

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

	)	State File No. L-06200
Rhonda Loyer	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Steve Janson
	)	Commissioner
Visiting Nurses Association	)	
	)	Opinion No. 22R-99WC

**RULING ON DEFENDANT’S MOTIONS FOR RECONSIDERATION AND  
IMPOSITION OF SANCTIONS**

Defendant, through attorney Barbara H. Alsop, moves for reconsideration of the findings of fact and conclusion of law expressed in Opinion Number 22-99WC, as well as imposition of sanctions upon the claimant’s attorney pursuant to Rule 4 (d) of the Workers’ Compensation and Occupational Disease Rules. The claimant, represented at hearing by attorney Kathleen A. Yarnell, has failed to respond to these motions.

Specifically, defendant believes that the hearing officer for this case adopted a finding of fact advanced by the claimant that included a misstatement of the facts. Defendant further believes that this adoption led the Commissioner to fail to address a major defense argument. Finding of fact number five in the opinion states:

On Sunday, September 21, 1997, claimant played Bingo at the Albury Fire Station. After playing for about one half hour, she stopped because her hand cramped up. Although she had experienced pain for several months, this was the first time her hand locked up on her. Claimant testified that she used to play Bingo frequently but had not been playing much for the last few years. She also testified that when she plays she does not pick up the chips by grasping them with her fingers, but instead uses a magnetic wand to collect chips off the table after a game and deposits them in a box.

Conclusion of law number five in the opinion states:

Specifically, Dr. Johansson assumed erroneously that claimant used a certain finger to thumb mechanism repetitively to place chips on and remove them from her Bingo cards, when in fact she used a wand to remove the chips from her card.

The finding of fact and the conclusion of law at issue are not inconsistent with the evidence as stated by the claimant in her own, credible, redirect testimony. When asked how she removed the chips from Bingo cards after a game was completed, the claimant responded, “With a wand, a magnetic wand, you just sweep it across.” Further, the claimant’s attorney directly asked if she picked the chips up from the cards to which the claimant responded, “No.” Finding

of fact number five succinctly and correctly summarizes this testimony. The Commissioner concluded from this, in conclusion of law number five, that Dr. Johansson's opinion, although expressed in an expert and informed manner, holds less weight because it was based upon the faulty assumption that the claimant both placed chips onto, and removed chips from her Bingo cards with the same finger to thumb mechanism.

As stated in *Kruse v. Town of Westford*, the finder of fact is under "no obligation to accept, interpret, or apply evidence in accordance with the views of either party." 145 Vt. 368, 374 (state board of appraisers as trier of fact). The trier of fact must consider all the evidence in the case tending to corroborate or contradict the testimony presented. See *Renfro v. City of Emporia*, 732 F. Supp. 1116 (D. Kan.) aff'd, F.2d 1529 (10<sup>th</sup> Cir. 1991). Proposed findings of fact submitted by attorneys are not evidence and they were not used or adopted as such in this case. Instead, the facts found by the trier of fact were grounded sufficiently in the claimant's own testimony and evidence surrounding that testimony. Ultimately, the Commissioner has not failed to address any argument advanced by the defendant, but has simply concluded that the expert testimony used to support defense arguments was undermined by the claimant's own credible testimony.

Finally, motions for imposition of sanctions involve very serious issues in the legal profession and should not be taken lightly. However, they also should not be granted lightly either. Defense counsel believes that because she was not supplied with a copy of the claimant's proposed findings and rulings, the claimant's attorney should be sanctioned. Defendant believes that it was prejudiced by this oversight because defense counsel was unable to respond to misstatements contained in the document, that the hearing officer ultimately adopted. As clarified above, no misstatement of fact was included in the Commissioner's final decision. The decision was based upon findings supported by genuine, credible evidence and testimony presented at hearing. For this reason, the defendant has not been prejudiced in anyway by the failure of claimant's attorney to provide a copy of this document in a timely manner. The Department does not wish to condone this type of attorney oversight, but also does not believe that harsh sanctions are necessary in this particular case, which involved no prejudice to the opposition.

Accordingly, the claimant's motions for reconsideration and for imposition of sanctions are DENIED.

Dated at Montpelier, Vermont, on this 8th day of July 1999.

---

Steve Janson  
Commissioner