

Fredriksen v. Georgia-Pacific Corp. (Oct. 17, 1997)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Arthur Fredriksen)	State File No. J-06839
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
)	
Georgia-Pacific Corp.)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 28-97WC

Heard in Montpelier, Vermont on May 23, 1997
Record closed on July 3, 1997

APPEARANCES:

Attorney Richard H. Munzing, for the claimant
Attorney Stephen D. Ellis, for the defendant

ISSUES:

1. Is claimant entitled to temporary total disability compensation from November 27, 1995 to January 1, 1996?
2. On what date did claimant reach medical end result?
3. Is claimant entitled to temporary total disability compensation after June 6, 1996, and if so, for what period(s)?
4. What is the extent of claimant's permanent impairment?

CLAIMANT SEEKS:

1. Temporary total disability benefits from November 25, 1996 to January 2, 1996 under 21 V.S.A. § 642.
2. Temporary total disability benefits from their termination on June 3, 1996 to March 19, 1997 under 21 V.S.A. § 642.
3. Permanent partial disability compensation based on 9% whole person impairment for the right upper extremity under 21 V.S.A. § 648.
4. Medical and hospital benefits under 21 V.S.A. § 640.
5. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS:

1. In January 1994, employee Arthur Fredriksen ("claimant") was hired by employer Georgia-Pacific Corporation ("defendant"). Prior thereto, in 1993, employee had worked at the defendant's plant as a temporary employee.
2. On September 30, 1995, claimant was working as a "Tech-I", a machine operator position at defendant's plant in Brattleboro, Vermont, earning an hourly wage of \$10.69.
3. On September 30, 1995, claimant reported that he had injured his right shoulder.
4. Between October 4, 1995 and November 27, 1995, claimant was paid temporary total disability compensation per a Form 21 at the weekly rate of \$319.64 based upon the foregoing injury.
5. By notice dated November 9, 1995, then treating orthopaedist A. Douglas Lilly gave claimant an unrestricted release to return to work effective November 16, 1995.
6. The defendant issued a Form 27 noticing intent to discontinue TTD payments on November 27, 1995. The Form 27 recites that it was mailed on November 16, 1995.
7. On December 5, 1995 claimant received a certified letter dated December 2, 1995 terminating his employment effective immediately.
8. After filing a Form 8 noticing intent to change health care providers dated December 8, 1995 claimant began treating with John T. Chard on December 20, 1995.
9. On January 2, 1996 claimant began a new job at the Quaker Oats facility in Putney, Vermont.
10. On claimant's behalf, a notice and application for hearing dated January 4, 1996 was filed and entered by the Department on January 12, 1996.
11. On February 1, 1996 Dr. Chard performed an arthroscopy with superior labral debridement and open excision, distal clavicle.
12. Based thereon, the parties entered into a second Form 21 for the payment of TTD compensation based upon disability beginning February 1, 1996.

13. On May 22, 1996, based upon an IME evaluation by Dr. Wieneke on May 6, 1996, the defendant noticed intent to discontinue TTD compensation effective May 31, 1996. Per a Form 13, TTD compensation actually was paid to June 3, 1996 and not thereafter. Based upon a 5% whole person permanency assessment by Dr. Wieneke, however, the employer continued to issue weekly payments to the employee categorizing them as "weekly permanent partial disability compensation advances." These payments continued until October 1996, 20.5 weeks later.

14. On May 6, 1996, the same day of the IME evaluation with Dr. Wieneke in North Adams, Massachusetts, employee began a third shift job at the Putney Paper Company.

15. On March 19, 1997, Dr. Chard determined that claimant had reached maximum medical improvement and rated the right shoulder for permanency, assessing a 9% whole person impairment.

16. The parties have prepared a Joint Exhibit of medical records and medical invoicing which shall be admitted into the record.

FINDINGS OF FACT:

1. Claimant was employed by defendant Georgia Pacific as a "Tech-I" machine operator which required him to work with paper rolls weighing approximately 1,000 pounds. On September 30, 1995 claimant was pushing one of these rolls with his right shoulder when he felt a tearing, burning sensation in his right arm.

