

C. D. v. Grand Union

(August 4, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

C. D.

Opinion No. 34-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Grand Union

For: Thomas W. Douse  
Acting Commissioner

State File No. P-17052

Hearing held in Montpelier on February 28, 2006

Record closed on May 15, 2006

**APPEARANCES:**

Patrick Biggam, Esq., for Claimant

David R. McLean, Esq., for Defendant

**ISSUES:**

1. Whether Claimant's cervical injury is work-related.
2. If so, whether Claimant is permanently and totally disabled as a result of her work-related injury.

**EXHIBITS:**

Joint:

1. Medical Records
2. Functional Capacity Evaluation (FCE) supplemental records

Claimant:

1. First Report of Injury
2. Statement of Claim
3. December 17, 2002 Correspondence from Paul A. LaPadula, Workers' Compensation Specialist
4. Attorney-Client Fee Agreement

Defendant:

1. Dr. Bucksbaum independent medical examination (IME) report
2. Dr. White IME report and record review
3. FCE Report by Erica Galipeau of Injury and Health Management Solutions
4. Vocational Assessment Report of John May, MA CRC
5. Social Security Disability Decision
6. Settlement Statement from November 2000 Motor Vehicle Accident
7. January 31, 2003 Correspondence from Dr. Daniel Robbins to Attorney Johnson
8. December 3, 2001 Treatment Note from Upstate Neurology Consultants
9. March 18, 2002 Correspondence from Amy Rothman, MS CRC to Laura Collins
10. June 13, 2001 VR Progress Report
11. July 16, 2001 VR Progress Report

**FINDINGS OF FACT:**

1. Claimant, a fifty-two year old woman, worked in the Deli Department of Grand Union in Bennington, Vermont for over twenty years until February of 2000.
2. At all relevant times, Claimant was an employee and Grand Union her employer, within the meaning of the Vermont Workers' Compensation Act.
3. Claimant's work duties as a Deli Manager at Grand Union included lifting, stocking, and slicing deli products.
4. Claimant injured her neck while lifting sheetrock at work in 1983. Thereafter, she received periodic neck adjustments from a chiropractor. She also participated in physical therapy.
5. In 1995, an MRI revealed degenerative arthritis and associated degenerative disc disease with slight bulging at C5-6.
6. On July 7, 1995, Dr. Robert A. Micley treated Claimant with a cervical epidural injection.
7. Throughout this time, Claimant did not miss work due to her neck or shoulder pain.
8. At some point between February 1999 and November 1999, a new meat slicer arrived at the Deli Department. Claimant used it on a regular basis. The new meat slicer weighed approximately 100 pounds.
9. On November 17, 1999, Claimant visited with Dr. Methany at Orthopaedic and Hand Surgery. She complained of right shoulder pain and discomfort in the left shoulder.
10. In February 12, 2000, while working in the Deli Department, Claimant experienced increasing pain in her neck and right shoulder when using the new meat slicer.

11. Claimant has not worked since February 21, 2000.
12. On that same day, she sought treatment from Dr. Daniel Robbins at Orthopaedic and Hand Surgery. Dr Robbins noted that Claimant “has had a flare-up of the right arm and right neck associated with using a meat slicer at work.” He recommended an MRI scan.
13. The insurance carrier at risk, Continental Casualty Company, filed a First Report of Injury (Form 1) on February 21, 2000. The injury is described as “possible tendonitis in the neck and right arm and shoulder due to repetitive motion from using the meat slicer.”
14. In March of 2000, an MRI revealed a right-sided disk herniation of C5-6 with central C4-5 bulge and a high intensity zone (HIZ). Dr. Robbins recommended surgery.
15. On March 15, 2000, Dr. Robbins performed anterior cervical fusion surgery of C4-C6.
16. A month later, Claimant continued to experience numbness and pain in her right shoulder.
17. An MRI showed mild tendinosis with suggestive calcific bursitis on May 2, 2000. Dr. Methany treated Claimant with injections.
18. A June 2000 note indicated that Claimant had begun to suffer from neck and shoulder pain on the left side in addition to the right side. Claimant was diagnosed with bilateral calcific tendinosis. Injections were providing minimal pain relief.
19. On August 11 2000, Dr. Methany performed a right shoulder arthroscopy, arthroscopic subacromial bursectomy, debridement of rotator cuff calcific deposits, and a distal clavicle excision.
20. A month later, Claimant was diagnosed with impingement syndrome of the left shoulder. She did not respond to conservative care.
21. On November 17, 2000, Dr. Methany performed a left shoulder arthroscopy, arthroscopic debridement of a labral tear, arthroscopic subacromial decompression and debridement of calcific deposits. His postoperative diagnosis was left shoulder calcific tendonitis and inferior labral tear.
22. Claimant was in a car accident while returning home from the arthroscopy. She struck her head against the windshield. Claimant was transported to the hospital where she complained of a global headache. She denied any neck or shoulder pain.
23. On March 22, 2001, Claimant sought treatment from Dr. Apicella, a pain management specialist. She complained of left scapular pain that radiated down the back of the arm, then into the hand, and caused tingling in her fingers. She also reported deep aching pain at the neck base.

