STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-05696
	)	
Dung Nguyen	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Bestfoods Baking Company	)	Commissioner
	)	
	)	Opinion No. 41-02WC

Hearing held in Montpelier, April 22, 2002
Record closed on May 23, 2002

APPEARANCES:

Charles L. Powell, Esq. for the Claimant
Andrew W. Goodger, Esq. for the Defendant

ISSUES:

1. Is the Claimant's upper extremity injury causally related to his July 24, 2000 work-related injury?

2. Is the Claimant entitled to temporary total disability benefits?

3. Is the Claimant entitled to permanent partial disability benefits?

EXHIBITS:

Claimant's Exhibit 1:	Excerpt from employment records
Claimant's Exhibit 2:	Job search logs
Claimant's Exhibit 3:	Medical Records
Claimant's Exhibit 4:	Curriculum vitae of Mark Bucksbaum, M.D.
Defendant's Exhibit A:	Transcript of deposition of James Mogan, M.D. 10/25/01
Defendant's Exhibit B:	Curriculum vitae of John Johansson, D.O.

FINDINGS OF FACT:

1. Claimant is a native of Vietnam, who testified at the hearing through a translator, Vuong Le, from the Vermont Refugee Resettlement Program.

2. Since his arrival in the United States in 1990, Claimant worked for several employers, including University of Vermont, the Saigon Restaurant and the Defendant in this case, Bouyea Fassetts (Best Foods), where he started working in 1997. Over the course of the next few years, Claimant was promoted and received pay increases three or four times.

3. In July of 2000 Claimant's job was at a machine designed to flatten dough. In the process, he and another employee worked together to put a 50-pound board in place. On July 24, 2000, one side of the board fell onto his left index finger. He felt dizzy; his hand was bleeding, was painful and he was sweating.

4. Claimant's testimony that the bar restrained his hand and a traction force was necessary to extricate it was uncorroborated and inconsistent with a blow to the tip of a finger.

5. Claimant was then taken to the employer's designated care facility, the HealthSouth Medical Clinic in South Burlington, where Dr. Tim Fitzgerald saw him, diagnosed a finger crush injury/abrasion and prescribed medications. With regard to work, Dr. Fitzgerald recommended a splint and restricted him to minimal use of his affected hand.

6. When he saw the Claimant again three days later, Dr. Fitzgerald kept the original restrictions in place.

7. On August 2, 2000 Dr. Fitzgerald determined that the finger was not healing. He prescribed more medications and referred Claimant to Dr. Mogan, a hand specialist.

8. At an August 7, 2000 office visit, Dr. Mogan also diagnosed a crush injury and recommended therapy for desensitization and range of motion. The next day a physical therapist evaluated the Claimant, noting that he was unable to tolerate a gripping exercise using putty.

9. On August 15, 2000, a Semmes Wenstein Monofilament Sensory Chart revealed a sensory loss. The therapist documented Claimant's report of shoulder discomfort. That complaint was repeated at subsequent visits.

10. Claimant's hand strength and range of motion improved, although Claimant's discomfort continued. He continued to work full time, full duty.

11. On September 11, 2000 Dr. Mogan noted that Claimant's fingertip was about the same and that he had a mildly positive impingement test of the shoulder, but good range of motion. Dr. Mogan wrote: "He has continued to work right along. I think it makes sense to take him out of work for a few weeks and place him on Vioxx and get him into a shoulder therapy program." Claimant was given a note from Dr. Mogan's office that specifically stated "No work until 9/25/00…" The out of work slip was for both shoulder and finger.

12. Claimant took the out of work note to work where he was told to wait in the break room where he remained for the rest of his shift.

13. On September 12, 2000 the employer's Plant Manager, Drew Hoban and Albany Human Resource representative Dan Zonka, spoke to Elizabeth Kerr-Benard, R.N., an experienced nurse in Dr. Mogan's office. The men informed Ms. Kerr-Benard that they were not recognizing Dr. Mogan's September 11, 2000 out of work note and that they were attempting to provide limited duty to the Claimant.