2. Claimant left work and went to the Brattleboro Memorial Hospital Emergency Department where the attending physician, Dr. Carolyn Taylor-Olson, wrote that claimant was unable to lift his arm because of limb numbness. Dr. Taylor-Olson noted tenderness along the rotator cuff with decreased range of motion. Her initial diagnosis was possible right rotator cuff injury.

3. Defendant filed a First Report of Injury on October 2, 1995.

4. A Form 21, Agreement for Temporary Total Disability Compensation, was prepared by defendant and signed by claimant for compensation benefits on October 27, 1995 at the rate of \$319.64 per week. The payment of this compensation ended on November 27, 1995, pursuant to a Form 27, Notice to Commissioner and Employee of Intention to Discontinue Payments, because "[e]mployee has been released to return to regular duty as of November 8, 1995."

5. After his September 30, 1995 injury claimant began treating with A. Douglas Lilly, M.D., at defendant's request. Dr. Lilly arranged for physical therapy at Springfield Hospital. On October 21, 1995 claimant's physical therapist wrote in a progress note that claimant had "much greater motion, but strength still decreased and pain." The therapist continued that "Art wants to return to work but is not ready for full duty."

6. In a note dated October 31, 1995 Dr. Lilly indicated that claimant needed to remain off work for present and to continue therapy. Dr. Lilly wrote in November 9, 1995 that he "may return to work unrestricted as of Wednesday, November 16, 1995."

7. Claimant's physical therapist at Springfield Hospital wrote on November 16, 1995 that claimant failed to show for his last two scheduled appointments following his work release to light duty. Claimant did not return to physical therapy.

8. Claimant reported to work at defendant's on November 8, 1995, but was sent home until further notice. At the formal hearing, claimant testified that he was suspended pending investigation of his application for employment with defendant.

9. On December 5, 1995 claimant was terminated by defendant for reasons unrelated to this claim.

10. After filing a Form 8 on December 8, 1995 the claimant began treating with John T. Chard, M.D., an orthopedist. Claimant's initial visit with Dr. Chard was on December 20, 1995, where Dr. Chard observed claimant "appears to have two related problems. I believe that he has some type of a rotator cuff problem, probably a tendinitis that has been resistant to treatment. He also has degenerative disc disease at C5-6 . . . and given the posture that he demonstrates to me when he pushes the roll, I suspect that he also sustained an injury to his neck that aggravated this condition and is now responsible for the headaches, neck pain, and perhaps for the numbness in his arm." Dr. Chard also indicated that an appointment would be arranged for claimant to have an MRI and neurologic consultation.

11. The MRI was performed on December 21, 1995 at Dartmouth Hitchcock Medical Center (DHMC). A report from the examining radiologist concluded that claimant had: "1) several suprascapular ganglion cysts; 2) probable labral pathology, suspect anterior tear; 3) minimal tendinitis in supraspinatus tendon; and 4) moderate arthrosis of the acromioclavicular joint."

12. On January 2, 1996 claimant began working for Quaker Oats packing boxes of rice cakes. Dr. Chard felt that claimant's description of his employment tasks should not adversely effect his current physical condition. Claimant testified at the formal hearing that he tried to avoid heavy lifting, but was required to perform repetitive motions and overhead reaching. Claimant also testified that he was experiencing pain in his shoulder and neck as well as numbness down his arm to his fingers.

13. On January 3, 1996 claimant treated with Dr. Chard again for a follow-up on the MRI and for continuing shoulder, neck, arm and headache symptoms. Dr. Chard's notes indicate that claimant experienced some good days and some bad days with regard to his shoulder pain and that heavy lifting aggravated his symptoms. Dr. Chard also wrote that claimant seemed to be tolerating his work at Quaker Oats fairly well. In reviewing the MRI, Dr. Chard indicated that the most dramatic findings were "those of the ganglions, poor visualization of the labrum anteriorly and superiorly and evidence of impingement and moderate arthropathy of the AC joint." Dr. Chard continued that there was "no evidence of rotator cuff tear or substantial tendinitis." Dr. Chard concluded that the MRI showed "some intrinsic shoulder pathology."

