

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

)	State File No. J-13300
)	
Lynne Rider)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Michael S. Bertrand
Orange East Supervisory Union)	Commissioner
and Utica National Insurance)	
)	Opinion No. 14-03WC

Hearing held in Montpelier on July 11 and July 12, 2002
Record closed on August 14, 2002

APPEARANCES:

Mark H. Kolter, Esq., for the Claimant
John W. Valente, Esq. for the Defendant

ISSUES:

1. Are the Claimant's current difficulties a result of a work-related injury for which Orange East Supervisory Union/Utica is responsible?
2. If so, is Lynne Rider permanently totally disabled?

EXHIBITS:

Joint Exhibit I: Medical Records

- Claimant's 1: Curriculum vitae of Glenn D. Johnson, M.D.
- Claimant's 2: October 18, 2000 letter by Dr. Johnson
- Claimant's 3: February 23, 1998 letter by Dr. Johnson
- Claimant's 4: May 26, 2002 letter by Dr. Johnson
- Claimant's 5: Deposition of Dr. Johnson dated May 28, 2002 (transcript and videotape)
- Claimant's 6: Resume of Lynne Rider
- Claimant's 7: Report by Mark Bucksbaum, M.D. re: October 10, 2001 examination
- Claimant's 8: Curriculum vitae of Mark Bucksbaum, M.D.
- Claimant's 9: Curriculum vitae of Diane Aja
- Claimant's 10: Myron Smith report dated May 28, 2002
- Claimant's 11: Curriculum vitae of Myron Smith dated May 28, 2002
- Claimant's 12: Curriculum vitae of Thomas McAllister, M.D.
- Claimant's 13: Table 14-1, AMA Guides, 5th ed. (i.d. only)

Claimant's 14: McAllister/Spencer letter, March 28, 2002
Claimant's 15: DSM IV, pp. 445-469, Somatoform Disorder
Claimant's 16: DSM IV, p. 32 GAF Scale

Defendant's A: Curriculum Vitae of Albert M. Drukteinis, M.D., J.D.

FINDINGS OF FACT:

1. At all times relevant to this action, Claimant Lynne Rider was an "employee" and Orange East Supervisory Union/Utica her "employer" within the Workers' Compensation Act and Rules. Claimant was employed as a Spanish teacher at Oxbow High School, a profession she began in 1965. She had been at Oxbow since 1978.
2. On September 21, 1995 Claimant slipped and fell in the school lunchroom, hitting her head first on the cement block wall then onto the floor.
3. Claimant left the school that day and tried to rest. However, at about 8:00 in the evening, she was concerned about her condition and went to Cottage Hospital in Woodsville, New Hampshire where the walk-in clinic was closed. After speaking with a nurse she met in the hallway, she felt she could wait until the next morning to see a doctor. The next morning she returned to the hospital for treatment of head, neck and shoulder pain and within the next few days was seen again for concussion, mental status changes and unsteadiness.
4. Parker Towle, M.D., neurologist at the Hitchcock Clinic in Keene, New Hampshire, saw the Claimant twice in the month of October of 1995. He diagnosed post concussion syndrome and documented his observations and her complaints of unsteadiness.
5. Prior to her work-related fall, Claimant had a medical history of migraine headaches and a balance problem known as benign paroxysmal vertigo, for which she had been treated. The earlier problems resolved and were qualitatively different from those which developed after the 1995 fall.
6. In 1996 Claimant went to Detroit to assist her family when her father was ill.

7. Part of Claimant's treatment following the work-related fall included cognitive remediation at the Department of Speech-Language Pathology at DHMC with Judy Perkins, Ph.D. In that last of the visits with Dr. Perkins before her trip to Detroit, is this assessment: "Patient continues with complaints in attention to multiple stimuli, executive functioning and fatigue." (April 26, 1996). Claimant missed a visit while she was in Detroit. After she returned, her May 15, 1996 session was shortened due to fatigue. At that time Dr. Judy Perkins, wrote "patient continues with increased complaints in attention to multiple stimuli, executive functioning, a fatigue due to stressful visit to Detroit."
8. On May 16, 1996 Dr. Johnson wrote that her condition had almost cleared as a result of rehabilitation, but then she had to travel to Detroit because father was ill. He noted, "With the combination of both emotional stress and physical exercising, she has had a recurrence of instability."
9. Claimant's father passed away in 1997.
10. On December 23, 1998 Claimant was in an automobile accident in which she was hit from behind, was treated at Cottage Hospital and wore a neck brace for a month or two. There is nothing convincing in the record to suggest that the accident accounts for the Claimant's current problems.

