

P. H. v. CV Oil Co., Inc.

(May 26, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

P. H.

Opinion No. 15-09WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

CV Oil Co., Inc.

For: Patricia Moulton Powden
Commissioner

State File No. S-03322

OPINION AND ORDER

Hearing held in Montpelier on April 7 and April 14, 2008

Record closed on May 19, 2008

APPEARANCES:

Ronald Fox, Esq., for Claimant

Craig Matanle, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a result of his August 3, 2001 work-related injury?
2. If Claimant is not permanently and totally disabled, what is the extent of his permanent partial disability?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Vocational rehabilitation records

Claimant's Exhibit 1: Deposition of Matthew Friedman, M.D., Ph.D., March 25, 2008

Claimant's Exhibit 2: *Curriculum vitae*, Matthew Friedman, M.D., Ph.D.

Claimant's Exhibit 3: 3/17/08 fax transmittal (4 pages)

Claimant's Exhibit 4: Clinician-Administered PTSD Scale for DSM-IV

Claimant's Exhibit 5: Colorado scale worksheet and category conversion table (3 pages)

Defendant's Exhibit A: *Curriculum vitae*, Albert Drukteinis, M.D., J.D.

Defendant's Exhibit B: Medical exhibit index

Defendant's Exhibit C: *Curriculum vitae*, George White, Jr., M.D., M.S., CIME

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Interest pursuant to 21 V.S.A. §664
Costs and attorney's fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his 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. Judicial notice also is taken of relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment, 5th ed.* (the "AMA Guides").
3. Claimant is 58 years old, a lifelong resident of Bethel, Vermont. For most of his adult life he has been employed as a fuel oil delivery driver, first in his father's business and since 1988, for Defendant. Claimant enjoyed his job, as he liked being outside and working on his own.

Claimant's Work-Related Injury

4. On Friday, August 3, 2001 Claimant was making a fuel oil delivery when a thunderstorm arose. Claimant was outside his truck, standing with his hand on the nozzle of the hose, filling a customer's tank. A small dog had wandered up and was standing between his legs. Suddenly Claimant felt an intense shock enter his left forearm and course down his left leg. At the same time, the dog yelped and ran off. Claimant surmised that he had been struck by lightning.
5. Claimant felt dazed and panicked. Although he does not remember doing so, he completed four or five additional deliveries and then returned to the office. He next recalls standing in the office, telling his boss that he had been struck by lightning and that he was going home because he did not feel well.
6. Claimant took his previously scheduled vacation the following week. During this time he felt dazed, confused and "fuzzy." His arm and left side ached and he experienced severe headaches. When his vacation week ended, Claimant returned to work, but on his first day back, after driving his delivery truck only a short distance down the road his left arm felt numb and weak, to the point where he feared losing control of the steering wheel. Claimant returned to the office and was advised to seek medical treatment. He has not returned to work since.

On-going Symptoms and Treatment

7. In the years since the August 2001 injury, Claimant's physical symptoms have included pain, numbness and weakness in his left arm and leg, headaches, fatigue, sleep disturbance and possibly some neurocognitive deficits as well. Although certainly many of the doctors who treated or examined Claimant suspected that his diffuse neuropathies were caused by the lightning strike, with the exception of positive left carpal tunnel syndrome findings all other electrodiagnostic testing was within normal limits.
8. Claimant also has experienced significant psychological symptoms since the lightning strike injury. These include anxiety, depression, nightmares, flashbacks, irritability, difficulty concentrating and hyper-vigilance.
9. Functionally, Claimant's ongoing symptoms have affected him in dramatic ways. Most notably, he feels unable to drive for more than short distances along familiar routes. This is in part because of his physical symptoms – numbness in his left arm and leg, for example – and in part due to his psychological symptoms – anxiety, difficulty concentrating, constantly feeling on edge and being easily startled, particularly by loud or unexpected noises.
10. As treatment for his physical symptoms, Claimant underwent a left carpal tunnel release in December 2001. Most of his symptoms persisted. In January 2003 he participated in a four-week outpatient multidisciplinary pain management program run by Dr. Mann, a psychologist, with input from Dr. Lefkoe, a physiatrist. Claimant made mild functional gains in this program, but these were offset by an intensifying array of anxiety, depression and somatization. Dr. Mann concluded that Claimant's recovery was being impeded by strong psychological factors and that he was at significant risk for a self-imposed disability role. Dr. Lefkoe concurred with this assessment, specifically noting a significant behavioral overlay to Claimant's symptoms.
11. Both Dr. Mann and Dr. Lefkoe noted that Claimant also exhibited symptoms of post traumatic stress disorder (PTSD), including flashbacks, difficulty concentrating, memory issues and dissociative episodes. Other doctors also had postulated that Claimant suffered from PTSD as a result of his accident, among them Dr. Boucher, an independent medical evaluator, Dr. Sax, Claimant's treating neurologist, Dr. Porter, his treating psychiatrist, and Sarah Kenealy, his treating mental health counselor.
12. Treatment for Claimant's psychological symptoms has consisted primarily in medications for anxiety and depression and supportive counseling. As part of the latter process Claimant has learned various techniques to relax and calm himself when his symptoms threaten to overwhelm him.
13. Claimant was determined to be at an end medical result in August 2004, and on those grounds the Department approved the discontinuance of his temporary disability benefits effective September 10, 2004. Neither party disputes that determination.

