

Weeks v. N.S.A. Industries

(April 27, 2005)

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

Linda Weeks	)	Opinion No.27-05WC
	)	
v.	)	By: George K. Belcher
	)	Hearing Officer
	)	
N.S.A. Industries	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. T-12953

Prehearing conference held on December 28, 2004

Hearing held on March 4, 2005

Record Closed on May 1, 2005

**APPEARANCES:**

Steven A. Adler, Esq., for the Claimant

Jennifer K. Moore, Esq., for the Defendant

**ISSUES:**

1. Whether the claimant's left arm and shoulder problems diagnosed by Dr. Lon Howard as a torn rotator cuff and labrum, cubital tunnel syndrome, and carpal tunnel syndrome arose out of and in the course of her employment with NSA Industries, Inc.
2. Whether Workers' Compensation Rule 11 requires the Defendant/Employer to pay for an Independent Medical Examination with a physician other than the treating physician, selected by the claimant and obtained in anticipation of litigation.

**EXHIBITS:**

Joint I: Medical Records

Claimant 2: Affidavit of Heather Ely

Claimant 3: Letter from Gary Royer

Claimant 4: NSA Performance Evaluations

Claimant 6: Letter from Caledonia Internal Medicine dated 2/17/05

Claimant 7: Letter from Dr. Gagnon's Office dated 2/14/05

Claimant 8: Letter from the Department of Labor & Industry dated 10/5/04

Claimant 12: NSA Supervisors Main Responsibilities

Claimant 14: Campbell's Orthopedics; Mosby; 9<sup>th</sup> Edition

Claimant 19: Health Insurance Claim Form re Dr. Bucksbaum

Claimant 24: Curriculum vitae of Dr. Lon Howard

Defendant A: Social Security Disability Report  
Defendant B: Social Security Disability Application  
Defendant C: Social Security Disability Earnings Records  
Defendant D: Letter to Dr. Howard from Axelrod & Adler dated 10/7/04  
Defendant E: NSA Punch Details

**CLAIM:**

1. All temporary total disability and permanent disability and rehabilitation benefits arising from the left shoulder and arm impairment.
2. Payment of all unpaid medical bills associated with the left shoulder left arm and reimbursement of those associated bills paid by claimant's private health insurance.
3. Payment of Dr. Bucksbaum's bill for his medial examination of the claimant.
4. Costs associated with litigation.
5. Reasonable attorney fees and interest.

**FINDINGS OF FACT:**

1. Linda Weeks, the claimant, is 44 years old. She has a history of fibromyalgia and upper extremity problems dating back to at least 1995. She was an employee of NSA Industries, Inc. from June 28, 1999 until August 12, 2003. NSA Industries, Inc. is an employer within the meaning of Vermont's Workers' Compensation Act. Royal & SunAlliance is the Workers' Compensation insurer for the defendant.
2. NSA Industries, Inc., fabricates and assembles sheet and metal parts from steel, aluminum, brass and copper. The parts are drilled, ground, deburred, sanded, and smoothed. The parts and materials are packed and unpacked from, and onto, various packaging and pallets. Claimant's duties included repetitive work, using hand, machine, and air tools of various types including a "deburring tool."
3. Claimant's evaluations from her date of hire through March of 2002 were uniformly excellent. (Claimant's Exhibit 4) Claimant was a valued employee and accordingly had advanced from laborer to working supervisor during her tenure with defendant.

