

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

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| Brian Smith |) | Opinion No. 03-05WC |
| |) | |
| |) | By: Margaret A. Mangan |
| v. |) | Hearing Officer |
| |) | |
| Vermont Agency of Transportation |) | For: Laura Kilmer Collins |
| |) | Commissioner |
| |) | |
| |) | State File No. S-15606 |

Pretrial conference held on April 19, 2004
Hearing held on October 19 and 20, 2004
Record Closed on December 22, 2004

APPEARANCES:

Charles L. Powell, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

Is claimant’s somatoform disorder work related?

EXHIBITS:

- Joint I: Medical Records (2 volumes)
- Claimant’s 1: Photo of claimant with coworkers
- Claimant’s 2: Photo of claimant in front of employer’s truck
- Claimant’s 3: Photo of claimant next to truck
- Claimant’s 4: Job description of Transportation Maintenance Worker III
- Claimant’s 5: Summary of major job duties and expectations
- Claimant’s 6: Notice of Promotion from III to IV
- Claimant’s 7: Job requirements for Maintenance Worker IV
- Claimant’s 8: Performance Evaluation Report for period 2/12//01 to 8/12/01
- Claimant’s 9: Notes from Bob Hannan 2/12/01 to 7/10/01
- Claimant’s 10: Claimant’s letter to Bob Hannan 2/18/01
- Claimant’s 11: Claimant’s email to Bob Hannan 4/7/01
- Claimant’s 12: Claimant’s email to Bob Hannan 4/29/01
- Claimant’s 13: Bob Hannan’s email to claimant and replies 6/01
- Claimant’s 14: Employment application 12/28/00
- Claimant’s 15: 2001VR file
- Claimant’s 16: Deposition of Thomas McAllister, M.D. 1/15/04

Claimant's 16A: Report of Thomas McAllister, M.D.9/23/04
Claimant's 17: Curriculum vitae of Dr. McAllister
Claimant's 18: Deposition of Timothy Douse, AOT Maintenance Supervisor
Claimant's 19: Deposition of Donald Welch

Defendant's A: Curriculum vitae of Janis Peyser, Ph.D.
Defendant's B: Deposition of Robert Bigelow

FINDINGS OF FACT:

1. Claimant worked in the maintenance department of the Vermont Agency of Transportation (AOT) for one year, from February 12, 2001 to February 26, 2002. Claimant was a good worker who loved what he did.
2. Claimant secured the AOT job with assistance from Bob Hannan of Vermont's Vocational Rehabilitation office after five years of unemployment due to a psychiatric disability. His history included posttraumatic stress disorder (PTSD).
3. During the year of employment with AOT, claimant worked diligently, although ghosts from his past visited him. For example, on May 1, 2001 claimant was given an out of work note from the Clara Martin Center for psychiatric reasons. Records from that center note efforts to engage claimant in treatment. They also note that claimant had on his own stopped taking his medication and that he was dependent on his fiancée with whom he had been involved for a decade.
4. On June 1, 2001 a stated goal for the claimant at the Clara Martin Center was that he would engage in treatment and attend regular scheduled appointments.
5. By June 21, 2001, he complained of agitation, racing thoughts and nightmares. He had discontinued a prescribed medication on his own. Another drug was prescribed.
6. Notes from August 2001 indicate that claimant was not involved in active treatment. An August 14, 2001 note recounts claimant's report of feeling nervous at work and others were noticing it. He had racing thoughts, but expressed concern about that he could not take one of the sedating medications in the morning because of work.
7. On August 23, 2001, claimant sought medical care for a lumbar back strain and was given an out of work note. He remained out of work until November 19, 2001. During that time his psychiatric condition improved.
8. A note from November 19 states that claimant was 100% compliant with taking medication. Yet, on February 12, 2002, it was noted that claimant was not taking a prescribed medication. Claimant complained of not doing well. He was worse than he was in the fall.
9. On February 26, 2002, an incident occurred at a garage salt shed that led to this claim. Claimant's job that day was to push salt into the shed with a loader. Claimant received a phone call, answered by Tim Douse, who went outside to get claimant. Douse saw

claimant walking toward him with a piece of 3x6 lumber. He also noticed that the shed had been damaged and that claimant seemed upset. Timothy Douse assured claimant that there was no problem and the shed could be repaired. Claimant was rubbing a spot on his neck. Claimant then walked into the garage and took his call. When he was in the garage claimant told a coworker, Donald Welch, that his loader had become hung up on a cable and broke a post. He reported that he climbed on the salt pile where a post was snapped off, picked up one end, and fell. He said it “caught him in the neck.”