24. Dr. Apicella suspected degenerative disc disease of posterior joint syndrome at her neck. He later performed a medial branch block and a cervical epidural.
25. In October of 2001, Claimant underwent a functional capacity evaluation (FCE) by Dr. Matheny. He concluded that she had a sedentary-light work capacity. He also opined that Claimant had not reached medical end result.
26. On July 17, 2001, Claimant visited with Dr. Calder of Upstate Neurology Consultants for pain management. He injected cortisone into her neck and shoulder area.
27. Dr. Calder, in December of 2001, was unable to recommend that she return to work given her ongoing neck pain.
28. In January of 2002, Dr. Robbins noted that Claimant suffered from neck and shoulder pain on a regular basis. He could not identify a neurological cause, so he recommended injections. Claimant remained unresponsive to most forms of treatment.
29. On April 8, 2002, Dr. Mark Bucksbaum conducted an independent medical examination (IME) at the carrier's request. Dr. Bucksbaum could not say whether or not the neck and shoulder conditions were causally related to her employment at Grand Union. He did opine that Claimant had a sedentary-light work capacity with some limitations. In addition, he concluded that she had reached medical end result.
30. The Department received a Form 21 Agreement for Temporary Total Disability Compensation on August 27, 2002.
31. In a December 4, 2002 letter, Dr. Bucksbaum further opined that there was no evidence to support the idea that Claimant's right shoulder injury aggravated her pre-existing neck and shoulder conditions.
32. Over the next year, Claimant continued to accept injections.
33. In May of 2003, Claimant underwent a left-side approach with an anterior discectomy and C6-C7 with fusion. Dr. Robbins's post-operative diagnosis was C6-C7 disc herniation and degeneration below previous C4-C6 fusion.
34. A few months after the surgery, Claimant's pain returned. She suffered from left shoulder discomfort and persistent neck pain.
35. George Fontinopolous, vocational rehabilitation counselor, testified that he had closed Claimant's case in 2003. He stated that she might have a light-sedentary work capacity. However, she was incapable of sustained, gainful employment given the severity of her pain, the multiple surgeries at her age, and the labor market in her area.
36. On January 22, 2004, Claimant underwent a left shoulder clavicle excision by Dr. Matheny.
37. Claimant continued to have chronic neck pain and headaches throughout 2004.

38. On October 13, 2004, Dr. George White performed an IME on Claimant. He opined that Claimant was at a medical end result for her left shoulder.
39. Dr. Robbins referred Claimant to Dr. James Rathmell to consider a spinal cord implant. Claimant visited with Dr. Rathmell on March 7, 2005. His diagnosis was persistent left neck pain and shoulder pain with multilevel degenerative disc disease. He recommended a temporary implantation of a spinal cord stimulator.
40. On June 27, 2005, Erica M. Galipeau performed an FCE. Ms. Galipeau opined that Claimant is capable of a light-sedentary work capacity at least part-time. Ms. Galipeau testified that Claimant might be more capable given the variable levels of effort, such as her subjective reports of pain.
41. Dr. Rathmell implanted a temporary spinal cord stimulator on August 9, 2005. Given the success of the temporary stimulator, Claimant opted to have a permanent device installed on August 30, 2005. A week after surgery, Claimant reported that it was not working as well.
42. On November 22, 2005, Claimant underwent another surgery to replace the permanent stimulator. Subsequently, Claimant reported no improvement.
43. John May, vocational rehabilitation counselor, assessed Claimant's employability. In a December 9, 2005 letter, he concluded that Claimant was capable of performing regular, gainful employment based on her work capacity and the availability of sedentary jobs in the labor market.
44. Subjectively, Claimant experiences chronic pain in the neck and in the right and left shoulders. She also suffers from photophobia (light sensitivity) with headaches.