4. In March of 2002, the claimant reported to her supervisor, Matthew Smith, that she was having left shoulder soreness. On March 28, 2002 claimant went for an appointment with her medical provider, Elaine Robinson, FNP of Caledonia Internal Medicine. Claimant reported left shoulder and right elbow pain. Elaine Robinson restricted claimant's work activities to no repetitive motion of the left shoulder and planned that further restrictions would be recommended by physical therapy. (Joint Medical Exhibit 1, Page C100)
5. On March 28, 2002 claimant's Average Weekly Wage was \$483.49 according to the Form 25 filed with the Department.
6. At the referral of Elaine Robinson, claimant began physical therapy at Wyand PT on 4/2/02, which was supervised by Ben McCormack R.P.T. Orthopaedic problems were noted, with a specific assessment of left shoulder rotator cuff tendonitis and a sprain of the AC joint. Return to Work Restrictions were imposed to include no repetitive reaching or over the shoulder use of the left arm. (Joint Medical Exhibit 1, Page DWPT121)
7. On 4/5/02, a Form 1: Employee's Claim and Employer First Report of Injury, was filed with Royal & SunAlliance, Workers' Compensation insurer for NSA Industries. The Form 1 stated that the machine involved in the accident was a "deburring tool" and that the accident occurred by, "Employee having problems with left shoulder/tendonitis/right arm lateral epicondylitis from repetitive motion." The body part involved was described as "Multiple upper extremities/Lt Shoulder/Rt Arm."
8. On May 2, 2002 claimant was referred by Elaine Robinson to Dr. Craig Dreisbach, an orthopaedic surgeon, for persistent left shoulder pain (Joint Exhibit 1, Page CSIM 071). Elaine Robinson indicated in the referral letter that claimant had a history of fibromyalgia "which seems to be giving her more trouble of late."
9. On May 10, 2002 claimant was taken out of work by Elaine Robinson for health reasons and Short Term Disability was commenced by defendant.
10. Claimant began treating with orthopedist, Dr. Craig Dreisbach, on May 29, 2002 for her left shoulder pain. His diagnosis was left rotator cuff tendonitis with impingement. He injected her shoulder with a steroid and told her not to work until he re-evaluated her. Royal & SunAlliance accepted this as a Workers' Compensation claim and paid for Dr. Dreisbach's treatment of claimant. The March 28, 2002 injury was accepted by the defendant, if not explicitly, then by waiver. (Claimant's Exhibit 8)

11. On May 30, 2002 Elaine Robinson referred claimant to rheumatologist, Dr. Karen Nepveau for recommendations for management of claimant's fibromyalgia. According to Elaine Robinson claimant had "actually done remarkably well over the years until recently, when she received an overuse injury at her job at a machine shop." Claimant's flare of her fibromyalgia is temporally related to her work injury. (Joint Exhibit 1: Tab 3: CSIM 112)
12. Dr. Dreisbach continued to treat claimant for her left shoulder pain, recommending continued physical therapy and an MRI.
13. A non-contrast MRI of the left shoulder was done at Northeastern Vermont Regional Hospital on August 28, 2002 and interpreted by Dr. Richard R. Bennum as, "No rotator cuff tear is seen." Prominent acromioclavicular joint hypertrophic change was seen. (Joint Medical Exhibit 1, Page NVRH 210)
14. On September 17, 2002, Dr. Dreisbach recommended that claimant undergo surgery on her left shoulder and, on October 2, 2002, Dr. Dreisbach performed a left Neer Acromioplasty and excision of the distal clavicle by an open surgical procedure with no arthroscopy. He removed a large osteophyte. Dr. Dreisbach found that she had "an intact rotator cuff". (Joint Medical Exhibit, Page CD1110)
15. As of that same date of October 2, 2002, NSA Industries converted claimant's short-term disability to worker's compensation. Claimant's medical bills associated with this surgery were accepted and paid by Royal & SunAlliance. Claimant began receiving Total Temporary Disability Workers' Compensation benefits. Based on claimant's Average Weekly Wage of \$483.49, her weekly compensation rate for Temporary Total Disability was \$322.35.
16. Dr. Dreisbach released claimant back to work beginning January 6, 2003 with restrictions of no over head lifting and limited use of her left arm. Further restrictions were imposed by Elaine Robinson in order to accommodate her aggravated fibromyalgia. Elaine Robinson states, "it was generally agreed that the patient does have Fibromyalgia and that this was exacerbated by injury to the shoulder." Elaine's recommendations were that claimant start with no more than 2½ hours per day increasing weekly by half an hour to the maximum of 4 hours per day. (Joint Exhibit 1, Page CSIM 160)
17. Claimant returned to work in the Pemming Department at the defendant, occasionally handling various size pieces of stainless steel, some of which were very large and bulky. Part of the pemming procedure involved removing protective plastic sheathing from the material. This involved reaching, bending, and pulling activities. The claimant had pain in her left shoulder, but she thought that it was part of the healing process.

