

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. Z.

Opinion No. 26-08WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

University of Vermont/
Cannon Cochran

For: Patricia Moulton Powden
Commissioner

State File Nos. X-05380 & C-13492

OPINION AND ORDER

APPEARANCES:

Christopher J. McVeigh, Esq. for Claimant
Stephen D. Ellis, Esq. for UVM and Cannon Cochran

ISSUES:

1. Did the Claimant suffer a compensable left shoulder injury on or about December 3, 2005?
2. Is the Claimant entitled to have the insurer pay for Celebrex and Tramadol medications after September 2005?
3. Has the Claimant made misrepresentations in support of her claim and if so, what is the appropriate penalty?

EXHIBITS:

Joint Medical Exhibit

Defendant's Exhibits as Referred to in Proposed Findings:

- Defendant's Exhibit #1 – PA Cowey's January 9, 2006 notes
- Defendant's Exhibit #2 – Claimant's Radiology Report dated 1/9/06
- Defendant's Exhibit #3 – Claimant's Intake Sheet dated January 9, 2006
- Defendant's Exhibit #4 – Physical Therapy Notes dated January 11, 2006
- Defendant's Exhibit #5 – Physical Therapy Initial Questionnaire
- Defendant's Exhibit #6 - Dr. Ciongoli patient notes dated January 23, 2006
- Defendant's Exhibit #7 – Dr. Abate's patient notes dated February 7, 2006
- Defendant's Exhibit #8 – Dr. Abate's authorization to release patient information
- Defendant's Exhibit #9 – Notes of Claimant's statement to CCMSI
- Defendant's Exhibit #10- Physical Therapy Notes dated April 13, 2006
- Defendant's Exhibit #11- Letter from Claimant dated June 23, 2006
- Defendant's Exhibit #12-Claimant's statement to Janine Goff, CCSMI
- Defendant's Exhibit #13-E-Mail from Claimant to Dr. William Lakin
- Defendant's Exhibit #14- Dr. Lakin's letter dated 12/5/06
- Defendant's Exhibit #15- PA Edwin Cowey's statements (Deposition)
- Defendant's Exhibit #16- PA Cowey's Progress Note changes
- Defendant's Exhibit #17- PA Cowey's Addendum to January 9, 2006 notes
- Defendant's Exhibit #18- Claimant's statements to PA Cowey in his Notes
- Defendant's Exhibit #19- Note from Dr. Abate's Assistant per Claimant's request
- Defendant's Exhibit #20- Statement from Dr. Abate dated August 30, 2006
- Defendant's Exhibit #21- Statements of Dr. Abate (Deposition)
- Defendant's Exhibit #22- Phone Log of Lee Stewart
- Defendant's Exhibit #23- First Report of Injury
- Defendant's Exhibit #24- Letter from Mary Reilley dated October 2, 2006

Depositions Submitted into Evidence

- Janine Goff
- Mary Reilly
- Lee Stewart
- Claimant
- Dr. William Lakin, Ph.D.
- PA Edwin Cowey
- Dr. Joseph Abate
- Dr. George White
- Dawn Densmore

FINDINGS OF FACT:

