Debra Sharples-Lizotte. v. Feed Commodities (April 15, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Debra Sharples-Lizotte

v.

Feed Commodities International, Inc

Opinion No. 11-09WC

By: Jane Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. M-18175

OPINION AND ORDER

Hearing held in Montpelier on February 19, February 20, March 26 and March 28, 2008
Record closed on May 16, 2008

APPEARANCES:

Richard Cassidy, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a result of her February 24, 1999 work-related injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Photograph of barn exterior
Claimant's Exhibit 2: Photograph of ladder
Claimant's Exhibit 3: Photograph of trap door in haymow (closed)
Claimant's Exhibit 4: Photograph of trap door in haymow (open)
Claimant's Exhibit 5: Vocational Rehabilitation Assessment, February 6, 2008 (22 pages)
Claimant's Exhibit 7: Photographs of haymow (6 pages)
Claimant's Exhibit 8: Transcript of videotape deposition of Stephanie Lizotte, February 18, 2003

Defendant's Exhibit 3: Employment/professional materials (Bates #60001001-60001026)
Defendant's Exhibit 4: Education records (Bates #40001001-40001041)
Defendant's Exhibit 5: Feed Commodities Int'l employment records (Bates #14001001-14001129)
Defendant's Exhibit 200: Video deposition and transcript of Nancy Hebben, Ph.D., January 28, 2008
Defendant's Exhibit 201: Deposition of Thomas Kirchura, February 18, 2003

Defendant's Exhibit 202: March 25, 2008 letter from Nancy Hebben, Ph.D.

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant began working for Defendant as a dairy nutritionist in December 1998. Her job duties involved marketing Defendant's feed products to local dairy farmers. As part of her work she collected feed samples from her customers' farms, tested their nutritional composition and recommended adjustments accordingly.

4. Claimant had extensive education and work experience in the field of agricultural nutrition. She earned a Bachelor of Science degree in biology, a Master's degree in dairy science and took credits towards her Ph.D. Prior to working for Defendant she worked as a dairy tester, taught animal science courses and assisted with her then-husband's dairy nutrition consulting business. Just prior to her employment with Defendant she held a similar position with a local competitor.

The Work Injury

5. On February 24, 1999 Claimant was visiting the Choiniere farm, one of her assigned customers, to obtain a feed sample for testing. Claimant's 15-year-old stepdaughter, Stephanie Lizotte, was accompanying her. They arrived during the noon hour and entered the barn. Claimant climbed the ladder to the haymow and bagged a sample for later analysis. As she turned to exit, she stepped on a trap door in the haymow floor. The door gave way and Claimant tumbled to the concrete floor below, a distance of seven to eight feet.

6. Stephanie Lizotte did not witness the actual fall, but turned when she heard a loud noise and saw Claimant lying prone on the barn floor. Claimant was not moving and was unresponsive. Stephanie estimated that she tried for about two minutes to rouse Claimant and then ran to the farmhouse for help. Mark Choiniere and his wife ran back to the barn with her, a distance of approximately 100 yards. Mr. Choiniere estimated that about two minutes elapsed from the time Stephanie knocked on their door to the time they arrived at the barn. By the time they got there, Claimant was conscious, aware and able to speak. Mrs. Choiniere called the ambulance while Mr. Choiniere stayed with Claimant.

7. It is unclear for exactly how long Claimant was unconscious after her fall. The Rescue Squad record indicates a one- to two-minute loss of consciousness. The Emergency Room record states that there was no loss of consciousness at all. Years later Claimant reported to examining physicians that she had been unconscious for five to fifteen minutes. Extrapolating from what is known – that Claimant was unresponsive when Stephanie Lizotte left her to run to the farmhouse for help and conscious by the time Mr. Choiniere arrived at the barn two minutes later – it is unlikely that Claimant's loss of consciousness could have lasted for more than five minutes or so.

8. Claimant did not recall exactly how she fell or how she landed. Upon arrival at the scene, the Rescue Squad noted that she had a bump on the back of her head and pain in her neck and left hip. The Emergency Room record indicates that she landed on her left buttocks and flank. At her first visit to her osteopath one week later, Claimant reported that she "banged her head on the way down." Given that she did not fracture her skull or suffer an extended loss of consciousness, it is unlikely that Claimant took the brunt of the fall with her head.

