

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Michael Wallace)	State File No. K-24580
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
)	For: R. Tasha Wallis
)	Commissioner
Velan Valve Corp.)	
)	Opinion No. 11-01WC

Hearing held in Montpelier, Vermont on June 28, 2000, July 14 and 18, 2000.
Record closed on October 9, 2000.

APPEARANCES:

Christopher McVeigh, Esq. for the claimant
Stephen D. Ellis, Esq. for the defendant

ISSUE:

Was the defendant justified in terminating the claimant's temporary total disability benefits on November 17, 1999?

EXHIBITS:

- Claimant's Exhibit 1: Correspondence from Attorney McVeigh to Attorney Ellis, 2/14/00 and 3/20/00
- Claimant's Exhibit 2: Correspondence from Concentra to Attorney McVeigh 1/20/99 with memorandum of 1/13/99
- Claimant's Exhibit 3: Concentra Progress Report 5/12/99, 6/16/99

- Defendant's Exhibit A: Form 27, Notice of Intention to Discontinue Payments, 11/8/99 with attachments
- Defendant's Exhibit E: Handwritten notes from Personnel File
- Defendant's Exhibit F: Memorandum of Accommodation and Agreement 4/7/93; Notice of Disciplinary Action, 4/5/93;
- Defendant's Exhibit G: Psychiatric Evaluation of claimant by Albert M. Drukteinis, M.D., J.D.
- Defendant's Exhibit H: Correspondence from David M. McKay, M.D. to Attorney McVeigh, 18/8/99
- Defendant's Exhibit I: Correspondence from David M. McKay, M.D. to Attorney McVeigh, 10/28/99

PRELIMINARY COMMENT:

With the claimant's proposed Findings of Fact and Conclusions of Law, his attorney appended medical records that he stated had been inadvertently omitted from the medical record exhibit. The defendant, whose counsel prepared the medical exhibit, strongly objects to the admissibility of those records after the record had closed. Correspondence between counsel suggests that efforts were made to come to agreement on the medical record exhibit a month before the hearing began. Excluding the records could benefit the side preparing them to the detriment of the opposition. On the other hand, admitting them after the record has closed may unfairly surprise the party who may have never seen them and set a dangerous precedent. See, Workers' Compensation Rule 7 (d). Because of the danger of unfair surprise and because in this case the medical record exhibit had been prepared well in advance of the hearing, records offered after the close of the evidence are not considered in this opinion.

FINDINGS OF FACT:

1. On November 8, 1999 the employer's counsel filed a Form 27 Notice of Intention to Discontinue Benefits effective November 1999. The form, based on the assertion that the claimant had been released to work but had not made a reasonable effort to return to work, was supported with a statement of the adjuster, physical therapist's work capacity evaluation and psychiatric evaluation by Dr. Drukteinis.

Work Injury

2. The injury that forms the basis for this workers' compensation claim occurred on June 9, 1997 at Velan Valve Company in Williston, Vermont where the claimant had worked as a machinist for 11 years. Claimant took great pride in the heavy work that he did and his ability to support his family.
3. The claimant was injured when he grabbed a 130 pound metal part to prevent it from falling to the floor. Ultimately it was determined that the claimant had herniated two discs in his cervical spine that required a surgical fusion. Dr. Cordell Gross performed that surgery on July 29, 1997.
4. In October 1997 after Dr. Hetman released him to work for a sedentary job, the claimant returned to work on a light duty basis.
5. The claimant considered the light duty job at Velan Valve a "make work" job that did not exist before or after he had it.
6. The medical records support claimant's testimony that he pushed himself hard, perhaps too hard, to maintain his employment. He wanted to prove to himself and others that he could work.

7. By the end of October, the claimant was to be working 4 hours a day, yet he insisted on working 6 hours.
8. Physical therapy notes document visits when the claimant said he was doing fine and others when he had complaints of discomfort. Gradually he began lifting heavier and heavier weights. By February 4, 1998 the therapist noted that he was in tears over his work. A "psych referral" was recommended.

