M. M. v. State of Vermont, Department of Corrections (May 13, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

M. M.	Opinion No. 20-08WC
v.	By: George K. Belcher Hearing Officer
State of Vermont, Department of Corrections	For: Patricia Moulton Powden Commissioner
	State File No. U-11445

Hearing held on February 8, 2008 in Montpelier, Vermont.
Record closed on March 18, 2008.

APPEARANCES:

Heidi Groff, Esq., for the Claimant
Nathaniel K. Seeley, Esq., for the Defendant

EXHIBITS:

Pre-Trial Stipulation dated February 8, 2008
Joint Medical Exhibit: Medical Records of the Claimant
Claimant's Exhibit A: Chart of Medical Opinions
Claimant's Exhibit B: Curriculum Vitae of Dr. Mark Bucksbaum
Defendant's Exhibit 1: Letter from K. Donahue to Mr. Seeley dated January 31, 2008
Defendant's Exhibit 9: Insurance Claim from Dr. Bucksbaum dated January 25, 2008

ISSUES:

1. What permanent partial disability is the Claimant entitled to as a result of his work-related injury?

2. Is the Claimant entitled to reimbursement for the Functional Capacity Evaluation that was recommended by Dr. Shulman and Dr. Bucksbaum?

3. Is the Claimant entitled to reimbursement for the permanent partial disability evaluation performed by Dr. Bucksbaum (since the Claimant's treating doctor, Dr. Shulman, does not do PPD evaluations)?

4. Are the Claimant's chiropractic treatments following Dr. Boucher's report of November 7, 2006 reasonable and necessary?

FINDINGS OF FACT:

1. At the time of his injury, the State of Vermont was Claimant's employer and the Claimant was an employee of the State of Vermont as defined in the Workers' Compensation Act.

2. The Claimant, Myron Messeck, was born on October 23, 1954. On February 2, 2004, he was working as a corrections officer for the State of Vermont, Department of Corrections. He suffered a workplace injury when an inmate assaulted him. This was a serious assault, which caused injuries to his face, eye socket, and neck.

3. At the time of the assault, the Claimant was moving a prisoner to a lock-down cell when the prisoner struck him with his right arm. The Claimant's memory of the incident thereafter is poor but he was taken to the Northwestern Medical Center emergency room where he was examined. The examination showed irritated right and left eye, soft tissue swelling, cut and contusion over the right eyebrow. Mr. Messeck complained of double vision (diplopia). A CAT scan was performed which showed a "trace left parietal irregularity, which may be a very tiny SDH [subdural hematoma] versus bony artifact. The CAT scan showed evidence of an internal broken eye socket or sinus cavity. He also had some blurred vision.

4. The Claimant did not return to his job with the Department of Corrections, in large part, because of concerns by medical providers that another head injury would put him at greater risk due to the injuries of the assault.

5. As of the date of the hearing, the Claimant was complaining of neck pain, back pain, headaches, diplopia, impaired lateral vision, impaired memory, impaired concentration and altered speech (speaking in a high-pitched voice). In September of 2007, the Claimant returned to work for the State of Vermont at a Vermont Welcome Center for 32 hours per week.

6. It is not disputed that the Claimant suffered a work-related injury and that his spine, facial nerve, mental functioning, and eyesight were affected by the injury. Causation is not an issue. The issue in the case primarily involves the extent of permanent impairment of the Claimant. On this, the evaluating doctors disagree.

7. Concerning the facial nerve impairment, the doctors did agree that the Claimant's facial nerve impairment justified a 1% whole person impairment. Concerning the claim that the Claimant's voice was affected by the injury, there was no expert evidence offered in support of this claim. The other impairments are discussed separately.

