to his September 27, 1991 work-related injury.*

*32. The Travelers has refused to pay for chiropractic or physical*

therapy treatments after December 17, 1992 (the date of the Form 27) and has refused to pay for Dr. Turek's evaluation of February 16, 1994. These refusals are unjustified. Even if Claimant had reached MMI as early as October 1992, that does not logically establish that additional medical or chiropractic treatments are not compensable expenses. However, ill-advised the carrier's refusal to pay may be, it is not established that the refusal was made in bad faith or in the complete absence of any justification.

33. Claimant's return to Dr. Turek in February 1994 for a permanency assessment was justified due to the Traveler's refusal to pay for medical treatments for Claimant.

34. Claimant testified that he has a profound fear of needles, and that he declined recommended treatment (in this case, an epidural block recommended by Dr. Turek) in part because of his fear, and in part because there was not a reasonable chance that the procedure would be successful in treating his condition or symptoms, and in fact because he was concerned (based upon Dr. Turek's advice) that the procedure might make his condition worse.

35. Dr. Turek testified that in therapy involving the epidural block injection he had recommended to Claimant, approximately 10 to 20% of patients obtain permanent relief, and that approximately another 10% will obtain temporary relief.

## CONCLUSIONS OF LAW

### A. THRESHOLD MATTERS

1. In workers' compensation cases, a claimant has the burden of establishing all facts essential to the rights asserted. *McKane v. Capital Hill Quarry Co.*, Vt. 45 (1926); *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161 (1963). The claimant must establish, by sufficient competent evidence, the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. *Rae v. Green Mountain Boys Camp*, 122 Vt. 437 (1961).



2. *For a claimant to sustain his or her burden of proof, there must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incidents complained of occurred and were the cause of the claimed injury, and the inference from the facts must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941)*

3. *Temporary disability is a "condition of reduced earning power that exists until the injured workman is as far restored as the permanent character of his injuries will permit...it is measured by the duration of the healing period..." Wroten v. Lamphere, 147 Vt. 606, 609 (1987). It is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the worker's compensation are concluded. See Moody v. Humphrey, 127 Vt. 52, 57 (1968); Orvis v. Hutchins, 123 Vt. 18, 24 (1962); Sivret v. Knight, 118 Vt. 343 (1954).*

4. *The singularly most important issue presented by the case is a determination of whether there is sufficient evidence to establish a causal link between Claimant's lower back injury of September 27, 1991 (for which there is no dispute as to Defendant's liability) and to his subsequent mid and upper back problems. This threshold question must be answered before the other matters presented in the claim are addressed. In making his determination, the evidence of Dr. Turek (as Claimant's treating physician of long duration) is given considerable weight. Dr. Turek has treated the Claimant over a course of nearly ten years, including almost six years before the original work-related injury occurred. As affirmed by Dr. Towle, who examined Claimant for Defendant, in view of the nature and extent of Claimant's injury condition, Dr. Turek's treatment depended in a significant way on "touch" in evaluating Claimant's condition. Based upon the foregoing evidence, it is found that Claimant's subsequent mid and upper back problems, as he experienced them between December 20, 1992 and June 25, 1993, are the direct consequence of his September 27, 1991 work-related injury, and Defendant is liable for workers' compensation payable in connection therewith.*

5. *Based upon the evidence presented, Claimant has sustained a compensable injury or condition to his mid and upper back, which is determined to be 21% spine or 13% whole person, attributable to the cervical and thoracic spine only, and which impairment is different than and in addition to the impairment to Claimant's lower back for which he has previously received compensation. Rule 11(a)(4).*

*B. DATE OF PERMANENT IMPAIRMENT FOR COMPENSATION PURPOSES*

*6. Defendant has raised the issue of whether the date upon which temporary total disability compensation (TTD) should be considered to have ended in connection with the lower back injury is October 9, 1992 (the date of Dr. Turek's first permanency assessment) or December 24, 1992 (the effective date of the Form 27 filed by Defendant). Rule 18 provides, in pertinent part, as follows:*