14. Claimant filed a notice and application for hearing dated January 4, 1996 with the Department of Labor and Industry to determine his "entitlement to temporary disability compensation subsequent to discontinuance by employer on or about 11/27/95."

15. On January 11, 1996 claimant treated again with Dr. Chard for persistent right shoulder and neck pain as well as persistent headaches. Dr. Chard's note stated that claimant "has tried doing his normal work duties at Quaker Oats. However, over the last 2 days, he has had excruciating discomfort especially towards the end of the day." Pending claimant's neurological exam, Dr. Chard decided not to alter his treatment, but prescribed Flexeril for muscle spasm and instructed claimant to continue with Darvon.

16. Elijah W. Stommel, M.D., a neurologist at The Hitchcock Clinic, examined claimant on January 18, 1996. Dr. Stommel wrote that "[a]lthough Arthur's examination is largely normal from a neurological perspective, considering the degree of degenerative changes on his cervical spine films and considering that he does have some symptoms that are radicular in nature, I think it would be appropriate to obtain an MRI scan of the cervical spine to further evaluate things." Dr. Stommel concluded, "I have suggested that he try Pamelor, an antidepressant."

17. Claimant's cervical MRI results were discussed by Dr. Stommel in a January 23, 1996 note which stated the "MRI scan shows some degenerative changes at multiple levels, but no evidence of cord compression or of neuroforaminal encroachment." "I do not believe that the patient's symptoms are referable to his neck at least for the most part."

18. Dr. Chard on January 24, 1996 indicated that Dr. Stommel's findings showed little cause to suspect the neck as the source of claimant's problems and decided that based on the previous MRI which showed evidence of arthrosis of the AC joint with some impingement from the AC joint, Dr. Chard recommended an arthroscopy of his right shoulder to be followed by an open AC joint excision.

19. On January 25, 1996 Dr. Chard wrote a note to Quaker Oats indicating that claimant would be out from January 25, 1996 until approximately March 7, 1996 for shoulder surgery.

20. Dr. Chard performed an "arthroscopy with superior labral debridement and open excision, distal clavicle" on February 1, 1996. In Dr. Chard's operation report he wrote that "there was some mild fraying of the anterior labrum but no evidence of tear or separation." "The articular surface of the glenoid was unremarkable."

21. On February 1, 1996, Kuhrt Wieneke, M.D. conducted an independent review of claimant's medical records at the request of Attorney Ellis. Dr. Wieneke concluded that there was "evidence of arthritic changes in the AC joint and possibly a tear of the anterior labrum in the glenohumeral joint." "Both conditions clearly would have preexisted his work incident on 9/30." Dr. Wieneke concluded that the arthroscopy that was being performed on the same day by Dr. Chard would yield findings "likely relating to the arthritic changes described in the shoulder MRI and not to an acute injury pattern." "I do not believe, therefore, that the surgery proposed for today relates to this injury on 9/30/95."

22. On April 18, 1996 a second Agreement for Temporary Total Disability Compensation was filed with the Department. Defendant agreed to pay TTD beginning February 1, 1996 at a weekly rate of \$319.64. Claimant did not return to work at Quaker Oats as they were unable to keep open claimant's position for the six week recovery period projected by Dr. Chard.

23. Claimant was seen in Dr. Wieneke's office on March 18, 1996 for a clinical follow-up to the record review conducted previously. Notes from Dr. Wieneke's clinical examination refer to the scars on claimant's shoulder from his various surgeries. The note continued, "[h]e has full abduction, flexion, extension, external and internal rotation, right shoulder." "He is virtually pain free over the AC joint area." Dr. Wieneke concluded that "there was a preexisting osteoarthritis in the right AC joint, at the time of this injury on 9/30/95." "I would agree that the surgery performed was at least in part related to his injury."

24. On March 20, 1996 claimant called Dr. Chard requesting medication because his shoulder had become very painful. "[Claimant] was offered Darvocet which he felt would be inadequate and requested an appointment to be seen . . . he later called back and canceled this appointment." He indicated that he had contacted his family physician. Claimant called Dr. Chard again on March 20, 1996. Dr. Chard noted, "I think it is important to re-evaluate his shoulder before providing significant analgesics . . . as he really shouldn't be having this level of pain at this time and, secondly, to make sure before ordering medication that is appropriately indicated."

