

T. B. v. University of Vermont

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

T. B.

Opinion No. 42-08WC

v.

By: Phyllis G. Phillips, Esq.,  
Hearing Officer

University of Vermont

For: Patricia Moulton Powden,  
Commissioner

State File No. X-05627

**OPINION AND ORDER**

Hearing held in Montpelier on June 23<sup>rd</sup>, June 25<sup>th</sup> and July 18<sup>th</sup>, 2008

**APPEARANCES:**

Todd Schlossberg, Esq., for Claimant  
Stephen Ellis, Esq., for Defendant

**ISSUES PRESENTED:**

1. Has Claimant reached an end medical result for the compensable work-related injury she suffered on March 6, 2006 and if not, to what additional workers' compensation benefits is she entitled?
2. Did Claimant suffer compensable injuries to her right elbow and/or hand causally related to her employment for Defendant, and if so, to what workers' compensation benefits is she entitled?

**EXHIBITS:**

Joint Exhibit I: Joint Medical Exhibit

Claimant's Exhibit 4: July 15, 2005 First Report of Injury

Claimant's Exhibit 5: Photographs of buffer

Claimant's Exhibit 6: Photographs of floor cleaner

Claimant's Exhibit 7: Photographs of vacuum cleaner and mops

Claimant's Exhibit 8: Photographs of salt boxes

Claimant's Exhibit 9: Photographs of entrance

Claimant's Exhibit 10: Photographs of staircase

Claimant's Exhibit 11: *Curriculum Vitae*, Jonathan Fenton, D.O.

Claimant's Exhibit 12: *Curriculum Vitae*, John Macy, MD

Claimant's Exhibit 13: Deposition of Adam Shafritz, MD taken on June 12, 2008

Claimant's Exhibit 14: *Curriculum Vitae*, Adam Shafritz, MD

Claimant's Exhibit 15: *Curriculum Vitae*, Rayden Cody, MD  
Claimant's Exhibit 16: DVD, Dr. Levy IME 8/7/07

Defendant's Exhibit A: Notice of Intent to Change Health Care Provider, March 16, 2007  
Defendant's Exhibit B: Notice of Intention to Discontinue Payments, approved 4/20/07  
Defendant's Exhibit C: Deposition of Gabrielle Mikula taken on June 12, 2008  
Defendant's Exhibit D: Deposition of Richard Morrison, MD taken on June 12, 2008  
Defendant's Exhibit E: Deposition of Cheryl Laskowski taken on June 10, 2008  
Defendant's Exhibit F: Deposition of William Farrell taken on August 25, 2006

**CLAIM:**

Temporary disability benefits pursuant to 21 V.S.A. §642  
Medical benefits pursuant to 21 V.S.A. §640  
Interest pursuant to 21 V.S.A. §664  
Attorney's fees and costs pursuant to 21 V.S.A. §678

**FINDINGS OF FACT:**

1. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.
2. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
3. Claimant and her husband are Bosnian immigrants. They resided in Sarajevo during the Bosnian War, and emigrated to the U.S. in 1997. Both are now U.S. citizens. Claimant's husband is proficient in English, but Claimant is not.
4. Claimant began working as a housekeeper for Defendant in 2001. Her job duties included mopping, waxing and buffing floors, vacuuming carpets, dusting, washing and other general cleaning activities.
5. On March 6, 2006 Claimant injured her right shoulder while lifting boxes of ice-melting salt at work. Claimant testified that she felt slow, gradual pain in her right chest and shoulder when she lifted the first box, and then a sudden, severe pain that "felt like it took my breath away" when she lifted the second box.
6. Claimant reported her injury to her supervisor, who completed a First Report of Injury form on March 8, 2006, stating "As she [was] lifting box of salt she felt pain at her right shoulder."
7. Defendant accepted the claim for what it determined to be a "right shoulder strain" and began paying workers' compensation benefits accordingly.

