

Craig Hankins v. Fred's Plumbing & Heating (April 5, 2010)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Craig Hankins

Opinion No. 13-10WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Fred's Plumbing & Heating

For: Patricia Moulton Powden  
Commissioner

State File No. X-04015

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on November 6, 2009

Record closed on December 10, 2009

**APPEARANCES:**

Steven Robinson, Esq., for Claimant

John Valente, Esq., for Defendant

**ISSUES PRESENTED:**

1. Has Claimant reached an end medical result for his compensable work-related injury?
2. If yes, is Claimant entitled to permanent total disability benefits?
3. If not, is Claimant entitled to additional temporary total disability benefits?

**EXHIBITS:**

Joint Exhibit I: Medical records

Joint Exhibit II: Vocational rehabilitation records

Claimant's Exhibit 1: Deposition of Robert McLellan, M.D., October 27, 2009

Claimant's Exhibit 2: *Curriculum vitae*, Robert McLellan, M.D.

Claimant's Exhibit 3: Claimant's Form 8, January 18, 2007

Defendant's Exhibit A: Various surveillance reports with accompanying DVDs

**CLAIM:**

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

Alternatively, temporary total disability benefits pursuant to 21 V.S.A. §642

Interest, costs and attorney 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.

Claimant's Work Injury

3. Claimant worked for Defendant as a propane delivery truck driver. On January 23, 2006 he slipped and fell on the ice while making a delivery. Claimant fell to the ground with a twisting motion and landed hard on his back. He immediately felt pain in his lower back, with pain and numbness radiating down his right leg.
4. Claimant's medical records reveal at least two prior instances of low back pain, one in the fall of 2003 and another one in early 2004. In both cases, Claimant complained of severe unrelenting back pain and demonstrated pain behaviors that appeared to be over-exaggerated. Also in both cases Claimant required very high dosages of narcotic pain medications to control his symptoms, apparently because he has a very high opioid metabolism rate.
5. As a result of the January 2006 fall, Claimant suffered a right-sided L5-S1 disc herniation. Consistent with his prior episodes of low back pain, Claimant complained of severe, relentless pain, exacerbated by even light activity and alleviated only briefly by extremely high dosages of narcotic analgesics. Conservative attempts to manage his symptoms, including physical therapy, epidural steroid injections and facet blocks, all failed.
6. In December 2006 Claimant underwent surgery, a right-sided L5-S1 microdiscectomy performed by Dr. Tranmer. Post-operatively he continued to experience severe lumbar radiculopathy and debilitating pain. Diagnostic studies revealed a recurrent disc herniation. In August 2007 Claimant underwent a second surgical procedure at the same level. Once again, his symptoms continued virtually unabated.

Current Symptoms and Treatment Recommendations

7. Claimant's symptoms today are for the most part unchanged. He experiences severe low back pain, with pain and numbness radiating down his right leg and into his right foot. Often he suffers painful muscle spasms as well. He sleeps poorly at night and takes sporadic cat-naps during the day to catch up. He needs help washing his back and cannot tie his own shoes. Claimant testified that on a good day, he can walk short distances, run errands in his truck (which is equipped with a seat he finds comfortable), drive a riding lawn mower, push a grocery cart and carry a bag of groceries. On a bad day, he can do little more than sit and read.

8. None of the doctors who have treated or examined Claimant since his second surgery can find a specific anatomical cause for the severe symptoms he continues to experience. Virtually every doctor has commented on the extreme pain behaviors Claimant exhibits on examination. They have described Claimant at various times as “writhing in pain,” moaning audibly, grimacing, crying and presenting “in pain extremis.”<sup>1</sup> Most if not all also have expressed concern about Claimant’s ongoing use of narcotic pain medications, which he continues to take in very high dosages, though none have found any evidence that he is misusing the drugs in any way.
9. Currently Claimant continues to treat with Dr. McLellan, the chief of occupational medicine at Dartmouth Hitchcock Medical Center. Dr. McLellan is board certified in occupational medicine and experienced in pain management. Dr. McLellan first evaluated Claimant in April 2006, at the referral of Dr. Haas, Claimant’s treating physician at the time. Dr. McLellan again evaluated Claimant in February 2009, and has been monitoring his care since then.
10. In Dr. McLellan’s opinion Claimant now suffers from post-laminectomy syndrome, which essentially refers to a patient for whom surgery has failed to alleviate ongoing back and leg pain. Dr. McLellan acknowledges that spine imaging studies have not revealed a specific “pinch” point or other anatomic basis for Claimant’s lower extremity pain. For this reason, and also because Claimant already has failed two previous disc surgeries, Dr. McLellan does not consider him to be an appropriate candidate for additional surgery. This is consistent with the opinions of other consulting physicians as well.
11. Dr. McLellan also does not consider Claimant to be an appropriate candidate for a functional restoration program. Such a program encourages patients to develop appropriate coping strategies so that they are able to focus less on their pain and more on increasing their functional abilities. Psychological counseling and cognitive behavioral therapy are key components of functional restoration.
12. According to Dr. McLellan, unless the patient welcomes the concept and is interested in pursuing this type of approach, functional restoration is unlikely to be successful. Unfortunately, by all reports Claimant lacks insight as to the extent to which his symptoms might be driven at least in part by psychological factors. He appears stubbornly resistant, therefore, to the possibility that psychologically-based treatment might help alleviate his pain experience and thereby improve his functioning.