Past History

9. The claimant's subsequent course and treatment must be viewed against the backdrop of his particular history.
10. When he was a boy, the claimant endured physical abuse and responded with behaviors that resulted in his placement in the Weeks Home and Jail.
11. As one of the oldest children in a family where the children were abused, the claimant struck back to protect his younger siblings and eventually left home. He learned to appreciate his physical strength that provided him with a harbor of safety and a bulwark of security upon which he built his personality and identity.
12. When he was 25 years old, the claimant met and married Lori Benoit who is disabled with hemiplegia, paralysis in her case on the left side of her body. The claimant became responsible for performing many of the aspects of the home keeping and for taking care of Mrs. Wallace. For example, he lifted her in and out of the bathtub, buttoned her clothes and did other tasks she could not easily perform herself.
13. The claimant assumed responsibility for maintaining the Wallace home, physically performing work when needed. By all accounts, the claimant's life stabilized in many ways after he married. For example, before his marriage he maintained a steady but peripatetic work history; afterwards he maintained a steady but grounded work pattern, as evidence by his 11 years at Velan Valve before the injury.

Post Injury Work and Medical Care

14. Carl Adams, Velan Valve's representative at the hearing, testified that nobody at Velan Valve monitored the claimant's work activities to ensure that he stayed within his physical limitations.
15. In his testimony, the claimant described why he steadfastly tried to do his work at Velan Valve. If he could maintain his job, he could maintain a point of stability in his life. He could recapture the physical strategies and work that had structured his life and identity. The medical and psychological records eloquently record the claimant's loss and grieving related to the loss of his physical strength. For

example, on July 15, 1998 Fletcher Allen Health Care (FAHC) psychologists noted that the claimant had a “severe depressive reaction due to loss of his main source of self-worth—physical strength and ability to provide for his family.”

16. Vocational counselor Jay Spiegel testified how the claimant tried vigorously to obtain a job as a tool room attendant B when an unexpected opening occurred. Dr. Hetman determined that with accommodations, the claimant might have been able to do the work. When the work was more than what Dr. Hetman had recommended, the claimant tried to do it, to his detriment.
17. When the physical duties of the tool machine attendant B job became too onerous for the claimant and he realized he could not do it, on June 22, 1998 he was hospitalized at FAHC with a major depression. Until that date, the claimant had not been hospitalized for any psychological or behavioral difficulties for many years.
18. Dr. Hetman referred the claimant to Laurance Thompson, a licensed psychologist, for therapy. On December 16, 1997 Thompson noted the claimant’s difficulty with “poor pacing skills.” He predicted that the claimant was in danger of lapsing into a depression if he could not work, given his reliance on and pride in his physical strength. In April 1998 Thompson noted anger and grief, and by May 6, 1998, when relieved of the tool crib job, anger and fear over feeling “out of control over his future.” Subsequent notes suggest that the claimant was coming to grips with the inevitable loss of his job, but when actually relieved of the job, Mr. Thompson noted, that he felt angry, scared and “out of control over his future.”
19. In June 1998 Mr. Thompson referred the claimant to Nancy T. Silberg, Ph.D. for pain management, counseling and psychological treatment for depression. Dr. Silberg documented the claimant’s profound depression and, consistent with most psychological and psychiatric providers, noted his escalating inability to cope with the loss of his physical strength, “his primary source of self worth.”
20. Because of his profound symptoms, the claimant admitted himself to the psychiatric unit at Fletcher Allen Health Care on June 22, 1998. His treating psychiatrist, Dr. Magdalena Naylor, diagnosed claimant with major depression with psychotic features.
21. After several weeks at FAHC and a short readmission from July 13 to July 17, 1998, the claimant was discharged from FAHC with the recommendation that he enter the Seneca Day Treatment Program and establish a relationship with the Counseling Service of Addison County (CSAC).
22. The claimant then proceeded to establish a therapeutic relationship with a number of providers at the CSAC who gradually became his treatment team. The process began with Kirk Luder, M.D., a psychiatrist and Mary Claire Dehaven, a therapist.