18. On February 20, 2003 claimant did not work because of left shoulder pain. On February 21, 2003, claimant called her medical case manager, Mary Guyette RN of Wagner Rehab, L.L.C., and reported that she had been working outside her work restrictions and that she was having problems returning to work. Mary Guyette attempted to contact the employer regarding this matter.
19. Claimant remained out of work until February 25, 2003 at which point Dr. Dreisbach allowed her to return to work only at a desk job until he could re-evaluate her on March 11, 2003.
20. On March 11, 2003, when Dr. Dreisbach re-evaluated claimant, he noted that she had a sudden increase in her left shoulder pain with no specific history of trauma, but that she had been doing repetitive motions at work. He thought that she was not able to go to work at this point. He referred claimant for physical therapy. In a letter to Elaine Robinson, FN, he stated, "Objectively, I can't find anything wrong with her shoulder. She has full range of motion and although she complains of pain I have no explanation for it." (Joint Medical Exhibit, Page CD1110)
21. Claimant was re-evaluated by Ben McCormack, P.T. on March 19, 2003. He noted that, although she was recovering very well immediately following her surgery, she was having a flare up of symptoms with impingement type pain throughout her left shoulder. Claimant continued to attend physical therapy but little progress was made in relieving her left shoulder pain.
22. Claimant also continued to treat with Dr. Dreisbach. Dr. Dreisbach allowed her to return to work on June 9, 2003, 4 hours a day with light duty restrictions inclusive of no overhead lifting.
23. When re-evaluated on July 30, 2003, Dr. Dreisbach noted that her shoulder continued to bother her and he performed another shoulder injection with steroid.
24. Claimant attempted to work within the restrictions but was unable to maintain the consistent work schedule because of her shoulder pain. August 12, 2003 was claimant's last day of work at NSA Industries. On August 12, 2003, claimant was placed on an unpaid medical leave of absence, which remains her current status.
25. From October 2, 2002 through August 12, 2003 Royal & SunAlliance paid claimant's Temporary Total Disability and Temporary Partial Disability.
26. On August 15, 2003 at the request of Royal & SunAlliance, Dr. Nelson Haas performed an independent medical exam of claimant.

27. Dr. Haas believed that “It is unlikely that Mrs. Week’s present symptoms are associated with any work related problem. The reasons for this are presented in the ‘Impression’ section, above. Ms. Weeks current symptoms do not have any clear physical basis.” (Joint Exhibit 1: Tab 8: NSH 1400) Within the “Impressions” section he related that her playing softball and landscaping could have contributed to or caused her shoulder problems. (Joint Exhibit 1, Page: NSH 1200) He felt that Ms. Weeks was suffering from degenerative joint disease. He believed that she was at maximum medical improvement. (Joint Exhibit 1, Page NSH 1400)
28. After getting Dr. Haas’s report, all benefits to claimant were stopped even though Royal & SunAlliance did not file a Form 27 Employers Notice of Intention to Discontinue Payments.
29. As of Dr. Dreisbach’s last visit with claimant on September 10, 2003, she continued to have left shoulder discomfort. His notes state, “At this point I note she’s got full ROM of the shoulder but her major problem is related to fibromyalgia. I have nothing else to offer her in terms of treatment or recommendations.” (Joint Medical Exhibit, Page CD1800)
30. On October 9, 2003, Elaine Robinson went out on her own short term disability and did not return to her office practice until January 19, 2004. (Claimant Exhibit 6)
31. On October 31, 2003, Dr. Dreisbach closed his practice as well. (Claimant’s Exhibit 7)
32. When both of claimant’s treating practitioners were no longer available and with no benefits or income, claimant simply saw no one. As explained by Catherine Maier, who later came to counsel claimant for her depression, when describing the fact that Dr. Dreisbach resigned and Elaine went out on leave, Catherine documented “Linda could not get a referral to Dr. Howard until Elaine returned. Linda was depressed and did not want to see another M.D. Trust is an issue for Linda - She only trusted Elaine...” (Joint Exhibit 1: Tab 15; CM 1300)
33. On October 16, 2003, claimant applied for Social Security Income and Disability benefits. In connection with that application she claimed that her illnesses, injuries and conditions were myofascial pain, severe fatigue, migraines, sleep deprivation, irritable bowel syndrome, depression and severe muscle weakness. (Defendant Exhibit A)
34. On October 9, 2003 she signed a similar application, which stated “Disability is a combination of impairments including fibromyalgia, chronic fatigue, irritable bowel syndrome, migraine headaches, myofascial pain in joints, problems with left shoulder (which required surgery in October 2002) and chronic depression.” (Defendant’s Exhibit B)