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<sup>1</sup> Claimant demonstrated some of these pain behaviors during the formal hearing. He frequently grimaced, sighed, changed his position while seated, stood up, leaned on his chair and moved about the room.

13. This resistance was particularly evident in the context of the comprehensive pain evaluation Claimant underwent, at Dr. McLellan's referral, with Dr. Fanciullo, a Dartmouth Hitchcock pain specialist. In his June 11, 2009 office note, Dr. Fanciullo described the visit in some detail:

I asked him early on about whether or not he had seen a mental health practitioner or a psychologist or psychiatrist. He responded that he does not like it when people talk to him about psychiatry. He spent almost the entire visit convincing me that he had pain and trying to convince me that he had requisite psychological skills to determine that he does not need to see a psychologist when it was so obvious that he does need to see a psychologist. . . . I explained to him on multiple occasions that this has been going on for over three years now and he really has to try to get over it, and he has not been able to get over it by himself and he needs some help to try to help him get over it.

...

Plan: We spent a long time together today . . . with me explaining to him that I would not be able to care for him unless he saw a psychiatrist. He insisted over and over that this problem was not in his head.

...

I have spent, as I mentioned, a great deal of time with him today talking about coping skills, the fact that it is likely that even if the opioids work, they will only reduce his pain by 30% and that he needs to learn how to cope with the pain and have . . . value [in] his life despite the fact that he has the pain and that he must eliminate the dramatic and abnormal pain behaviors that he exhibits so prominently. I think he disagrees with everything about the plan . . .

14. There is no indication in the medical records that Claimant ever pursued the psychiatric treatment upon which Dr. Fanciullo had insisted. At this point, given his low level of functioning and extreme pain focus, Dr. McLellan no longer considers him to be an appropriate candidate for functional restoration. Dr. McLellan testified that assuming Claimant's attitude towards such an approach remains unchanged, in his opinion Claimant is at end medical result for his January 2006 injury.
15. Defendant presented evidence from three independent medical evaluators to the effect not only that Claimant is at end medical result, but also that he reached that point some time ago. Dr. Gennaro conducted an independent medical evaluation on April 3, 2008 and later determined that Claimant had reached an end medical result as of August 11, 2008. Dr. Ensalada performed a medical records review and, based on Dr. Gennaro's earlier exam, determined that Claimant had reached an end medical result "no later than" April 3, 2008. Last, Dr. Kirkpatrick conducted an independent medical evaluation in October 2009 and concluded that Claimant likely had achieved end medical result in early 2009.

16. In reaching their conclusions as to end medical result, both Dr. Gennaro and Dr. Kirkpatrick agreed that Claimant's ongoing symptoms were either caused or aggravated by his January 2006 work injury. Notably, however, Dr. Ensalada came to view Claimant's presentation differently.<sup>2</sup> In Dr. Ensalada's opinion, Claimant suffers from both somatoform pain disorder and an opioid abuse disorder. Dr. Ensalada believes that it is those two conditions, and not the January 2006 work injury, that account for Claimant's persistent reports of severe pain and total incapacity.
17. Somatoform pain disorder refers to a mental or behavioral condition characterized by subjective complaints that far exceed any objectively determined evidence of physical pathology. It is a recognized behavioral disorder according to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*. Patients who suffer from this condition unconsciously exaggerate their physical symptoms for psychological purposes.
18. Dr. Ensalada pointed to Claimant's prior episodes of low back pain (referred to in Finding of Fact No. 4 above) as evidence of his "propensity to somaticize." He noted that in both 2003 and 2004 Claimant's treating physicians had commented on Claimant's exaggerated pain behaviors and heavy use of narcotic pain medications. With that in mind, Dr. Ensalada concluded that at the time of Claimant's January 2006 work injury both his somatoform pain disorder and his opioid abuse disorder were "active and pre-existing," and that the 2006 event had neither caused nor aggravated nor accelerated those conditions in any way.
19. Dr. Ensalada acknowledged that he is not a licensed psychologist or psychiatrist and that he arrived at his diagnosis without personally having examined or interviewed Claimant. He also acknowledged that he previously had reviewed the medical records relating to Claimant's prior episodes of low back pain in the context of his 2007 records review, but did not attribute Claimant's symptoms to a psychological condition rather than a physical one at the time.