#### Medical Opinions

45. Dr. Daniel Robbins, a board certified orthopaedic surgeon and Claimant's treating physician of ten years, opined that Claimant's cervical and right shoulder conditions were caused by her work at Grand Union. Dr. Robbins testified that Claimant has a preexisting degenerative disc disease. The repetitive slicing aggravated her disease and caused a new annulus tear in her right shoulder. An MRI in March revealed findings of a high intensity zone (HIZ). This led him to conclude that the right shoulder injury was recent given the chemical correlation of the HIZ.
46. Dr. Robbins also opined that the neck injury was work-related. Claimant, while operating the new deli slicer, flexed and twisted in a way that became a causative mechanism for disc herniation.

47. Taking the chronic pain and her subsequent surgeries into consideration, Dr. Robbins concluded that Claimant could not function in a light-sedentary work capacity. He assessed Claimant's impairment at 28 percent of the whole person for the cervical spine. In sum, given Claimant's increased pain from the new meat slicer, the repetitive nature of her work and the new tear, Dr. Robbins opined that Claimant's neck and right shoulder conditions were related to her employment. Dr. Robbins, however, could not opine as to whether or not Claimant's left shoulder injury was work related.
48. Dr. Mark Bucksbaum, occupational specialist, performed two independent medical examinations on Claimant. He testified that the cervical spine and left shoulder injuries were not causally related to her employment. He conceded that slicing meat exacerbated her right shoulder injury. In contrast, he did not believe the repetitive motions were sufficient to cause her neck injury because there was no rotation or mechanical forces placed on the neck. Instead, Claimant's neck condition was a result of the natural progression of her underlying condition, not from slicing meat. He assessed Claimant's impairment at 28 percent of the whole person for the cervical spine. Dr. Bucksbaum opined, within a reasonable degree of medical certainty, that Claimant's neck and left shoulder injuries were not causally linked to her occupation.
49. Dr. George White, occupational specialist, also performed an independent medical examination on Claimant. He opined that there is no casual connection between her left shoulder injury and her work injury. Claimant instead suffers from calcific tendonitis. Unlike Dr. Robbins, Dr. White concluded that the HIZ is not a marker for trauma. Dr. White also testified there is no causal relationship between the neck condition and her previous employment. The meat slicer did contribute to the right shoulder injury because there was insufficient force to cause neck trauma. Furthermore, Dr. White opined that the left shoulder injury was caused by Claimant's degenerative condition, not by her occupation at Grand Union. According to Dr. White, Claimant's neck and left shoulder injuries were not work-related.

## **CONCLUSIONS OF LAW:**

1. In workers' compensation cases, where the causal connection between an accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
2. While a reasonable degree of medical certainty might connote some marginally higher standard of proof than a mere preponderance, the modifier "reasonable" returns the standard to the level of preponderance [more likely than not]. *Wheeler v. Central Vermont Medical Center*, 155 Vt. 85, 94 (1990).
3. In this case, however, there are several conflicting medical opinions that could satisfy that standard of proof.

4. Therefore, the ultimate decision depends on a choice between the medical expert evidence. In order to address divergent medical opinions, the Department considers the following criteria: 1) The nature of treatment and length of time there has been a patient-provider relationship; 2) whether all accident, medical, and treatment records were made available to and considered by the examining physician; 3) whether the report or evaluation at issue is clear and thorough and includes objective support for the opinions expressed; 4) the comprehensiveness of the examination; and 5) the qualifications of the experts, including professional training and experience. *Wallace v. Velan Valve Corp.*, Opinion No. 51-02WC (2002); *Yee v. IBM*, Opinion No. 38-00WC (2000); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Martin v. Bennington Potters*, Opinion No. 42-97WC (1997); *see also, Morrow v. VT Financial Services*, Opinion No. 50-98WC (1998).
5. It is well established that a work-related aggravation of a preexisting condition is compensable. *Jackson v. True Temper*, 151 Vt. 592 (1989). “Aggravation” means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. This has been explained as “a destabilization of a condition which has become stable, although not necessarily fully symptom free.” *Cote v. Vermont Transit*, Opinion No. 33-96 WC (1996).
6. The Workers’ Compensation Act, having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983).