35. On February 24, 2004, following Elaine Robinson's return from leave, she saw claimant and documented that she still had left shoulder problems, but her chief complaint was depression and fibromyalgia. She referred Claimant for physical therapy.
36. On March 17, 2004 claimant reported an onset of left elbow discomfort. She had previous elbow problems years earlier, but this is the first medical documented left elbow problem reported after her employment with the defendant.
37. On May 26, 2004, claimant first came under the care of orthopaedic surgeon, Dr. Lon Howard, a board certified orthopaedic surgeon, at the referral of Elaine Robinson. During his initial examination of the claimant she showed clinical signs that she might have a torn rotator cuff in her left shoulder. Dr. Howard planned to have a re-evaluation by MRI and recommended that she get back into physical therapy. During this visit, the claimant reported a problem in her left elbow started about a year ago. Dr. Howard initially thought this problem was not work related. (Joint Medical Exhibit, Page LO 100)
38. On June 11, 2004, an MRI of the left shoulder revealed a partial rotator cuff tear, a SLAP lesion, and biceps tendonitis. Dr. Howard felt that she had no work capacity at this time.
39. On June 18, 2004, Dr. Howard saw her in follow up of her work related injury to the left shoulder. He read the MRI and saw a partial tear of the rotator cuff. His impression was that there was a "left shoulder recurrent tear of the rotator cuff and neuropraxia." He recommended conservative measures and that nerve conduction studies be obtained. During this visit she also complained of left hand numbness. (Joint Medical Exhibit, Page LO700)
40. Nerve conduction studies were performed by Dr. Andrew Forrest, on September 14, 2004, due to her continued left elbow pain and hand numbness. These studies documented moderate neuropathy at the left wrist but found the left ulnar nerve to be normal.
41. While initially Royal & SunAlliance paid claimant's medical bills for treatment with Dr. Howard, shortly thereafter it stopped.
42. On or about September 27, 2004 Royal & SunAlliance filed a Form 27 Employers Notice of Intention to Discontinue Payments and a Form 2 Denial of Workers' Compensation Benefits by Employer or Carrier.