23. At the intake evaluation on July 29, 1998, Mary Claire DeHaven described claimant as one whose thinking was concrete and insight limited. She noted that he needed to cope with the loss of his physical strength on which his identity depended.
24. Dr. Luder performed a thorough evaluation of the claimant on July 29, 1998. He concluded that the claimant was a cognitively limited man with a persistent and severe state of depression since his 1997 work related injury. Despite hospitalizations, active involvement in a day care program and medication, Dr. Luder noted that the claimant had shown little improvement in his depressive symptoms.
25. On December 17, 1998, Dr. Luder confirmed that the claimant was incapable of performing any work activities of any kind. He reconfirmed that opinion in a March 2, 1999 letter to Concentra, noting that the claimant's symptoms were too severe to participate in a work program.
26. On several occasions, the claimant met with nurse case managers whom EBI had hired to monitor the claimant's psychological condition. One of these nurses, Susan Rancher, opined on February 2, 1999 that the claimant could not return to work.
27. EBI also hired Catamount Case Management to perform vocational rehabilitation services for the claimant. Teresa Bouchard, a vocational counselor with Catamount, met with the claimant on December 17, 1998. Because of what she determined was his inability to participate in the rehabilitation process and after consulting with Mary Claire DeHaven, Bouchard ultimately suspended services on March 8, 1999.
28. In mid-March of 1999 the claimant attempted to kill himself and in the midst of that attempt, scuffled with his son Ben. Claimant was arrested, charged with domestic assault and was evaluated at the Vermont State Hospital. As part of the proceeding, Jonathan Weker, M.D., a psychiatrist, evaluated the claimant. He concluded that at the time of the assault, the claimant was mentally ill and unable to conform his conduct to the requirements of law.
29. In the spring of 1999 the claimant began working with Heidi Champney, a caseworker at CSAC in a program for individuals with severe psychological disabilities. To qualify for that program, one must suffer a significant psychological disability. Ms. Champney does not hold a professional degree in counseling, but has worked with troubled clients at CSAC for six years. During that time she has learned from the clinical staff in training sessions and group work.

30. Ms. Champney testified that in her work with the claimant, he has been cooperative in trying to get better, and even though his progress has been slow, it has been steady. She has seen him perform minimal physical activities when she has been with him. He participated as a cook at the Evergreen House, part of the claimant's overall therapeutic program at CSAC. He prepared lunch for approximately 15 people once a week for several hours, after which he complained of considerable fatigue.
31. On his own the claimant tried to prove his academic skills by participating in Learning Center and Community College classes and rudimentary math.
32. The records suggest that the claimant's psychological progress has been one where he has taken at least two steps backward with every three steps forward. The progress is certain, albeit slow.

Expert Opinions

33. On June 23, 1999 the claimant was evaluated by the defense expert, Albert Drukteinis, M.D., J.D. in Manchester, New Hampshire. That evaluation involved an interview and psychological testing. Dr. Drukteinis described the claimant's presentation as that of "an emotionally distressed, initially subdued man with marked pain behavior" and one with a "dramatic and somewhat histrionic presentation." At the time of the evaluation, the claimant was "clearly depressed, at times tearful and emotionally overwhelmed."
34. Testing described a coping style that Dr. Drukteinis described as one where "this patient easily can become distraught emotionally and is inclined to expect trouble in most relationships. He exhibits a moody demeanor as he anticipates being humiliated or hurt by others. It is this expression that accounts in part for his rather detached and isolated life style... To avoid the discomfort of his erratic emotions, he is likely to choose the safety of withdrawing into his private and restricted world... In response to serious or chronic illness, this patient will tend to react even more intensely and emotionally than usual."
35. In the report that followed that evaluation, dated August 25, 1999, Dr. Drukteinis concluded that the claimant suffered psychological harm as a result of his injury at Velan Valve. He wrote, "the loss of his physical strength could have resulted in the breakdown of his defenses and the emerging of his current Major Depressive Disorder." He also wrote that the claimant "may require continued intense psychiatric and psychological treatment." At the hearing, Dr. Drukteinis conceded that the claimant suffered a psychological injury that arose out of his physical injury at Velan Valve and that the loss of physical strength resulted in the breakdown of his defenses.