Medical Opinions: For the Claimant

11. Dr. Glenn Johnson is a board certified otolaryngologist who had fellowship training in otology, neurotology and skull base surgery. He works at the Dartmouth-Hitchcock Medical Center in the section of Otolaryngology and Audiology. He has treated the Claimant since at least 1993 when he treated her for benign paroxysmal vertigo.
12. In Dr. Johnson's opinion, Claimant's benign paroxysmal positional vertigo had resolved before her 1995 work-related injury. That opinion is based on the difference in the clinical findings between 1993 and 1995. In 1993 the primary problem was her perception of rotation with head movement, whereas in 1995 it was a perception of being off balance all the time, whether standing or sitting, "leaving her with this constant feeling of instability." Furthermore, in 1995 she presented with a different quality of equilibrium and symptoms associated with head injury she had never had before, including "difficulty focusing on tasks, memory lapses, problems with administrative judgment...."

13. According to Dr. Johnson, Claimant has had waxing and waning of symptoms since 1995, but no long-term remission of her balance and equilibrium problems. The stressful events surrounding the illness and death of her father increased her symptoms, but not the underlying condition set in motion by the 1995 fall.
14. Platform Posturography tests performed at Dr. Johnson's direction objectively indicate Claimant's balance disturbance commencing in 1995. Dr. Johnson unequivocally fixed the cause of Claimant's current balance disorder and resulting instability problems as her fall at work in September 1995.
15. Claimant's balance disorder is permanent. Dr. Johnson assigned a 25% to 30% whole person impairment rating to the balance disorder. The rating is based on the 5th edition to the AMA Guides to the Evaluation of Permanent Impairment.
16. Claimant's balance disorder caused by the 1995 head injury affects Claimant's driving, her ability to concentrate and normal movement.
17. Vocational rehabilitation counselors, including Jane Shaw, made substantial but unsuccessful efforts to assist the Claimant first to return to her teaching job, then to obtain retraining and employment.
18. Claimant's balance disorder and related symptoms render the Claimant incapable of engaging in regular, sustained employment that would benefit her and an employer.
19. Thomas W. McAllister, M.D. is a neuropsychiatrist with background and training in the treatment of head injuries of all types and severities. He is President of the American Neuropsychiatric Association.
20. Dr. McAllister is the Claimant's primary treating psychiatrist. He has treated her since December 1997, with at least twenty visits.
21. Dr. McAllister is familiar with the Claimant's medical records and the opinions of the defense experts.
22. Dr. McAllister diagnosed the Claimant with a mild traumatic brain injury with post concussion syndrome and somatoform disorder. He explained that a "mild" head injury refers to its severity at the time of the injury, not to its sequelae. In this case, although Claimant's symptoms at the outset were mild, the actual injury to her brain was more severe, as evidenced by post-concussion syndrome. This syndrome develops in three domains: 1) cognition; 2) sensory/somatic; and 3) emotional. Claimant falls into the unfortunate 10% of those with mild head injuries whose problems persist after one year.