Permanent Partial Impairment

14. Dr. White, an occupational medicine specialist, rated the extent of Claimant's permanent physical impairment at 7% whole person. Dr. White testified that this rating included 3% impairment referable to Claimant's residual left carpal tunnel syndrome symptoms, 2% referable to his left leg neuropathy and a 2% allocation for his headache-related pain. According to Dr. White's interpretation of the *AMA Guides*, only the pain referable to Claimant's headaches is separately ratable; the pain related to his left carpal tunnel syndrome and left leg neuropathy is encapsulated already in the impairment ratings for those conditions.
15. Neither party disputes Dr. White's determination as to the extent of Claimant's permanent physical impairment. As to the extent of Claimant's permanent psychological impairment, Dr. White specifically deferred to those with more expertise in this area.
16. The dispute as to the extent of Claimant's permanent psychological impairment revolves around the primary diagnosis for his ongoing symptoms. Two independent medical examiners have weighed in on the subject – Dr. Drukteinis for Defendant, and Dr. Friedman for Claimant.
17. Dr. Drukteinis, a forensic psychiatrist, conducted two evaluations of Claimant – the first in March 2004 and the second three years later, in July 2007. Following his first evaluation, Dr. Drukteinis diagnosed Claimant with a pain disorder associated with both psychological factors – namely, somatization – and a general medical condition – the physical injuries caused by the August 2001 lightning strike. In making this diagnosis Dr. Drukteinis specifically determined that although psychological factors were playing some role in his symptomatology, they were not the sole cause of his pain disorder. For that reason, a diagnosis of somatoform pain disorder, a purely psychological condition, would be inappropriate.
18. Dr. Drukteinis also diagnosed Claimant with depression and PTSD, both causally related to the lightning strike. In Dr. Drukteinis' opinion, however, these conditions created only a mild impairment of function and therefore would only minimally restrict Claimant's ability to return to work. In reaching this conclusion, Dr. Drukteinis relied primarily on Claimant's assertion that the pain associated with his left-sided physical symptoms was his most limiting factor, not any mental disturbance or emotionally-based symptoms.
19. Dr. Drukteinis found little variance overall between the results of Claimant's psychological testing in 2004 and the results of his repeat testing in 2007. He did note that Claimant appeared to be emphasizing his PTSD symptoms more in his 2007 evaluation than he had earlier. Although Dr. Drukteinis did not think Claimant was in any way malingering, he theorized that issues of secondary gain might have prompted Claimant subconsciously to exaggerate his symptoms.

20. Dr. Drukteinis determined that Claimant suffered a 6% psychological impairment causally related to his pain disorder. Again, in reaching this conclusion Dr. Drukteinis emphasized that any restriction in function arising out of Claimant's psychological symptoms resulted primarily from the pain associated with his physical condition, not from his depression or PTSD. With that in mind, Dr. Drukteinis felt that in order to be logically consistent, his psychological rating for pain would have to be less than Dr. White's 7% physical impairment rating, as otherwise the psychological symptoms would take on more prominence than they merited.
21. Dr. Drukteinis testified that he referred to the Colorado scale for quantifying the extent of Claimant's permanent psychological impairment and determining the appropriate rating, although he did not complete the written work sheet provided by the developers of that rating mechanism for doing so.
22. At the request of Claimant's attorney, Dr. Friedman, a psychiatrist, conducted a psychological evaluation of Claimant in August 2007. Dr. Friedman is the Executive Director of the U.S. Department of Veterans' Affairs National Center for PTSD, a congressionally mandated center of excellence for research and education on the disorder. He is a nationally recognized PTSD expert.
23. Dr. Friedman assessed Claimant using the Clinician Administered PTSD Scale (CAPS), a structured interview test that is recognized as the "gold standard" for both diagnosing PTSD and rating its intensity. A proper PTSD diagnosis requires analysis of six criteria, labeled A through F, summarized as follows:
 - Criterion A, the stressor criterion, establishes that the individual was exposed to a life-threatening traumatic event, to which he or she strongly responded with fear, helplessness or horror.
 - Criterion B references a cluster of "re-experiencing" symptoms, such as nightmares or flashbacks, in which the traumatic event continues to intrude on daytime thoughts or sleep at night.
 - Criterion C refers to avoidance or numbing behaviors – efforts to avoid thoughts, feelings or conversations about the traumatic event, or activities that arouse recollections of it, for example.
 - Criterion D encompasses hyper-arousal symptoms, such as difficulty falling or staying asleep, difficulty concentrating, hyper-vigilance and exaggerated startle responses.
 - Criterion E is durational, requiring that no PTSD diagnosis be made until at least thirty days after the traumatic event.
 - Last, Criterion F requires that the PTSD symptoms noted cause significant distress and functional impairment.