43. When claimant returned to see Dr. Howard on September 29, 2004 for re-evaluation, he noted that she had continued left shoulder pain, left elbow pain, and numbness and tingling into the left median nerve distribution. He believed these were all the result of her repetitive work injury. He also noted the results of the nerve conduction study, which were remarkable for carpal tunnel syndrome on the left. His impressions were left shoulder torn rotator cuff, left elbow cubital tunnel syndrome, and carpal tunnel syndrome on the left. He opined that all of the above diagnoses were consistent with the work injuries that she described to him. The plan was to first perform a carpal tunnel surgical release on the left, which would be followed by repair of her shoulder rotator cuff injury and then the cubital tunnel. He did not believe she had any work capacity at that time. (Joint Medical Exhibit, Page LO 1300)
44. On October 5, 2004, Timothy Ryan, Staff Attorney of Workers' Compensation, rejected Royal & SunAlliance's Form 2 attempt to deny the March 28, 2002 injury stating "the carrier had already accepted (if not explicitly, then by waiver) the claim and paid benefits on it in 2003 and may not now challenge its compensability at this date..." (Claimant's Exhibit 8). Additionally, he rejected their Form 27.
45. Claimant attended her own IME by Dr. Mark Bucksbaum on November 5, 2004. Dr. Bucksbaum is Board Certified in Physical Medicine, Pain Management and Independent Medical Examinations. Claimant provided complete medical records to Dr. Bucksbaum inclusive of Dr. Haas's August 15, 2003 IME report. It was Dr. Bucksbaum's opinion, following a comprehensive review of records and examination of the claimant within a reasonable degree of medical certainty, that the claimant had recurrent rotator cuff tear and that her left shoulder injury was causally related to her March 2002 work activities. He further opined that the treatment she had received for the shoulder injury was reasonable, necessary, and related to her work related injury. Since she remained symptomatic with left shoulder pain and was planning on having additional treatment, he felt it was premature to place her at a medical end point or to assign any impairment rating. Dr. Bucksbaum implicitly agreed that the claimant had a light duty work capacity. (Joint Medical Exhibit, Page MJB 118)
46. At the referral of Dr. Howard, claimant returned to be re-evaluated by physical therapist, Ben McCormack, who now had his own firm, Northern Physical Therapy. Ben McCormack found that claimant had positive impingement of her shoulder and physical therapy was planned.
47. Ben McCormack believes that he was dealing with the same orthopaedic problems as he had previously. He further believes that, having treated claimant for 2½ years, her left shoulder problem never fully resolved and that he was still treating her for left shoulder rotator dysfunction. He further believes that on all occasions that he saw her, claimant had objective signs of left shoulder problems.

48. On November 30, 2004, claimant underwent a carpal tunnel release on the left by Dr. Howard.
49. Claimant continued to attend physical therapy following the carpal tunnel release and surgical planning for her left shoulder problems was in process.
50. Claimant underwent left shoulder arthroscopy, debridement of the torn labrum, and open acromioplasty with repair of the torn rotator cuff and torn labrum on February 1, 2005. He removed a new osteophyte and repaired the rotator cuff tear. The claimant has recovered well from this surgery.
51. To date, claimant continues to be actively treating with Dr. Lon Howard and Ben McCormack of Northern Physical Therapy. Dr. Howard first planned to treat the left cubital tunnel conservatively prior to resorting to a surgical plan.
52. At the request of Royal SunAlliance, claimant on January 13, 2005 attended a second evaluation by Dr. Nelson Haas.
53. At this point in time there was objective evidence of a physical problem with her left shoulder. Having learned that claimant was not playing baseball or doing any significant gardening, Dr. Haas modified his opinion about the cause of her left rotator cuff and labrum injuries. He was not able to say what caused the injuries, but based on his job site review in January 2005, he did not think they were caused by work. It was Dr. Haas's opinion that the work claimant performed at NSA Industries, Inc., especially after mid-2002, was unlikely to have caused the injuries to her left shoulder that were seen on the June 2004 MRI scan. He further opined that her arm numbness and tingling was also unlikely to have been caused by her work at NSA. The bulk of this addendum IME performed by Dr. Haas was not a medical assessment but rather an evaluation of her workplace activities. Dr. Haas admitted at the hearing that, "It is very hard to sort this out." Dr. Haas felt that the current left shoulder problem was a distinct and unrelated problem from the 2002 injury. It is likely that Dr. Haas was unaware that Dr. Howard had detected a partial rotator cuff tear in the 2002 MRI. Dr. Haas based his opinion, in part, upon his conclusion that parts of the reports by the claimant were incredible. Dr. Haas was not a treating physician to the claimant.