14. Claimant was at work on the 12th where he was kept in the break room another day.

15. A limited duty form was faxed from the employer to Dr. Mogan's office on the 13th. After consulting with Dr. Mogan, Ms. Kerr-Bernard completed the faxed form on which she wrote, "no lifting with left arm, no use of left arm for work... Must attend physical therapy. Absence from work 9/11 and 9/12 supported… Totally disabled from 9/11-12… partially disabled as of 9/13 per restrictions."

16. Claimant went to pick up the form on the 13th. After her observation of the Claimant and a conversation with him, she reported her belief that Claimant was favoring his right arm, not the injured left hand, in what she assessed was a point of confusion with him and clear evidence that he was malingering. She then changed the form to reflect that it was his right arm that was affected and gave it to the Claimant to take to work. After Claimant left the office, Ms. Kerr-Benard phoned the employer to report her suspicion that Claimant was malingering. Her note for the day reflects that belief.

17. On the 14th, Claimant returned to Dr. Mogan's office to ask why "right" rather than "left" had been identified as the affected side on the limited duty form. Ms. Kerr-Benard changed the form again –from "right" to left."

18. The employer no longer offered any light duty work to the Claimant.

19. After a physical therapy session on the 15th, the therapist noted that physical demands at work included "lifting racks, prolonged standing, use arms a lot." Goals identified were to 1) get rid of shoulder pain and 2) increase function of left upper extremity. Physical findings were consistent with complaints.

20. Physical therapy continued. On September 20th, the therapist wrote that Claimant was to go back to work the following week, although he was still complaining of intermittent tingling and numbness in his left arm.

21. On September 25, 2000 Dr. Mogan recommended a Functional Capacity Evaluation (FCE) and that Claimant remain out of work until it was done.

22. The FCE resulted in a determination that Claimant was capable of performing at the light level. It also suggested that the Claimant limited his participation in the evaluation. For example, he performed simple portions of the examination in a particularly slow manner inconsistent with the claimed injury. The final recommendation was for a 4 to 6 week trial of work conditioning and work stimulation tailored with the goal of return to work full duty. Dr. Mogan deferred to the recommendation in the FCE.

23. The Travelers, employer's workers' compensation insurer, did not accept the recommendation for a trial of work conditioning and work stimulation.

24. A Community Health Center note of December 5, 2000 stated that Claimant was temporarily completely disabled and unable to perform normal duties of his regular work because of persistent pain in his left index finger.

25. Travelers arranged for Dr. Davignon to perform an independent medical examination with the assistance of an interpreter. At that examination on December 19, 2000, Claimant told Dr. Davignon that he did not have shoulder complaints at the time of his original finger injury. But he also said that his job involved twisting, repetitive work and overhead work, which Dr. Davignon concluded could have caused his shoulder problems. The examination revealed a negative impingement test of the shoulder, full range of motion of the spine, intact motor testing of the left arm and decreased range of motion in the finger. Dr. Davignon recommended a return to work with specific restrictions on the use of the left hand, arm and shoulder.

26. On March 29, 2001, Dr. Rathmell concluded that Claimant could return to work, but also suggested that the Claimant "may be able to find a line of work where he can use his left extremity in a limited capacity and return to gainful employment."

27. In July 2001, Dr. Bucksbaum examined the Claimant and tested for motor and sensory nerve damage. The motor portion of the examination was normal, although on palpation Claimant noted pain along the nerve. Therefore, Dr. Bucksbaum confirmed a sensory nerve loss extending along the radial nerve from the first and second fingers to the shoulder, and recommended that Claimant stay at the light level until treatment is completed.

28. In Dr. Bucksbaum's opinion, two mechanisms combined to injure the Claimant. First was the direct crush injury to the finger; second was the stress and stretch of the nerve when the Claimant jerked in an effort to extricate his finger. Crucial to Dr. Bucksbaum's opinion are the assumptions that Claimant's arm was trapped under the board at the time of the original accident and that Claimant had shoulder pain from the outset. He agreed that a delay in the onset of symptoms would be inconsistent with a stretch injury to the radial nerve.