25. Claimant visited with Dr. Chard on March 21, 1996 stating that he increased his physical therapy which appeared to inflame his shoulder. Dr. Chard noted excellent range of motion which was confirmed by the report from claimant's physical therapist. Dr. Chard released claimant for light duty work on that day. "A prescription for Vicodin, 1 tablet . . . with no refills, was called in to Brooks Pharmacy at Bellows Falls. Patient was advised that this would be his last narcotic prescription."

26. An April 2, 1996 intake note from Anne Briccetti, MSW, at Health Care Rehabilitation Services of Southeastern Vermont, related diagnostic impressions of generalized anxiety disorder. In the "Formulation" section of the note, Briccetti wrote, in effect, that although he denied it, she suspected that he might have been drug seeking.

27. Claimant was examined by Dr. Cole and was diagnosed with an adjustment disorder with mixed anxiety and depression symptoms. Dr. Cole gave claimant free samples of Prozac which claimant returned unused.

28. Dr. Chard saw claimant again on April 8, 1996 found him to be recovering well and released him to return to all of his regular work activities.

29. On April 15, 1996 defendant issued a second notice to discontinue TTD compensation effective April 25, 1996 because "the claimant has been released to return to work but has, so far as we are aware, made no attempt or effort to return to work." The Department rejected this form. An amended Form 27 was issued on April 30, 1996 reasoning that "claimant has been released for regular work but has not returned to work."

30. Claimant was examined by Dr. Wieneke on May 6, 1996 as an Independent Medical Examiner. Dr. Wieneke wrote, "[claimant] is pain free and has normal shoulder musculature compared with the left or side opposite. In short, he has recovered uneventfully from surgery and is cleared for regular work." Dr. Wieneke placed a twenty pound lifting restriction on claimant with no overhead work for approximately six to eight weeks. Dr. Wieneke concluded, "Based on the surgery performed, including excision of the outer end of the clavicle and release of the coracoacromial ligament as well as arthroscopic evaluation of the shoulder, there is a five percent impairment, whole person. He is at a medical end point."

31. Claimant began working at Putney Paper Company on May 6, 1996 as a packer, assisting a machine operator. Claimant was to work the third shift beginning at 11:00 p.m. On claimant's first day, the machine operator to whom claimant was assigned received a call at approximately 3:00 a.m. and had to leave work for a family emergency. Claimant contends that the machine operator told him to go home. Upon leaving, claimant informed the shift manager that he was going home because the machine operator told him to and because he was tired. Claimant worked his full shift on May 7, 1996 but called in sick on May 8, 1996 because he was experiencing great pain. When he arrived at work on May 9, 1996 he was terminated without recourse for failure to make his probationary period.

32. Claimant attempted to schedule a visit with Dr. Chard, but was unable to get one immediately. Claimant returned on May 10, 1996 to his family physician Dr. Leppman. Dr. Leppman documented stiffness and limitation in shoulder abduction and rotation and prescribed a short course of Vicodin.

33. In Dr. Chard's May 13, 1996 office note, claimant is quoted as saying he initially felt that this would be a "packing" job. However, when he started the job, he was required to lift boxes that he felt were quite heavy over his head. On the "objective" portion of Dr. Chard's note, it was observed that "examination of the right shoulder shows no swelling or ecchymosis. Active range of motion is limited to 90 degree abduction and 100 degree forward flexion." Claimant's pain was assessed as "likely overuse of the right shoulder. Given the fact that [claimant] has not worked for a while, this was probably too much overhead work to initially start."

34. Dennis Chaffee, the Plant Manager for Putney Paper, testified that the packer position did not require any overhead work or heavy lifting, but required moving two pound bundles of paper towel from one platform to another at waist level.

35. Claimant's termination at Putney Paper perhaps was an unfortunate misunderstanding between claimant and his employer. I am unable to find that the 1995 work-related injury accounted for it.

