

Wilbur Baraw v. F. R. Lafayette, Inc.

(January 20, 2010)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Wilbur Baraw, Jr.

Opinion No. 01-10WC

v.

By: Sal Spinosa, Esq.  
Hearing Officer

F.R. Lafayette, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. Z-01098

**OPINION AND ORDER**

Hearing held in Montpelier on December 4, 2009

Record closed on December 28, 2009

**APPEARANCES:**

Steven Robinson, Esq. for Claimant

Kelly Smith, Esq., for Defendant

**ISSUES:**

1. Has Claimant reached an end medical result for his September 27, 2007 work injury?
2. Do Claimant's current mental health counseling sessions constitute reasonably necessary treatment for his work injury?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Orleans Medical Clinic referral, May 13, 2009

Defendant's Exhibit A: *Curriculum Vitae*, William Nash, Ph.D.

**CLAIM:**

Temporary total disability benefits pursuant to 21 V.S.A. §642

Medical benefits pursuant to 21 V.S.A. §640

Interest, costs and attorneys fees pursuant to 21 V.S.A. §§664 and 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 contained in the Department's file relating to this claim.
3. Claimant lives in Craftsbury, Vermont with his wife and daughter. On the date of his injury, Claimant was 33 years old.
4. Claimant worked for Defendant for ten years. For three of those years he was a truck driver. Subsequently, he operated a piece of heavy equipment used to drive posts into the ground. The machine is known as a "post pounder."
5. On September 27, 2007 Claimant was operating the post pounder to replace roadside guard rails. As he pulled up a metal rod that supported the original guard rail, the rod broke and hit Claimant in the head between the eyes. Claimant immediately lost consciousness.
6. Defendant accepted Claimant's injury as compensable and began paying both temporary total disability compensation and medical benefits accordingly.
7. Claimant attempted a return to work during both 2007 and 2008. He initially operated the post pounder but its constant movement and vibrations triggered migraines, dizziness and nausea. Claimant transferred to ground work as a laborer but the continual physical movements of that job caused the same symptoms. Claimant has not worked since October 2008.

### *On-going Treatment and End Medical Result*

8. Dr. Haas, an occupational health physician, evaluated Claimant on August 6, 2008. He also reviewed Claimant's then-existing medical records, including those of Dr. Haq, a neurologist, whom Claimant saw periodically between early October 2007 and late February 2008. Dr. Haq had diagnosed Claimant with post-traumatic migraine headaches and post-concussion syndrome.
9. Dr. Haas concurred with Dr. Haq's diagnosis. He found no evidence of any traumatic brain injury. Based both on Claimant's subjective report and on his objective examination, Dr. Haas concluded that Claimant's condition had stabilized and that whatever symptoms persisted were relatively mild. Claimant reported that his headaches had been infrequent since December 2007 and that he had experienced only three episodes of dizziness in the previous six months. His wife reported that his memory deficits were stable. On objective examination, Dr. Haas found Claimant to be within normal limits for both coordination and balance. As for his mood, Claimant reported that he felt "like a million bucks" on most days at work.

10. Dr. Haas noted that Claimant continued to experience episodic headaches and dizziness, mild positional vertigo, mild fatigue and memory difficulties, but doubted that these symptoms would likely resolve with further treatment. As for any suspected cognitive deficits, Dr. Haas felt that in the absence of a pre-injury baseline, further neuropsychological testing was unlikely to reveal anything new or lead to more effective treatment. Dr. Haas concluded, therefore, that Claimant had reached an end medical result and rated him with a 3% whole person permanent impairment.<sup>1</sup>
11. On November 18, 2008 Claimant saw Dr. Haas again. Subjectively, Claimant reported that his headaches and dizziness had worsened since September 2008. Objectively, in contrast to his prior examination only three months earlier, this time Dr. Haas' testing revealed evidence of vertigo and balance deficits. Dr. Haas was unable to explain why Claimant's condition had worsened. In an effort to address these symptoms, Dr. Haas prescribed physical therapy for balance stabilization and additional medications for headaches.
12. On December 12, 2008 Claimant underwent a neuropsychiatric evaluation with Drs. Ammerman and McAllister at Dartmouth Hitchcock Medical Center. Claimant described the circumstances of his injury and reported persistent symptoms of insomnia, dizziness, nausea, head pain, motion sickness and memory loss. The doctors determined that Claimant had suffered a mild brain injury and had not yet returned to his functional baseline. For further treatment, they outlined the following plan:
  - Referral to an ear, nose and throat specialist for further evaluation whether Claimant's balance issues might be evidence of a middle or inner ear problem;
  - Neuropsychological testing to identify and quantify Claimant's cognitive complaints;
  - Physical therapy to address Claimant's dizziness symptoms;
  - Medication adjustments to address Claimant's depression; and
  - Referral to the Dartmouth Hitchcock Headache Clinic for further evaluation of Claimant's headaches.