24. Coincidentally, severe thunderstorms were occurring around the time of Dr. Friedman's evaluation, so he was able to witness first-hand Claimant's response to what he had reported to be a distressing symptom trigger. In all, Dr. Friedman determined that Claimant met or exceeded the diagnostic threshold for each of the criteria. His results on the CAPS testing placed him in the severe range for PTSD.
25. Dr. Friedman also diagnosed Claimant with the same type of pain disorder that Dr. Drukteinis had diagnosed, as well as a major depressive disorder, again as Dr. Drukteinis had found. Contrary to Dr. Drukteinis' analysis, however, Dr. Friedman found Claimant's PTSD to be the predominant psychological issue, not his pain disorder. Dr. Friedman noted that other medical providers had engaged in a "collective scratching of the head" as they tried to understand why Claimant's pain problems did not seem severe enough to explain the extent of his functional immobility. In Dr. Friedman's view, the "missing piece of the puzzle" was the extent to which Claimant's PTSD had impaired him.
26. Dr. Friedman used the Colorado rating scale to determine the extent of Claimant's permanent psychological impairment, and concluded that Claimant had suffered a 17% permanent impairment referable to his PTSD diagnosis. Dr. Friedman acknowledged that he has performed only three or four impairment ratings in his career, has used the Colorado scale only once previously and has never used the *AMA Guides*.
27. The Colorado rating scale utilizes a work sheet to assess an individual's level of impairment in four general areas of function: (1) activities of daily living; (2) social functioning; (3) thinking, concentration and judgment; and (4) adaptation to stress. Chapter 14 of the *AMA Guides* instructs evaluators to use similar categories to assess the extent of impairment due to a mental or behavioral disorder, but does not provide any mechanism for translating the impairment into a numerical rating. The Colorado scale does provide such a mechanism.
28. Dr. Friedman testified that he essentially transcribed his CAPS findings onto the Colorado rating scale in order to determine Claimant's impairment. Thus, his rating was based on Claimant's PTSD symptoms, not his pain complaints. Presumably this means, for example, that when Dr. Friedman rated Claimant as "moderately impaired" with respect to his sleeping patterns, he was referring to Claimant's self-reported tendency to awaken from distressing nightmares, not his inability to sleep due to pain in his left arm or leg. This is consistent with Claimant's own testimony on the issue.
29. Dr. Friedman also commented on the treatment Claimant had received to date for his psychological symptoms. In his view, it was inadequate. Claimant has received neither of the two medications specifically approved by the Food and Drug Administration for treatment of PTSD. Nor has he undergone the type of cognitive behavioral psychotherapy that has proven to be most effective with PTSD patients. Dr. Friedman testified that with better, more focused treatment some of Claimant's PTSD symptoms might yet be ameliorated.