36. On May 22, 1996 defendants, based upon Dr. Wieneke's May 6, 1996 finding of medical end result, filed a notice of intent to discontinue TTD compensation effective May 31, 1996. Temporary total disability benefits were actually paid until June 3, 1996.

37. Claimant continued to treat with Dr. Chard for persistent shoulder pain. On May 20, 1996 Dr. Chard wrote a letter to James Murphy, M.D. at DHMC asking for suggestions regarding claimant's continued pain and whether there was a relation between the ganglion cysts from the 1995 MRI and the current pain.

38. Claimant saw Dr. Murphy on June 25, 1996 who wrote that it was difficult to tell if the cysts were causing the pain, and "would recommend that he have a Neurology consult whereby the neurologists could do fine-needle EMG's of the supraspinatus and infraspinatus to see if there are injuries to these muscles as a result of compression of the suprascapular nerve." Dr. Murphy recommended, "[p]ending the results of this injection and also electrical evaluations, I think posterior exploration of this region may be releasing the suprascapular nerve if it indeed is under any significant pressure, causing further pain in the shoulder."

39. Dr. Stommel, performed the EMG studies reporting the findings in a July 30, 1996 note: "no compelling proximal nerve damage . . . the patient does [have] evidence of bilateral carpal tunnel syndrome by electrical criteria." "Whether the patient should have the ganglion cysts removed will be decided by Dr. Chard and Dr. Murphy."

40. In a September 17, 1996 letter to Attorney Munzing, Dr. Chard wrote, "the surgery planned for [claimant's] shoulder which is scheduled to be done by Dr. Murphy is a consequence of the work place injury in September of 1995. The ganglions were not addressed during the surgery in 1996 as it was felt that less extensive surgery would probably result in relief of his symptoms." Dr. Chard concluded by stating claimant was not yet at medical end result as he was still being treated.

41. On October 1, 1996 Dr. Murphy administered a cortisone injection into claimant's right shoulder to alleviate the pain prior to surgical intervention of ganglion cyst removal. On October 10, 1996 claimant returned to Dr. Murphy stating that the injection really was of little benefit. On October 16, 1996 Dr. Murphy performed arthroscopy of the right shoulder. Dr. Murphy's notes from the procedure indicate that "exploration of the posterior scapular region did not reveal a ganglion cyst nor any obvious mass or pathology within the region of the suprascapular nerve, the infraspinatus muscle, the posterior glenoid nor along the interior margins of the spinous scapula." The only indication of potential difficulty with claimant's right shoulder was the "fraying of superior labral margins."

42. On December 2, 1996 Dr. Murphy, in a letter to Attorney Munzing wrote, "It is my opinion that [claimant's] shoulder symptoms and subsequent treatment, including the surgery which I performed on October 16, are as a direct result and remain in the chain of causation' that relates to the workplace injury suffered by [claimant] in September of 1995."

43. In a letter to Attorney Ellis dated December 6, 1996 Dr. Murphy wrote, "I do not anticipate that [claimant] will have any permanent impairment beyond the 5 per cent whole-person impairment assessed by Dr. Wieneke last May."

44. In a January 30, 1997 letter Dr. Murphy stated that labral tears are associated with ganglion cysts. He opined that the pain claimant had and the subsequent surgeries "are directly related to the original September 1995 injury."

45. Dr. Chard in an office note dated March 19, 1997 wrote, "[claimant] has reached his maximum medical improvement and has a permanent partial impairment of his right shoulder. This is due to a reduced range of motion of the shoulder resulting in a 5% upper extremity imparity and the restriction arthroplasty of the distal clavicle, a 10% impairment." "These combine to 15% upper extremity and convert to 9% whole person." Dr. Chard wrote further, "In my opinion, this condition is a result of the injury sustained by [claimant] on September 30, 1995. It is of interest that Dr. Murphy at the time of his second arthroscopy found no evidence of a rotator cuff tear and, therefore, nothing to suggest that there had been an interval injury."

46. In subsequent testimony, Dr. Chard stated that he did not know whether the reduced range of motion was, in fact, permanent since stiffness and discomfort would be expected to persist for several weeks upon returning to work after a prolonged period of not working, but could ultimately resolve. Additionally, in a December 11, 1996 MRI, a rotator cuff tear was noted which could be responsible for reduced range of motion.