### Claimant's Pre-Injury Medical History

8. In December 2001 Claimant was involved in a motor vehicle accident. She suffered injuries to her lower back, left shoulder, neck and left leg. Claimant also was diagnosed with post-traumatic stress disorder causally related to the collision. Ultimately Claimant and her husband recovered \$198,000 in the personal injury litigation arising from the accident.
9. Claimant continued to complain of diffuse low back, neck, left shoulder and left arm pain for years after the motor vehicle accident. Her treating providers appear never to have pinpointed the exact source of her pain, particularly with respect to her left shoulder and neck symptoms. Many pointed to the language barrier as a complicating factor in terms of their ability to understand the nature of her complaints. It is likely that Claimant's post-traumatic stress disorder also played a role in perpetuating her chronic pain symptoms. Claimant never was deemed an appropriate surgical candidate, and attempts at conservative therapy, including injections, physical therapy, psychological counseling, osteopathic manipulation and pain medications, all proved largely ineffective in addressing her symptoms. Despite her ongoing complaints of pain, however, for the most part Claimant continued to work throughout this period.
10. Claimant's treatment providers consistently noted that her symptoms following the motor vehicle accident were confined entirely to her left side and did not include any right-sided neck, shoulder or arm pain. Claimant was continuing to treat for these left-sided symptoms at the time of the March 2006 work injury, and for some time thereafter as well.
11. In addition to the residual symptoms from her motor vehicle accident, in 2003 Claimant also began experiencing pain and numbness in her left wrist, hand and fingers. Electrodiagnostic studies revealed moderately severe left carpal tunnel syndrome, for which Claimant underwent endoscopic release in January 2004. Defendant accepted this injury as causally related to Claimant's work, and paid workers' compensation benefits accordingly.
12. At the time her left carpal tunnel syndrome was diagnosed, electrodiagnostic studies revealed mild carpal tunnel syndrome on the right as well. This condition was asymptomatic, however, and therefore was not treated.
13. In July 2005 Claimant reported to her supervisor that she felt pain and numbness in her right arm while vacuuming and mopping. The supervisor completed a First Report of Injury, but noted that Claimant did not seek medical treatment for these symptoms.

### Claimant's Post-Injury Medical Treatment

14. Claimant continued to work following the March 6, 2006 lifting injury and did not seek medical treatment until days later. When she did, she presented to the Emergency Room on March 11, 2006 complaining of sharp right-sided chest and shoulder pain that she reported had begun "after lifting [a] heavy box of salt at work."
15. Initially Claimant was diagnosed with cervical, thoracic and right shoulder muscle strain/sprains causally related to the lifting incident. Her symptoms did not respond to conservative treatment, however, and instead worsened and became more diffuse. Claimant complained of pain and weakness throughout her right shoulder and tightness in her neck. At times she was noted to have reduced range of motion, although this finding was not consistent. Claimant treated conservatively for these symptoms throughout 2006 and 2007.
16. Claimant also continued to complain of pain and numbness in her right elbow and hand. Electrodiagnostic studies completed on March 30, 2006 revealed nerve entrapments at both the wrist and the elbow. The medical evidence does not support any causal relationship between these entrapments and the March 6, 2006 lifting injury. Rather, Claimant's medical providers reason that these symptoms were causally related to her repetitive use of heavy floor-cleaning machinery at work.
17. According to her treating physicians, Claimant has been unable to work since March 13, 2006.
18. In many respects, the progression of Claimant's right-sided symptoms mirrored the progression of left-sided symptoms she had experienced following the 2001 motor vehicle accident. As had been the case before, furthermore, Claimant's right-sided symptoms were as resistant to conservative treatment as her left-sided symptoms had been. Physical therapy, pain medications and injections all were ineffective at alleviating her symptoms.
19. In October 2007 an MRI study of Claimant's right shoulder revealed a tear in her labrum. On March 20, 2008 she underwent arthroscopic surgery to repair the lesion, which was surgically diagnosed as a large Type II superior labrum anterior-posterior (SLAP) tear.

