

Moreau v. M&M Beverage (March 12, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Christopher Moreau) *File #: F-19036*
) *By: Barbara H. Alsop*
v.) *Hearing Officer*
) *For: Mary S. Hooper*
M&M Beverage) *Commissioner*
)
) *Opinion #: 13-96WC*

Hearing held at Montpelier, VT, on February 13, 1996, and February 21, 1996.

Record closed on February 26, 1996.

APPEARANCES

Gary D. McQuesten, Esq., for the claimant
Harold E. Eaton, Jr., Esq., for the defendant

ISSUE

Whether the claimant reached an end medical result from his work injury of March 18, 1993 on or before October 28, 1995, or continues to be in need of medical services.

THE CLAIM

- 1. Temporary partial disability compensation pursuant to 21 V.S.A. §646 from October 28, 1995, and continuing.*
- 2. Medical and hospital benefits pursuant to 21 V.S.A. §640.*
- 3. Bills in the amount of \$212.45 for the installation of a dawn simulator.*
- 4. Attorneys fees and costs pursuant to 21 V.S.A. §678(a).*

EXHIBITS

Joint Exhibit 1 Medical record notebook
Claimant's Exhibit I Electrical bills totaling \$212.45
Claimant's Exhibit II Sleep log maintained by claimant

- Claimant's Exhibit III Pamphlet on "Minor Head Injury" (previously marked for i.d. "a")*
- Defendant's Exhibit A Deposition of Andres Roomet, M.D.*
- Defendant's Exhibit B Curriculum Vitae of Albert M. Drukteinis, M.D., J.D.*
- Defendant's Exhibit C Article from The Clinical Neuropsychologist, Vol. 9 (previously marked for i.d. "b")*
- Defendant's Exhibit D Article from Archives of Clinical Neuropsychology, Vol. 8 (previously marked for i.d. "c")*
- Defendant's Exhibit Article from Am. J. Psychiatry 153: 1 (previously marked for i.d. "d")*
- For Identification "e" A letter from Dr. Drukteinis to counsel for the defendant, sealed*

FINDINGS OF FACT

- 1. The above exhibits are admitted into evidence, with the exception of "e" for identification. That document has been sealed. Notice is taken of all forms filed with the Department in this matter.*
- 2. Christopher Moreau was the manager of the South Barre store of the M&M Beverage chain, a business owned by his father, where he had been employed consistently from his graduation from high school. On March 18, 1993, he suffered an injury in a motor vehicle accident that occurred as he was returning to the store after retrieving some documents from his home. An on-coming vehicle slid into the driver's side of his vehicle at a slow rate of speed. The claimant's head struck the pillar behind the driver's door, leaving a small contusion.*
- 3. The claimant reported feeling fuzzy immediately after the impact, although he did not lose consciousness. He got out of his vehicle to check on the other driver. He later went to Central Vermont Hospital where he was diagnosed with a cervical strain and a contusion of the left temple. He was placed in a cervical collar, and released, having been advised to rest and to return if his symptoms worsened.*
- 4. The claimant reported for some time after the incident that his biggest problem was with his neck. He treated with John M.*

Peterson, D.O., on March 22, 1993, whose notes indicate that the chief complaint was pain in the neck and upper back, although the claimant also reported headaches since the accident.

5. The first report of an increase in migraine activity was in the week before April 12, 1993, or three weeks after the accident. This report was made both to Dr. Peterson and to the claimant's regular doctor, John D. Matthew, a board certified family practitioner. Dr. Matthew noted that the claimant was complaining of poor sleep, and an increase in depression. Dr. Matthew had previously treated the claimant for both a sleep disorder and depression, dating back to 1985.

6. The claimant also began physical therapy on April 14, 1993, where his complaints were mainly with regard to the neck strain. He reported that he was having difficulty sleeping because he could not lie in his normal posture due to the neck injury. He also confirmed the report of migraine headaches, indicating that he had been free of migraines for a period of eighteen months prior to the accident.

7. On April 27, the claimant returned to see Dr. Matthew, who noted that the sleep disturbance had improved with the prescription for amitriptyline, and that his headaches were decreasing. He also noted that the claimant's weight was increasing, and that a referral to a dietician would be appropriate. The claimant has claimed that he gained 70 pounds after the accident attributable to medications, his inactivity caused by the physical injury, and his depression.