23. Claimant's mild traumatic brain injury and post-concussion symptoms include fatigue, loss of attention, distractibility, balance and gait problems, problems with activities of daily living and cognition. Standardized tests confirm her difficulty with concentration.
24. In addition to post-concussion disorder, Claimant suffers from somatoform disorder, a diagnosis Dr. McAllister, Dr. Drukteinis, Dr. Kenosh and Dr. Miller all made. Somatoform disorder has at its core a mind-body connection, but it does not involve malingering and is not a factitious disorder.
25. Based on Dr. McAllister's convincing testimony, I find that Claimant's somatoform disorder was caused by her 1995 fall at work.
26. As a result of Claimant's mild traumatic brain injury, post-concussion syndrome and somatoform disorder, Dr. McAllister concluded that Claimant has no realistic work capacity. At most she could work in a sheltered workshop on a part-time basis. Even if somatoform disorder were removed from the equation, Claimant would be unable to work.
27. Mark J. Bucksbaum, M.D. is a board certified psychiatrist with substantial relevant experience. He diagnosed the Claimant with disequilibrium, traumatic brain injury with memory loss, major depressive disorder and somatoform disorder.
28. Dr. Bucksbaum assessed Claimant with a 51% whole person impairment. Based on Table 11-4 on page 253 in the *Guides*, he agreed with Dr. Johnson that she should be assigned a 30% whole person impairment as a result of her disequilibrium. Further, Dr. Bucksbaum found that she has a 30% whole person impairment from her mild traumatic brain injury in addition to the 30% for the equilibrium problem. According to the combined values chart in the *Guides*, two 30% ratings combine to total 51%. (The formula is $A + B(1-A)$, in this case, $30 + 30(1-30)$). *Guides* at 604. The rating for the mild traumatic brain syndrome was taken from earlier editions of the *Guides* because the 5th edition does not provide percentages. The analogies drawn from the descriptions in the 5th edition and the ratings are logical and sound, and are accepted.
29. Dr. Bucksbaum found the Claimant to be unable to return to work. Although he believes she might be able to work 2 to 3 hours at one time in a highly supported sheltered work environment, he does not equate that with gainful employment. Her cognitive dysfunctions, including problems with memory, a short attention span, high distractibility and her permanent balance disturbance all contribute to her inability to work.
30. Dr. Bucksbaum believes that the Claimant is unable to drive or to fly, although she has limited driving abilities and flies to Detroit once every other year.

31. Diane Aja, an occupational therapist with experience with patients with brain injuries, performed a functional capacity evaluation on the Claimant. Based on the results of that examination, Ms. Aja concluded that Claimant does not have a work capacity for vocationally relevant periods of time, which means there is no “reliable, sustainable or repeatable work capacity.” Ms. Aja concluded that Claimant cannot work part-time or full-time, except in a sheltered workshop type environment.
32. Myron Smith is a vocational rehabilitation counselor with substantial experience in the field. Based on his knowledge and experience, meeting with the Claimant, review of prior vocational rehabilitation efforts and a transferable skills analysis, he concluded that she could not likely engage in gainful employment or find a job of any type in the Vermont economy and labor market, given her vocational deficits.
33. Mr. Smith concluded that Claimant has no reasonable prospects for finding gainful employment.
34. Jane Shaw was a vocational rehabilitation counselor who worked with the Claimant for two years. She observed that Claimant tried to retrain herself and to find work but did not have the capacity to work. Ms. Shaw opined that Claimant’s fatigue, balance problems and confusion cause her to be virtually unemployable except in a sheltered type of employment.

For the Defendant

35. Albert Drukteinis, M.D., J.D., is a psychiatrist who evaluated the Claimant for the Defendant. He is board certified in psychiatry and has extensive experience and training in treating patients with somatoform disorders. He reviewed all the medical records in this case, some depositions and performed an evaluation of the Claimant.
36. Dr. Drukteinis opined that, absent a physical cause, the Claimant’s balance disorder, dizziness, difficulty concentrating, inability to focus, understand and adapt, are due to her somatoform disorder. A somatoform disorder means the presence of physical symptoms that suggest a general medical condition, but which cannot be fully explained by any general medical condition afflicting the patient. DSM IV at 445.

37. Further, Dr. Drukteinis concluded that the somatoform disorder is not causally related to the 1995 fall. It became apparent as the post-concussion syndrome was resolving and was not apparent until May of 1996. In his opinion, the disorder is due to problems unrelated to work, deep psychological factors within her personality, which she has denied. He believes the somatoform disorder was triggered by her trip to Detroit and divorces and not by her work-related injury and its sequelae. He does not believe she is currently suffering from traumatic brain disorder.
38. Michael Kenosh, M.D. is the head of the Rutland Regional Medical Center Rehabilitation Unit and performed an evaluation of the Claimant on behalf of the defendant. Dr. Kenosh treats people with head injuries on an outpatient basis as well as on the inpatient rehabilitation unit.
39. Dr. Kenosh reviewed the entire medical record as well as depositions in this case. He opined that Claimant suffers from a somatoform disorder caused by psychological issues, not on her 1995 slip and fall. He based the opinion on his knowledge of brain injuries, which usually do not result in the deficits Claimant has, on her behaviors, which he characterizes as those from a somatoform disorder and on two detailed neuropsychological evaluations.
40. In Dr. Kenosh's opinion, the somatoform disorder was triggered by events that occurred after her 1995 work-related fall. Those events were the stressful trip to Detroit and the subsequent motor vehicle accident. During his examination he noted that her subjective complaints were out of proportion to physical findings and he observed inconsistencies that he believes support a nonorganic cause.
41. Dr. Kenosh did not find the results of the platform posturography useful because while the test can confirm that one is suffering from balance difficulties, it does not help to identify the cause.
42. Although Dr. Kenosh agreed that the Claimant currently has impairments, he does not believe they are attributable to her work-related fall. He assigned a zero impairment rating to the fall.
43. Claimant submitted her claim for attorney fees of \$27,099.00 for 301.30 hours at \$90.00 per hour and expenses totaling \$26,140.49.