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<sup>1</sup> Specifically, Dr. Haas rated Claimant with a 0% impairment referable to his headaches, 1% for his dizziness symptoms and 2% for deficits in cognitive performance.

13. Although the medical records are incomplete,<sup>2</sup> it appears Claimant underwent each of the further evaluations Drs. Ammerman and McAllister recommended. Specifically:
- As reported by Dr. Orecchio in the context of his independent medical evaluation, Claimant was evaluated by Dr. Saunders, an otolaryngologist, in 2009 for his disequilibrium and dizziness symptoms. The record does not indicate what further treatment recommendations, if any, Dr. Saunders made.
  - Claimant underwent a neuropsychological evaluation with Drs. Kumbhani and Roth on March 5, 2009. The findings were consistent with a traumatic brain injury, but also reflected Claimant's pre-morbid level of functioning as well. The doctors suggested that Claimant might benefit from a behavioral medicine referral, but again, the record does not reflect whether Claimant pursued this recommendation. Beyond that, they recommended cognitive deficit coping strategies – avoiding environmental distractions or multi-step tasks, for example – but no real treatment *per se*. They also recommended psychological counseling for Claimant's depression.
  - Claimant underwent a course of physical therapy to address his dizziness and balance issues. The record does not reflect how this therapy progressed and/or the extent to which it was successful. Claimant testified at the formal hearing that he had concluded it.
  - As discussed below, Claimant began treating with Dr. Ward, a neurologist at Dartmouth Hitchcock, primarily for his headaches but with some attention to his other symptoms as well.
14. At Defendant's request, on May 1, 2009 Claimant underwent an independent medical evaluation with Dr. Orecchio. Dr. Orecchio is board certified in neurology with an added qualification in clinical neurophysiology. Dr. Orecchio reviewed Claimant's medical records, including apparently some that are lacking from the record here, notably Dawna Pigeon's physical therapy notes and Dr. Saunders' otolaryngological evaluation.
15. As Dr. Haas had noted in his November 2008 examination, Dr. Orecchio found positive evidence of vertigo and balance issues, possibly indicative of an inner ear dysfunction. These issues had persisted despite the further treatment recommended not only by Dr. Haas, but by Drs. Ammerman and McAllister as well. Dr. Orecchio remarked that it was typical for an injury such as Claimant's to generate symptoms that would wax and wane over time. Thus, despite his persistent, though occasional, headaches and disequilibrium symptoms, Dr. Orecchio concluded that Claimant had reached an end medical result, with a 3% whole person permanent impairment.

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<sup>2</sup> Records contained in the parties' joint medical exhibit refer to various other providers who either treated or evaluated Claimant for his work injury, but whose records are not themselves included in the exhibit. It is apparent, for example, that Claimant underwent physical therapy with Dawna Pigeon and also an otolaryngological evaluation with Dr. Saunders, but those records are absent from the joint medical exhibit. In addition, the records pertaining to Claimant's treatment with Dr. Ward, his current neurologist, are incomplete. These gaps in the factual record are significant.