8. The claimant reported to his physical therapist on May 3 that he suffered a sharp spasm when he picked up a snare drum that weighed about 15 pounds. During this period and continuing to the present, the claimant has been active in a rock and roll band, including evening band practices and night time performances on an average of once a week. Any interruption in his ability to perform with his band had ended by the beginning of 1994.

9. Dr. Peterson returned the claimant to light duty work, half time, as of May 3, 1993, and on May 7, 1993, indicated that the light duty schedule should continue for two weeks thereafter. On April 29, 1993, Dr. Peterson told the workers compensation insurance adjuster that the prognosis was good for this claimant, based on his good relief and results from treatment with the doctor and the physical therapist.

10. *By June 7, 1993, Dr. Peterson was reporting that the claimant was doing well, with decreased headaches and better sleep, based on the medications he was receiving from Dr. Matthew. In the last visit, on August 17, 1993, Dr. Peterson noted that there had been no neck pain for awhile, and no headaches for a month. The claimant also reported that he was not playing basketball for fear of injury, and that his weight was increasing with inactivity. He also reported that, because of the sleep disturbance, the claimant had seen a neurologist in Burlington because of the possibility of a head injury.*

11. *On June 11, 1993, at what turned out to be his last appointment, the claimant told the physical therapist that he had been sleeping well for about a week, and the headaches were the only limiting factor in his recovery. He indicated that he slipped on days he played basketball and that he had played that day. He also noted that he had practice, presumably with his band, that night. He did not appear for his last scheduled therapy session, nor did he cancel his appointment.*

12. *Much of this improvement was noted in his appointment with Dr. Matthew on June 17, where again the chief complaint was the headache problem. He was prescribed capoten for his headaches at this time.*

13. *Dr. Matthew testified that the claimant exhibited signs of a sleep disorder, headaches and cognitive problems from his first appointment after the accident. He testified that the constellation of symptoms suffered by the claimant suggested a temporal lobe disorder, and were an accepted and expected consequence of the accident. In particular, he noted the claimant's difficulty sleeping, his irritability and sudden rages, and his cognitive deficiencies, as well as psycho-sensory problems.*

14. *Dr. Matthew testified that the headaches and the problems with the claimant's neck were resolved within five or six months. He also testified that the psycho-sensory symptoms were being treated with Vitamin E, and that the cognitive difficulties were resolving with time. However, he indicated that the claimant's distress over the handling of his claim by the insurance company has contributed to some of his symptoms and has delayed his progress.*

15. *The claimant has sued in Superior Court the workers compensation insurance carrier for its poor handling of his claim.*

Specifically, he has complained about the carrier's failure to pay his medical providers in a timely manner, and its failure to authorize the purchase and installation of a dawn simulator for a substantially delayed period of time. That suit is still pending.

16. Dr. Matthew has testified that the claimant's current uncontrolled problem is his sleep disorder, described as a sleep onset phase delay. The claimant apparently sleeps from 3:00 a.m. until noon, and had deficits in his ability to concentrate after working for about four hours. The implication is that his sleep is not totally restorative. Dr. Matthew correlates the claimant's sleep disorder with the car accident.

17. The claimant was treated for a sleep disorder by Dr. Matthew at various times since their initial contact in 1985. The record is replete with references to delayed onset of sleep and consequent fatigue the following day. Dr. Matthew testified that the claimant had had a history of inability to fall asleep before midnight, although he had been able to awaken for school in the morning. However, the claimant had continued to have problems with falling asleep in school as a result. There is reference to nonrestorative sleep as late as 1991 in the medical records.

18. Dr. Matthew referred the claimant first to Dr. Robert F. Theisen, a clinical psychologist, and then to Dr. James Whitlock, Jr., a neurologist at Northeast Rehabilitation Hospital in Salem, N.H. The purpose of these referrals was to establish the nature of the claimant's cognitive and perceptual impairments, and to determine if there was a treatable temporal lobe problem.

19. Dr. Theisen testified to his testing and treatment of the claimant. At his first appointment with the claimant in August of 1993, he performed a series of neuropsychological tests. He based his readings of the results on the claimant's reported history as he did not have available to him any of the claimant's premorbid records. He indicated that he tested the claimant for treatment purposes, not for forensic purposes, and that he would have needed prior records, including medical and educational records, if he were performing a forensic examination.