20. Dr. John Macy, an orthopedic surgeon, performed the surgical repair of Claimant's SLAP tear. Dr. Macy specializes in shoulder surgery and is the only fellowship-trained shoulder surgeon practicing in Vermont. Dr. Macy testified that he "feels very strongly" that Claimant's SLAP tear was caused by the March 6, 2006 work-related lifting injury. In support of his opinion, Dr. Macy cited the following facts:
  - (a) The mechanism of injury – a sudden heavy overload to the shoulder caused by lifting – was consistent with a resulting SLAP tear;
  - (b) The symptoms Claimant experienced immediately after the incident, which Dr. Macy described as a "pop or snap" followed by deep-seated pain in the shoulder, decreased range of motion and weakness, all are classic signs of a SLAP tear;
  - (c) Claimant had no prior medical history indicating a pre-existing SLAP tear; and
  - (d) There is no evidence of any intervening event between the March 6, 2006 lifting incident and Dr. Macy's discovery of the SLAP tear that might have caused such an injury to occur in the interim.
21. Both the medical records and Claimant's testimony generally establish the facts relied upon by Dr. Macy in support of his opinion, with the possible exception of his description of Claimant's symptoms as constituting "classic" evidence of a SLAP tear. In particular, the medical records do not substantiate Dr. Macy's assertion that Claimant described feeling a "pop or snap" while lifting on March 6, 2006.
22. Claimant's treating physicians all agree now that Claimant most likely suffered a SLAP tear on March 6, 2006 which remained undiagnosed until revealed via arthroscopic surgery. They cite numerous reasons why the tear was not discovered earlier. First, they note that clinical testing for labral tears often yields variable results, such that the only "gold standard" for diagnosing a tear conclusively is to view the shoulder arthroscopically. In addition, Claimant's clinical presentation was complicated both by her language barrier and by the extreme muscle guarding she exhibited, which often precluded a thorough physical examination of her shoulder. Last, Claimant did not fit the profile of the typical SLAP tear patient, in that she was not engaged in the athletic-type throwing activities that most commonly give rise to such an injury.
23. Defendant's expert medical witnesses agree that Claimant suffered a SLAP tear, but disagree that it was caused by the March 6, 2006 lifting incident. Drs. Backus, Levy and Nowak all opined that neither Claimant's report of her symptoms immediately following the March 2006 incident nor her clinical picture thereafter reasonably support the existence of such a tear prior to the October 2007 MRI study. All concluded, therefore, that there must have been some intervening event, albeit unidentified, that caused the tear to occur.

24. Drs. Backus, Levy and Nowak contend that Claimant suffered a muscle strain/sprain as a result of the March 6, 2006 lifting incident. Dr. Backus' ultimate diagnosis was a cervical-brachial pain syndrome, which can cause referred pain from the neck and shoulder into the forearm. Dr. Backus concluded that Claimant had reached an end medical result for this injury at least by the time of his independent medical examination on August 10, 2006. Beyond that, Dr. Levy, a neurologist, found signs of "abundant symptom magnification" during his subsequent examination of Claimant, which Defendant's psychiatric expert, Dr. Kelly, interpreted as evidence of deliberate malingering.
25. As of the date of the formal hearing, Claimant was continuing to recover from the March 2008 surgery and has not yet been determined to be at end medical result. Both Claimant and her husband testified that since the surgery Claimant has increased mobility in her shoulder. Dr. Macy's most recent office note reflects that Claimant still complains of pain in her shoulder, but that her recovery is proceeding essentially as expected. The physical therapy notes document similar progress.
26. As for Claimant's right elbow and wrist pain, treatment of the nerve entrapments found in the March 30, 2006 electrodiagnostic studies largely has been deferred pending her recovery from Dr. Macy's shoulder surgery and further resolution of her shoulder symptoms. Notably, Claimant's elbow and wrist symptoms have not improved despite being off work for more than two years. During that time, Claimant's medical providers occasionally have remarked on repetitive non-work-related activities that reasonably might be aggravating her symptoms, such as rolling dough and vacuuming at home.