8. The Claimant's principal medical expert was Dr. Mark Bucksbaum. Dr. Bucksbaum is a medical doctor who is Board Certified by the American Board of Physical Medicine and Rehabilitation, the American Board of Pain Management, and the American Board of Independent Medical Examiners. He is licensed as a medical doctor in the states of Vermont, New York and Maine. See Claimant's Ex. B. The Defendant's principal medical expert was Dr. William F. Boucher. Dr. Boucher is a medical doctor who is licensed to practice medicine in Vermont, Maine, and New Hampshire. The bulk of his work is independent medical evaluations but he also maintains a part-time clinical practice. He is board certified in occupational medicine. The Defendant's psychiatric expert was Dr. Albert M. Druckteinis who is a psychiatrist, medical doctor and juris doctor. He holds medical licenses in Vermont, New Hampshire, Maine, and Florida. He 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 operates a part-time clinical practice but the bulk of his work is criminal and civil assessments and evaluations. All of the evaluators were equally familiar with the AMA *Guides* to the Evaluation of Permanent Impairments, 5th edition (hereinafter referred to as "the *Guides*"). All three experts regularly do evaluations and provide testimony in workers' compensation cases. None of these three experts were the Claimant's treating physician. The Claimant's treating physician, Ned Shulman, MD, does not do permanency ratings.

Visual Impairment

9. The Claimant testified that he had double vision following the injury. He was prescribed prism lenses for his glasses, which appear to have substantially corrected the double vision. Mr. Meesick testified, however, that his left peripheral vision is still blurred and that he has trouble reading in weak light conditions and when the print is small.

10. Dr. Bucksbaum attributed a 10% whole person impairment on account of the Claimant's vision. He made this assessment based upon a medical record which he interpreted to show an acuity impairment (20/25 right eye; 20/40 left eye; report of Dr. Fazzone dated February 9, 2005, Page 147 of the Joint Medical Exhibit). Dr. Bucksbaum used Table 12-4 of the *Guides* to calculate a 10% impairment of visual acuity, and Table 12-10 to calculate a ten per cent whole person impairment. (Testimony of Dr. Bucksbaum).[1]

[1] Dr. Bucksbaum's report of December 8, 2006 indicated that his conclusion as to vision was based on a visual examination of March 16, 2005 of Optimetrics Associates, Inc. That report showed that the corrected vision of the Claimant was 20/13 (right eye) and 20/25 (left eye).

11. According to Dr. Bucksbaum, even if the Claimant's visual acuity were normal, the Claimant would be justified in a 10% whole person impairment due to the diplopia, loss of reserve vision capacity and the need for a vision aid device (prism glasses). Under Sec. 12.4b of the *Guides*, page 298, impairment to vision other than loss of acuity or field of vision (such as double vision) can be given an impairment rating. That section states in part,

> If significant factors remain that affect functional vision and that are not accounted for through visual acuity or visual field loss, a further adjustment of the impairment rating of the visual system may be in order. The need for adjustment, however, must be well documented. The adjustment should be limited to an increase in the impairment rating of the visual system (reduction of FVS) by, at most, 15 points.

12. Dr. Bucksbaum concluded that, with the Claimant's eye examination and his "incompletely controlled diplopia with the use of prism lens, he most closely fits into the entry end of Class 2 of the vision impairment table 12-10". Joint Medical Exhibit, Page 319.[2]

13. Dr. Boucher, on the other hand, attributed a 5% whole person impairment for the Claimant's vision. Dr. Boucher discounted any vision loss due to lack of visual acuity under the *Guides* because visual acuity is to be measured under the *Guides* with the "best correction". See Section 12.2b, Page 282. Dr. Boucher recognized that up to 15 points under the Functional Vision Score can be attributed to diplopia, but he noted that the Claimant's diplopia was "well rectified with glasses". His rating of 5% placed the Claimant in the middle of the Class 1 of table 12-10.

14. Dr. Bucksbaum's use of uncorrected acuity scores does not appear to be consistent with the *Guides.* His rating 10% whole person impairment without loss of acuity would have required at least a 10 point Functional Vision Score for the diplopia (which would be 10 of the 15 available points).[3]

Cervical Impairment

15. Dr. Bucksbaum evaluated the Claimant's neck and determined that he was entitled to 8% whole person impairment based upon Table 15-5 of the *Guides*. Dr. Bucksbaum did an extensive physical examination of the Claimant and noted that he had asymmetrical loss of range of motion and muscle guarding. The Claimant had a well-documented history of neck pain and headaches following the injury. Dr. Bucksbaum placed the Claimant in the high end of the range of DRE Cervical Category II from Table 15-5 of the *Guides* because of the neck pain and headaches. He explained that it would be possible to place the Claimant in the low end of this range (5% whole person impairment) and allocate a separate 3% for Occipital Neuralgia. Dr. Bucksbaum felt, however, that it was more efficient to simply place the Claimant at the high end of the range.