Initial Treatment and Diagnosis

9. Claimant was treated and released at the hospital Emergency Room. She was awake, alert and oriented. There were no focal neurological signs to suggest a brain injury and no suggestion of any significant neurological problem.

10. Based on the fact that Claimant experienced only a brief loss of consciousness after her fall, and had no retrograde amnesia or other significant disturbance in her mental status immediately thereafter, it is likely that she sustained a concussion. A concussion is a temporary physiological disruption in the way the brain works. It is a mild traumatic brain injury, with symptoms that typically resolve within a few weeks. As such, it is to be distinguished from a moderate or severe brain injury, the diagnosis of which typically requires an extended loss of consciousness (thirty minutes or more) and post-traumatic amnesia for at least 24 hours after the event.

11. In the first month following her fall Claimant complained of dizziness, headaches, lapses in concentration and memory, difficulty sleeping and episodes of visual changes and "space-outs." Claimant treated initially with an osteopath, Dr. McPartland. Later, however, a friend related that she had suffered from "seizures" with symptoms similar to those Claimant described and had treated for them with Dr. Matthew, a primary care provider at The Health Center in Plainfield, Vermont. Claimant testified that she understood that Dr. Matthew advocated an alternative approach to treating health issues, which appealed to her. At the friend's suggestion, Claimant began treating with Dr. Matthew's partner, Dr. Crose.

Temporal Lobe Epilepsy Diagnosis and Treatment

12. Claimant first treated with Dr. Crose approximately one month after her fall, on March 30, 1999. Based on Claimant's report of symptoms at that first visit, Dr. Crose diagnosed temporal lobe epilepsy, the cause of which she attributed to the "major head injury" Claimant had suffered at the Choiniere farm.

13. Like all forms of epilepsy, temporal lobe epilepsy is caused by abnormal electrical discharges in the brain. Seizures or "spells" result. Unlike *grand mal* seizures, however, which involve the entire brain, in temporal lobe epilepsy the electrical misfiring that occurs is less widespread. The seizures that typify temporal lobe epilepsy, therefore, usually do not involve the loss of consciousness and violent shaking throughout the body that occurs in the context of a *grand mal* seizure. Rather, a temporal lobe epileptic seizure is more likely to involve a brief period of dissociation, where the patient stops talking, stares and seems momentarily to have lost contact with his or her environment. Automatic behaviors such as lip smacking frequently occur as well. Afterwards the patient is likely to feel disoriented, lethargic and sleepy. Because the electrical short-circuiting that causes a temporal lobe epileptic seizure affects the same area of the brain each time, seizures tend to be stereotypical, meaning that there is little variation in symptomatology from one to the next.

14. A traumatic brain injury, particularly one that involves a skull fracture or penetrating head wound, can cause epilepsy. Conversely, the general medical consensus is that a concussion of the type Claimant suffered in her fall, involving only a brief loss of consciousness and no retrograde amnesia, provides an insufficient insult to the brain to do so.

15. There is no definitive diagnostic test for temporal lobe epilepsy. However, because epilepsy is a disorder involving abnormal electrical activity in the brain, and because EEG testing measures the brain's electrical activity, positive EEG findings are a critical objective measure for diagnosing epileptic conditions. Other neuroimaging tests, such as CT and/or MRI scans, also can confirm the diagnosis. Although EEG testing is not infallible, technological advances have increased its sensitivity significantly, particularly with repeat testing. False negatives – cases in which patients are determined to suffer from epileptic conditions notwithstanding normal EEG test results – are increasingly unlikely.

16. Being a disorder of the brain, specialist treatment for epilepsy typically comes under the purview of neurology. Some neurologists, called epileptologists, have expertise even more specific to the condition.

17. At Dr. Crose's direction, Claimant underwent a CT scan and EEG testing in April 1999. Both tests were negative for any brain mass, lesion or seizure activity.

18. Also at Dr. Crose's direction, in July 1999 Claimant underwent a neuropsychological evaluation with Dr. Peyser. Such an evaluation uses both clinical interviews and psychological testing to determine a patient's intellectual functioning and identify deficits in such cognitive domains as concentration, memory, language, problem-solving and reasoning. From the results of her testing Dr. Peyser concluded that Claimant had suffered no decline in cognitive functioning attributable to her fall at the Choiniere farm. In fact, Dr. Peyser noted that Claimant performed best on the subtest thought to be most sensitive to diffuse brain injury.