## **CLAIMANT'S MEDICAL OPINIONS:**

54. Dr. Howard graduated medical school in 1982, is a board certified orthopedic surgeon, and is claimant's treating orthopedist. He was board certified in 1990 and re-certified in 2000. Dr. Howard was adamant and states to a very high degree of medical certainty that there is a direct causal relationship between claimant's work-related injury of March 2002 and her current symptoms of left shoulder rotator cuff tear. Dr. Howard reads his own MRI films and has done so since residency. On his review of the August 28, 2002 MRI films, he found that both a rotator cuff and labral tear were in fact present. In this way his opinion contradicts the reading of the MRI conducted by Dr. Bennum. His reading of the films is also contradictory to Dr. Dreisbach's conclusion after surgery that there was no rotator cuff tear. Dr. Howard testified that with the open surgical approach undertaken by Dr. Dreisbach, it is not possible to fully evaluate whether a rotator cuff tear is present. In contrast, an arthroscopic approach allows visualization of the areas otherwise inaccessible visually or by palpation. However, Dr. Dreisbach did not use an arthroscopic approach. Therefore, the underlying problems of a rotator cuff tear and labral tear were never treated by Dr. Dreisbach.
55. After the surgery that Dr. Dreisbach performed, claimant's problems settled down while she remained out of work but upon her return, they again worsened. Dr. Howard testified to a degree of medical certainty that there was a tear of the labrum and rotator cuff existing in August of 2002 and that his problem was not corrected by the surgery in October 2002. His reading of the 2002 MRI was reconfirmed by the June 2004 MRI and the fact that the claimant had never been able to fully return to full work activity. He testified that the 2002 left shoulder problem was the same problem, which was appearing in 2005. Dr. Howard admitted that the evidence of causation between the left cubital tunnel and the left carpal tunnel syndrome and the claimant's work is not quite as clear as the rotator cuff problem. He testified that nerve damage to the nerves running through the shoulder can amplify nerve damage to the lower arm. He called this the "double crush" effect. Given the shoulder injury, and the time of onset of the lower arm problems, and the nerve conduction studies, it was Dr. Howard's opinion, to a degree of medical certainty, that the claimant's left elbow and left wrist problems were causally related to her work with the defendant. He related the injury to repetitive motion, vibration and the metal handling that the claimant was doing during her employment with the defendant. Claimant is currently unable to return to work and is not yet at a medical end result.

56. Ben McCormack is a registered Physical Therapist and he is additionally a certified Ergonomic Specialist. He opined that he is dealing with the same problems as he had previously: that claimant had a continued orthopedic component. He said that the longitudinal view was that her left shoulder problem never fully resolved and that he had seen her repeatedly over the years and was still treating her for the same left shoulder rotator dysfunction. He further testified that on all occasions that he saw her the mechanical tests he administered showed objective signs of left shoulder problems. He felt that she had clear and consistent orthopedic problems with her left shoulder from 2002 to 2005.
57. Dr. Bucksbaum is Board Certified in Physical Medicine, Pain Management and Independent Medical Examinations. Following a complete medical records review and physical examination of claimant, Dr. Bucksbaum opined that within a reasonable degree of medical certainty claimant's left shoulder injury was causally related to her March 2002 work activities. He further opined that the treatment she had received for the shoulder injury was reasonable, necessary, and related to her work related injury. Based on her ongoing medical treatment for her work related injuries, he felt it was premature to place her at a medical end point or assign any impairment rating.
58. Dr. Craig Dreisbach is a Board Certified Orthopaedic Surgeon and was claimant's treating physician from May 29, 2002 through September 10, 2003. During this time he treated and billed claimant's left shoulder problems as a work related claim. While he did not diagnose a rotator cuff tear, nor did he see one during the October 2002 surgery, it was clear that he was befuddled and at a loss to explain the claimant's continued shoulder problems following the surgery.