The Compensability of the 2005 Incident

1. The Claimant was an employee and the Defendant an employer under the Workers' Compensation Act during the relevant time periods of this claim.
2. The Claimant works for the Space Grant Program at the University of Vermont (UVM) funded by or through NASA federal funds. The Claimant's work is extensive and includes both administrative duties and preparing exhibits for display at conferences which must be transported by the Claimant in large portfolios or luggage bags.
3. As part of her work, the Claimant had to transport and set up an exhibit at Patrick Gymnasium, Burlington, Vermont on approximately December 3, 2005 for an exhibit called DesignTASC (TASC).
4. The Claimant testified that at the end of the day on approximately December 3, 2005, she had to dismantle the exhibit, pack it up and then transport the materials back to an office at UVM. Although she did have some help, she lifted some heavy bags over her left shoulder. She testified that it was at this time her alleged work injury occurred. At hearing, her testimony was that she was loading the large bag by pushing it into her husband's truck when she felt a strong pain. In her deposition testimony, she stated that she felt a strong pain in her shoulder when she was attempting to push the case into her own car. On January 23, 2006, in her letter to the Department of Labor, the Claimant wrote that the injury occurred while she was transporting presentation materials in vinyl bags with over the shoulder carrying straps and while pulling a large rolling case of materials.
5. The Claimant's husband, Louis Zeno, did corroborate his wife's testimony that she hurt her left shoulder around December 3, 2005 while transporting work materials from the gymnasium exhibit. He testified that he was there and helped her load materials into both his truck and her vehicle.
6. After allegedly hurting her shoulder, the Claimant and her husband proceeded to UVM to unload the materials and put them in their proper storage room. The Claimant did not miss any work from her alleged injury at this time.
7. The Claimant did not make an appointment with a doctor for her injury until December 20, 2005. It was not until January 9 of 2006, that the Claimant treated for her shoulder injury with Physician Assistant (PA) Edwin Cowey in Dr. Joseph Abate's office. PA Cowey wrote the Claimant's history in his notes which were later transcribed. Both the report and PA Cowey's notes state that the Claimant had experienced a sharp stabbing pain in her shoulder while picking up groceries. He also noted that she had experienced chronic shoulder pain for several years but in December (2005) it became exacerbated by "driving a car or lifting suitcases and such." Physical therapy was prescribed.

8. On the form the Claimant filled out at Dr. Abate's office she responded "unknown" when asked if her injury was work related. She did not mention any work related injury to PA Edwin Cowey that was noted. On the intake form, the Claimant in her own handwriting wrote that her injury began "December 20, intense".
9. On the second page of the intake form the Claimant responded to the question about previous orthopedic problems by noting "records, orthopedic" (referring to previous injuries Dr. Abate had treated), cerebral palsy from birth, right knee, and back problems. Again, she did not write anything about a work injury of her left shoulder.
10. Claimant chose to attend physical therapy at Excel Physical Therapy. On January 11, 2006, she completed and signed an Initial Questionnaire in which she responded "no" to the question "Is this a workers' compensation claim?" In response to the question, "Have you ever had this problem before?" the Claimant answered, "Yes when being treated for the other side (right shoulder)." She also wrote "pain in left shoulder/Dr. Abate had once diagnosed a small tear in the L shoulder."
11. On January 23, 2006, the Claimant saw Dr. Kenneth Ciongoli and reported that she had "some sort of rotator cuff problem" but did not state that it was work related.
12. On February 7, 2006, the Claimant saw Dr. Joseph Abate for her left shoulder pain. She told him on "12/20/05 she was carrying a bag over her left shoulder. When she went to drive her car after this she had severe pain in the shoulder." Dr. Abate's plan was to see her again in March and to review her MRI and then presumably schedule her for surgery. Also on February 7, the Claimant signed a Patient Consent to Operation or Other Procedure form in which she authorized Dr. Abate to perform a left shoulder arthroscopic repair. She also signed an Authorization to Release Patient Information form in which she did not check off the box allowing the information released for the purposes of workers' compensation.
13. On March 27 of 2006, the Claimant contacted UVM's workers' compensation claims administrator, Cannon Cochran Management Services, Inc., to gain authorization for prescriptions related to a 1989 injury. She did not mention any current workers' compensation injuries. On March 30, 2006, the Claimant underwent surgery on her left shoulder by Dr. Abate. The surgery was paid for by Primary Blue Cross/Blue Shield of Vermont, the Claimant's personal insurer.
14. The first report of injury was not filed by the Claimant until April 14, 2006. The Claimant testified that she tried to obtain a workers' compensation intake form earlier, but had difficulty locating it on the newly computerized system at UVM. She did make an inquiry around that time to Mary Reilly, Assistant to the Dean of Engineering, about intake forms for worker's compensation and was directed to Human Resources. Ms. Reilly testified that this could not have occurred prior to late March, 2006. She stated she was surprised that the Claimant was filing a report of an incident that had occurred months earlier but signed the form when it was given to her.