#### **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. The dispute between the parties here involves a question of medical causation. Claimant's medical experts contend that she suffered a labral tear in the March 6, 2006 lifting incident, for which she continues to treat and as a result of which she is unable to work. In contrast, Defendant's experts assert that the labral tear did not occur in March 2006 but rather was caused by some unspecified subsequent event, not work-related, for which it bears no responsibility. Defendant contends that the injuries Claimant did suffer as a result of the March 2006 lifting incident – either a muscle strain/sprain and/or a cervico-brachial pain syndrome – have since resolved and that therefore it owes no additional workers' compensation benefits beyond what it already has paid.

3. This claim presents a frustrating reminder that medical science often is inexact, particularly with respect to forensic determinations of causal relationship. Symptoms do not always progress in textbook fashion, clinical tests do not always yield consistent results, and a patient's recovery does not always proceed linearly. It is not surprising that well-qualified medical experts may have widely divergent opinions as to causal relationship.
4. 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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).
5. As to the causal relationship between Claimant's labral tear and the March 6, 2006 lifting incident, I find that Dr. Macy's opinion is the most credible. As the only fellowship-trained shoulder specialist in Vermont, his qualifications are unassailable. His theory of causation is adequately supported by the medical records, and what outlying facts there might be are not so significant as to fatally undermine his conclusions.
6. In contrast, Defendant's expert opinions rely either on the existence of some unspecified intervening event to account for Claimant's labral tear or on conscious, deliberate malingering to explain her ongoing complaints. I find the former explanation too speculative to accept, and the latter one unsupported by the totality of the evidence, including Claimant's credible demeanor at the formal hearing.
7. I conclude, therefore, that Claimant has sustained her burden of proving that the March 6, 2006 work injury caused her to suffer a labral tear in her right shoulder, for which she continues to treat and as a result of which she continues to be temporarily totally disabled.
8. Claimant has not sustained her burden of proof as to the causal relationship between her work activities and her right elbow and wrist neuropathies, however. The more credible medical evidence establishes that had these conditions been work-related, Claimant's symptoms would have abated once she stopped working in March 2006. The fact that they did not abate at all, but rather progressed, is convincing evidence that they were not caused by Claimant's work activities. Other non-work-related factors must have acted to perpetuate and aggravate them.
9. Claimant has submitted a request under 21 V.S.A. §678 for costs and attorney's fees. An award of costs to a prevailing claimant is mandatory under the statute. As for attorney's fees, these lie within the Commissioner's discretion. As Claimant has substantially prevailed, I find that an award of both costs and attorney's fees is appropriate. Pursuant to 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this decision within which to submit her claim for such fees and costs.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Ongoing temporary disability benefits causally related to Claimant's right shoulder labral tear until she either reaches an end medical result or returns to work, whichever occurs first, in accordance with 21 V.S.A. §§642, 643 and 643a;
2. Medical benefits covering all reasonably necessary medical services and supplies causally related to treatment of Claimant's right shoulder labral tear, in accordance with 21 V.S.A. §640;
3. Additional workers' compensation benefits, including permanent partial disability benefits and/or vocational rehabilitation benefits, proven to be causally related to Claimant's right shoulder labral tear;
4. Interest on the above amounts in accordance with 21 V.S.A. §664; and
5. Costs and attorney's fees in an amount to be determined based on Claimant's submission in accordance with Conclusion of Law No. 9 above.
6. Claimant's claim for workers' compensation benefits causally related to the nerve entrapments at her right elbow and wrist is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 24<sup>th</sup> day of October 2008.

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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.