36. Although he agreed that the claimant's psychological condition was caused by the claimant's 1997 work related injury, he opined that the claimant does not have any significant psychiatric disability. Dr. Drukteinis concluded that the claimant was able to engage in a vocational rehabilitation program and conduct a good faith effort to look for work. The employer offered the Drukteinis report in support of the Form 27 filed in November 1999.
37. At the hearing, Dr. Drukteinis described the claimant as a manipulative individual who lacks motivation. He opined that a return to work would help lift the claimant from his depression.
38. Dr. Drukteinis's opinion was based on a single visit with the claimant and select videotapes purporting to show a discrepancy between what the claimant says he can do and what he can actually do.
39. On October 5, 1999 CSAC records reveal that the claimant felt suicidal after his evaluation with Dr. Drukteinis and the insurance carrier's video surveillance. The staff sought prompt intervention from a psychiatrist, Dr. Jimerson. The staff held a meeting to consult with one another about the claimant suicidal ideation and recommended hospitalization.
40. On October 8, 1999 and, David McKay, M.D., one of claimant's treating psychiatrists, stated that because of the claimant's then existing psychological condition, he could not engage in a good faith effort to look for work, nor could he become involved in a vocational rehabilitation program.
41. Also in October of 1999, the carrier notified the claimant that he had a duty to make a good faith effort to look for work and claimant's counsel consulted with Dr. McKay.
42. Dr. McKay grounded his opinion that the claimant as unable to work on the fragility of the claimant's psychological state, the concern over rejection and failure regarding an effort to look for work and the impact of such rejection or failure would have on the claimant. Specifically, Dr. McKay wrote, "Mr. Wallace is now engaging positively in services at the Counseling Service; he has demonstrated an ability to receive support from others and offer support to them in return; and he has begun to identify a positive facet of himself in this regard which may later provide a source of self esteem which is separate from his physical strength. With this established, he could then pursue training for a new career without perceiving it as an indication of personal failure."

43. Dr. McKay testified that the claimant has been in the process of rebuilding a psychological identity and personhood, as his previous psychological identity, largely structured upon his physical strength and the security and protection his physical strength had given his life, had been destroyed by his June 1997 injury and his failed effort to perform physically demanding work.
44. Dr. McKay cited as examples of the claimant's attempt to get better, his participation in programs CSAC offered, such as Evergreen House. However, he believes the devastation this claimant suffered means that his improvement will involve one small step at a time.
45. On November 2, 1999, Anna Marie Schrader, claimant's psychiatric health care nurse, wrote. "He says that keeping busy has been helpful to him, it provides him with distraction and he can sometimes stop thinking about all of the pain he is experiencing. Mike let me know that he continues to have struggles with the insurance company and is not feeling optimistic about the settlement that they offered him. He is very interested in getting involved with vocational rehabilitation, but cannot do anything until he has settled with his insurance company. He denies suicidal ideation today, he just says that if he were to die it might be a relief because it is difficult to withstand the physical pain he's experiencing." The claimant explained, without contradiction, that he intended to pursue college education to be a social worker, and the only means available to him to pursue that rehabilitation goal, which no one else ever embraced, was through settlement proceeds. In fact, on his own he pursued adult education classes around the time of this November 2, 1999 note.
46. A January 5, 2000 CSAC note describes the claimant as "very depressed, crying and shaking as he talks." Claimant acquiesced in a hospitalization at FAHC that day. This occurred during the time that the carrier maintained that the claimant had a work capacity and the ability to participate in a vocational rehabilitation program.
47. At no point has Dr. McKay or any of the other medical or psychological care providers ever suggested that the claimant should not return to work or participate in vocational rehabilitation; the question has been when he would have the best chance psychologically to participate successfully in such a program. Success would depend on his ability to cope with frustrations and setbacks, which inevitably arise in work or vocational rehabilitation efforts. At the hearing, Dr. McKay expressed his belief that the claimant had developed psychological skills sufficient to cope with the vocational rehabilitation or work search process.
48. Heidi Champney, who was part of the claimant's CSAC treatment team, worked with the claimant on a weekly, sometimes twice weekly, basis for almost a year at the time of the hearing. She described the development of the claimant's coping skills as an ongoing process that in November 1999 were not developed enough for a work search.