19. Just one day after completing Dr. Peyser's neuropsychological evaluation, Claimant reported to Dr. Crose that she felt her memory had returned to normal, that she was performing her job responsibilities satisfactorily and that she had adjusted to whatever lingering deficits she felt she had. In August 1999 Dr. Crose determined that Claimant had reached an end medical result, with no residual neuropsychological impairment and no restrictions against full-time full-duty work.

20. Barely a month later, however, in September 1999 Claimant returned to Dr. Crose, reporting that she "was not doing well." She complained of having spells involving vision changes, difficulty finding words and extreme problems with concentration. Dr. Crose reiterated her diagnosis of temporal lobe epilepsy causally related to Claimant's February 1999 fall and head injury. She later characterized Claimant's difficulties as "recurrent psychomotor seizures." As treatment, Dr. Crose prescribed Neurontin, an anti-seizure medication.

21. Based on Claimant's report of her recurrent symptoms Dr. Crose retracted her previous end medical result determination. She also imposed work restrictions against driving or working around large animals until Claimant's seizures were better controlled.

22. Claimant reported that there were numerous days during the fall of 1999 that she was unable to work on account of her symptoms. By December 1999 she had reduced her work schedule to half-time, 20 hours per week.

23. In February 2000 Claimant transferred her care to Dr. Matthew, Dr. Crose's partner. Like Dr. Crose, Dr. Matthew is a primary care provider at The Health Center. Although not a neurologist, Dr. Matthew claims a special interest in epilepsy spectrum disorders. He testified that there is a "constant stream" of temporal lobe epilepsy patients through his practice, an average of about two per week. No evidence was introduced as to how this caseload compares to the incidence of temporal lobe epilepsy in the general population.

24. Among the symptoms Claimant reported to Dr. Matthew were "space-out" episodes, speeded, slowed or jumbled thoughts, memory gaps, olfactory and auditory hallucinations, altered time and distance perception and auras around objects. She also complained of increased irritability and bouts of sudden rage or intense depression. On subsequent visits, Claimant reported sleep disturbances and episodes of sudden diarrhea and loss of bladder control. Claimant's husband testified that on one occasion Claimant had a "spell" during dinner and fell forward into a plate of food. Dr. Matthew testified that he personally had witnessed Claimant exhibiting brief "space-outs" and momentary lapses of awareness during her office visits with him.

25. Claimant also reported to Dr. Matthew that since her fall and the onset of her seizures she felt an increase in psychic abilities and a more spiritual turn in her personality. Prior psychological records document that Claimant had professed to having psychic abilities previously, dating back even to her childhood, but she believed they were somehow enhanced after the accident.

26. At Dr. Matthew's suggestion, in March 2000 Claimant reduced her work schedule to twelve hours per week. Dr. Matthew also reiterated Dr. Crose's prior recommendation that Claimant not drive or work around large animals until her seizure disorder was under better control. By this time Claimant felt that she was not performing nearly as well at work as she had prior to her accident. She had trouble organizing her thoughts, forgot appointments and made mistakes. Claimant attributed these difficulties to her seizure disorder.

27. Claimant's supervisor, Thomas Kirchura, had a different view. Like Claimant, Mr. Kirchura began working for Defendant in December 1998. He had only limited direct supervisory interaction with Claimant prior to her February 1999 accident, therefore. Nevertheless, he testified that he did not view Claimant's performance issues as unusual in the context of the cross section of sales associates he had managed in the past. Mr. Kirchura surmised that Claimant was resisting the new procedures he had implemented and felt pressure to meet the performance standards he had imposed. He questioned whether Claimant had the self-initiative and organizational skills he felt were necessary for a sales job such as hers.

28. In fact, Mr. Kirchura was not the first one to question Claimant's organizational skills. Years before the February 1999 accident, a forensic psychological evaluation undertaken in the context of Claimant's 1996 divorce and ensuing custody dispute with her ex-husband described Claimant as "disorganized and unfocused, given to poor follow-through and completion of tasks." The report also noted that Claimant was "intensely involved" in paranormal pursuits. The 1996 evaluation raises the possibility that the difficulties Claimant experienced at work, as well as some of the other post-accident symptoms she reported to Dr. Matthew – sensory hallucinations, auras and feelings of increased psychic abilities, for example – in fact long pre-dated her injury.