20. Based on the testing he performed, Dr. Theisen found that the claimant had certain cognitive defects as a result of the accident that could be expected to improve with time. At the time of the hearing, Dr. Theisen testified that the claimant was still suffering from anxiety, depression and irritability, all of which he attributed to the accident. He indicated that his sole source

for information about the claimant's premorbid state was the claimant, and that he may have considered the claimant's prior depression insignificant at the time of the first tests. He relied on Dr. Matthew for review of the prior records and for his diagnosis of a temporal lobe disorder.

21. Dr. Theisen found no evidence that the claimant was malingering, and indicated that the tests he performed had safeguards against invalidity. However, he confirmed that there exist studies that suggest that neuropsychologists are poor at assessing malingering, and that one of the suggested fixes for this problem is to obtain a valid and comprehensive premorbid history.

22. Dr. Theisen retested the claimant in September of 1994, after approximately one year of psychological treatment. At that time, his cognitive impairments were minimal and were possibly a function of his sleep disorder rather than neurogenic.

23. Dr. Whitlock examined the claimant in January of 1994. At the time of his examination, the major problems identified by the claimant were the delayed onset of his sleep and his lack of motivation. Dr. Whitlock found that the claimant's complaints were non-ictal in nature, that is, not related to seizure activity, thereby counterpoised to Dr. Matthew's suspicion of temporal lobe disorder. He recommended a polysomnography to determine the nature of the sleep problem and to rule out the possibility of sleep apnea, a condition that the claimant's obesity predisposed him to.

24. As a result of this recommendation, the claimant underwent a sleep study at the Hampstead Hospital Sleep-Wake Disorders Center under the aegis of Dr. Deborah E. Sewitch on October 24, 1994. The sleep study found no evidence of abnormal paroxysmal EEG activity, no evidence of sleep apnea, and substantial evidence of an environmentally induced alteration in the circadian timing of the claimant's sleep, that is a delayed sleep phase. A significant finding was that the claimant's medications may have been responsible for the nonrestorative nature of his sleep, and there were a number of recommendations made concerning the changing of his medications and the aggressive treatment of his agitation disorder.

25. The primary recommendation of the sleep study was to establish firmly the claimant's sleep pattern. After discussing the matter with the claimant, and determining that he was

interested in establishing a sleep pattern consistent with his night owl personality, Dr. Sewitch recommended the confirmation of the second shift pattern that the claimant had already established on his own. Specifically, she recommended a sleep phase to begin at 3:00 a.m. and end at 11:00 a.m. She indicated that it was important for the claimant to get up and out of bed at 11:00 a.m. whether he was rested or not, in order to establish this pattern. She also confirmed that he should increase his level of physical activity, and recommended that he work part time. This was specifically to allow for his playing in his band at night, a factor that he apparently emphasized in his discussions with the doctor.

26. Dr. Sewitch indicated that, in the establishing of the more formal sleep schedule, the claimant might need some assistance in awakening, and that a device was available that would work in conjunction with Melatonin to reinforce the schedule. This would be a dawn simulator that would gradually raise the lights in the room at the time the claimant was scheduled to awaken. She wrote that [b]right morning light has both clock resetting as well as physiological activating/energizing properties in human beings. Bright light raises metabolic rate and increases body temperature, activating the system for the waking day. (emphasis in original.)

27. The claimant was seen at the request of the insurer by Dr. Andres Roomet, a board certified neurologist and electroencephalographer. He was first seen on February 25, 1994, prior to the sleep study but after the evaluations by Drs. Theisen and Whitlock. Dr. Whitlock's report was supplied to Dr. Roomet after the completion of his initial evaluation. Dr. Roomet also had access to the claimant's medical records back to 1985, when Dr. Matthew first began to treat the claimant. He also had the opportunity to view the actual EEG and CT scans, which the claimant had brought with him to the examination.

28. Based on his examination of the claimant and his review of the medical records, Dr. Roomet found, in February of 1994, that the claimant was at an end medical result from his injuries suffered in the March 1993, motor vehicle accident. Specifically, he found that only two of the claimant's complaints could be charged to that accident, the neck strain and the increase in migraine headaches. He found that the claimant's prior history of depression, treated with psychoactive medications, and sleep disorder made it unlikely that his current complaints in those areas were causally related to the accident.

29. After Dr. Roomet had the opportunity to view the results of Dr. Whitlock's study of the claimant, his opinion did not change. He confirmed that a sleep study might be helpful to the claimant, but would not be required by any injury that the claimant suffered in the accident. He found that the sleep disorder was the continuation of a pre-existing condition, and had no relationship to the relatively minor injury suffered by the claimant in this case.

