

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

Thomas Wilson	)	Opinion No. 54-03WC
	)	
	)	By: George K. Belcher
v.	)	Hearing Officer
	)	
	)	For: Michael S. Bertrand
Sally and James Black and	)	Commissioner
TIG Insurance Co.	)	
		State File No. R-16122

Expedited hearing held in Montpelier, Vermont on October 2, 2003  
Record closed on December 2, 2003

**APPEARANCES:**

Attorney Patricia K. Turley Esq., for the Claimant  
Attorney Jeffrey W. Spencer Esq., for the Employer/Insurer

**ISSUES:**

1. Is the Claimant’s cervical condition, surgery of late 2002, and follow-up care related to the original fall, which occurred while he was employed on December 21, 2000?
2. If the cervical condition is related to the fall, is the Claimant at medical end result, and if so, when was the medical end result reached and what permanency is due?
3. Was the termination of benefits by the Employer proper?

**EXHIBITS:**

Joint Exhibits

Joint Exhibit A-V: 22 Prints of X-Rays and MRI images  
Joint Exhibit W: Joint medical exhibit of medical records and reports

Claimant's Exhibits

Claimant's Exhibit X: Curriculum Vitae of John R. Robinson, Jr., M.D.  
Claimant's Exhibit Y: Brigham and Associates, Inc. Referral Form  
Claimant's Exhibit Z: Letter from April Pettengill of April 3, 2003  
Claimant's Affidavit: Affidavit of Patricia Turley, Esq. in Support of Attorney Fees

Defendant's Exhibits

Defendant's Exhibit 1: Curriculum Vitae of William Boucher, M.D.  
Defendant's Exhibit 2: Seven (7) Letters from Attorney Turley to doctors soliciting opinions  
Defendant's Exhibit 3: Group of letters from Attorney Turley to Dr. Robinson

**STIPULATED FACTS:**

1. On December 21, 2000, Claimant was employed by Sally and James Black, d/b/a Black Ink Property Management.
2. On December 21, 2000, Sally and James Black were insured by TIG Insurance Company (TIG) for Workers Compensation.
3. On December 21, 2000, Claimant fell down a flight of stairs, landing on his elbows and forearms with his arms behind him.
4. On December 21, 2000, Claimant's weekly wage was \$431.00.
5. Claimant has been out of work since late January 2001.
6. Claimant injured his right shoulder in the fall and TIG accepted that injury as compensable in February or March of 2001.
7. Claimant underwent rotator cuff repair surgeries in June 2001 and May 2002, both for full thickness tears in his right shoulder. Medical benefits relating to the right shoulder

8. Cervical MRIs were completed on September 6, 2001.
9. In August 2002, the TIG Nurse sent a note indicating that TIG accepted the neck condition as a compensable injury. The parties stipulated that this note had the effect of acceptance. A Form 27 was filed on January 8, 2003 by TIG to terminate benefits for the neck, which is the subject of this expedited hearing.
10. The Claimant underwent physical therapy for his neck and left shoulder in the summer or fall of 2002. He was referred for an MRI of his neck on October 16, 2002 and then to a neurosurgeon, Dr. Robinson.
11. The Claimant underwent cervical spine surgery on February 26, 2003.
12. Workers Risk Services obtained an independent records-review opinion by Dr. Boucher on January 5, 2003.

**FINDINGS OF FACT:**

1. The Claimant is a 43-year-old male who currently resides in Florida.
2. He joined the U. S. Navy when he was 17 years old and was on active duty from 1984 to 1988. In 1986, while in the Navy, he pulled a muscle in his right shoulder and was on three weeks of light duty before returning to full, unrestricted duty. He was honorably discharged in 1988. He moved to Vermont in 1993 and was working for the employer, James and Sally Black, as a maintenance/repair person at the time of the fall in 2000.
3. Before the fall in December of 2000 he was not restricted in his work. He had full capability for work without any problems with his neck, shoulders or arms. He had had no problems with his right shoulder since the incident in the Navy. He had never had neck or nerve problems before December 2000. He had never sought significant medical treatment for his neck or left shoulder before December of 2000.
4. At the time of the fall on December 21, 2000 the Claimant felt a “pop” in his right shoulder and then felt excruciating pain in his right shoulder.

5. The next morning he was in severe pain. He went to the Veteran's Hospital in White River Junction, VT. He had no health insurance. In order to receive treatment he thought that he had to relate his current problem to the injury in the Navy. In order to relate the injury to his military service, he told the medical staff at the VA that the pain had continued from a prior muscle strain in the Navy. (see Joint Exhibit W, Document 1-3) This was an intentional misrepresentation, which was made for the purpose of securing medical treatment. Later, when the Claimant realized that the fall would justify a Workers Compensation Claim, he related the pain in the shoulder to his fall.
6. In March of 2001, it was determined that the Claimant had torn his rotator cuff in his right shoulder and had ripped certain muscles there. (See Joint Exhibit W, Page 23-24, Dr. Meriam's evaluation of March 27, 2001.) The right shoulder required two surgeries (June 14, 2001 and May 10, 2002) and extensive medical treatment.
7. There is no dispute about the causation or compensability of the right shoulder. Its relevance to this case has to do with whether or not it may have masked another injury.
8. Approximately 2-3 months after the fall, the Claimant reported tingling in his left hand. (See notes of Susan Anderson, PAC, Joint Exhibit W, Page 17). He was seen by a neurologist in Vermont (Dr. Fries) but there was no conclusive diagnosis as to this problem. Dr. Fries ordered an MRI of the cervical spine, which was done on September 6, 2001. That report disclosed a herniation of the C4-5 disc and indentation of the spinal cord at C4-5 and C6-7 (See Joint Exhibit W, Page 70). The Claimant moved to Florida in October of 2001. There he went under the treatment of Dr. Pierre Girard. Dr. Girard is an orthopedic surgeon who did the second surgery on the right shoulder. It appears that he suspected that there might be neurological damage to the Claimant because in July of 2002, the Claimant was complaining of neck pain and headaches. Dr. Girard referred the Claimant to Dr. Robinson in November of 2002 (See page 206 of Joint Exhibit W).
9. Dr. Robinson is a neurosurgeon who practices in Stuart, Florida; he regularly performs brain, spinal and nerve fiber surgery. He is experienced with cervical nerve problems.