Vocational Rehabilitation

30. Claimant was found entitled to vocational rehabilitation services in December 2002. He began working with Fran Plaisted, a certified vocational rehabilitation counselor, to develop a plan for returning to suitable employment.
31. Claimant underwent a functional capacities evaluation in June 2003. He was determined to be capable of at least part-time work in the sedentary to light range to start, with the potential gradually to increase to full-time light work. The functional restrictions underlying Claimant's limited work capacity specifically related only to his physical complaints, although the evaluator also noted that PTSD issues might be complicating the rehabilitation process as well.
32. Ms. Plaisted's efforts to develop an appropriate return to work plan for Claimant focused primarily on two potential employment opportunities – real estate appraisal and woodworking. As to the first, Ms. Plaisted investigated the training Claimant would need, and for his part, Claimant arranged a job shadow situation with an acquaintance appraiser. Claimant was excited about the prospect of becoming an appraiser and was both appropriately invested and cooperative in the process. Unfortunately, however, after job shadowing for only a portion of the appraiser's day, Claimant determined that he was unable to tolerate the amount of driving involved, due both to his physical symptoms and his psychological aversion to driving.
33. Claimant and Ms. Plaisted next turned to the possibility of self-employment as a woodworker. Again, Claimant demonstrated a high level of interest in this vocational objective and was entirely cooperative in the process of determining whether it was viable. On his own initiative, he contacted a home furnishings manufacturer and asked whether it would be interested in subcontracting the production of some of its smaller items to him. The manufacturer responded that it might very well be.
34. Upon hearing of the \$20,000 price tag associated with tearing down an existing shed on Claimant's property and rebuilding it as a woodworking shop, however, Defendant's workers' compensation insurance adjuster was far less enthusiastic about this vocational option. The adjuster questioned whether it was appropriate to eliminate the possibility of real estate appraiser as a viable vocational goal in light of the fact that there was no medical documentation of Claimant's stated inability to drive to the extent required for that occupation. With that in mind, the adjuster directed Ms. Plaisted to draft an Individualized Written Rehabilitation Plan (IWRP) with real estate appraiser as the identified vocational goal.
35. As instructed, Ms. Plaisted drafted the proposed real estate appraiser IWRP. In the course of doing so, she contacted Claimant's attorney to inquire whether he was aware of any medical documentation of Claimant's inability to drive to the extent necessary for such a position. Despite repeated requests, Claimant's attorney failed to respond to Ms. Plaisted's inquiries.

36. In fact, from reviewing the medical records, although many medical providers have noted that Claimant often experiences stress while driving, none has specifically restricted him from continuing to drive. Notably, furthermore, both Dr. Friedman and Dr. Drukteinis have suggested that with cognitive behavioral therapy and desensitization techniques Claimant's driving-related anxiety might be ameliorated.
37. Ms. Plaisted never actually presented the proposed real estate appraiser IWRP to Claimant and never submitted it to the Department for its consideration. She felt frustrated in her efforts to provide meaningful vocational rehabilitation services to Claimant. She knew that he no longer wanted to pursue employment as a real estate appraiser because of the driving involved, but because of his attorney's unresponsiveness she was unable to obtain the necessary medical documentation to justify eliminating this option as a viable vocational goal.
38. In an effort to resolve the stalemate she felt she was at, Ms. Plaisted suggested that Defendant's adjuster request an informal conference with the Department's vocational rehabilitation specialist. The adjuster declined to do so, and instead instructed Ms. Plaisted to close her file. The Department approved the closure on the grounds that the failure of Claimant's attorney to respond to repeated requests to contact Ms. Plaisted amounted to a "lack of cooperation" with the vocational rehabilitation process.
39. Ms. Plaisted testified that many loose ends were left unresolved and unexplored at the time she closed Claimant's vocational rehabilitation file. For example, Claimant never underwent neuropsychological testing to determine whether he had the aptitude for further schooling or other vocational training, as had been recommended in his vocational assessment. His inability to drive to the extent required by a real estate appraiser was never documented one way or the other. He never explored the possibility of renting appropriate woodworking space rather than building a new shop, so as to make that vocational plan more viable. Ms. Plaisted stated that in addition to the vocational options she pursued with Claimant other possibilities for suitable employment also might have existed, but these were not investigated. She testified that she was surprised and disappointed with the carrier's decision to have her close Claimant's vocational rehabilitation file rather than continue working with him. Simply put, she stated, "I did not think I was done."
40. Both Claimant and Ms. Plaisted testified that they got along well with one another during the course of their vocational rehabilitation efforts, that each found the other to be appropriately responsive and cooperative and that each would be willing to re-engage in the process if given the opportunity.
41. As to the question whether Claimant was rendered permanently and totally disabled as a result of his work injury, Ms. Plaisted testified that her vocational rehabilitation efforts on his behalf focused entirely on "suitable" return to work goals. She never even began the process of determining whether appropriate opportunities for "gainful" employment existed. Without having done so, she could not make any meaningful determination as to whether Claimant was permanently and totally disabled from a vocational rehabilitation perspective.

42. From a purely physical point of view, and in keeping with the results of the June 2003 functional capacities evaluation, both Dr. Lefkoe and Dr. White opined that Claimant's condition merited few work restrictions and did not preclude him from gainful employment.
43. The principal medical dispute as to Claimant's ability to work relates to his psychological injuries. Dr. Drukteinis believes that it would be therapeutic for Claimant to explore vocational options and that he is capable psychologically of returning to gainful work. Dr. Friedman is somewhat less optimistic. In his opinion, due to the chronicity of Claimant's PTSD, certain habitual ways of thinking about his capacity to work have set in. With that in mind, Dr. Friedman fears that even with optimal PTSD-focused treatment Claimant's function will not be restored to the point where he is capable of gainful employment.