30. Dr. Roomet again saw the claimant on July 12, 1995. At that time, the only significant finding was of a sleep disorder that was attributable to psychological and behavioral factors, and to stress. He states that any linking of these issues to the original car accident would have to be done by a psychiatrist or a psychologist. Dr. Roomet indicated that the claimant was at an end medical result for his physical injuries, and that there was no permanent impairment attributable to them.

31. The claimant was seen by Albert M. Drukteinis, M.D., J.D., on September 22, 1995. Dr. Drukteinis is board certified by the American Board of Psychiatry and Neurology, the American Board of Forensic Psychiatry, and the American Academy of Pain Management. He is also on the faculty of the Dartmouth Medical School. Dr. Drukteinis interviewed the claimant for approximately two hours, and additionally administered a battery of psychological tests, including the Cognitive Capacity Screening Examination, Wechsler Memory Scale I, Beck Depression Inventory, Patient Anxiety Scale, Millon Behavioral Health Inventory (MBHI), and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Dr. Drukteinis had all of the claimant's relevant medical records, including those of Dr. Matthew back to 1985.

32. Dr. Drukteinis found that the claimant was suffering from dyssomnia, a condition involving an odd or irregular pattern of sleep. The claimant also had problems with recurrent depression, although he was not depressed when Dr. Drukteinis saw him. In addition, the claimant had a pain disorder associated with psychological factors. Finally, Dr. Drukteinis found that the claimant had potentially a resolved post-concussion syndrome.

33. Dr. Drukteinis indicated that the claimant told him that his job at the store had become a rat race and that he had gravitated more toward playing drums in his band. He had confirmed his tendency to be awake later at night as a result. Dr. Drukteinis found that this was consistent with the sleep

disorder treated by Dr. Matthew in the claimant's high school years, and was also consistent with the claimant's pre-existing tendency for depression and lethargy, possibly aggravated by his diabetes and marked obesity.

34. Dr. Drukteinis testified that the claimant had a number of psychological problems prior to his injury, and that the accident presented him with an opportunity to resolve these issues, in a sense becoming the mechanism for the resolution of long standing difficulties. While the accident could be viewed as a precipitating factor in a recurrence of his depression, the fact that he was not depressed as of September 22, 1995, suggests that he was at an end medical result at that time for the recurrence.

35. Dr. Drukteinis also testified that a number of the claimant's claimed symptoms were noted in the literature as consistent with complaints in non-brain injured claimants, and with malingering by patients with a possibility of secondary gain. Secondary gain in this case means the existence of financial incentives for the continuance of a medical condition. The significance of the former, that is, complaints of non-brain injured patients, is that the constellation of symptoms arise not from the injury itself but from the fact of the injury. The significance of the second finding is that the symptoms that arise from the fact of the injury arise at least in part because of the possibility of financial gain.

36. The claimant first treated for psychological problems in 1985, while still a high school student. At that time, he was unmotivated in school, unable to fall asleep at night, difficult to arouse in the morning, and unable to stay awake at school. He also had poor eating habits and a tendency to gain weight. That problem has continued unabated up to the time of the hearing, where the claimant presented as seriously obese. Dr. Drukteinis opined that some of the claimant's problems, including his inability to control his weight, were in response to the fact that his family was a very high achieving family, including highly educated and successful parents and a brother who was furthering his education at the collegiate and post-collegiate level.

37. The claimant had a history of a remarkable number of musculo-skeletal problems, including diagnoses of fibromyalgia and temporal mandibular joint disorder. Dr. Drukteinis indicated this was significant in determining whether the complex of symptoms that arose after the accident were more likely caused by nature or by accident. He found that the claimant had a family

predisposition to depression, weight gain and musculo-skeletal complaints, as well as a personal history for these problems. This would tend to suggest that the claimant's difficulties in these areas were not caused by the accident.