29. In June 2000 Defendant informed Claimant that for safety reasons it could no longer allow her to work until she had been seizure-free for at least six months. Claimant has not worked since.

30. Dr. Matthew's treatment of Claimant, which has been ongoing since February 2000, has consisted primarily in prescribing a variety of anti-seizure medications, in numerous dosages and combinations. Although certain of Claimant's symptoms have improved, others have not. She still experiences transient lapses in awareness and episodes of forgetfulness, particularly if she has slept poorly the night before. Bright lights bother her. She avoids crowds because "there is too much going on." Dr. Matthew determined in March 2002 that Claimant had reached an end medical result, but in his opinion she still is not seizure-free and probably never will be.

Other Expert Opinions as to Diagnosis and Treatment

31. Throughout Dr. Matthew's treatment, his diagnosis – temporal lobe epilepsy causally related to the traumatic brain injury he believes Claimant suffered in her February 1999 fall – has remained unchanged. Dr. Matthew stands alone in his analysis of Claimant's disorder, however. None of the other medical providers who have evaluated Claimant share his view to the required degree of medical certainty. Of note, excepting Dr. Kenosh, a physiatrist, all of these other providers hold board certifications and/or specialty credentials in either neurology, psychiatry, psychology or neuropsychology, areas of expertise that are particularly relevant to the current claim.

32. Dr. Ciongoli, a neurologist, was the first to question Dr. Matthew's diagnosis. At Defendant's request, Dr. Ciongoli conducted an independent medical evaluation in June 2000. Dr. Ciongoli suspected at that time that Claimant did not have a specific seizure disorder but rather that her symptoms might be psychological. A February 2001 continuous video EEG monitoring study confirmed his suspicions. As had been the case with Claimant's first EEG testing in April 1999, the study revealed no seizure activity. On those grounds Dr. Ciongoli concluded that a diagnosis of seizure disorder was not appropriate.

33. Dr. Kenosh, a physiatrist, was the next independent medical examiner to evaluate Claimant, again at Defendant's request, first in October 2001 and then again in November 2004. In concluding that Claimant did not have temporal lobe epilepsy, Dr. Kenosh noted the following:

    (a) Claimant was at extremely low risk for post-traumatic epilepsy as a result of her February 1999 fall, which did not involve any depressed skull fracture, acute intracranial bleeding, dural penetration or other indicia of traumatic brain injury;

    (b) Two EEGs had shown no seizure activity whatsoever;

    (c) Neuropsychological testing revealed no significant cognitive dysfunction; and

    (d) Claimant's current complaints, which included "bizarre neurological symptoms," were not consistent with a diagnosis of temporal lobe epilepsy.

34. In Dr. Kenosh's opinion, Claimant's symptoms most likely represented a conversion disorder, not causally related in any way to her February 1999 fall at the Choiniere farm. Such a diagnosis presumes a psychological origin to Claimant's complaints rather than a physical one. A patient with a conversion disorder "converts" his or her psychological stress into physical symptoms. In Claimant's case, the converted symptoms allegedly manifested themselves as "pseudoseizures."

35. Pseudoseizures are episodes that resemble epileptic seizures but are not associated with any electrical abnormalities in the brain. They can imitate all types of epilepsy and are virtually impossible to distinguish reliably by observation alone. They can involve trancelike behavior, tongue biting, incontinence, twitching and unusual emotional states. Because they so closely mimic true epileptic seizures, pseudoseizures often are misdiagnosed and treated – improperly – as a physical condition rather than a psychological one.

36. To make a definitive diagnosis of either pseudoseizures or true epilepsy, epileptologists typically rely on multiple sources of data, including not just clinical observation or patient report of symptomatology but also video-EEG monitoring and response – or not – to anticonvulsant medications. Other red flags that may point to a diagnosis of pseudoseizures include seizures that are prolonged, fluctuating in character from one event to the next or otherwise unusual in presentation.

37. Following Dr. Kenosh's evaluation Claimant next was evaluated by Dr. Whitlock, a neurologist, in December 2001, this time at Dr. Matthew's referral. While Dr. Whitlock agreed that Claimant's history was suspicious for some form of temporal lobe epilepsy, he did not completely embrace that diagnosis. Rather, he too posited that Claimant might be experiencing pseudoseizures, either alone or in combination with temporal lobe epileptic seizures.

