

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

*Earline Miner*

*Opinion No. 39-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*State of Vermont Department of Social  
and Rehabilitation Services and  
Central VT Home Health and Hospice*

*For: Michael S. Bertrand  
Commissioner*

*02848*

*State File Nos. T-17438; H-07941; M-*

*Hearing held in Montpelier on April 29, 2004  
Record Closed on June 1, 2004*

**APPEARANCES:**

*Gregory W. McNaughton, Esq., for the Claimant  
Jason R. Ferreira, Esq., for the Defendant, SRS  
William J. Blake, Esq., for the Defendant, CVHHH*

**ISSUES:**

- 1. Did the claimant suffer a work related injury to her right shoulder as a result of a fall at SRS on December 3, 2002?*
- 2. If so, was that injury an aggravation or recurrence?*

**EXHIBITS:**

- I: Medical Records*  
*II: Deposition of Anthony Lapinsky, M.D.*

**FINDINGS OF FACT:**

- 1. On December 3, 2002, the Vermont Department of Social and Rehabilitation Services (SRS) was an employer and claimant its employee within the Workers' Compensation Act (Act).*

- 2. On October 12, 1994, Central Vermont Home Health and Hospice (CVHHH) was an employer and claimant its employee within the meaning of the Act.*

### CVHHH

3. *In the early 1990s claimant worked as a home health aide at CVHHH. On October 12, 1994, she injured her shoulder and upper back while transferring a patient.*
4. *Claimant treated with Dr. Jennings after that injury. He recommended that she be trained for a job that would put less stress on her shoulder.*
5. *After receiving the recommended training, claimant obtained a clerical job with the State.*
6. *On July 21, 1997, Dr. Jennings placed claimant at medical end result with a 7% whole person impairment.*
7. *Residual pain and loss of motion in her shoulder continued after the CVHHH injury, but claimant's shoulder was otherwise stable until the December 2002 incident with SRS.*

### SRS

8. *Claimant worked in a clerical/secretarial job at SRS in the Burlington office. On December 3, 2002, while standing near a doorway at work claimant slipped and fell on some water from melted snow. As her feet went out from under her, she grabbed a doorknob in an attempt to regain her balance. That attempt failed, however. She bumped her head and landed on her back.*
9. *After the fall, she felt soreness in the left hip, upper back and head. The most intense pain was a throbbing headache.*
10. *Claimant could not identify with certainty which part of her body, buttock or hip, hit the floor first.*
11. *Four co-workers witnessed the fall.*
12. *Claimant did not seek medical treatment immediately, choosing to see if the pain would resolve with time.*
13. *Claimant visited her primary care physician, Dr. Patti, with complaints of right knee pain, right shoulder pain and a cough in February of 2003. She reported that the shoulder pain had been constant since the earlier CVHHH injury.*

14. *Claimant was referred to board certified orthopedic surgeon, Anthony Lapinsky, M.D., who first operated on the claimant's knee and later on her shoulder.*
15. *When Dr. Lapinsky questioned the claimant about a traumatic event, she described the on the job fall at SRS the previous December.*
16. *Dr. Lapinsky performed the shoulder surgery on May 21, 2003 to repair a torn rotator cuff.*
17. *Claimant was out of work as a result of the shoulder surgery until September 8, 2003.*

### Medical Opinions

18. *At the request of SRS, Dr. Verne Backus, Occupational Health Physician, examined the claimant and reviewed all medical records. He opined, within a reasonable degree of medical certainty, that claimant did not incur a full thickness rotator cuff tear as a result of her December 2002 fall at SRS.*
19. *In support of his opinion, Dr. Backus noted that the mechanism of her fall was not consistent with a rotator cuff tear, that claimant did not have symptoms consistent with a rotator cuff tear immediately after the fall and that she continued to do her work afterwards.*
20. *Dr. Lapinsky, who surgically repaired claimant's torn rotator cuff, noted a fresh tear, one of months' duration, not an old or chronic tear from years before. Further he noted that the nature of claimant's fall, with the arm hyperextended, is consistent with a rotator cuff tear.*
21. *In his treatment of many patients with such a tear, Dr. Lapinsky has noted that not all have the same pattern of pain complaints after an injury, with some having little pain. Weakness and loss of overhead weakness are the keys to the diagnosis.*
22. *In this case, claimant had an underlying chronic shoulder problem, but the rotator cuff did not tear fully until the 2002 fall.*
23. *Dr. Davignon also evaluated the claimant in this case. He opined that she tore her rotator cuff in the 2002 fall and has a 7% whole person impairment over and above the 7% incurred in the 1994 accident.*

### Attorney Fees and Costs

24. Claimant submitted evidence that her attorney worked 40.9 hours on this case and incurred \$803.85 in necessary expenses.

### **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. In this dispute between carriers, as well as one of compensability, we revisit familiar aggravation-recurrence territory. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. "Recurrence" means the return of symptoms following a temporary remission. Rule 2.1312. Therefore, CVHHH is

*liable for the full extent of benefits if the second injury is solely a "recurrence" of the first injury--i.e., if the second accident did not causally contribute to the claimant's disability. If, however, the second incident [fall at SRS] aggravated, accelerated or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second injury is an "aggravation," and the second employer becomes solely responsible for the entire disability at that point."*

*Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626 (1997).

4. Because the issues are beyond the ken of a layperson, expert evidence is required, which in this case come from Dr. Lapinsky and Dr. Backus. In considering such conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's

*qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. Miller v. Cornwall Orchards, Op. No. WC 20-97 (Aug. 4, 1997); Gardner v. Grand Union Op. No. 24-97WC (Aug. 22, 1997).*

- 5. Dr. Lapinsky has the advantage in the first, second, and third criteria. He has treated the claimant; has the expertise necessary in this case, that of an orthopedic surgeon; directly observed the damaged shoulder tissue; and related the mechanism of injury to the diagnosis based on science and years of experience. In contrast, Dr. Backus's only advantage is that he reviewed more records, which alone cannot offset the overwhelming advantage of Dr. Lapinsky in this case.*
- 6. Based on the sound opinion on Dr. Lapinsky, therefore, I conclude that claimant suffered an injury to her shoulder at SRS in December of 2002, a torn rotator cuff that required surgical repair. At a minimum the injury was an aggravation of a previous shoulder injury. In any event, CVHHH has no liability.*
- 7. As a prevailing claimant, she is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678 (a). Hourly fees are limited to \$90.00 per hour. WC Rule 10.12.10. Claimant prevailed in this case because of the efforts of her attorney who has requested fees based on a reasonable number of hours. She is awarded \$3,681 (40.9 hours x \$90.00) in attorney fees and \$803.85 in costs necessary in the successful pursuit of this claim.*

**ORDER**

*Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the State of Vermont (SRS) adjust this claim.*

*Dated at Montpelier, Vermont this 14<sup>th</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.*