47. Claimant's attorney has submitted a statement of attorney's fees and costs. These are admitted into evidence.

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 (1962). 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. Once a claim has been accepted by a carrier or employer, the burden of proof is on that party to establish the propriety of terminating temporary benefits. *Cormier v. Capital Candy Co.*, Op. No. 60-96WC (Oct. 25, 1996); *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

3. 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).

4. Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation until reaching medical end result or successfully returning to work. *Coburn v Frank Dodge*, Op. No. 34-95WC (Aug. 2, 1995); see *Orvis v. Hutchins*, 123 Vt. 18, 24, 179 A.2d 470, 474 (1962) (temporary disability ends when maximum earning power has been restored or recovery process has ended). The determination of medical end result is a question of fact.

5. Unless a claimant has successfully returned to work, temporary disability compensation may not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by the evidence, is received by the commissioner and the claimant. 21 V.S.A. § 643(a); Vermont Workers' Compensation Rule 18.

6. Claimant is seeking temporary total disability for two periods of time. For the first, November 25, 1995 to January 2, 1996, claimant failed to meet his burden of proof. Claimant undoubtedly suffered a work-related injury on September 30, 1995 while working for the defendant. During the time claimant was recuperating and absent from work, defendant paid temporary total disability until claimant was released to return to his regular duties as of November 8, 1995. Upon claimant's return to work, he was notified that he was suspended indefinitely for reasons unrelated to his injury. Claimant failed to establish that his suspension and eventual termination stemmed, in any way, from his physical disability. The credible evidence regarding this matter indicates clearly that claimant was unable to return to work because he omitted critical answers on his application for his employment, not because of his September 30, 1995 injury.

7. Claimant is also seeking temporary total disability compensation from May 22, 1996 to March 19, 1997 which for purposes of this analysis can be divided into two periods. From May 22, 1996 to October 16, 1996 claimant is not entitled to TTD. Dr. Chard released him for work on March 8, 1996. Claimant began working on May 6, 1996 in a job that ended for reasons unrelated to his injury. Until Dr. Murphy performed an arthroscopy on October 16, 1996, there is no clear evidence that claimant was disabled from work.

8. The question whether claimant is entitled to TTD from October 16, 1996 until March 19, 1997 when Dr. Chard determined that claimant was at a medical end result involves a dispute between medical experts. Dr. Wieneke had placed claimant at a medical end result with a 5% permanency on May 6, 1996.

9. The Department has historically examined several questions in determining the credibility of physicians: 1) which expert is the treating physician? 2) what degree of professional training and expertise does each expert have in the given area? 3) what was the nature and extent of the evaluation performed (including the degree of access to all medical records)? and 4) what objective tests and findings does the physician advance in support of his or her opinion? *Gardner v. Grand Union*, Op. No. 24-97WC (Aug. 25, 1997); *Moreau v. M&M Beverage*, Op. No. 13-96WC (Mar. 12, 1996).

10. Drs. Chard and Murphy, as claimant's treating physician, were familiar with his history and symptoms. Dr. Wieneke had less of an opportunity to judge this claimant thoroughly. All three physicians have the professional training and experience necessary to render an opinion on the orthopedic issues presented in this case. However, Drs. Chard and Murphy were able to evaluate the claimant more extensively than Dr. Wieneke could because of the time they had to evaluate him and because they were able to observe operative findings. On balance, therefore, the opinions of the treating physicians are accorded greater weight than that of defendant's expert in this case.

11. All three physicians documented claimant's approaching readiness to return to work in January 1997. In his January 2, 1997 report following a December 17, 1996 evaluation, Dr. Wieneke noted continuing improvement and recommended a return to light duty work in February with a transition to medium duty over several weeks. A medical end result could not have been reached until after that period expired. On January 14, 1997 Dr. Murphy noted that claimant was not yet at an end medical point but expected that he would be within three months depending on vocational rehabilitation and work capacity evaluation. On January 27, 1997 Dr. Chard confirmed claimant's involvement in rehabilitation and recommended a functional capacity evaluation. Not until March 19, 1997 did Dr. Chard determine that claimant was at a medical end result. That date is consistent with reports of all three physicians and is accepted here.