38. The next independent medical evaluator to weigh in on Claimant's diagnosis was Dr. Drukteinis, a psychiatrist. Dr. Drukteinis first evaluated Claimant in May 2003, and then again in October 2007.[1]

39. Dr. Drukteinis concluded that Claimant was not suffering from temporal lobe epilepsy, but rather that her symptoms most likely were psychogenic in origin and probably represented a conversion disorder. In reaching this conclusion, Dr. Drukteinis relied on many of the same facts that Dr. Kenosh had noted – that Claimant's initial head injury was not severe enough to cause a traumatic brain injury, that there had been no documented evidence of seizures on two EEGs, that neuropsychological testing showed no evidence of cognitive dysfunction and that the "bizarre array of symptoms" Claimant reported simply did not fit the diagnosis of temporal lobe epilepsy.

[1] Initially Dr. Drukteinis was retained as a defense expert in the context of the third-party personal injury litigation Claimant had brought against the owners of the Choiniere farm. His more recent evaluation occurred in the context of the pending workers' compensation claim, at Defendant's request.

40. Dr. Drukteinis found further support for a psychological rather than physical origin to Claimant's ongoing symptomatology in his interpretation of Claimant's personality profile and mental status exam. According to Dr. Drukteinis, Claimant's psychological testing revealed her to be highly subject to suggestibility, with poor psychological insight and primitive psychological defense mechanisms. All of these are traits typical of conversion disorder patients.

41. As to causation, Dr. Drukteinis referred to evidence of psychological stressors and life conflicts that either pre-dated or coincided with Claimant's fall at the Choiniere farm. A common factor among patients diagnosed with conversion disorder is that because they are not psychologically insightful, they are unable to recognize the emotional toll that such conflicts impose. As they take on more and more, emotionally they wear out. Rather than complain, however, they look for a "convenient target" upon which to displace their psychological stress, by converting it to physical symptoms instead.

42. The "convenient target" in Claimant's case was the February 1999 fall. In Dr. Drukteinis' opinion, however, the fall neither caused nor aggravated her underlying conversion disorder. It merely provided a face-saving means of escaping what had become an intolerable amount of psychological stress and conflict.

43. Dr. Drukteinis also commented on the treatment Claimant had received to date for her condition. In his opinion, to provide a medical treatment for a non-existent physical condition served only to reinforce Claimant's psychological disorder. Dr. Drukteinis recommended that Claimant be weaned gradually off of her anticonvulsant medications and that more intense psychological treatment be introduced instead.

44. At her attorney's referral, Claimant underwent a forensic psychological evaluation with Dr. Kessler in June 2004, and then again in February 2008.[2] Dr. Kessler is board-certified in clinical health psychology, which focuses on the relationship between psychology and medical illness.

45. According to Dr. Kessler's analysis, if a medical explanation – temporal lobe epilepsy – existed for Claimant's condition, then a psychological diagnosis would be inappropriate. As Dr. Kessler did not consider himself qualified to determine whether the medical diagnosis fit, however, he could not make a psychological diagnosis to the required degree of certainty. Dr. Kessler acknowledged that Claimant's psychological presentation was complicated. He hypothesized that if one were to exclude a medical explanation for Claimant's complaints, in his opinion a diagnosis of pseudoseizures would be the best fit for her symptom presentation.

[2] As with Dr. Drukteinis, Dr. Kessler initially was retained by Claimant's attorney in the context of her third-party action against the owners of the Choiniere farm. Claimant's attorney later asked him to reevaluate Claimant for the purposes of the current workers' compensation claim.

46. Dr. Kessler's assumption that a medical diagnosis of temporal lobe epilepsy necessarily excludes a psychological diagnosis of pseudoseizures appears to conflict with that of another of Claimant's experts, Dr. Whitlock. As noted above, Dr. Whitlock, a neurologist, had speculated that Claimant's condition might be due either to temporal lobe epilepsy alone or in conjunction with pseudoseizures. In fact, according to a medical journal article appended to Dr. Drukteinis' 2003 report, up to 10% of patients with epilepsy may develop pseudoseizures as well.

47. Despite his inability to make a definitive diagnosis, Dr. Kessler believed that Claimant's condition was causally related to her February 1999 fall. In his opinion, Claimant's post-injury psychological functioning was considerably decreased, and whether that resulted from a physical injury or a psychological one in either event it stemmed from the accident rather than from any alternative cause.