38. As of September 22, 1995, the only remaining condition that Dr. Drukteinis found was the dyssomnia. He opined that the dyssomnia, as indicated by the sleep study, was not caused by the accident but rather by the claimant's life choices, including his avowed night owl personality and his choice to play in his rock and roll band. He found that the claimant's claim of fatigue would not be surprising in a man weighing 400 pounds, and that it would not be reflective of the lack of restorative sleep. He indicated that the delayed onset sleep disorder that the claimant exhibits is relatively easily treated when the sufferer is motivated to cure the problem. Within a matter of a few weeks, with a regimented practice, an individual can reset the natural sleep-wake clock. The reason the claimant has failed is poor sleep hygiene coupled with innate lack of motivation, a trait he has exhibited since his earliest treatments with Dr. Matthew in the mid 1980's.

39. The claimant had had a prior sleep disorder while in high school. After a review of the records, Dr. Drukteinis determined that the distinction between that first disorder and the present one is simply that the claimant had to get up in high school, even with a delayed sleep onset, while there is no similar requirement now. The lack of that stimulus is what has prolonged the syndrome now.

40. Dr. Drukteinis indicated that the claimant was at an end medical result for any psychological problem that was caused by the accident, in his opinion, the possible post concussion syndrome that had resolved by January of 1994, at the latest. Dr. Drukteinis found that the claimant had suffered no permanent impairment as a result of the accident.

41. Based on the reports of Dr. Roomet and Dr. Drukteinis, the carrier filed a Form 27, Notice of Intention to Terminate Benefits, which was to be effective on October 28, 1995, citing the doctors opinions that the claimant had reached an end medical result.

42. The claimant has presented evidence that his attorney has spent 18.2 hours prior to the hearing of this matter in preparation of the case. He has not indicated the hours spent by

his attorney in the hearing of the case or in the preparation of proposed findings and rulings. The record will note that this case was tried over the course of two full days. The claimant has also presented evidence of expenses in the amount of \$990.00 for Dr. Theisen, in the amount of \$220.00 for two hours of preparation, and \$770.00 for seven hours at the hearing. Although Dr. Theisen was present in the office of the Department of Labor and Industry for about seven hours, his testimony only lasted approximately two hours.

CONCLUSIONS OF LAW

- 1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).*
- 2. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979). 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 were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*
- 3. Since it appears that all of the doctors agree that, as of October 28, 1995, the claimant's only remaining problem from the accident was the sleep disorder, the only questions to be determined here are whether the sleep disorder arose out of the injuries sustained in the motor vehicle accident and, if it did, whether the claimant has reached either an end medical result or reached maximal medical improvement from that injury.*
- 4. As is frequently the case, this decision turns on the respective credibilities of the physicians. While the claimant's testimony was lengthy, it was of questionable merit in light of conflicting evidence in the medical reports and reservations about his motives, conscious or subconscious, in testifying. Therefore, the dispute will be resolved by resort to principles of long standing application by this Department in the resolution of*

medical disputes, as reflected in Rule 14 of Processes and Procedure for Claims under the Vermont Workers Compensation and Occupational Disease Acts, the prior rules of the Workers Compensation Division.

5. Based on those guidelines, I find that the most credible physician appearing in this matter was Dr. Drukteinis. While he was not the treating physician, he had access to all the medical records relating to the claimant's treatment with Dr. Matthew and Dr. Theisen. He also has substantially more professional training and expertise than either of the treating physicians in the areas in question here. He performed a more complete evaluation than Dr. Theisen, as Dr. Theisen himself indicated, in that Dr. Drukteinis did a forensic examination of the claimant. Finally, after hearing the testimony from all three doctors who appeared, it is clear that Dr. Drukteinis had more objective support for his opinions, while Dr. Matthew appeared to rely in some large measure on his subjective knowledge and experience with the claimant. It was also apparent that Dr. Matthew's understandably invested interest in the claimant after treating him since he was 15 years of age made him a less than objective reporter and recorder of the claimant's history and condition. In particular, it is of some concern that Dr. Matthew failed to recognize the consistency of the claimant's history of fatigue, lethargy, depression and lack of motivation with his current complaints.

6. I find that the claimant's current sleep disorder is more likely a natural continuation of his preexisting sleep problems that date back to 1985 rather than an outcome of the motor vehicle accident of 1993. I therefore find that the claimant has failed to meet his burden of proof that he has not reached an end medical result from the injuries sustained on March 18, 1993.

7. Because the claimant has not prevailed, he is not entitled to an award of costs or attorney's fees.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the claimant's claims for benefits under the Workers Compensation Act after October 28, 1995, be and hereby are DENIED.

DATED at Montpelier, Vermont, this 12th day of March 1996.

Mary S. Hooper
Commissioner