#### Claimant's Work Capacity

20. Claimant has not worked since his January 2006 accident. In July 2009 he underwent a functional capacities evaluation. Based on that testing, the evaluator concluded that Claimant did not have sufficient work capacity to seek gainful employment. In reaching that conclusion, the evaluator noted that Claimant had self-limited on certain tests due to pain, such that his actual physical strength might have been somewhat greater than what he demonstrated. Even apart from Claimant's strength testing, however, the evaluator determined that Claimant's low tolerance for sitting, standing or weighted lifting precluded even sedentary work.

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<sup>2</sup> Initially, following an October 2007 medical records review Dr. Ensalada determined that the relationship between Claimant's January 2006 work injury and the subsequent development of his radicular symptoms was "one of aggravation." At Defendant's request, Dr. Ensalada took a "second look" at Claimant's medical records in May 2009, and in the course of that review reached his current opinion as to causation.

21. Dr. McLellan concurs in this assessment of Claimant's work capacity. In his opinion, Claimant is permanently and totally disabled. Dr. McLellan testified that the thought of Claimant being employable is incompatible with his presentation on exam – his pain-focused behaviors, his inability to stand straight and his described low level of functioning.
22. Defendant's medical experts disagree. Drs. Gennaro, Ensalada and Kirkpatrick all opined that Claimant has a sedentary work capacity. In reaching this conclusion, both Dr. Gennaro and Dr. Ensalada discounted the results of the July 2009 functional capacities evaluation. In their opinion, an FCE measures only what a patient feels capable of doing on a particular day, and the results may be skewed by his or her fear of pain or reinjury. Consequently, while such testing may be helpful in terms of identifying a patient's functional capacity, it is not necessarily definitive.

### Vocational Rehabilitation

23. At Defendant's referral, in August 2006 Claimant met with John May, a certified vocational rehabilitation counselor, to begin the process of determining whether Claimant was entitled to vocational rehabilitation services. At the meeting, Mr. May obtained information from Claimant as to his educational background and prior work experience. At the conclusion of the meeting Mr. May asked Claimant to review, sign and send back a medical release form so that Mr. May could review Claimant's medical records.
24. Despite repeated subsequent requests, Claimant refused either to sign the medical release form or to provide a written explanation for his refusal to do so. Ultimately, Mr. May determined that Claimant was not interested in pursuing vocational rehabilitation services and closed his file.
25. Mr. May testified that had Claimant indicated his willingness to continue with the entitlement process, the next step would have been to identify a suitable vocational goal. In order to do so, Mr. May testified, he might have sought a more formal assessment of Claimant's functional abilities, aptitudes and skills. In addition, he might have investigated various training options, adaptive equipment and assistive technologies that conceivably could help expand Claimant's vocational options. Last, Mr. May testified that he might have reviewed Claimant's medical treatment options to see how pursuing one or another would impact his vocational abilities. Without having done any of these things, Mr. May testified that he was unable either to identify an appropriate vocational goal or to develop a suitable return to work plan.
26. Claimant testified that he only vaguely recalled his interactions with Mr. May. He stated that he was in great pain at the time of Mr. May's initial visit and that subsequently, during the time when Mr. May would have been sending his follow-up letters, he was recovering from his second surgery. Thereafter, in early 2007 Claimant sought to change vocational rehabilitation providers from Mr. May to another counselor who had been recommended to him. However, because he used the wrong form to do so the Department never acted on his request, and Claimant never pursued the matter himself.

27. At the request of Claimant's attorney, Greg LeRoy, a certified vocational rehabilitation counselor, met with Claimant to evaluate his ability to benefit from vocational rehabilitation services and return to gainful employment. Mr. LeRoy also reviewed Claimant's medical records.
28. In Mr. LeRoy's opinion, Claimant's chronic pain, his use of narcotic pain medications, his poor coping skills and his psychologically driven pain behaviors preclude him from sustaining competitive employment, either with or without vocational rehabilitation services. In reaching this conclusion, Mr. LeRoy relied heavily on the results of the July 2009 functional capacities evaluation, which determined that Claimant lacked even a sedentary work capacity, and also on Dr. McLellan's determination that Claimant had reached an end medical result and was permanently and totally disabled.
29. According to Mr. LeRoy, vocational rehabilitation services are appropriate only in cases in which the injured worker either has a viable work capacity or reasonably is expected to regain some with further treatment. Vocational rehabilitation services alone cannot create a work capacity. Thus, Mr. LeRoy testified, given that Claimant has reached an end medical result without having regained any work capacity, there is no basis for providing vocational rehabilitation services.