29. Dr. Bucksbaum treated the claimant from August 2001 through February 4, 2002 when he found him to be at medical end with a 3% whole person impairment. He continues to treat Claimant for palliative care.

30. Also in August 2001, Travelers sent the Claimant for a second medical evaluation, this time with Dr. Johansson who reviewed records and examined the Claimant. Dr. Johansson noted that Claimant reacted with pain to even light touch and that his physical findings were essentially normal. He concluded that Claimant's complaints far outweigh the "paucity of objective findings."

31. Claimant maintained job search logs between January 18, 2001 and September 4, 2001.

32. With the assistance of Melanie Cleveland, Vocational Rehabilitation Counselor for the State of Vermont, Claimant found work between mid-September and mid-December 2001 when the company had a lay-off. Because light duty work for a non-English speaking, uneducated worker in Burlington has been hard to find, Ms. Cleveland recommended that Claimant participated in English as second language courses.

33. Claimant has shoulder pain, but there is nothing intrinsically wrong with his shoulder.

34. Claimant is willing to do light duty work, but has been unable to find it.

35. Dr. Mogan, Dr. Johansson and Ms. Kerr-Bernard believe that the claimant has been malingering, an opinion based largely on Ms. Kerr-Bernard's conviction and the FCE.

36. Claimant submitted evidence that his attorney worked 77.7 hours on this claim and incurred $2,743.87 in expenses.

DISCUSSION:

1. Based on Dr. Bucksbaum's opinion that Claimant's July 2000 finger injury caused damage to the sensory portion of the median nerve and resultant shoulder and arm pain that disabled the Claimant and resulted in a 3% whole person impairment, Claimant seeks temporary disability benefits from September 14, 2001 until February 4, 2002, permanency benefits based on 3% whole person impairment, medical benefits and attorney fees and costs.

2. Defendant argues that Claimant did not suffer a work-related arm injury. The finger injury itself was relatively minor--x-rays revealed no fracture and claimant returned to work the day of the injury. He failed to report any shoulder symptoms until a month after the finger injury. Furthermore, experts opined that Claimant is malingering or magnifying his symptoms and because Claimant dislikes the employer, he is motivated to bring a false claim. What's more, defendant contends that Ms. Kerr-Benard in Dr. Mogan's office would have no reason to be less than objective. Yet, it cannot be ignored that Ms Benard had a conversation with the employer who revealed a refusal to accept Dr. Mogan's September 11th out of work note. Therefore, Ms. Benard had knowledge of that refusal when she observed the Claimant on the 13th and made the unusual call to the employer. That call alone suggests that she aligned her loyalty with the employer, not with the patient in the care of her office.

3. Language and cultural differences between the Claimant and his employer and care providers suggest the possibility that Ms. Kerr-Benard misunderstood the Claimant and that he misunderstood her when they spoke in Dr. Mogan's waiting room on the 13th.

4. More objective criteria, therefore, must be determinative of the disputed issues. The objective facts show that Claimant did not have shoulder pain the day he hurt his finger, an injury that was minor and not disabling. He continued to work for a month and a half after the finger injury. When he first saw Dr. Mogan in early August 2000 he did not complain of shoulder or arm pain. With a single exception, based solely on a report of pain on palpation, all examinations of the Claimant's arm and shoulder have been normal in strength and sensation. Therefore, it is not likely that the Claimant injured the sensory portion of the median nerve at the time of the July finger injury, as he alleges. Consequently, his shoulder and arm symptoms cannot now be attributed to that injury.

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Although Claimant has proven that he suffered a finger injury, he has not proven that it was disabling. Therefore, he is not entitled to temporary total disability benefits.

4. And, without the necessary causal link from the July injury to Claimant's arm and shoulder problems, Claimant is not entitled to permanent partial benefits.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 16th day of October 2002.

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R. Tasha Wallis
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.