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[2] Dr. Buckbaum continually referred to the prism glasses as "vision enhancements". The *Guides* do not support his position.

[3] On February 9, 2005, Dr. Fazzone found that the prism lenses improved the vision of the Claimant and that the Claimant "has no, or minimal, double vision." Page 146 of Joint Medical Exhibit.

16. Dr. Boucher agreed that the Claimant fit within the same Category II and deserved a rating between 5-8%, but he placed him at 5% because "…the examinee's cervical condition has a minimal effect on activities of daily living."

17. The Claimant testified that he never had neck pains or problems before this injury. He now has neck pain, which radiates up into his head and causes headaches. The headaches sometimes become so severe that he develops an upset stomach. Frequently in the medical records, the Claimant's neck pain and headaches were mentioned as significant obstacles to his ability to work and function.

Lumbar Impairment

18. The Claimant noticed lower back problems during the healing process of the other injuries. He had never had lower back problems before. He notices his lower back has pain when he sits for long periods of time or when he walks on uneven ground.

19. Dr. Bucksbaum examined the Claimant's lower back. Dr. Bucksbaum's examination showed abnormal range of motion in the Claimant's lower back, and an asymmetrical range of motion. See page 313, Joint Medical Exhibit. In addition, he noted pain on palpation. The Claimant had a positive "Jolt test", pain while walking on his toes, and "postural sway difficulty". These indicators led Dr. Buckbaum to conclude that the Claimant had chronic mechanical low back pain caused by the injury and that the Claimant was justified in a 5% whole person impairment from Table 15-3 of the *Guides* for this problem.

20. Dr. Boucher also did an examination of the Claimant's low back but approached the examination with a "low suspicion" of finding anything. Dr. Boucher measured the Claimant's range of motion in the lumbar area once, using only one inclinometer instead of three readings using two inclinometers as recommended in the *Guides*.

21. Dr. Boucher noted that the Claimant's range of motion was 20 degrees right and left lateral flexion, with normal being 25 degrees. Because the 20% reduction in flexion was equal on both sides, Dr. Boucher's opinion was that the Claimant's range of motion was "normal". Dr. Boucher also noted tenderness in the lower back on palpation. Despite these findings, Dr. Boucher determined that the Claimant's back condition was "normal" and gave a 0% impairment rating.

22. It was clear from the testimony that Dr. Bucksbaum did a much more thorough examination of the Claimant's lower back than did Dr. Boucher. Dr. Bucksbaum's examination was more consistent with the criteria set forth in the *Guides*.

Mental Condition

23. The Claimant complained of memory problems following the injury. His ability to focus seemed to be less. He had problems sleeping. He was worried that he might leave a store or public place and forget to take his daughter with him, so he always asked that she stay with him in public.

24. Dr. Bucksbaum diagnosed the Claimant as having Traumatic Head Injury/Post-concussion syndrome. He rated the Claimant as having a whole person impairment of 8% whole person impairment based upon Table 13-6 of the *Guides*. This table gives a range of whole person impairment from 1% to 14% for impairment related to mental status after evaluating memory, orientation, judgment and problem solving, community affairs, homes and hobbies and personal care. Clearly, Dr. Bucksbaum was rating the Claimant based upon the belief that the Claimant had a subdural hematoma or concussion. See page 319 of Joint Medical Exhibit. Dr. Bucksbaum noted that his assessment of impairment under Chapter 13 was "consistent with a Class II impairment rating under chapter 14; mental and behavioral disorder." Id. He also emphasized that it was the impairment which was being rated and not the underlying cause, regardless of whether the cause was physiological or emotional.

25. Chapter 13 of the *Guides* is used to rate impairment of the central and peripheral nervous system. "Chapter 13 provides criteria for evaluating permanent impairment due to documented dysfunction of the brain, cranial nerves, spinal cord, nerve roots, and/or peripheral nerves and muscles." Page 305 of the *Guides*.