#### Surveillance

30. Defendant introduced evidence of eighteen non-consecutive days of surveillance conducted over a period of fourteen months, from August 2008 through October 2009. In addition to the investigators' written reports, Defendant introduced approximately five hours of video documentation. The videos show Claimant performing such activities as mowing his lawn with a riding mower, driving to and from various locations, walking, standing, bending at the waist, pushing a shopping cart, and using a broom to clear snow from his truck.
31. The videos do not depict any clear instances of the type of marked pain behaviors Claimant's doctors often noted. Notably, there is no audio component to the videos, so it is impossible to discern whether Claimant might have been expressing pain at any time while he was being monitored. Nevertheless, he is not observed to be visibly writhing in pain, grimacing or crying, for example. There are a few occasions during which it appears Claimant might be favoring his right leg slightly while walking, and one occasion during which it appears he might be leaning on a shopping cart for support, but even these instances are not so clearly depicted as to be conclusive. In all, at least during the five hours during which filming occurred, the videos appear to show Claimant attending to his daily activities in little, if any, apparent distress.
32. When asked to comment on the surveillance, Dr. Gennaro testified that he only reviewed a few minutes of the videos and that he saw nothing that was inconsistent with the July 2009 functional capacities evaluation. Dr. Ensalada testified that he watched all of the videos, and that Claimant's behavior appeared very different from what had been documented in the medical records he had reviewed.

33. Dr. McLellan did not watch the videos. Upon hearing a description of the types of activities depicted, he acknowledged that they seemed at odds with Claimant's typical presentation during most of his office visits. Dr. McLellan also acknowledged, however, that he would expect Claimant to have both "good" and "bad" days, and that he would encourage him to be as active as possible every day.

#### **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. 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).
3. The dispute here centers on whether Claimant's January 2006 work injury has rendered him permanently and totally disabled. Claimant points to three pieces of evidence in support of his claim – first, the July 2009 functional capacities evaluation, which determined that he lacked even a sedentary work capacity; second, Dr. McLellan's opinion that he is permanently and totally disabled; and third, Mr. LeRoy's conclusion that he is not an appropriate candidate for vocational rehabilitation services.
4. Against this evidence, Defendant counters with the opinions of Drs. Gennaro, Ensalada and Kirkpatrick, all of whom determined that Claimant has a sedentary work capacity. Beyond that, Defendant argues that Claimant failed to engage properly with the vocational rehabilitation services that Mr. May offered him in 2007, and that it is premature to consider him permanently unemployable until he does so. Third, Defendant points to Dr. Ensalada's diagnosis of somatoform pain disorder rather than the January 2006 work injury as the cause of Claimant's current symptoms. Last, Defendant asserts that the surveillance reports and videos document Claimant engaging in activities that are inconsistent with his subjective complaints of pain and previously demonstrated pain behaviors.

Permanent Total Disability

5. 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.

6. 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 Capacities 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.

7. A finding of odd-lot permanent total disability is not to be made lightly. *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008). For that reason, and as Rule 11.3100 makes clear, typically there must be evidence to establish first, what the injured worker's functional capabilities are, and second, that no viable vocational options exist within those capabilities. *Id.*; *Prescott v. Suburban Propane*, Opinion No. 42-09WC (November 2, 2009).
8. Here, I accept the results of the July 2009 functional capacities evaluation, together with Dr. McLellan's opinion, as the most credible evidence of Claimant's functional capabilities. Based on that evidence, I find that Claimant's low tolerance for sitting or standing, his heavy reliance on narcotic pain medications and his pain-focused behaviors preclude even a sedentary work capacity. While it may be true, as Drs. Gennaro and Ensalada attested, that a functional capacities evaluation measures only what a patient feels able to do on a particular day, Defendant provided no objective evidence that Claimant probably would have tested better on a different day.<sup>3</sup> Without such evidentiary support, Defendant's expert opinions are unpersuasive.

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<sup>3</sup> Of note, neither Dr. Gennaro nor Dr. Ensalada could point to any specific activities captured on the surveillance videos that were inconsistent with the results of Claimant's functional capacities evaluation.