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*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible 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).
2. 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. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. The Claimant argues that she is entitled to permanent total disability pursuant to 21 V.S.A. § 644. Because this case predates the 2000 statutory amendments, the parties agree that Claimant is entitled to permanent total disability if her injury is within the enumerated list articulated in 21 V.S.A. § 644¹, or if, without considering individual employability factors such as age and experience, the evidence indicates that she is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.* 148 Vt. 415 (1987). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."
5. Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages.
6. In the present case, the Claimant clearly is unable to engage in regular or gainful employment because of a host of problems. Those problems included the balance disorder, post concussion syndrome, somatoform disorder, multiple associated debilitating symptoms and less than sedentary work capacity. Despite hers and the professionals' efforts, all attempts at getting her back to work have failed. On this issue, the experts have little disagreement. Therefore, she has met her burden of proving permanent total disability.

¹ The non-exclusive list of injuries enumerated in § 644 includes total and permanent loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, a spinal injury resulting in permanent and complete paralysis of both legs or both arms or of one leg and one arm, and a skull injury resulting in incurable imbecility or insanity.

7. More difficult is the question whether Claimant's permanent total disability is due to her work-related accident in 1995, a determination necessarily based on expert medical testimony.
8. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the Claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (1997); *Gardner v. Grand Union*, Op. No. 24-97WC (1997).
9. Dr. Glenn Johnson has the advantage of having treated the Claimant before and after her work-related accident and treating her for several years. He is the only expert qualified as an otologist and neurotologist and consequently the best to render opinions regarding a comparison between her pre and post states of disequilibrium and interpretation of the platform posturography tests. As such, his opinion is well-supported objectively. The care he provided to the Claimant has been in the same institution where she received therapy and where she was referred to other specialists, providing a record for Dr. Johnson that was current and comprehensive.
10. Dr. Glenn McAllister, neuropsychologist, is also a treating physician with particular expertise in the sequelae of head injuries, although he had not seen the Claimant prior to her injury. His explanation about the profound results of what was initially a "mild" head injury is well supported by the Claimant's history and his extensive training and experience. He, too, had the relevant medical records.
11. Dr. Drukteinis, an expert in the area of psychiatry, concedes that he does not have the expertise in the area of balance disorder. And Dr. Kenosh, although well-versed in the Claimant's history and review of the records, lacks the specialized expertise crucial to a determination in this case.

12. On balance, therefore, the Claimant's experts have proven to be the most persuasive. They have convinced me that Claimant's fall at Oxbow led her current balance problem and psychiatric problems, which in combination render her permanently and totally disabled. Although she had stressful events after the fall, I am not convinced that a stressful trip or a parent's death severed the chain of causation from the initial injury.
13. Furthermore, pre-existing problems are not reason to deny a claim for one who was employed with those problems before the 1995 work-related fall, which caused injuries leading to the problems that now disable her. It is "black letter law that an employer takes each employee as is, and is thus responsible under our workers' compensation law for an accident or trauma which disables one person but which might not disable another." *Petit v. No. Country Union High Sch.*, Opinion No. 20-98WC (1998), "[C]ompensation is not based on any implied warranty of perfect health or immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited into activity by accidental injury received in the performance for the work for which he is hired." *Morrill v. Bianchi*, 107 Vt 80, 87-88 (1935).
14. As a prevailing Claimant, Ms. Rider is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. 21 V.S.A. § 678(a); WC Rule 10. Given the magnitude of the present claim for fees and costs, a separate hearing will be held if this issue cannot be resolved within 30 days.

Dated at Montpelier, Vermont this 17th day of March 2003.

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.