26. Chapter 14 is used to evaluate the impairment of mental and behavioral disorders. This chapter of the *Guides* does not include percentage impairments. According to the *Guides*, "Numerical impairment ratings are not included, however, instructions are given for how to assess an individual's abilities to perform activities of daily living." See page 357 of the *Guides*. "The use of percentages implies a certainty that does not exist." Page 361 of the *Guides*.

27. Dr. Drukteinus saw the Claimant for evaluation on February 22, 2005, January 13, 2006, and again on March 30, 2007. Dr. Drukteinus reviewed the medical records of the claimant and he administered various psychological tests. Dr. Drukteinus was doubtful that the Claimant actually suffered a subdural hematoma and was of the opinion that the Claimant did not have a traumatic brain injury or residual post-concussion syndrome. Rather he determined that the Claimant was suffering from anxiety disorder and adjustment disorder with depressed mood. He believed that these conditions were causally related to the injury and that the Claimant was at medical end result.

28. Because the *Guides* do not use percentages in Chapter 14 assessments, Dr. Drukteinus looked to the Colorado system of rating mental impairments. Under this system of percentage allocation, and, considering that the Claimant's mental condition was in partial remission, he calculated that the Claimant's impairment was minimal to mild and that it deserved a rating of 5% whole person impairment. Dr. Drukteinus left open the possibility of an additional award for pain, but felt that the pain question should have been taken into account with the other medical impairment assessments.

Functional Capacity Examination

29. Dr. Ned Shulman (the primary care physician) recommended to the Department on October 19, 2006 and May 11, 2007 that the Claimant have a Functional Capacity Examination. Pages 257 and 329, Joint Medical Exhibit. Dr. Shulman did not testify in this case as to why he wanted the Claimant to have a functional capacity examination. Before he made these recommendations, Dr. Shulman made a fairly detailed evaluation of the Claimant's work capacity, including lifting capacity, in a letter dated September 6, 2006. Joint Medical Exhibit, Pages 250-252. The emphasis in his letter was upon his diagnosis of "post traumatic stress disorder".[4] It is unclear in the record why Dr. Shulman felt a functional capacity examination would assist him or the Claimant.

30. Dr. Bucksbaum recommended in his report of December 8, 2006 that the Claimant could benefit from a functional capacity examination. Joint Medical Exhibit, page 320. His recommendation was that an FCE could assist in determining his work tolerances. Dr. Bucksbaum felt that the Claimant's plan of becoming a commercial truck driver was "likely above his work limits". Id. Dr. Peyser had determined on August 3, 2006 that, "There is no reason why Mr. Meeseck could not be employed as a truck driver." Page 243 Joint Medical Exhibit. Dr. Drukteinus came to the same conclusion on April 5, 2007. Page 328, Joint Medical Exhibit. Dr. Todd Faxvog, Chiropractor, also thought commercial driving was feasible, at least for a trial. Page 246, Joint Medical Exhibit.

31. The Commissioner takes judicial notice under Vermont Workers' Compensation and Occupational Health Rule 7.1800 of the Vocational Rehabilitation forms in the Department's file. The Claimant was found to be eligible for vocational rehabilitation services on September 8, 2004. On February 28, 2007 Vocational Rehabilitation Counselor, Wayne Sullivan, reported that he and Mr. Meesek had agreed to place the Vocational Rehabilitation file on "suspension" for six months so that the Claimant's employment status with the State of Vermont could be determined. It appears from the records that the vocational rehabilitation counselor had not requested the FCE, and, in fact, the vocational rehabilitation case was in "suspension" at the time the FCE was performed. See Department File, Wayne Sullivan Voc. Rehab. Report of February 28, 2007. No Individual Written Rehabilitation Plan was ever formulated by the counselor.

32. The Claimant participated in a functional capacity examination on July 20, 2007. He paid the expense of this and would now like this expense ($1,500.00) to be assessed against the employer. The FCE determined that the Claimant had a medium, full-time work capacity. See page 353, Joint Medical Exhibit.

[4] This diagnosis was consistently made by Dr. Shulman as late as August, 2007, (Page 362, Joint Medical Exhibit) despite the conclusions by Dr. Drukteinis, Janis M Peyser, PhD, Dr. Steve Sobel, that this diagnosis did not apply to the Claimant. See pages 179, 249, and 327, Joint Medical Exhibit.