49. Ruth Benoit, the claimant's mother-in-law, testified that since June 1997 the claimant has not been performing many of the physical tasks he had done before his injury.
50. Jay Spiegel, vocational rehabilitation counselor, testified to his readiness and willingness to provide vocational services to the claimant once he was capable of engaging in the process. He acknowledged receiving a letter from the claimant's attorney scheduling a meeting in March of 2000 and meeting with the claimant to discuss vocational rehabilitation efforts. Between March 16, 2000 and the date of appearance at the hearing, he had no further contact with the claimant or his attorney, but had been in contact with defendant in an attempt to craft a vocational rehabilitation plan. Mr. Spiegel conceded that the process he was using in this case was unusual. Typically he works directly with the injured worker to develop a plan that he then forwards to the employer/carrier. In this case he copied defense counsel, but not the claimant or claimant's counsel, on vocational developments.
51. Mr. Spiegel acknowledged that the claimant was cooperative in his vocational rehabilitation efforts and that his attempts to improve his reading and mathematical skills would enhance his job opportunities. In his March 8, 2000 report, developed almost 8 months after Dr. Drukteinis's evaluation, Mr. Spiegel noted that the claimant's "physical and psychiatric difficulties make development of a rehabilitation plan challenging."
52. Little evidence suggests that the claimant has not always tried to better himself and follow the professional advice from his medical and psychological care providers.
53. At the hearing, the claimant presented as a sincere, extremely troubled individual whose own testimony elicited overt expressions of sadness and grief.
54. The claimant's attorney submitted evidence of 195.05 hours in legal work on this case before the record closed on October 9, 2000 (hours claimed after the record closed are not included.) He also submitted a list of reasonable and necessary expenses totaling \$1384.41. Although he claimed a total of \$1770.41 in expenses, he has not shown that the courier (\$14.00) and telecopy (\$372.00) charges were reasonable and necessary.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. Where the causal connection between an accident and an injury is obscure and the layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.* 137 Vt. 393 (1979). In a physical-mental case, the claimant's burden is to prove that his physical injury caused his psychological harm. *Blais v. Kemper*, Opinion No. 30-90WC (July 30, 1999).
3. In this case, there is no doubt that the claimant suffered a work-related physical injury that required a multi-level cervical fusion and left him unable to return to hard physical labor.
4. Dr. Drukteinis and Dr. McKay agreed that the claimant's psychological difficulties resulted from his work-related physical injury at Velan Valve. His psychological records are remarkably consistent in attributing the cause of his psychological problems to his loss of physical strength, his source of pride and identity.
5. The question presented here is whether the claimant was totally disabled from any and all work when the carrier notified him that he had to make a good faith effort to look for work or engage in a vocational rehabilitation process in October 1999.
6. An injured worker is entitled to temporary total disability benefits once he demonstrates that he is fully disabled. Once such entitlement has been established the employer/carrier has the burden of proving that benefits should be discontinued. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).
7. In cases such as this one, with competing expert opinions this Department has considered the following factors in determining the weight to be given the opinions: 1) the nature of treatment and length of time there has been a therapeutic relationship; 2) whether accident, medical and treatment records were available to and considered by the expert; 3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts, including professional training and experience. *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997).
8. Under the factual circumstances in this case and after evaluating the competing opinions of Dr. Drukteinis and those from the CSAC team, of which Dr. McKay's is the most prominent, I conclude that until June of 2000, the claimant had been totally disabled from any and all work and totally disabled from participating in the vocational rehabilitation process.
9. Claimant's psychological records leave little room for doubt that the claimant's physical injury and resultant pain destroyed his self-image as a physically strong individual able to endure life's challenges. Dr. McKay persuasively testified about concern over the claimant's own attempts to look for work and the distinct potential for psychological relapse should he fail in those attempts. Dr. McKay

was in a better position than Dr. Drukteinis to make that determination because he was a member of a treatment team that included workers who observed the claimant frequently, monitored his progress and intervened on an urgent basis when necessary.

