STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-19582
	)	
Ilia Dinis	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Handy's Texaco	)	Commissioner
	)	
	)	Opinion No. 01SJ-01WC

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

The primary issue in this case is whether the claimant suffered an injury that is compensable under the Workers' Compensation Act. If the claim is found to be compensable, the issues whether the claimant is entitled to permanent total disability benefits and benefits associated with the nursing care provided by his parents must then be determined. The hearing began in October 2000 with two days of evidence, including the introduction of medical records, testimony from the claimant's fact witnesses and his medical expert on causation. The hearing is to be continued later this month.

The claimant now moves for summary judgment on the issue of permanent total disability based on the evidence presented. Attorneys Gary W. Lange and Daniel H. Maguire of Swanson & Lange represent the claimant. Attorney Glen L. Yates represents the employer.

FACTS:

The following facts are not in dispute:

1. Claimant Ilia Dinis, born on February 19, 1972, was an employee and Handy's Texaco his employer as those terms are defined in the Vermont Workers' Compensation Act ("Act") and Rules.

2. Cincinnati Insurance Company was the Workers' Compensation carrier for Handy's at all relevant times.

3. At the time of the injury at issue in this case, and for several years beforehand, the claimant was employed as an automotive mechanic at Handy's.

4. On April 1, 1998 the claimant was working on a Ford F-150 pickup truck that was on the hydraulic lift in Bay # 1 at Handy's. In the process of replacing the starter motor, he had removed the old one and was waiting for the new one when Nikoll Marku arrived on the premises.

5. Nikoll Marku had visited the claimant at work in the past and was known to those who worked at Handy's. On April 1, 1998, Marku walked through the office area at Handy's, was acknowledged by a Handy's employee, Richard Brisson, then entered the bay area of the garage to speak with the claimant.

6. In the open bay area of the garage, the claimant worked in bay #1, mechanic George Korol in Bay # 2 and mechanic Hoang Nguyen in Bay #3 at the time of the incident that gave rise to this claim.

7. The claimant and Marku spoke for five to ten minutes in a friendly manner. While they were talking, the new starter motor arrived for installation into the pickup.

8. The claimant, with his back to Marku, began to install the starter motor that was elevated on the hydraulic lift. Marku attacked the claimant from the rear, then immediately ran from the premises.

9. Marku denies having assaulted the claimant. He denies that he was at Handy's on April 1, 1998. Marku states the claimant was his friend and that he had no reason to harm him.

10. As a result of the attack, the claimant suffered numerous injuries. His head injury resulted in a right-sided hemiparesis with impairments in gait, speech and fine motor skills. He also suffered cognitive and psychological impairments.

11. The parties agree, based on a report from Dr. Eric White, that the claimant reached maximum medical improvement on March 22, 1999.

12. On January 5, 2000, Dr. Elizabeth Michaels, claimant's treating psychiatrist, opined that he is permanently and totally disabled, unemployable and would be institutionalized but for the care rendered by his parents.

13. On July 21, 2000, Dr. Thomas Zweber, Director of Physical Medicine/Rehabilitation at Fletcher Allen Health Care, opined that "it is highly probable that this gentleman is unemployable even in the most protected, supervised, structured and facilitory type of situation.

14. At the defendant's request, the claimant had an IME conducted at the Northeast Rehabilitation Hospital. Dr. James Whitlock, who oversaw that evaluation, summarized his findings as follows: " It is my impression that Mr. Dinis has a permanent and essentially total disability. While further slow improvements may accrue over time—especially if there is a breakthrough in treatment of his PTSD/depression, he is unlikely to be capable of any kind of gainful employment or competitive employment in the future."

The defendant produced an affidavit from Jane Ropulewis-Shaw, a vocational rehabilitation specialist, which recited the following: First, Ms. Ropulewis-Shaw listed her professional qualifications and contacts with the claimant and his doctors. She stated that the claimant

received vocational rehabilitation services provided by the State of Vermont Rehabilitation services and occupational therapy to improve his skills with his non-dominant hand. Defense counsel's law firm donated a computer for the claimant's use and plans proceeded to assist the claimant by enhancing the skills and positive attributes he had to train him to perform a sedentary job. Through personal contacts of the employer, a site for job coaching was located at a motel as a receptionist. The intent of the plan was to give the claimant realistic and rewarding employment that would generate income and give him a felling of self-esteem. Claimant's attorney terminated the rehabilitation process, stating that it would be resumed only if the employer accepted the case as compensable.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate only where, taking the allegations of the nonmoving party as true, it is evident that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See *In re Margaret Susan P.*, __ Vt. __, __, 733 A.2d 38, 43 (1999). In determining whether material facts exist for trial, all reasonable doubts are resolved in favor of the party opposing summary judgment.

2. Under the Workers' Compensation Act, an individual is permanently and totally disabled pursuant to 21 V.S.A. § 644 in the case of the following, non exclusive, list of injuries: 1) The total and permanent loss of sight in both eyes; 2) The loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrist; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity."

3. To qualify for permanent total disability, the claimant's injury must either fit one of those enumerated in 21 V.S.A. § 644, or must have as severe an impact on earning capacity as one of the scheduled injuries. *Drinkwater v. Norton Brothers, Inc.*, Opinion No. 21-98WC (Apr. 30, 1998); Gravel *v. Cabot Creamery*, Op. No. 15-90WC (July 10, 1991); *Bishop v. Town of Barre*, 140 Vt. 565 (1982).

4. If a claimant qualifies for permanent total disability, the employer is obligated to pay sixty-six and two thirds of his average weekly wage "for the duration of the permanent total disability, but in no event …for less than three hundred and thirty weeks." 21 V.S.A. § 645(a). After three hundred and thirty weeks, benefits continue "if the injury results in the loss of actual earnings or earning capacity after the injured employee is as far restored as the permanent character of the injuries will permit and results in the employee having no reasonable prospect of finding regular employment." Id.

5. The medical reports dramatically demonstrate the claimant's severe impairment. Yet, the affidavit from Ms. Ropulewis-Shaw creates a genuine issue of material fact related to the claimant's actual employability. Has a realistic vocational plan been attempted? In this young man with a strong work ethic, will such a plan lead to work that will improve his condition? Such material disputed facts preclude judgment as a matter of law.

Accordingly, the claimant's motion for summary judgment is DENIED.

Dated at Montpelier, Vermont this 3rd day of January 2001.

R. Tasha Wallis
Commissioner

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Labor & Industry