

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

Gloria Ballou	)	Opinion No. 41A-04WC
	)	
	)	
v.	)	
	)	State File No. P-13746
Northeast Cooperatives	)	
	)	

**RULING ON CLAIMANT'S UNOPPOSED MOTION FOR FEES**

Gloria Ballou, a prevailing claimant in Opinion No. 41-04WC dated September 23, 2004, is hereby awarded attorney fees and costs as requested pursuant to 21 V.S.A. § 678(a) and WC Rule 10:

Attorney fees of \$2,695.50 for 29.95 hours at \$90.00 per hour and necessary costs of \$37.00.

Dated at Montpelier, Vermont this 30<sup>th</sup> day of December 2004.

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Margaret A. Mangan  
Hearing Officer

*Ballou v. Northeast Cooperatives*

*(September 23, 2004)*

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

*Gloria Ballou*

*Opinion No. 41-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*Northeast Cooperatives*

*For: Michael S. Bertrand  
Commissioner*

*State File No. P-13746*

*Submitted on written record  
Record closed on May 20, 2004*

**APPEARANCES:**

*Tim A. Clark, Esq., for the Claimant  
Jennifer K. Moore, Esq., for the Defendant*

**ISSUE:**

*Was claimant temporarily and totally disabled from her work related injury from October 17, 2000 through June 17, 2001?*

**EXHIBIT:**

*Medical Records*

**STIPULATIONS:**

- 1. Claimant was an employee and Northeast Cooperatives her employer within the meaning of the Workers' Compensation Act at the time of her injury in 2000.*
- 2. On or about January 5, 2000, claimant injured her left elbow in the course of her employment with Northeast Cooperatives after a table collapsed and hit her.*

3. *Royal Sun Alliance (RSA), Northeast Cooperative's workers' compensation insurance carrier, accepted the claim and commenced paying medical and indemnity benefits.*

4. *On May 23, 2000, claimant underwent a left cubital tunnel release with Dr. Jon Thatcher. On June 28, 2000, Dr. Thatcher released claimant to return to work, restricting her release to use of the right arm only. Claimant is right hand dominant.*
5. *On August 31, 2000, this Department approved a Form 27 to discontinue further temporary total disability benefits.*
6. *In September 2000 claimant moved to Ohio.*
7. *On September 19, 2000, claimant visited Dr. D'Amato with complaints of left arm pain.*
8. *Dr. D'Amato recommended surgery that was performed on June 7, 2001.*

**FINDINGS OF FACT:**

1. *The stipulations are accepted as true.*
2. *On May 23, 2000, Dr. Thatcher performed a left cubital tunnel release for claimant's elbow injury.*
3. *Claimant returned to work in July after Dr. Thatcher released her with the restriction that she use only her right arm.*
4. *After ten days back on the job, claimant returned to Dr. Thatcher with the complaint that her symptoms had flared up. In his note for that July 21, 2000 visit, Dr. Thatcher wrote that claimant "could return to work at a job that allowed her not to use her left arm at all but apparently this is not available at Northeast Cooperatives." In that note, Dr. Thatcher also referred to claimant's upcoming move and his belief that she would not need more medical attention for her elbow.*
5. *On July 28, 2000, Dr. Thatcher gave claimant an "out of work—return to work" form specifying that she was to have no use of her left arm at work for 4 to 6 weeks.*
6. *The Northeast Cooperatives Human Resource Manager sent claimant a letter dated July 31, 2000, with an offer of work within Dr. Thatcher's restrictions.*

7. *The workers' compensation insurer sent claimant temporary total disability checks to her Ohio address through September 6, 2000.*
8. *When claimant first saw Dr. D'Amato on September 19, 2000, he restricted her to right hand only work.*
9. *Dr. D'Amato noted that because the ulnar nerve was so close to the surface, it was causing symptoms that could only be corrected surgically.*
10. *Claimant did not look for work within her restrictions.*
11. *On October 17, 2000, Dr. D'Amato placed claimant out of work until surgery could be performed, which he estimated would be in six to eight weeks.*
12. *The insurance carrier denied the claim for the surgery, stating in a December 2000 letter that it would obtain an independent medical examination.*
13. *In response to specific questions regarding causation, both Dr. Thatcher and Dr. D'Amato sent letters to the carrier in December 200 stating that claimant's symptoms and need for surgery related directly to her work related injury.*
14. *In January 2001 the defense reasserted its position that it would not accept the proposed surgery without an IME.*
15. *Claimant remained out of work and continued to treat with D'Amato who reiterated his concern that conservative, non-surgical, treatment was inadequate.*
16. *The defense sent claimant to Dr. Rutherford for an IME on March 30, 2001. Dr. Rutherford, too, opined the proposed surgery was causally related to the 2000 work related injury. Further, he opined that her clinical situation would have been no different had she remained in Vermont at a one arm only job and that use of her arm during the move to Ohio did not affect the course of her condition.*
17. *In Dr. Rutherford's report, he also noted that claimant had a limited work capacity with a five pound lifting restriction for her left arm and no use of a key board with the left hand.*

18. *Claimant did not look for work within the restrictions specified by Dr. Rutherford, nor was she advised to do so.*
19. *On June 7, 2001, claimant had the recommended surgery, after which she was temporarily totally disabled. The carrier paid benefits for that period of disability.*

**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, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984).*
2. *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 inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*
3. *Claimant has met her burden of proving that her work related injury of 2000 caused her disability from October 17, 2000 to March 30, 2001. Dr. D'Amato placed her out of work in October when he recommended surgery that was not performed until June 2001. The only suggestion that claimant may have had a work capacity in the interim was from Dr. Rutherford who in March of 2001 suggested that she might have had a limited work capacity. Yet, the carrier did not at that time instruct the claimant to conduct a job search within the restrictions as required by WC Rule 18.1300.*
4. *Furthermore, no medical expert confirmed the defense theory that claimant's move to Ohio caused the problems that necessitated the surgery. In fact, all rejected that theory.*
5. *As a prevailing claimant, Ms. Ballou is entitled to a mandatory award of necessary costs and discretionary award of reasonable attorney fees, when supported by the fee agreement and evidence of hours worked and costs incurred. 21 V.S.A. § 678(a); WC Rule 10.000. Claimant is given 30 days to file the supporting documentation for the request for fees and costs.*

**ORDER:**

*Therefore, based on the foregoing findings of fact and conclusions of law, Northeast Cooperatives/RSA is ORDERED to pay claimant:*

- 1. Temporary total disability benefits from October 17, 2000 to June 7, 2001.*
- 2. Interest at the statutory rate computed from the dates the payments would have been paid had they not been denied until date of payment. 21 V.S.A. § 664.*

*The award of attorney fees and costs is deferred.*

*Dated at Montpelier, Vermont this 23<sup>rd</sup> day of September 2004.*

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*Michael S. Bertrand  
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.*