16. Dr. Orecchio reiterated his end medical result opinion on July 21, 2009. Having reviewed additional medical records, including apparently some from Dr. Ward, the neurologist who was treating Claimant's headaches, Dr. Orecchio still maintained that Claimant had reached an end medical result for his balance dysfunction. As to Claimant's persistent headaches, Dr. Orecchio deferred somewhat to Dr. Ward, stating that he believed Dr. Ward's involvement in treating these was "important." Dr. Orecchio anticipated that Dr. Ward's treatment in this regard would consist primarily in monitoring and adjusting Claimant's medications.
17. With Dr. Orecchio's end medical result opinion as support, Defendant discontinued Claimant's temporary total disability compensation effective July 30, 2009.
18. The record contains only one office note from Dr. Ward, dated July 21, 2009. That note reflects that Claimant had been maintaining a headache journal for some time, however, and thus may be indicative of prior office visits with Dr. Ward as well. Dr. Ward reported that Claimant's headaches had been "quite intermittent" during the preceding months and that Claimant was able to control all of them with medication. He further reported that Claimant's balance issues were being addressed with physical therapy. Dr. Ward remarked that he "might" seek another neuropsychological evaluation in three months' time, but did not explain for what purpose he would do so. Last, Dr. Ward adjusted Claimant's headache medication.
19. Also in July 2009 Dr. Ward responded to an inquiry from Claimant's attorney as to whether Claimant had reached an end medical result, stating, "unsure, but if not, close" (emphasis in original). Later, in a letter to Claimant's attorney dated September 23, 2009 Dr. Ward advised that Claimant had reached an end medical result for his headaches, but not for his disequilibrium symptoms. The letter does not specify what further treatment Dr. Ward was recommending to address those symptoms.<sup>3</sup>
20. Claimant testified that he saw Dr. Ward again in early December, apparently for the purpose of monitoring his headaches and adjusting his sleep medications. The record of that visit was not available at the hearing. Claimant testified that he was scheduled to see either Dr. Ward and/or Dr. McAllister again in early February 2010, but again, it was unclear from his testimony for what purpose.

### Mental Health Counseling

21. As noted above, in the context of Claimant's March 2009 neuropsychological evaluation Drs. Kumbhani and Roth recommended that Claimant undergo psychotherapy to address his depressive symptoms. To that end, Claimant began treating with Ruth Hale, M.S.W. in May 2009.

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<sup>3</sup> The letter references an enclosed office note dated September 17, 2009. Possibly Dr. Ward specified his treatment plan in that note, but once again, the parties' joint medical exhibit does not include the record.

22. Between May and August 2009 Ms. Hale conducted approximately thirteen counseling sessions with Claimant. Throughout these sessions the themes have been largely consistent. Claimant describes feeling worthless and frustrated at his inability to work and provide for his family. He has adapted poorly to spending more time at home, and his relationship with his wife has suffered as a result. He continues to feel hampered by his short-term memory deficits and his inability to complete household tasks. He admits to feeling depressed. Claimant reiterated these sentiments in his formal hearing testimony. Clearly they continue to weigh heavily upon him.
23. The tenor of Ms. Hale's therapy was supportive, reflective and insight-oriented. She encouraged Claimant to express his feelings and as Claimant described, gave him an outlet for venting his frustrations.
24. In order to quantify the nature and extent of Claimant's depressive symptoms, Ms. Hale administered a depression screening inventory on July 14, 2009 and again on August 18, 2009. The results indicated that Claimant's depression had not improved with counseling, but rather had worsened slightly in the interim.
25. At Defendant's request, in August 2009 Dr. Nash, a psychologist, reviewed Claimant's medical and psychological treatment records for the purpose of determining whether Ms. Hale's therapy constituted reasonable and necessary treatment for Claimant's work injury. Dr. Nash testified at the formal hearing that he has performed numerous forensic examinations in workers' compensation cases, for both claimants and defendants.
26. In Dr. Nash's opinion, the cognitive and emotional consequences of Claimant's injury would be much better addressed by focusing more on adaptive techniques and rehabilitation strategies and less on "talk therapy." In fact, according to Dr. Nash, the therapy offered by Ms. Hale is counter-productive. Rather than encouraging Claimant to deal with his loss and then move forward, Ms. Hale's sessions have allowed him to remain focused on his symptoms and entrenched in his disability. Indeed, according to Dr. Nash, Ms. Hale's own depression screening inventories document that this is exactly what has occurred in Claimant's case.
27. In support of his opinion Dr. Nash cited to various reported studies indicating that "passive" treatments such as supportive counseling are largely ineffective in the context of chronic pain management, and in fact may even be detrimental. Although these studies all involved patients who suffered from low back pain, Dr. Nash testified that their findings were equally applicable to patients whose chronic pain had developed from other injuries as well.
28. With these studies in mind, Dr. Nash suggested that a multidisciplinary rehabilitation program likely would be a more effective treatment for a chronic pain patient such as Claimant. Without personally having evaluated him, however, Dr. Nash stopped short of making a specific treatment recommendation to that effect.

29. In sum, Dr. Nash concluded that Ms. Hale's therapy has not ameliorated Claimant's depression to any extent, and actually may have worsened it. In his opinion, therefore, her treatment is neither reasonable nor necessary.
30. With Dr. Nash's report as support, Defendant discontinued coverage for Ms. Hale's therapy sessions effective October 19, 2009.