10. While Dr. Drukteinis suggested that the claimant was manipulative and lacked motivation, the records and direct observers do not support such a conclusion. With the exception of the note from Mr. Schrader that suggested that the claimant was somehow resisting vocational rehabilitation efforts to hold out for a settlement, all other records portray a an individual struggling to maintain his sanity and his dignity. At times his own vocational dreams were unrealistic. But the claimant is not the expert in this case.
11. Dr. Drukteinis also suggests that work would help lift the claimant out of his depression. That may be true, but the timing is crucial. A depressed marathon runner disabled with a fracture might feel less depressed if she could resume running. But until the fracture heals and the leg is strengthened, it would be folly to make such an attempt. Similarly, the claimant's healing from his psychological fracture had not reached the point where he could return to vocational challenges, a judgment in this case best made by his treating team.
12. Dr. McKay and the treatment team at CSAC hold a superior position to Dr. Drukteinis in the knowledge of the claimant's capabilities. They have been with him on at least a weekly basis since 1998 and have observed him performing work-like activities. Dr. Drukteinis noted that the claimant's prior work history raised a suspicion about his motivation to work. In fact, the claimant had an eleven-year history of steady, dependable work.
13. Dr. McKay and Dr. Drukteinis both had access to all of the claimant's medical records; both have appropriate education, training and experience to render opinions in this case. Although Ms. Champney does not hold a professional degree or certification, her work with the claimant and experience over several years made her testimony on direct observations of the claimant a credible complement to Dr. McKay's opinions.
14. On balance, Dr. McKay's is the more persuasive opinion. That opinion together with the abundant psychological records for CSAC and the other health care institutions support the conclusion that the claimant was unable to participate in any vocational rehabilitation program or conduct a good faith effort to look for work in October 1999. Therefore, temporary total disability benefits must be reinstated as of November 17, 1999 when they were terminated.

15. Having prevailed in this difficult case, the claimant is awarded attorney fees of \$11703 (\$60.00 x 195.05 hours) and \$1384.41 in costs. 21 V.S.A. § 648; Workers' Compensation Rule 10.

16. The defendant's obligation to pay began on November 17, 1999.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the Carrier is ordered to:

1. Reinstatement temporary total disability benefits as of November 17, 1999;
2. Pay claimant \$11,703.00 in attorney fees and \$1,384.41 in costs.

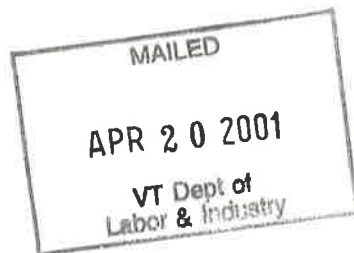
Dated at Montpelier this 20th day of April 2001.



R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.



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

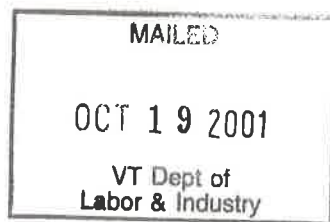
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Michael Wallace)	By: Margaret A. Mangan
)	Hearing Officer
)	
v.)	For: R. Tasha Wallis
)	Commissioner
Velan Valve Corp.)	
)	Opinion No 11A-01WC

AMENDED DECISION

The order rendered in this case on April 20, 2001 awarded the claimant attorney fees for 195.05 hours at \$60.00 per hour. The hourly rate as stated should have been \$70.00 per hour, the rate in effect at the time of the hearing. The opinion is hereby amended accordingly.

In addition, the opinion omitted the required "date upon which the employer's obligation to pay compensation ...began." 21 V.S.A. § 664. That was on November 17, 1999, the date established for reinstating the claimant's temporary total disability benefits. As such, the claimant is awarded interest on the unpaid compensation from November 17, 1999.

Dated at Montpelier, Vermont this 17th day of October 2001.





R. Tasha Wallis
Commissioner