*(a) Termination of Temporary Disability Compensation*

*(2) Termination of temporary disability compensation of the basis that claimant has reached a medical end result shall be prohibited in the absence of a Form 27 accompanied by adequate, written medical documentation. (emphasis supplied)*

*Based upon the foregoing, all compensation paid prior to December 24, 1992 shall be considered to be TTD and not permanent partial disability (PPD) compensation.*

*C. CLAIMANT'S ENTITLEMENT TO ADDITIONAL TTD COMPENSATION*

*7. Claimant has asserted an entitlement to TTD compensation for the period following the date of the Form 27, December 24, 1992, through the date of the motor vehicle accident, June 25, 1993. However, Claimant has not offered evidence which would conclusively establish, to the degree of certainty required by the Act, that he was temporarily totally disabled during this period. Based upon the lack of any competent evidence to the contrary, it cannot be concluded that Claimant was temporarily totally disabled after December 24, 1992 to any extent for which Defendant would be liable.*

*D. DR. TUREK'S POST-MOTOR VEHICLE ACCIDENT IMPAIRMENT RATING*

*8. One of the peculiar aspects of this case is the question of whether Dr. Turek could have performed a competent and conclusive permanency assessment several months after Claimant was injured in a motor vehicle accident, which assessment was directed at Claimant's condition before the accident. This question merits a specific conclusion of law. Both Dr. Turek and Dr. Towle testified that under the circumstances of his*

*case, because Claimant has returned to a pre-accident "baseline condition," and in view of Dr. Turek's long history as Claimant's treating physician, that it was possible for Dr. Turek to have made an assessment of permanency*

*to within the requisite degree of medical/chiropractic certainty. This position is supported by the evidence of Dr. Wing, who was of the opinion that the motor vehicle accident did not contribute to any permanency. Based upon this evidence and the foregoing findings, it is concluded that Dr. Turek's post-accident assessment of permanency satisfies the evidentiary standard. Egbert v. The Book Press, Inc., 144 Vt. 367 (1984).*

#### **E. CLAIMANT'S REFUSAL TO OBTAIN MEDICAL TREATMENT**

9. *Defendant has raised the issue of whether Claimant's refusal to obtain certain medical treatment (an epidural block involving injection therapy) contributed to Claimant's disability to an extent that Claimant's entitlement to disability compensation would be defeated. In order for the refusal of reasonable medical treatments to be a basis for denying compensation, the refusal must be "clearly unreasonable." 1 Larson, The Law of Workmen's Compensation, § 13.22 (1952; supp.1994) (hereinafter, "Larson"). "Reasonableness" involves a weighing of the probability of the treatment's successfully reducing the disability by a significant amount, against the risk of the treatment to the Claimant. Larson § 13.22 (b). Claimant testified that he has an extreme fear of hypodermic needles, and that this fear was a factor in his refusal to undergo the epidural block procedure. Under certain circumstances, this subjective fear can form, at least in part, the basis for a refusal of treatment. See, e.g., Cate v. M.S. Perkins Mach. Co., 102 NH 391, 157 A.2d 778 (1960) (claimant had previous "unfortunate experiences" from medical treatment unrelated to work-related injury; the court held that the claimant was not arbitrary and unreasonable in refusing a spinal fusion. However, a minority of the Court disagreed, and would have held that the reasonableness standard is objective - based on the procedure - and not subjective - based on Claimant's personal fears). In this case, Claimant's treating physician recommended the epidural block primarily in the hope of reducing the pain symptoms, but with little hope that it would be curative. Defendant did not offer any evidence to rebut Dr. Turek's estimates of a 10-20% chance of*

*curing or substantially improving Claimant's condition. Given Claimant's professed fear of injections and the relatively small statistical likelihood of a permanent or even temporary improvement in Claimant's condition, it is concluded that Claimant was not unreasonable in refusing the epidural block treatment, and that therefore his entitlement to compensation is not affected by his refusal. See also Keystone Steel & Wire Co. v. Industrial Comm'n, 72 Ill.2d 494, 381 N.E.2d 672 (1978) (claimant's refusal to submit to additional surgery due to a "sincere fear"*