48. At Defendant's referral, in September 2007 Nancy Hebben, Ph.D., a neuropsychologist, evaluated Claimant's cognitive function. Dr. Hebben's test results were similar to those Dr. Peyser had reported eight years earlier, just a few months after Claimant's accident. Specifically, Dr. Hebben found no change in Claimant's intellectual functioning from Dr. Peyser's earlier testing and no objective evidence of any cognitive or neuropsychological impairment.

49. The results of Dr. Hebben's psychological testing also lent support to Dr. Drukteinis' findings. Claimant's personality profile showed her to be suggestible, prone to developing physical symptoms when faced with psychological stress and lacking psychological insight. Dr. Hebben concurred both with Dr. Drukteinis' diagnosis of conversion disorder and with his conclusion that it had been neither caused nor aggravated by the February 1999 fall.

50. In rejecting a diagnosis of temporal lobe epilepsy Dr. Hebben took specific issue with the means by which Drs. Crose and Matthew had done so in Claimant's case. In her view, to make the diagnosis solely on the basis of the patient having endorsed symptoms that are thought to be characteristic of epilepsy, without objective evidence such as positive EEG results as well, is an outdated methodology. It fails to account for the fact that many of those symptoms are equally characteristic of conversion disorder.

51. At Defendant's request, in December 2007 Claimant underwent an independent medical evaluation with Dr. Levy, a neurologist. Dr. Levy concluded, "to a very high degree of medical certainty," that Claimant did not have temporal lobe epilepsy, but rather that her condition most likely was psychogenic in origin. In addition to citing the same factors upon which Drs. Kenosh, Drukteinis and Hebben had relied, Dr. Levy also noted that Claimant's seizures were poorly controlled despite multiple anticonvulsant medications, an indication that they were not physically caused. As at least some of these medications have anti-depressant and other psychotropic effects, the fact that Claimant "felt better" while taking them probably represented either a positive response to their mood altering qualities and/or a placebo effect, but in either event did not lend any support to a physical diagnosis, in Dr. Levy's opinion. In this respect his conclusion contrasts sharply with that of Dr. Matthew. Dr. Matthew testified that the fact that Claimant reported a return of her symptoms whenever she discontinued her anticonvulsant medications strengthened his belief that temporal lobe epilepsy was the appropriate diagnosis.

Claimant's Work Capacity

52. As noted above, Claimant has not worked since May 2000, when Defendant advised her that it would not accept her back at work until she had been seizure-free for at least six months. Subsequently, in November 2000 Claimant was found not entitled to vocational rehabilitation services, on the grounds that she had sufficient skills, education and job experience to obtain suitable employment.

53. Despite the fact that Claimant had been found not entitled, in 2001 Defendant voluntarily provided some vocational rehabilitation assistance to her. Claimant had professed an interest in using her increased psychic energies and spiritual awareness to lead her in a new vocational direction, and hoped to earn a living by sharing her clairvoyance. To that end, her vocational rehabilitation counselor helped her identify the course work and training necessary to become a Shamanic spiritual healer. For reasons that are not clear from the record, Claimant ultimately chose not to move forward with this plan.

54. In 2005 Claimant was found entitled to social security disability benefits, retroactive to the February 1999 accident. Her claim for these benefits had been supported by Dr. Matthew, who reported that her "space-out" episodes, memory problems and emotional volatility all combined to preclude her from working.

55. Currently Claimant's daily activities include caring for the chickens that she and her husband raise on their farm, seeing her teenage daughter off to school and "hanging out" with her when she returns, straightening up the house, doing errands and cooking some meals. She writes checks at her husband's direction and can use a computer to search the web and engage in e-mail correspondence. Claimant sometimes drives locally, but is uncomfortable beyond that, as with her memory lapses and momentary "space-outs" she fears becoming lost or confused.

56. In the context of her current workers' compensation claim, Claimant believes she is permanently and totally disabled from sustaining regular, gainful employment. Claimant's vocational rehabilitation expert, Greg LeRoy, testified in support of this claim. Mr. LeRoy noted the dispute among the medical professionals as to whether Claimant's condition was physically or psychologically based, but believes that in either event Claimant is unemployable.

57. In reaching this conclusion, Mr. LeRoy focused not on Claimant's transferable skills, but rather on her inability, in his opinion, to meet the general requirements of being a worker. Specifically, Mr. LeRoy commented that the unpredictable severity and frequency of Claimant's seizures would prevent her both from reporting to work on time and consistently and from performing her assigned work duties to an acceptable level of productivity and quality.