Ongoing Chiropractic Care

33. Dr. Shulman recommended in July of 2005 that the Claimant see a chiropractor. Page 301, Joint Medical Exhibit. The Claimant has regularly seen Dr. Todd Faxvog about every two weeks. During the visits he regularly has a manipulative adjustment and moist heat packs. He also receives a massage after the chiropractic treatment. The Claimant testified that the adjustments and massages help him with coping with his neck and back pain and doing his activities. The chiropractic treatments seemed to help him with his headaches as well. When he must miss an appointment, he finds that it is very difficult to last until the next appointment.

34. Dr. Bucksbaum testified that the chiropractic treatment was palliative and helpful to the Claimant in coping with his pain without medication. His opinion was that this treatment was reasonable. Dr. Shulman originally recommended the chiropractic treatments in July of 2005. His medical notes of May 18, 2006 indicated that Dr. Shulman thought that the Claimant will "most likely need to continue treatment such as chiro indefinitely." Page 231, Joint Medical Exhibit. On May 22, 2006 Dr. Shulman's notes state that, "I am aware he continues with Dr. Faxvog on weekly basis for correction and ideal resolution of cephalgia." Page 232, Joint Medical Exhibit. Neither Dr. Bucksbaum or Dr. Shulman addressed the need for massages as a separate, on-going treatment.

35. Dr. Boucher testified that the chiropractic treatments and massages probably made the Claimant feel better immediately afterward, but that the treatments did not improve function and would not be missed if they were discontinued for several months. In his report at page 271 of the Joint Medical Exhibit, Dr. Boucher stated,

> As regards to the examinee's neck pain, further chiropractic adjustments are not indicated. Studies have shown that manipulative therapies can be helpful in the acute phase of injury, but are not helpful in the chronic situation. In this case, the examinee has no ongoing benefit (i.e. improvement) from current chiropractic adjustments and further adjustments are neither reasonable or necessary.

36. Dr. John Peterson, D.O. did a medical evaluation of the Claimant on October 31, 2005. His report questioned the frequency of the chiropractic treatments but acknowledged that the Claimant seemed to benefit from them and that they might be serving a "palliative" purpose. Page 208, Joint Medical Exhibit.

Costs and Attorneys Fees

37. The Claimant incurred litigation costs in this matter of $1,201.00. This amount excludes Dr. Bucksbaum's permanency assessment which is dealt with in paragraph 49 and it does not include the $1,500.00 paid for the functional capacity examination. The Claimant has entered a contingent fee agreement with his counsel calling for attorney's fees of 25% of the gross award.

CONCLUSIONS OF LAW:

1. In Worker's 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. Under Vermont practice, impairments to various body parts and functions are rated pursuant to the *American Medical Association Guides to the Evaluation of Permanent Impairment*. 21 VSA Sec. 648(b); Workers' Compensation Rule 11.2210. The application of the *Guides* in this case is a complex matter which can be confusing at times, even to the experts. The experts in this case agreed on only one of the claims of impairment: the facial nerve impairment.

3. Where the claimant's injury is obscure, and the layman could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award for both compensability issues as well as the extent of the award sought. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979). The Claimant's complaint concerning his voice alteration must be denied since no expert testimony was offered to support it.

4. When choosing between conflicting medical opinions, the Department has looked at several factors: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03 WC (Sept. 17, 2003).

5. Here Drs. Bucksbaum and Boucher have similar experience, education, and history with the Claimant. Both appear to have examined all the pertinent records.

6. Concerning the vision impairment, I find that Dr. Boucher offered the most clear and thorough analysis of the vision impairment. His rating of a 5% whole person impairment for vision loss was more consistent with the language of the *Guides*, including the use of corrected vision capability.

7. Concerning the cervical impairment, I find that Dr. Bucksbaum's analysis was more persuasive since he gave due consideration to the Claimant's headaches and pain. Dr. Boucher seemed to downplay the continued pain and neck soreness which appears constantly through the medical records and which was never seriously questioned as to its veracity. Dr. Buckbaum's rating of 8% whole person impairment is more thorough and supported.