15. The Human Resource person, Lee Stewart, informed the Claimant that she should get her form on-line under the human resource category. This call to Human Resources occurred on April 10, 2006. Mr. Stewart does not recall when the Claimant called but he does keep and maintain phone logs which showed no calls from the Claimant until April 10, 2006. The log corroborates his testimony.
16. On April 11, 2006, the Claimant filled out another form at Excel Physical Therapy. She still did not indicate that her injury was a workers' compensation injury. In response to open ended questions she wrote "Surgery on L shoulder performed 3/30/06 by Dr. Abate. Cerebral palsy on total L side."
17. On April 13, 2006, the Claimant was again at Excel Physical Therapy and reported that she had surgery on her left shoulder. She then stated that she had experienced trouble with it for some time and reports she thinks she originally injured it in December when she moved some cases at work by herself. This is the first medical record made by the Claimant that the injury to her left shoulder was work related.
18. The Claimant in this case has had more than one prior workers' compensation claim and is familiar with the process. She is also a very precise person who appears to take her responsibilities very seriously, is articulate and very detail oriented. However, at the hearing she testified that she did not originally indicate her injury was a work injury on the medical forms because she had not yet filed the workers' compensation paperwork. In fact, she did not file a Report of First Injury until after her surgery with Dr. Joseph Abate and after a conversation with her insurer for her 1989 claim when she found out her medications were denied payment.
19. The insurer denied the claim in this case based on a finding that the injury was not work related based at least in part on the notes of PA Cowey who had reported that the Claimant had injured herself or aggravated pain in her left shoulder by lifting groceries. The Claimant, after knowledge of the denial of her claim, and upon learning the reason for the denial, called PA Cowey and asked him to change his medical office notes. PA Cowey did change his report but wrote the change was made only because of the request of the patient. As for medical treatment, PA Cowey recommended the Claimant keep taking the medications she was on and attend physical therapy.
20. Dawn Densmore, another UVM employee, who was at the December 3rd work event, did remember the Claimant saying that she had hurt herself at the December 2005 TASC event. She could not, however, remember what she was told about the injury. She also did not indicate she saw any evidence of an acute injury or a need for medical attention. At some point Dawn Densmore spoke to Mary Reilly; Administrative Assistant to the Dean of the College of Engineering, about the Claimant having suffered an injury. There was, however, no mention that the injury had occurred at work.

21. Shortly after her alleged injury on December 3, 2005, the Claimant told her assistant, Laura Campagne, about hurting her shoulder at the TASC work event and Ms. Campagne observed the Claimant favoring her shoulder during the month of December. However, prior to making a doctor's appointment, the Claimant mentioned to Laura Campagne that she had hurt her shoulder picking up groceries.
22. Dr. William Lakin, the Director of the Space Consortium at UVM, testified, based on his own memory but several years following the alleged incident, that the Claimant had told him she had injured her shoulder while moving materials for the December TASC exhibit. His testimony or memory was "refreshed" by notes from the Claimant that he requested she provide to him. The Claimant sent an e-mail on November 30, 2006 to Dr. Lakin claiming she had called Risk Management, UVM, and Human Resource Personnel on December 20, 2005 regarding her shoulder. The deposition testimony of Human Resource Personnel and Ms. Reilly conflict with the Claimant's statement. Dr. Lakin did not notify anyone else at UVM after hearing of her alleged injury. He did attest to her truthfulness in all of his experiences working with her.
23. Prior to the 2005 incident report being filed, the Claimant was denied payment by the insurer for medications from the prior 1989 workers' compensation injury. At that time, when she spoke to the insurer's representative, she did not at first mention that she was currently recovering from a surgery that was work related. She did indicate that the insurer would have to continue to pay for her medications for the rest of her life. This may have been a statement that her 1989 injury was found to have had permanency. The insurer seems to view this as a threat. The Claimant told the insurer's representative that she would get a note from Dr. Ciongoli to show the medications were for her 1989 injury. No note from Dr. Ciongoli was ever received.
24. Prior to Dr. Abate's deposition, and at the Claimant's request, Dr. Abate's assistant had provided the Claimant with a note stating "Per Dr. Abate it is reasonable that damage found at the time of surgery could have been related to workers' compensation injury based on the Claimant's statement regarding carrying presentation materials. When Claimant was informed by the Department that a statement from Dr. Abate's assistant would not suffice, she again called his office and requested a statement from him. On August 30th, 2006, Dr. Abate wrote that it was his opinion that the Claimant's left shoulder injury was related to the incident which happened at work on December 3, 2005.
25. However, Dr. Abate later stated in his deposition that the surgery findings of the Claimant disclosed pre-existing arthritis in her AC joint. He also stated that it was impossible to tell based on the surgery how long this condition had existed or if it was caused by a traumatic event or just cumulative wear and tear of the joint. He found her condition consistent with a shoulder strain but stated that he would have to rely on the Claimant's own statements to determine the cause of her need for surgery.