#### **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. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974). As to the first disputed issue in this claim, therefore – whether Claimant has reached an end medical result for his work-related injury – the burden of proof is on Defendant.
3. Defendant also bears the burden of proof as to the second disputed issue – whether Ms. Hale's counseling sessions constitute reasonable and necessary treatment for Claimant's work injury. Having initially accepted these treatments as compensable, Defendant now must prove that they are no longer reasonable and therefore not covered under 21 V.S.A. §640(a). *Scranton v. The Book Press*, Opinion No. 06-07WC (February 22, 2007). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable condition or injury. *Sinon v. State of Vermont*, Opinion No. 10-09WC (April 1, 2009); *see also Morriseau v. State of Vermont Agency of Transportation*, Opinion No. 8-00WC (May 17, 2004).

#### End Medical Result

4. Defendant relies on the opinions of Drs. Haas and Orecchio in support of its assertion that Claimant has reached an end medical result for his work injury. In response, Claimant relies on his ongoing treatment with Drs. Ward and McAllister as evidence that his condition has not yet reached a medical plateau.

5. 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).
6. The medical records demonstrate no disagreement on a number of points. Claimant sustained a serious blow to his head. He had numerous physiological symptoms after his injury, but principally dizziness, motion sickness, headaches, nausea and memory loss. Claimant's symptoms were consistent with a diagnosis of post concussive syndrome. Waxing and waning symptoms are characteristic of this type of injury.
7. Dr. Haas initially found Claimant to be at end medical result as of his August 2008 evaluation. After re-evaluating him in November 2008, however, Dr. Haas noted that Claimant's symptoms had worsened and prescribed further treatment in response. By doing so, in effect Dr. Haas retracted his prior finding of end medical result. I find his opinion to be insufficient support for Defendant's position, therefore.
8. Following their examination of Claimant in December 2008 Drs. Ammerman and McAllister made various recommendations directed at further evaluating and treating Claimant's ongoing headaches, disequilibrium and cognitive deficits. It appears from the record that each of these recommendations was followed to an appropriate conclusion. Dr. Orecchio so noted in the context of his May 2009 evaluation, as supplemented by his July 21, 2009 correspondence. On those grounds, Dr. Orecchio determined that Claimant had reached an end medical result by that latter date.
9. As for Dr. Ward, as of September 23, 2009 he acknowledged that Claimant had reached an end medical result for his headache symptoms, though not for his disequilibrium. Dr. Ward's opinion is flawed, however, in that it makes no mention of any specific treatment recommendations that reasonably might be calculated to lead to significant further improvement. This is an essential requirement to negate an end medical result determination. *Workers' Compensation Rule 2.1200*.
10. In the absence of any evidence relating to the purpose of Dr. Ward's ongoing treatment, I simply cannot find sufficient support for a finding that Claimant has not yet reached an end medical result. If such evidence exists, it was not produced here.
11. Having eliminated both Dr. Haas' and Dr. Ward's opinions on the issue, I am convinced that Dr. Orecchio's end medical result determination is the most credible. Dr. Orecchio conducted a thorough evaluation and appears to have reviewed all of the available medical records (including some that were not made available for my review here). His opinion was well-supported and persuasively established. I conclude, therefore, that Defendant's July 30, 2009 discontinuance on end medical result grounds was proper.



Compensability of On-going Mental Health Counseling Sessions

12. As to the compensability of Claimant's on-going counseling sessions with Ms. Hale, I am convinced by Dr. Nash's testimony that these are no longer reasonable and necessary. Dr. Nash's explanation as to why the reflective, supportive therapy Ms. Hale offered was more likely to be detrimental than beneficial was borne out by Ms. Hale's own objective measurements, which showed that Claimant's depressive symptoms actually increased over the course of her treatment. While palliative care can be compensable in appropriate circumstances, it must be shown to be effective at maintaining function, not worsening it. *J.C. v. Eveready Battery*, Opinion No. 12-07WC (April 3, 2007). Ms. Hale's treatment does not meet this standard.

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for temporary total disability benefits after July 30, 2009 is **DENIED**. Claimant's claim for medical coverage for Ms. Hale's ongoing counseling sessions is **DENIED**.

**DATED** at Montpelier, Vermont this 20<sup>th</sup> day of January 2010.

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Patricia Moulton Powden  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.