8. Concerning the lumbar impairment, I find that Dr. Bucksbaum's examination was significantly more thorough than that of Dr. Boucher. The examination provided a basis for Dr. Bucksbaum's opinion which makes his opinion the more persuasive. His rating of 8% to the lumbar spine is accepted.

9. Concerning the evaluation of mental impairment, I find that Dr. Drukteinus had more information due to his examination of the Claimant at three different times over a longer period of time. Moreover, his diagnosis of adjustment disorder and anxiety disorder was supported by other evaluations and was more credible. I find that the qualifications and experience of Dr. Drukteinus in rating a mental or neurological impairment is superior to that of Dr. Bucksbaum. Dr. Drukteinus convincingly refuted Dr. Bucksbaum's diagnosis of traumatic brain injury/post concussion disorder. Dr. Drukteinus' rating of a 5% whole person impairment is the more cogent assessment. The Department has recognized the Colorado system for the purpose of assigning an impairment percentage to mental disorders. See, e.g. *Bodell v. Webster Corporation*, Opinion No. 62-96WC (October 22, 1996), *Sargent v. Town of Randolph Fire Department*, Opinion No. 37-02WC (August 22, 2002).

10. The various impairments are combined pursuant to Workers' Compensation Rules 11.2200, 11.2300, and the Combined Values Chart of the *Guides*. The vision impairment of 5%, plus mental impairment of 5%, plus nerve impairment of 1% equal 11% whole person impairment, times 405 weeks, to equal 44.55 weeks. The spine impairment is: 8% cervical impairment, plus 5% lumbar impairment, for a total of 13% whole person impairment, times 550 weeks, to equal 71.5 weeks. The total permanent partial impairment award is 116.05 weeks of benefits.

11. The Claimant asks that the expense of Dr. Bucksbaum's permanency assessment be paid by the Defendant. According to Workers' Compensation Rule 11.2400,

> It shall be the employer's responsibility to pay for at least one permanency examination and impairment rating from the claimant's treating physician, notwithstanding its decision to obtain a rating from another medical examiner as well if it so desires. All impairment ratings received by the employer shall be copied to the claimant or [to] his or her attorney. At the commissioner's discretion, the employer may be ordered to pay for additional permanent impairment evaluations.

12. Since Dr. Shulman did not do permanency evaluations, it made sense for someone with familiarity with the *Guides* to do such an evaluation. Both Dr. Bucksbaum and Dr. Boucher agreed that a thorough record review and examination of the Claimant would be necessary for an assessment of permanent impairment. The rule's reference to "treating physician", should not bar the Claimant from having at least one evaluation paid for by the employer which is independent from the employer's own expert. The Commissioner has, on occasion, exercised her discretion to order that such evaluations be paid for by the employer. See *Sanz v. Collins*, Opinion No. 25-05 WC (April 26, 2005). In this case it is appropriate for the employer to pay for Dr. Bucksbaum's assessment ($2,160.00). The Commissioner approves it, in her discretion, for payment by the Defendant.

13. The Claimant also asks that the Defendant pay for the functional capacity examination. Although the Claimant's treating physician recommended that such an examination be done, it was not proven that this was needed *for treatment*. In fact, it is unclear why it was needed at all. The Claimant had been cleared by most of the evaluators to do the job of truck driver. Although, Dr. Bucksbaum questioned that conclusion, he was evaluating the *physical* impairment of the Claimant and he was not structuring an employment plan.

14. The Claimant has cited no express authority by which the Defendant can be ordered to pay for a functional capacity examination. Such examinations are often ordered as part of a vocational rehabilitation plan, but in this case the vocational rehabilitation program was "suspended" with the approval of the Claimant.

15. The Commissioner has concern that if Employers are to be charged with the expense of functional capacity examinations, then the necessity for such an examination should be shown as a clear medical purpose or as part of a vocational rehabilitation assessment/plan as contemplated by the statute. 21 VSA Sec. 641. Otherwise, such examinations might become a routine tactic in litigation preparation. In this case, there was no clear medical need for the functional capacity examination. There was no evidence that the vocational rehabilitation counselor asked for this evaluation. The Defendant should not be charged for it. Other facts in other cases might justify such an order, but not here.