The issue of the continued payment for Tramadol and Celebrex

1. The Claimant was working for the University of Vermont in 1989 as clerical staff when she fell and tripped over an extended lower desk drawer. The Claimant described this incident in minute detail at the hearing.
2. As a result of the work accident, the Claimant suffered an injury to her right shoulder and her cervical spine. She originally treated with Dr. Claude Nichols for her right shoulder and physical therapy was recommended. She returned to work following therapy but her shoulder continued to bother her. In pursuing treatment for the pain in her shoulder; the Claimant treated with a number of physicians; Dr. Claude Nichols, Dr. Rowland Hazard, several physical therapists and additional treatment through the Spine Institute.
3. The medical providers all noted the continued neck pain and right arm pain as part of their treatment and care for her. Dr. George White's medical evaluations in 1999 and 2005, Dr. John Johansson's medical evaluation and Dr. Jonathan Fenton's evaluation all noted the Claimant's right shoulder conditions and the chronic pain she suffered as a result of her injuries.
4. The Claimant sought additional treatment with Dr. Joseph Abate in 1997 due to her continued symptoms. Dr. Abate performed right shoulder surgery on the Claimant on February 9, 1998 and repaired the damage to her shoulder.
5. The Claimant recovered from this surgery but has continued to have persistent right shoulder symptoms from her December 1989 work related injury. The Claimant was referred to Dr. Kenneth Ciongoli, a neurologist, for her ongoing symptoms. Dr. Ciongoli began prescribing pain medication, Arthrotek, in 1998 for Claimant's diagnosis of occipital neuralgia related to her December 1989 injury.
6. Dr. Ciongoli continued to be the Claimant's neurologist and prescribed pain medications for her until he was no longer able to practice in 2007. The medication prescribed changed over time. Dr. Ciongoli switched the Arthrotek medication to Celebrex in 1999 but it was prescribed for the same condition. He also later added Vioxx. In 2004, there was another attempt to improve the Claimant's condition by changing medications by changing Vioxx to Bextra and then Celebrex, again. Tramadol was also added.
7. The record is clear that the pain medications may have changed somewhat but are all in a class of non-steroid anti-inflammatory medications for pain. They began being prescribed, at least in large part, for the Claimant's neck and upper extremity pain which were caused or aggravated by her fall at UVM. She has been on the medications in some form since they were originally prescribed and still suffers from neck and upper extremity pain. The medications are needed for Claimant's 1989 work related injuries.