#### **DEFENDANTS MEDICAL OPINIONS:**

59. Dr. Nelson Haas graduated medical school in 1995 and is an Occupational Health Physician. He began working in this field full time in October 2001. He opined at hearing that it was not likely that claimant's work activities following her return to work after the October 2002 surgery caused her current problems yet he had no firm opinion as to how she developed the tears. He now concedes that claimant did, by 2004, have a rotator cuff and labral tear. He did not identify any independent intervening cause that would break the chain of causation. By his own admission, he is not an orthopedist, he is not a surgeon, and he does not read MRI's. At the hearing he opined that claimant's problems now, i.e. rotator cuff and labral tear and nerve injury, are not the same as the problems she had in 2002. In forming this opinion he relies on 1) the radiologist's report of the August 28, 2002 MRI indicating that there was no tear and 2) the fact that Dr. Dreisbach did not detect any rotator cuff tear during the surgery he performed on October 2, 2002. Dr. Haas did not speak to either the radiologist or the surgeon and he was not aware of the significant margin or error in MRI evaluations.

## CONCLUSIONS OF LAW:

60. In a typical Workers' Compensation case 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 and the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984). However, once a claim has been accepted by a carrier or employer and they later decide to rescind acceptance, the burden of proof is then on the employer to justify discontinuance. See *Merrill v. University of Vermont*, 133 Vt. 101 (1974). As previously noted, on October 5, 2004, Timothy Ryan, Staff Attorney of Workers' Compensation, rejected Royal & SunAlliance's Form 2 attempt to deny the March 28, 2002 injury stating "the carrier had already accepted (if not explicitly, then by waiver) the claim and paid benefits on it in 2003 and may not now challenge it's compensability at this date..." Additionally, he rejected their Form 27. The compensability of the original injury has been determined and is no longer at issue.
61. In cases where the causal connection between an accident and the injury is obscure and a layperson would have no well-grounded opinion as to causation, expert testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). In deciding between conflicting medical opinions, the Department has traditionally looked to several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional's qualifications, including the education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective basis underlying the opinion. *Yee v. International Business Machines*, Opinion No. 38-00WC (Nov. 9, 2000). These factors weigh in favor of the opinions and conclusions of Dr. Howard. Moreover, the weight of the opinions by Dr. Howard, Dr. Bucksbaum and Dr. Dreisbach, concerning the relation of the initial injury to the work are persuasive. The opinion of Dr. Howard concerning the claimant's left elbow and left wrist problems are also persuasive. In this sense, the case is analogous to the case of *Liscinsky v. Temporary Payroll Incentives, Inc.*, Opinion No. 09-01 WC and 09R-01 WC. As in that case, "the chain of causation may be longer than usual, but the evidence is clear and sufficiently strong."
62. Under 21 V.S.A. § 640(a), a claimant is entitled to "reasonable surgical, medical and nursing services and supplies" for injuries that arise out of and in the course of employment. 21 V.S.A. § 618(a). The employer seeks to terminate coverage for medical benefits for an injury, which has been accepted, the burden is upon the employer to prove that the treatment is not reasonable. See *Rolfe v. Textron, Inc.* Opinion No. 8-00 WC (May 16, 2000).

63. One is entitled to continuing medical benefits as long as the causal relationship with work remains unbroken. “The subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent nonindustrial cause.” 1 Larson’s Workers’ Compensation Law, § 10 at 10-2 (2000). The gap in treatment encountered between October 2003 and May 2004 did not sever any causation with the work related injury. Since claimant’s rotator cuff and labral tears were in fact present on MRI films dated August 28, 2002, clearly the chain of causation was not broken. The records in this case contain references of claimant’s continued complaints of left shoulder pain.
64. Unless an injured worker has successfully returned to work, an employer shall notify both the Commissioner and the employee prior to terminating benefits under either section 642 or section 646 of this title.” 21 V.S.A. § 643(a). Claimant did not successfully return to work. “Temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by evidence, is received by both the commissioner and the claimant.” Rule 18.1100. “Termination of temporary disability compensation on the basis that claimant has reached a medical end result shall be prohibited in the absence of a Form 27.” Rule 18.1200. No such Form 27 was filed and/or approved prior to Royal & SunAlliance discontinuing claimant’s benefits.
65. All of the medical practitioners involved in the care of Ms. Weeks, including Dr. Dreisbach, Dr. Lon Howard, Elaine Robinson, FNP, and Ben McCormack, RPT, concur that claimant suffered a work-related injury to her left upper extremity. It has not resolved.
66. Claimant’s independent medical examiner, Dr. Bucksbaum, concurs in the conclusion that the injury is work-related, that all treatment has been reasonable and necessary, and that claimant is not yet at a medical end point. These conclusions are well supported, and consistent with the medical treatment rendered since the injury in March of 2002.
67. Dr. Bucksbaum’s bill of \$1,200.00 (Claimant’s Exhibit 19) does not qualify under the facts of this case as an impairment rating within Workers’ Compensation Rules 11.1530 or 11.2400. However, because the claimant is prevailing in this action, it is compensable as a cost under Rule 10.300