10. Douse went on the road unaware that claimant was going to the hospital. Welch returned to his route.
11. Claimant’s fiancée drove to the shed and from there took claimant to the emergency room at Cottage Hospital where he complained that a wooden pole had hit his head. He denied loss of consciousness, although he complained of a headache and reported that he was nauseated and had vomited. On examination, he was alert and oriented. Swelling was noted under his right eye. The right side of his neck was scratched.
12. Claimant was admitted to the hospital for overnight observation of mental status. That evening he reported having flashbacks from PTSD and asked to see his “psych” doctor.
13. At the time of discharge on February 28th, claimant was still complaining of a headache, and had a new complaint of “hearing voices in his head.” His neurological examination was normal with the exception of his speech that the discharging physician described as “not entirely fluent with broken up sentences.” His discharge diagnoses were: 1) closed head injury, 2) post-concussive syndrome with headache, dizziness and fatigue; and 3) “hearing voices,” no signs of psychosis.
14. Less than a week later, claimant was seen at Dartmouth-Hitchcock Medical Center (DHMC) where the history was recorded as: “was struck in the head by a large pole that was part of a salt shed. He obviously lost consciousness.” On examination it was noted that he was mentally slow, but could give details about the accident while saying he did not remember much. He was diagnosed with “significant concussion,” prescribed amitriptyline and told to follow up with his primary care physician.
15. Claimant became progressively worse. On March 8, 2002 he was admitted to the psychiatric unit of DHMC with a diagnosis of PTSD.
16. The records recount dramatically a downward progression of claimant’s psychiatric course and the emergence of childlike talk. Throughout, records refer to strong support from his fiancée.
17. In his treatment at DHMC, Thomas W. McAllister, M.D began working with him. Dr. McAllister is a neuropsychiatrist with background and training in the treatment of head injuries. He diagnosed claimant with a somatoform disorder and recurrence of a preexisting psychoaffective disorder that had been in remission, based on history and more recent symptoms. That history includes a recurrence of PTSD, depression and anxiety. When Dr. McAllister first saw claimant he also had problems with mood, energy and sleep as well as balance, speech, vision, cognition, memory and attention.

18. Dr. McAllister identified the work related injury at issue as the cause. He noted that claimant's symptoms are out of proportion to what would be expected from the original injury, but caused by it nonetheless, a feature of such a diagnosis, which describes a group of disorders with physical complaints "for which there is often lacking supportive diagnostic data."
19. A neurologist asked to evaluate what could have been symptoms of seizure, later ruled out, asked that claimant have an amytal interview, which is an interview after the administration of a short-acting barbiturate, sometimes called truth serum, to help claimant describe and discuss his psychosocial symptoms. Claimant opted not to have that interview.
20. At the request of the defendant, Janis Peyser, Ph.D. performed a neuropsychological evaluation of the claimant on June 5, 2003. She recounted his history, reviewed his records and tested him. Testing revealed a pattern that could not have been simply from poor performance. In fact, he expended effort necessary to provide the wrong answer to questions. Validity testing revealed suspicious performance, indicating that he was exaggerating symptoms or malingering. He made no attempt at cooperating with motor function testing. History revealed deficits that varied according to whether he was conscious of being observed. In speech he was "flamboyantly agrammatic" although he had not been even one year before. Dr. Peyser noted that claimant had not been truthful about his psychiatric history, causing her to question the truthfulness of current symptoms. She concluded secondary gain issues associated with attention and his legal case are operative with this claimant.
21. In Dr. Peyser's opinion, claimant incorporated an injury into an illness, leading him to present himself as impaired and completely disabled. The problems from which he now suffers in her opinion are a result of his mental illness, not a brain injury.

22. Albert Drukteinis, M.D., forensic psychiatrist, also evaluated the claimant with an interview, testing and review of all records. He diagnosed an undifferentiated somatoform disorder unrelated to the work related injury. Dr. Drukteinis observed claimant's odd child like speech that he determined made no sense and use of a wheelchair even though he can walk. Although he was not willing to say that claimant's symptoms are intentional, Dr. Drukteinis noted signs of malingering, including a revision of history and regression to an invalid state. In sum, Dr. Drukteinis concluded that claimant's current state is the natural progression of his psychiatric state. To characterize the job he had as giving him his "life back" was a fantasy. It was simply a short-term period of mental stability for one who could not have sustained consistent work given his illness.
23. Dr. McAllister rejected the theories advanced by Dr. Peyser and Dr. Drukteinis, noting that all clinicians agreed that claimant had suffered a mild traumatic brain injury and that he had no history of a somatoform disorder before the injury at issue. He noted that most, but not all, persons who suffered a traumatic brain injury, improve. In his opinion, claimant falls into the category of those who sadly did not improve.
24. Claimant and his fiancée had moved to Vermont in December of 2000 after their hope that she receive a significant legal settlement, which would have allowed them to move west, had fallen through.
25. At the hearing, claimant wore dark glasses and sat in a wheelchair, although he can walk. He spoke in single syllable baby talk. His fiancée doted on him. He recounted precise details of the incident at the salt shed, details that are uncorroborated and which changed over time, yet he claimed to have limited memory and other cognitive disabilities.
26. Claimant submitted evidence in support of a claim for legal fees.

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 (1962). 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) (emphasis added).
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. Although claimant has a psychiatric history, that history cannot obscure the fact that his credibility is sorely lacking. He has been regular and sophisticated recipient of health care services for decades. He did not cooperate on neuropsychological testing. The accident he described was not witnessed. Although I am willing to accept that

something happened at the salt shed, it is not at all clear that he was hit in the head or sustained a head injury.

4. Dr. McAllister's opinion as a treating physician is based on a history from a less than credible person. More convincing are the opinions of Dr. Drukteinis and Peyser who noted a dishonest history, inconsistencies in the record and change in behavior when he thought he was no longer being observed. Claimant deliberately answered test questions incorrectly and embellished symptoms dramatically.
5. Because of claimant's less than reliable memory, long history of illness, five years of disability prior to the AOT employment, months of disability during the year he worked at AOT, emergence of troubling psychiatric symptoms while working, and unusual symptoms today, I accept the opinions of Dr. Drukteinis and Dr. Peyser who opined that a work incident did not cause claimant's current problems.
6. It may be that claimant's mental illness led to his recent bizarre behavior and to symptoms that seem to be malingering. He may have convinced himself that all he says is true. However, he has not proven that an incident at an AOT salt shed in February 2002 caused his current condition.

ORDER:

Therefore, based on the foregoing findings of fact and conclusion of law, this claim is DENIED.

Dated at Montpelier, Vermont this 14th day of January 2005.

Laura Kilmer Collins
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.