*of surgery not a bar to compensation); Morgan v. Sholom Drilling Co., 199 Kan. 156, 427 P2d 448 (1967) (claimant, totally disabled from back injury, refused surgery which, if successful, would have reduced disability to 10%. However, there was less than a 90% chance of success, and the procedure involved danger to life and significant pain. Refusal of claimant held to be reasonable).*

#### **F. ATTORNEYS FEES & COSTS**

*10. 21 V.S.A. § 678(a) requires the commissioner to award costs and permits the commissioner to award attorney fees within the limits set by Rule 10, which limits fees to \$35.00 per hour or as set forth in a contingency fee agreement. Thiverge v. Groleau, Op. No. 67-94 WC (April 20, 1995).*

*11. With regard to Claimant's costs, the Commissioner has considerable discretion in determining whether a request for fees, including fees charged by an expert witness, are reasonable. Pratt v. Georgia Pacific Corp., Op. No. 32-91 WC (Nov. 25, 1991). If the Commissioner finds that requested fee is excessive, she may order a different amount to be paid by a defendant. Id. In this case, Claimant has submitted an invoice from Dr. Turek seeking \$1,450.00 for services as an expert witness. Dr. Turek's fee as billed includes 1 hour of preparation at \$100.00 per hour and 6 hours (portal to portal to the hearing) for testimony and travel at the rate of \$225.00 per hour. This latter rate is excessive under the factors set forth in Pratt. The amount awarded as costs attributable to Dr. Turek's fees is set at his stated rate for testimony preparation of \$100.00 per hour, multiplied by seven (7) hours, for an award of \$700.00 for expert witness fees. In addition, Claimant has submitted in the form of an affidavit of his Attorney Mark L. Stephen, dated February 6, 1995, evidence of additional costs for telephone, tax, copying, and mailing in the amount of \$38.91, which amount is reasonable. Total costs in the amount of \$738.91 are approved.*

*12. With regard to attorneys fees, Mr. Stephen's affidavit states that he represented Claimant initially at an hourly rate of \$90.00 per hour, during which time he performed six (6) hours of service on Claimant's behalf, and thereafter pursuant to a contingent fee arrangement under which Claimant would pay his attorney 25% of the amount recovered, if any. This matter came on for final hearing on January 12, 1995, and the submission of requests for costs and attorney fees must be governed by the Rules then in*

effect. Rule 10(d) (as in effect on the date of the hearing) read as follows:

*(d) Evidence establishing the amount and reasonableness of any attorney's fee and/or costs for which the claimant seeks reimbursement shall be offered no later than the date upon which the proposed finding of fact and conclusion of law are filed with the Department. Failure to comply with this subsection may result in a denial of an award for attorney's fees and/or costs.*

*The affidavit submitted by Attorney Stephen is adequate evidence, under the prior rule, by which the Commissioner could determine an appropriate award of attorneys fees. In this instance, Claimant is entitled to an award of attorney's fees of \$35.00 per hour for 6 hours, equalling \$210.00, plus an additional award not to exceed \$2,790.00 or 20% of the compensation awarded, whichever is less. In no event shall the award of attorney's fees exceed \$3,000.00. Rule 10.*

#### **ORDER**

*Based upon the foregoing Finding of Fact and Conclusion of Law, it is ordered that Defendant or its workers compensation insurance carrier, the Travelers Insurance Co., shall pay to Claimant the following:*

*(a) Permanent partial disability compensation under 21 V.S.A. § 648, based upon 21% permanent impairment of the spine, for a period of 69.3 weeks;*

*(b) Costs in the amount of \$738.91;*

*(c) Attorney's fees in amount or equal to \$210.00 plus an additional 20% of the compensation awarded, \$2,790.00, whichever is less, for a total not to exceed \$3,000.00 in any event.*

*DATED at Montpelier, Vermont this \_\_\_ day of August 1995.*

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*Mary S. Hooper*

*Commissioner*