#### Causation

7. The defense accepts Claimant’s right shoulder injury as compensable. Claimant withdrew her left shoulder claim. Thus, the only issue before us is whether or not Claimant’s neck injury is causally related to her employment at Grand Union.
8. When all the evidence is considered as a whole, the more probable hypothesis is that Claimant’s neck injury is work-related and compensable.
9. When analyzing conflicting medical opinions, I begin first with the length of time the physician has provided care to the claimant. Dr. Robbins has provided care to Claimant for ten years and he has performed two cervical fusions on Claimant. Both Dr. Bucksbaum and Dr. White have conducted an independent medical examination on Claimant. Second, all records were available and considered by each physician. Third, all opinions have objective support. Fourth, the comprehensiveness of the examination inherently weighs in favor of Dr. Robbins because he has evaluated Claimant over time, with opportunities to judge her reactions to treatment. Finally, Dr. Robbins, an orthopaedic surgeon, is more qualified to render an opinion than Dr. Bucksbaum, an occupational specialist, and Dr. White, also an occupational specialist. Accordingly, the first criterion, the fourth criterion, and the fifth criterion weigh in Claimant’s favor.

10. Further, I accept Claimant's testimony that she repeatedly flexed and twisted her neck while operating the new meat slicer. Although contrary to Dr. Bucksbaum's and Dr. White's opinion, it is a logical conclusion that these repetitious movements aggravated her underlying neck condition.
11. Based on the expert medical evidence provided and a balancing of the above criteria, it is more likely than not that the degenerative disc disease in her neck was aggravated by her work given the repetitive nature of operating the new deli slicer, the length of her employment, and Dr. Robbin's supporting medical opinion. I conclude that Claimant's neck injury is work-related and is, therefore, compensable.

#### Permanent Total Disability

12. Claimant argues that she is permanently and totally disabled pursuant to 21 V.S.A. § 644(a). The injury in this case predates the July 2000 statutory amendments. Accordingly, Claimant is entitled to permanent total disability if her injury is within the enumerated list articulated in 21 V.S.A. § 644(a), or if, without considering individual employability factors such as age and experience, the medical evidence indicates that she is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.* 148 Vt. 415 (1987). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment." *G.G. v. Spates Construction*, Opinion No. 67-05WC (2005).
13. Claimant's injury does not fall within the enumerated list of § 644(a). Thus, the question is whether Claimant has no reasonable prospect of regular, gainful employment. Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages. See *Rider v. Orange East Supervisory Union, et. al.* Opinion No. 14-03WC (2003).
14. The balance tilts in favor of the defense on this issue. Even though Dr. Robbins, Claimant's treating physician, opined that Claimant's pain prevents her from sedentary part-time work, I find that her demonstrated abilities and the objective FCE results prove otherwise. Claimant is capable of performing significant activities that could be utilized for work, i.e. she is able to cook, shop, drive short-distances, and use a headset phone. Furthermore, the FCE performed by Erica Galipeau and evaluation by John May support the defense position that she is capable of light sedentary part-time work. The medical opinion of Dr. White also supports Claimant's sedentary part-time work abilities. Despite Claimant's pain, I am convinced that she is capable of gainful employment.
15. Taking the combined opinions and evidence of Claimant's abilities into consideration, I find that Claimant has not proven that she is incapable of regular, gainful employment. Hence, she is not entitled to permanent total disability benefits.
16. Instead, Claimant is awarded permanent partial disability benefits. Both Dr. Robbins and Dr. Bucksbaum assessed Claimant's impairment at 28 percent whole person for the cervical spine. I accept the 28 percent rating.



17. On a final note, the defense questioned whether or not Claimant's claim survived the statute of limitations. However, the defense made no supporting argument for this challenge. Mere allegations are insufficient. Consequently, we dismiss the statute of limitations issue.

Attorney's Fees

18. Under 21 V.S.A. § 678(a) and Workers' Compensation Rule 10.0000, a prevailing claimant is entitled to a discretionary award of reasonable attorney's fees and mandatory award of necessary costs. Thus, Claimant, because she prevailed on the highly contested issue of causation, is awarded the fees of 20 percent of the value of the award (not to exceed \$9,000) plus costs of \$4,199.46.

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law,

1. Defendant is hereby ORDERED to pay Claimant's reasonable and necessary medical expenses related to the cervical injury.
2. Claimant's request for permanent total disability benefits is hereby DENIED.
3. Claimant's request for permanent partial disability benefits based on a 28 percent impairment rating are hereby GRANTED.
4. Claimant's request for attorney's fees of 20 percent of the value of the award plus costs of \$4,199.46 is hereby GRANTED.

Dated at Montpelier, Vermont this 4<sup>th</sup> day of August 2006

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Thomas W. Douse  
Acting 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.