8. Through out the six year history that Dr. Ciongoli had been treating the Claimant; the insurer always paid her medical expenses for her 1989 injury.
9. However, in 2005, the Claimant was scheduled by the third party insurer for an evaluation with Dr. George White. One of the questions he was asked to address was whether or not the Claimant had ongoing treatment or prescriptions related to her injuries while at UVM. Dr. White mentioned in his evaluation report that the Claimant was taking Tramadol, Celebrex, and Tylenol, glucosamine and chondriotin and topical analgesic creams. He stated that the current medications were not “unreasonable.” He determined how long she would need the medications was not determinable but that she would probably need them for the foreseeable future. He stated that the medications were palliative care in part for the Claimant’s persistent neck and upper extremity symptoms.
10. The insurer then filed a Form 27 using Dr. White’s evaluation report as support that medications for the Claimant’s lower back pain should be terminated as they were unrelated to her 1989 injury. The insurer also wrote to Dr. Ciongoli and requested that he specify what body parts the pain medications he prescribed were for. He responded that her medications were for diffuse degenerative osteoarthritis as well as low back pain. He also stated that she the specific problem of facet pain with an eccentric disc bulge and bilateral neural foraminal narrowing at L4-S1. The Department approved the Form 27 which specifically stated “stop Medical benefits for her low back pain based on Dr. White’s report.” The Form 27 was approved September 7, 2005. However, it appears that Dr. Ciongoli referred to the Claimant’s back separately from her other pain related to her 1989 injury.
11. The Claimant’s Tramadol and Celebrex were paid for after the effective date of the Form 27’s approval by the Department more than once. A stipulation was reached that the insurer had paid for the Claimant’s medications on 9/26/05, 11/9/05 and 12/8/05. They did not pay for the medications beginning in March of 2006. It was at that time that the Claimant called the adjuster. In January, 2006, Cannon Cochran Management Services took over from Gallagher Bassett as UVM’s third party claims administrator.
12. Dr. White was deposed on June 29, 2007 regarding the reasonableness of the prescriptions Tramadol and Celebrex and found them reasonable and also found they addressed the pain in the upper body related to the Claimant’s 1989 accident.
13. Palliative medical care has been found compensable under the Vermont Workers’ Compensation Act. *Smith v. Whetstone Log Homes*, Op. No. 70-96 WC, November 25, 1996.

14. There are no medical records to show that there has been any improvement to the Claimant's right shoulder condition that causes her pain to cease and alleviate the need for her medications. The Claimant credibly testified that she still has pain related to the 1989 compensable work incident.
15. The Costs and Attorney's Fees requested were \$3,592.94 for costs and 170.20 hours of attorney fees.

CONCLUSIONS OF LAW:

1. Claimant has the burden to show by sufficient credible evidence that her injury to her left shoulder was work-related or occurred during the course of her employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). I find the Claimant has been inconsistent in her statements regarding this injury.
2. The Claimant had multiple opportunities to inform her physicians that her left shoulder injury was work related. She did not claim a work injury or inform her doctors that her injury was work related from the time of her alleged injury on or about December 3, 2005 up and until early April, 2006, after her surgery.
3. Although the Claimant testified that she understood that Mary Reilly was the person to whom she should report a work injury; Ms. Reilly does not believe that the Claimant approached her to find a workers' compensation intake form until late March, 2006 at the earliest.
4. Contrary to the Claimant's testimony, both PA Cowey and the Claimant's assistant both recall the Claimant complaining about her shoulder after picking up groceries on or around December 20, 2005. Claimant denies ever stating she hurt herself picking up groceries.
5. The Claimant has stated that she injured her shoulder at work "while transporting presentation materials in vinyl bags with over the shoulder carrying straps and while pulling a large rolling case containing a 8' x 6' metal framed display and materials for a presentation for an annual event..."; "having a sudden pain in my left shoulder while pushing a large case into the seat of her husband's truck" and also while attempting to push a case into the back seat of her own car. These statements are inconsistent and not at all like the very detailed and specific description the Claimant gave of her 1989 injury.
6. 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 reasonable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