12. Dr. Chard's impairment rating, 15% of the right upper extremity, converted to 9% whole person, was done in March 1997 in contrast with Dr. Wieneke's 5% whole person rating which was done in May 1996 before claimant's second surgery and before Dr. Wieneke's own January 1997 note in which he conceded that claimant was expected to improve. Dr. Chard's rating, based on a thorough evaluation and measurements crucial to use of the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, is the more credible rating.

13. Claimant also seeks payment for medical expenses associated with his work related injury. Defendant argues that the treatment it did not cover was not reasonable or necessary. Furthermore, it argues that drug seeking behavior, not the work related injury, explains why claimant sought treatment.

14. Yet Drs. Murphy and Chard clearly and definitively stated that claimant's pain was work related. Every procedure they performed was for the sole purpose of resolving that pain. And their efforts were successful. The reasonableness and necessity of the surgery is determined by what the surgeons had in mind when they decided to perform it. That the operative findings were different from what the surgeon expected cannot now be used to defeat this claim in light of the strong medical opinions supporting its necessity.

15. Claimant cooperated with his physicians in his effort to receive relief for the persistent pain. Even if he was a "drug seeker" as defendant so strongly argues, he sought the drugs to relieve the pain of the work injury. As was the case in *Dubee v. Willey's Village Auto*, Op. No. 24-90WC (July 9, 1991), any "dependency on drugs was a direct consequence of the work related injury prescribed by the claimant's physicians and directly supervised by them." See also *Jackson v. True Temper Corp.* 151 Vt. 592 (1989) (disability from the acceleration of preexisting alcoholism compensable). The cost of treatment, including prescription medications, is therefore compensable.

16. Claimant seeks attorney fees of \$5,526.50 (\$35 x 157.9 hours) and costs of \$2,078.46. The costs, all reasonable and necessary for this claim, include a \$1050 fee for Dr. Chard, of which \$787 was charged for his hearing testimony, and a \$500 fee for Dr. Murphy. Under 21 V.S.A. § 678(a), an award of necessary costs is mandatory and an attorney fee award is discretionary when the claimant prevails. *Miller v. IBM*, 163 Vt. 396, 400 (1995).

17. Because claimant prevailed on 80% of his claim, a discretionary award equal to that percentage of the fee requested for a total of \$4421.20 is made.

18. An award of costs, although mandatory, must be reasonable and necessary and is subject to the limits of the Workers' compensation Fee Schedule, Rule 40. Defendant contends that the fees sought for both physicians exceed what is allowable under that rule. Although Dr. Chard's testimony exceeded the time anyone had anticipated, I have no authority to award more than \$300 for that testimony. The good cause exception which authorizes the Commissioner to award a higher rate than that permitted by the fee schedule applies only to treatment. Rule 40.080. Dr. Murphy's four reports for which he charged a total of \$500 cannot realistically be considered "supplemental reports" limited to \$10 per page under Rule 40.112 as defendant argues. In fact, a medical expert's report is not covered by the fee schedule. Therefore, the award is limited to 90% of Dr. Murphy's fee or \$450 under Rule 40.021(a).

Claimant's award of costs, therefore, is based on the total claimed less \$537 (\$487 not allowed under the fee schedule for Dr. Chard's testimony and \$50 subtracted from Dr. Murphy's charge to bring his total to 90%).

ORDER:

THEREFORE, based on these FINDINGS OF FACT and CONCLUSIONS OF LAW, defendant is ordered to pay claimant:

1. Medical benefits subject to Rule 40.000;
2. Temporary total disability payments from October 16, 1996 to March 19, 1997;
3. Permanency based on 9% whole person. Carrier may take credit for any amount previously paid.
4. Attorney fees of \$4421.20 and costs of \$1541.46.

DATED at Montpelier, Vermont, this __17th__ day of October, 1997.

STEVE JANSON

Steve Janson
Commissioner