9. I agree with Claimant's vocational expert, furthermore, that vocational rehabilitation has no place in a case where, as here, the injured worker lacks the functional capacity to support even sedentary work. As Mr. LeRoy cogently explained, vocational rehabilitation services alone cannot create a work capacity where one does not otherwise exist.
10. Last, I find credible Dr. McLellan's assertion that Claimant is unlikely to benefit from further treatment, including functional restoration, and that therefore his disability is now permanent. Were Claimant a different person, one less focused on his pain and more open to the interplay between the mind and the body, he might be receptive to a psychologically based treatment approach. Unfortunately, however, Dr. McLellan appropriately acknowledged that he is not. Indeed, not even Defendant's medical experts have recommended further treatment along these lines.
11. Having concluded that a functional restoration program is not a viable treatment option, I accept as most credible Dr. Gennaro's determination that Claimant reached an end medical result for his January 2006 work injury on August 11, 2008.

*Somatoform Pain Disorder*

12. I conclude, therefore, that Claimant has met his burden of proving that he is permanently and totally disabled. To establish his right to benefits, however, Claimant also must show that his disability was either caused or aggravated by his January 2006 work injury. Defendant points to Dr. Ensalada's expert opinion as evidence that it was not.
13. Dr. Ensalada testified that the best explanation for Claimant's current symptoms and disability is somatoform pain disorder. According to him, this diagnosis is more a characteristic of Claimant's psychological makeup, not a consequence of his January 2006 work injury.
14. I find Dr. Ensalada's analysis unconvincing. First, although I acknowledge his impressive credentials, Dr. Ensalada is not a trained or licensed mental health professional. I question the propriety of accepting his diagnosis of a psychologically-based behavioral disorder without the benefit of more formal psychological testing and evaluation.
15. In addition, I find troubling the fact that Dr. Ensalada did not even interview Claimant himself, but rather based his diagnosis solely on his review of the medical records. Diagnosing a psychological condition is not the same as reviewing x-rays or MRI scans. To do so based only on second-hand reports noted in a cold medical record seems unreliable and unscientific.

16. Last, it is not clear to me from Dr. Ensalada's testimony exactly what the basis for his diagnosis was. Certainly many doctors commented on Claimant's pain-focused behaviors and propensity to magnify his symptoms. But presumably not every instance of symptom magnification merits a diagnosis of somatoform pain disorder. To the contrary, presumably this is where further psychological testing typically is called upon to provide the additional information necessary either to support or to refute a diagnosis of somatoform pain disorder. *See, e.g., Karabegovich v. Monahan SFI*, Opinion No. 37-09WC (September 29, 2009).
17. For all of these reasons, I find Dr. Ensalada's analysis unpersuasive. I accept instead Dr. McLellan's determination, with which both Dr. Gennaro and Dr. Kirkpatrick concurred, that Claimant's current symptoms and disability were either caused or aggravated by his January 2006 work injury.

### Surveillance

18. As a final defense, Defendant asserts that the surveillance reports and videos document activities that are at odds with Claimant's subjective complaints and dramatic pain behaviors, so much so as to call his credibility into question and undermine any finding of permanent total disability. I disagree. The videos do no more than depict Claimant engaging in activities that he admitted he was able to undertake on a "good" day, such as using a riding lawn mower, driving in his truck and running errands. They do not show what he is able to do – or not – on a "bad" day. They are extremely limited in scope – just five hours of video spread out over a period of fourteen months – and have no audio component. I do not find in them sufficient evidence either to undermine Claimant's own testimony or to negate the conclusions of his medical and vocational experts.
19. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$5,017.56 and attorney fees totaling \$15,327.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.
20. As for attorney fees, Claimant's request includes not only the fees incurred pursuing the current matter to formal hearing, but also fees incurred in 2007 and 2008 relating to issues that ultimately were resolved short of formal hearing. According to Workers' Compensation Rule 10.1300, such fees are recoverable only in limited instances, under circumstances that do not apply here. I find that the total amount of fees incurred pursuing issues unrelated to the current hearing was \$3,942.00; these fees are not recoverable. As to the remainder, which total \$11,385.00, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these fees are awarded.

**ORDER:**

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

1. Permanent total disability benefits commencing on August 11, 2008;
2. Interest on the above amounts calculated in accordance with 21 V.S.A. §664;
3. Costs totaling \$5,017.56 and attorney fees totaling \$11,385.00.

**DATED** at Montpelier, Vermont this 5<sup>th</sup> day of April 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.