16. The Claimant has shown through his own testimony, the testimony of Dr. Bucksbaum, and the report of Dr. Peterson, that the ongoing chiropractic treatments have a beneficial, palliative affect. They benefit the Claimant by relieving his pain, without the need for additional medication. They assist in his maintenance of function. They are recommended by the treating physician, Dr. Shulman. Under prior rulings of the Commissioner, continuing chiropractic care may be ordered when recommended by persuasive medical authority. See *Forrest v. Rockingham School District*, Opinion No. 30-96 WC (May 16, 1996), but see also *Burnah v. Carolina Freight Carriers*, Opinion No. 37-98 WC (June 28, 1998). The weight of the evidence *in this case* is in favor of the compensability of such treatments as a palliative measure.

17. The Claimant seeks costs which are mandatory under 21 VSA Sec. 678. (The costs allowed in this case do not include Dr. Bucksbaum's permanency assessment since that is being awarded under a different rule and costs do not include the cost of the FCE since that has been determined to be unrelated to this litigation and not recoverable under other provisions.) Recoverable costs are $1,201.00.

18. An award of interest is mandatory under 21 VSA Sec. 664 from the date on which the employer's obligation to pay compensation began. The evidence does not reflect the specific amount of the chiropractic bills, nor the amounts paid by the Claimant or his insurer. Likewise the dates upon which permanent partial disability payments have become due is unclear from the record. Under the statute I conclude that the Defendant is obligated to reimburse Claimant for any amounts he paid, along with interest at the statutory rate from the date of payment forward. The defendant is obligated to reimburse any third party payors as well, including interest charges or other late payment penalties assessed by them. To the extent that the Claimant is entitled to permanent partial disability benefits which were due according to this order but which have not yet been paid, the Defendant is obligated to pay interest from the due date to the date of payment.

19. In the discretion of the Commissioner, the prevailing party may be awarded "reasonable" attorney fees. 21 VSA Sec. 678 (a). Rule 10.1000 Vermont Workers' Compensation and Occupational Health Rules. The Commissioner has discretion as to whether to base an award of attorney fees on either an hourly or contingency basis. Rule 10.1200 Vermont Workers' Compensation and Occupational Health Rules. The Claimant prevailed in this formal proceeding on four of the seven issues presented (lumbar spine impairment, cervical spine impairment, permanency rating recovery, and chiropractic care). While counsel for the Claimant submitted a copy of the contingency fee agreement, she did not submit any evidence of her itemized time. In past cases, the Commissioner has weighed various factors in making determinations of reasonableness of attorney fees including the difficulty of the issues involved, the results achieved, the time and effort expended and whether the claim for fees is proportional to the efforts of the attorney. See *Estate of Lyons v. American Flatbread*, Opinion No. 36A-03 WC. Without some evidence as to the time and effort expended, the Commissioner cannot in this case make a reasoned decision as to the reasonableness of attorney fees. Accordingly, the record should remain open for the Claimant to submit such evidence. See *Estate of Roland Pion v. Vermont Asbestos Group, Inc.* Opinion No. 02R-07 WC.

ORDER:

Therefore, based upon the foregoing findings of fact and conclusions of law, the Commissioner determines that the Claimant's claim for workers' compensation benefits, is approved in part and the Defendant is ORDERED to pay:

1. Permanent Partial Impairment benefits of 11% whole person impairment not related to the spine (vision 5%; facial nerve 1%; mental condition 5%) and spine impairment of 13% whole person impairment (8% cervical and 5% lumbar) for a total of 116.05 weeks of permanent partial disability benefits;

2. Dr. Bucksbaum's permanency assessment cost of $2,160.00;

3. Litigation costs of $1,201.00;

4. Unpaid chiropractic bills;

5. Interest upon any of the items in paragraphs 1, 2, and 4 at the legal rate from the date the charges were incurred as set forth in paragraph 55 above;

6. Claimant's attorney may submit to the Department with a copy to the Defendant, within 30 days of the date of this order, an itemized statement of the time expended and the work performed. The Defendant shall have 10 days from the date of receipt to file any objection to the submission. The Commissioner will then act upon the issue of attorney fees.

Dated at Montpelier, Vermont this 13th day of May 2008.

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Patricia Moulton Powden
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. Sec. 670, 672.