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 the combination of both the physical and psychological injuries attributable to the August 2001 lightning strike have rendered him permanently and total disabled under the so-called "odd lot" doctrine. Alternatively, Claimant asserts that he is entitled to permanent partial disability benefits in accordance with Dr. Friedman's 17% impairment rating, as opposed to Dr. Drukteinis' 6% rating.

Permanent Total Disability

3. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

4. The workers' compensation rules provide further guidance. Rule 11.3100 states:

Permanent Total Disability – Odd Lot Doctrine

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

5. A finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. *Hurley v. NSK Corporation*, Opinion No. 07-09WC (March 4, 2009); *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2009). As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's functional capabilities are accurately assessed and second, all corresponding vocational options are comprehensively considered and reasonably rejected.
6. I find that Claimant has not met that standard here, because his vocational rehabilitation services were terminated prematurely. Perhaps his attorney should be faulted for failing to respond to a reasonable request for information. Perhaps Defendant's adjuster should be faulted as well for summarily closing Claimant's file rather than accessing the Department's informal dispute resolution resources. Whatever blame properly ought to be shared by those two, the fact is that Claimant failed to receive the full gamut of meaningful vocational rehabilitation services geared towards identifying at least gainful, if not suitable, employment opportunities.
7. I conclude, therefore, that Claimant has not sustained his burden of proving permanent total disability. I encourage the parties to re-engage in the vocational rehabilitation process in the hopes that he may yet return to suitable employment.

Permanent Partial Disability

8. As noted above, there is no dispute as to the extent of Claimant's permanent physical impairment, a 7% whole person impairment as rated by Dr. White. The parties' medical experts disagree, however, as to the extent of Claimant's permanent psychological impairment.
9. 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).
10. I find Dr. Friedman's opinion to be the more credible one here. His status as a nationally recognized PTSD expert appears to be well-earned. And although he has only limited experience with permanent impairment ratings, he thoroughly explained his rationale and included the completed Colorado rating system work sheet as support. It is apparent both from his testimony and from the supporting documentation he supplied that Dr. Friedman did not inappropriately emphasize Claimant's pain-related impairment, as Dr. Drukteinis theorized. To the contrary, in keeping with his determination that Claimant's primary psychological issue was PTSD, Dr. Friedman rated the impairment specifically referable to that condition.
11. I am persuaded that Dr. Friedman's 17% psychological impairment rating appropriately reflects the permanent partial disability referable to PTSD and in that sense more accurately encompasses the full extent of Claimant's permanent psychological injury.
12. Taking judicial notice of the Combined Values Chart referenced in the *AMA Guides*, I conclude that the combination of Dr. White's 7% whole person rating referable to Claimant's physical injuries and Dr. Friedman's 17% whole person rating referable to his psychological injuries yields a final whole person impairment of 23%.
13. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$10,602.70 and attorney's fees totaling \$11,214.00 (124.6 hours at the mandated rate of \$90.00 per hour). An award of costs to a prevailing claimant is mandatory under the statute. Here, Claimant has prevailed only on his claim for permanent partial disability benefits, not on his permanent total disability claim. None of the costs he has submitted for reimbursement, however, relate exclusively to the latter claim. Under these circumstances, although Claimant has only partially prevailed I find it appropriate to award all of the costs allowable by our statute and rules.

14. Of the costs submitted, however, \$4,800.00 relates to Dr. Friedman's charges for approximately three hours of deposition testimony. This far exceeds the maximum charge of \$300 per hour mandated by Workers' Compensation Rule 40.111. In accordance with that rule, Dr. Friedman's charges are reduced to \$900.00, and the total costs awarded, therefore, are reduced to \$6,702.70.
15. As for attorney's fees, these lie within the Commissioner's discretion, which typically is exercised to reduce the award commensurate with the extent of the claimant's success when he or she only partially prevails. Here, given that Claimant prevailed on his claim for permanent partial disability benefits but failed on his far broader claim for permanent total disability benefits, I find it appropriate to award him only 50% of his attorney's fees, or \$5,607.00.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits in accordance with a 23% whole person impairment referable to Claimant's physical and psychological injuries;
2. Interest on the above amounts calculated from September 10, 2004 in accordance with 21 V.S.A. §664;
3. Costs totaling \$6,702.70 and attorney's fees totaling \$5,607.00.

DATED at Montpelier, Vermont this 26th day of May 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.