**ORDER:**

The claimant is entitled to:

1. Retroactive Temporary Total Benefits from 8/13/03 to present.
2. Continuing Temporary Total Benefits (or Temporary Partial Benefits if the claimant becomes, or is, able to work) until claimant reaches medical end result at which time permanency will be determined. Such rehabilitation benefits as may be provided by the statute and rules.
3. Payment of all unpaid medical bills and reimbursement of those paid by or on behalf of claimant to the present and ongoing associated with the left shoulder injury, the left elbow injury and the left wrist injury.
4. Payment of Dr. Bucksbaum's \$1,200.00 bill.
5. Attorney fees to be supported by Affidavit filed within 15 days of the date of order.
6. Costs of action to be supported by Affidavit filed within 15 days of date of order.

Dated at Montpelier, Vermont this 27<sup>th</sup> day of April 2005.

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Laura Kilmer Collins  
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.

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

Linda Weeks	)	Opinion No.27A-05WC
	)	
	)	By: George K. Belcher
	)	Hearing Officer
v.	)	
	)	For: Laura Kilmer Collins
	)	Commissioner
N.S.A. Industries, Inc.	)	
	)	State File No. T-12953

**ORDER ON CLAIMANT’S UNOPPOSED REQUEST FOR ATTORNEY FEES**

As a prevailing claimant in Opinion No. 27-05WC (Apr. 27, 2005), Linda Weeks seeks an attorney fee award based on 164.85 hours worked and \$3,515.49 in necessary costs.

The Workers’ Compensation Act provides for a discretionary award of reasonable attorney fees and mandatory award of necessary costs. 21 V.S.A. § 678(a). Factors considered in fashioning an award include the necessity of representation, difficulty of issues presented, time and effort expended, clarity of time reports, agreement with the claimant, skill of counsel and whether fees are proportional to the efforts of counsel. See *Hojohn v. Howard Johnson’s, Inc.*, Op. No. 43A-04WC (2004); *Estate of Lyons v. American Flatbread*, Op. No. 36A-03 (2003).

Claimant’s success in this case was due the efforts of her attorney who needed to spend 155.85 hours because of the carrier’s denial, difficulty of the issues presented, necessary research, and discovery involved.<sup>1</sup> The issue presented in the case was straightforward, but the evidence was complex, lengthy, and contradictory. The attorney’s time in the case preparation and presentation in the amount of 155.85 hours is reasonable.

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<sup>1</sup> The affidavit of attorney’s time submitted by Attorney Adler contained a billing for 9 hours at the formal hearing billed for both March 4, 2005 (the actual date of the hearing) and, again, for May 5, 2005. This last billing entry was duplicated since both the attorney and the paralegal attended the hearing in March but only one of them billed. They tried to correct this by a second billing on May 5, 2005. It is unreasonable to compensate a paralegal at the attorney rate and to compensate for two advocates for one party at a hearing. See *Smith v. Skyline Corp.*, Op. No. 20-01WC (2002). The billing for May 5, 2005 is denied as unreasonable.

Therefore, Claimant is awarded fees of \$14,026.50 (155.85 hours at \$90.00 per hour) and costs of \$3,515.49.

Dated at Montpelier, Vermont this 30<sup>th</sup> day of June 2005.

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Laura Kilmer Collins  
Commissioner