58. Not surprisingly, Defendant's vocational expert, John May, reached an alternative conclusion. In his opinion, Claimant has not yet accessed all of the resources available to assist her in returning to work, and given her impressive educational background and transferable skills if she were to do so the prognosis for her being able to sustain regular gainful employment actually would be quite good.

59. Mr. May commented that vocational rehabilitation resources specific to people who suffer from traumatic brain injuries exist that would be relevant to Claimant's situation if in fact her condition proved to be physically based. Alternatively, were her symptoms determined to be psychological in origin, vocational rehabilitation would be a useful adjunct to a psychological treatment plan. Identifying jobs that did not involve hard deadlines or sustained work without interruptions probably would be appropriate for Claimant, and assistive technologies might allow her to overcome other employment barriers. With all these options in mind, in Mr. May's opinion it would be premature to conclude that Claimant is permanently and totally disabled from working.

60. The medical experts also weighed in on the subject of Claimant's work capacity. Drs. Matthew and Kessler were of the opinion that the unpredictable nature of Claimant's cognitive impairment would preclude her from maintaining the pace and focus necessary for her to sustain regular employment. On the other hand, Drs. Kenosh, Drukteinis, Hebben and Levy all noted that Claimant's cognitive testing had revealed no deficits or dysfunction whatsoever, and therefore all stated their belief that she was capable of working. In fact, both Dr. Drukteinis and Dr. Hebben noted that returning to work actually would be therapeutic for Claimant, by changing her focus from invalidism to increased productive activity.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Claimant here alleges that she incurred a traumatic brain injury in her fall at the Choiniere farm in February 1999, that she now suffers from temporal lobe epilepsy and that she is permanently and totally disabled. Defendant counters that the February 1999 fall resulted only in a concussion, that Claimant's current symptoms are psychogenic in origin and not causally related in any way to her fall and that in any event she is not permanently disabled from working.

3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (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. 37-03WC (Sept. 17, 2003).

4. On the issue whether the appropriate diagnosis for Claimant's condition is temporal lobe epilepsy or pseudoseizures, I find Defendant's medical experts to be more credible. First, I am persuaded that their specialist credentials, which were particularly relevant to Claimant's symptomatology, lent more weight to their opinions. More importantly, they arrived at their diagnoses by using a methodology that is consistent with the current accepted practice for making a differential diagnosis.

5. In contrast, Dr. Matthew's diagnosis ignores the fact that Claimant's injury was not of a type severe enough to cause temporal lobe epilepsy, that her symptom complex did not fit that diagnosis in important respects, and that repeat EEG testing could not confirm any physical dysfunction. Perhaps one of those inconsistencies alone would not be sufficient to detract from Dr. Matthew's conclusion, but taken as a whole they point away from temporal lobe epilepsy as the appropriate diagnosis. Furthermore, although Dr. Matthew professed a special interest in treating patients with epilepsy, he had no special certification in either neurology or neuropsychology, and did not adhere to the latest diagnostic techniques in forming his opinion. These facts all conspire to render his opinion less credible.

6. I conclude, therefore, that the weight of the evidence establishes that Claimant's condition is psychogenic rather than physical in origin. I further conclude that her February 1999 work-related fall neither caused nor aggravated its psychological underpinnings. In this regard, I find Drs. Drukteinis and Hebben's opinions to be more credible than Dr. Kessler's.

7. Having found that Claimant's condition was neither caused nor aggravated by her work injury, I need not reach the question whether she is permanently and totally disabled. I do note that recent formal hearing decisions have stressed the importance of accessing, considering and exhausting all viable vocational rehabilitation options prior to concluding that an injured worker is permanently precluded from returning to regular gainful employment. *Hurley v. NSK Corp.*, Opinion No. 06-09WC (February 23, 2009); *Gaudette v. Norton Brothers*, Opinion No. 49-08WC (December 3, 2008). I cannot accept that Claimant has done so here.

8. Claimant having failed to prevail on her claim for permanent total disability benefits, she is not entitled to an award of costs or attorney's fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for permanent total disability benefits is hereby **DENIED**.

DATED at Montpelier, Vermont this 15th day of April 2009.

_____
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. §§670, 672.