7. As with other unwitnessed claims, this case highlights the difficulties the claimant has sustaining her burden of proof when a written report of an injury is not filed for months following the alleged incident. In these types of cases, the trier of fact must scrutinize and weigh the credibility of witnesses, explore inconsistencies and look at all motivating factors. *Fanger v. Village Inn*, Op. No. 5-95 WC (1995).
8. In such cases, the Department considers the following questions: 1) Are there medical records contemporaneously with the claimant's injury and/or a credible history of continuing complaints; 2) What is the worker's knowledge of the Workers' Compensation system; 3) Is the Claimant's work performance consistent with her complaints; 4) Is there persuasive medical evidence supporting causation? *Hobbs v. Department of Economic Development*, Op. No. 25-04 WC (2004).
9. In this case, Dr. Abate must rely totally on the description of injury which was given by the Claimant as he stated the injury could have been caused by ordinary wear and tear or a trauma. He is aware the Claimant had cerebral palsy and her left side was weakened. He also was aware that she had arthritis and degenerative problems with her upper extremity as well as having suffered from an injury in 1989. His office notes and physician assistant's notes do not correspond to the injury described by the Claimant in their original form (prior to the Claimant requesting they be changed). Thus, there is no physician's note that verifies the Claimant's version of a work related injury.
10. The second prong of inquiry focuses on the Claimant's knowledge of the workers' compensation system. Unlike other cases, the Claimant in this case had multiple workers' compensation injuries and had previously filed reports of injury. She had an understanding of how the system operated. And yet, she still failed to indicate to the medical profession that this injury was work related until months after the alleged incident occurred. (Compare *Fanger v. Village Inn* with *Hobbs v. Department of Economic Development, Id.* and *Sequin v. Ethan Allen*, Op. No. 28-02 WC (Dec. 17, 2002).)
11. The third prong of the inquiry questions whether the Claimant's work performance is consistent with her complaints. The Claimant did inform another worker, Dawn Densmore that she had hurt herself in some way on the date she claims injury. She was at a work event. However, she lost no time from work and sought no medical care until over a month later. There was also a possible intervening event of lifting groceries which has been reported by some witnesses but denied by the Claimant. The Claimant does have prior injuries and a history that is consistent with her having difficulties doing the type of lifting required for her job. The materials that she transports for the TASC events are numerous and heavy. Dr. Abate simply could not tell after surgery if the injury was from trauma or not.

12. The fourth prong, a finding of persuasive medical opinion is absent. Dr. Abate could not provide a persuasive statement of causation in his deposition testimony.
13. There is no doubt in the mind of the trier of fact that the Claimant believes her injury occurred from a work event. Although her statements were sometimes inconsistent, the trier of fact was not persuaded that the Claimant was willfully making misstatements of material facts. However, the Claimant has failed to meet her burden of proof regarding her claim that she suffered a work related injury on December 3, 2005. It is found more likely that the Claimant was bothered by carrying the cases at the 2005 TASC event but not enough to seek medical help. This is found most likely to have been caused by her lifetime of cerebral palsy which weakened her left side, her arthritis and also exacerbated by lifting groceries, driving and other requirements of living. Thus, this injury is not found compensable.
14. The drugs, Tramadol and Celebrex are found reasonable and necessary as Dr. White stated in his IME evaluation and his deposition. They may have been helpful to the Claimant for non-work related health problems but were also necessary for the continued pain from her 1989 injuries. The medications are compensable and reimbursement should occur from the date payment was stopped and continue until such time as they are no longer found necessary and reasonable for the Claimant's 1989 compensable injury.

ORDER:

The Claim should be adjusted as follows;

1. The Claimant's medications for pain are found compensable and the insurer should pay for them and reimburse the Claimant for the medications from the time they stopped payment forward and continue to pay for pain medications which address the Claimant's upper extremities related to her 1989 injury.
2. The 2005 incident is found to be a non-work related injury and therefore, not compensable.
3. Claimant's attorney prevailed on half of the issues presented. Therefore, Claimant's attorney is awarded half the costs and fees requested on 1,796.47 and 85.10 hours of attorney time at 90.00 per hour.

DATED at Montpelier, Vermont this 2nd day of July 2008.

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.