10. When Dr. Robinson met with the Claimant in December of 2002, he reviewed the history of the case with the Claimant. His examinations of MRI films of October or November 2002, which had been sent by Dr. Gerrard, showed to Dr. Robinson that the Claimant had a spinal cord injury resulting from herniated discs in his neck. According to his evaluation and notes of December 31, 2002, “[An MRI from November 2002] illustrating severe disc injury at C4-5, C5-6, and C6-7 with dramatic spinal cord injury and cord compression at the C4-5 level ... opposite the very large herniated disc indenting into the spinal cord”. (See page 215 of Joint Exhibit W). Dr. Robinson quickly scheduled the Claimant for surgery. The surgery was done on February 24, 2003. Dr. Robinson performed a spinal fusion of the C-4, C-5, and C-6 vertebrae and he removed matter that was impinging on the spinal cord at the C-4, C-5, and C-6 levels. According to the operative report, the surgeon removed “Combinations of large bulging herniated pieces of disc material and extremely thick osteophytes surrounding the disc material with calcification of the posterior aspect of the disc space.” (See page 253 of the Joint Exhibit W).
11. The surgery was successful in that it stopped the majority of Claimant’s pain and tingling in his left arm and neck. (See page 305 of Joint Exhibit W). The Claimant would have attended physical rehabilitation following the surgery, but the insurer has denied liability for the surgery and the rehabilitation. According to Dr. Robinson, the neck injury is directly related to the fall of December 2000. Dr. Robinson is also of the opinion that the Claimant has not yet reached end medical result following his cervical spinal fusion.
12. The insurer denied liability for the claim in part upon the opinion of Dr. Christopher R. Boucher. Dr. Boucher did a records review of the Claimant’s history and medical evidence and concluded that the Claimant’s spinal condition was degenerative and not the result of the employment accident of December 2000. He concluded this, in part, upon his understanding that the initial MRI did not reveal any acute changes including no disc herniation or fracture. (See Page 224, Joint Exhibit W) (The MRI report of March 2001 did not disclose a disc herniation, but just 6 months later, a second MRI report noted a disc herniation at the C4-5 level. See Joint Exhibit W, Pages 18 and 70). It is the basic conflict in the two medical opinions (of Dr. Boucher and Dr. Robinson), which is at issue in this case.

13. Dr. Boucher is a medical doctor and he has a master's degree in public health. He practiced internal medicine and for the past 17 years he has practiced occupational medicine. Ninety per cent of his practice concerns muscular skeletal injuries. In the past he has taught at Tufts University and University of New England. He is board certified in Preventive Medicine and Occupational Medicine. He is a certified Independent Medical Examiner. (See Def. Ex. 1) He performs independent medical reviews for Workers Risk Services and he has done an average of 15 record reviews every six months, or so.
14. Dr. Boucher did not examine the Claimant. He reviewed medical records and medical chart information from the date of the injury until January of 2002. He did not examine the surgical notes of Dr. Robinson, nor did he examine Dr. Robinson's medical examination data.
15. When Dr. Boucher was asked, concerning the ability of a neurosurgeon, to diagnose the cause of injuries from an MRI image, Dr. Boucher indicated that the surgeons are qualified and experienced in repairing damage, but they are not necessarily qualified and capable at assessing the etiology of injuries. Dr. Robinson addressed this same point by saying that the surgeon often has the ability to look at the actual physical damage and relate the MRI, CAT Scan and X-ray images to what is actually found in the body during surgery. In short, he felt that he was better able to determine from the films whether the injury in this case was traumatic or degenerative.
16. There was very little equivocation by Dr. Robinson. He indicated that one does not see MRI's, which show disc bulging and impingement on the spinal cord of this sort, in a 42-year-old patient, without a significant traumatic injury. He indicated that a fall of the kind reported would be the type of trauma to cause this type of injury. He indicated that rotator cuff injuries are often seen with cervical spinal injuries and that they are "co-morbid" injuries. He said that the display of the traumatic injury to the spinal cord on the 2002 MRI was not a subtle finding, but, rather, it was clearly observable. Likewise, Dr. Boucher was equally convinced that this problem was a degenerative arthritis of the neck and not the result of a traumatic injury.

### Claimant's Credibility

17. Counsel for the employer argued that the Claimant had lied to the Veteran's Administration in order to secure VA benefits. Because he had misrepresented the history of the shoulder problem, therefore all diagnoses, which relied upon his subjective reports of history, should be suspect. Regardless of what he told the VA about his Navy history, he suffered a violent injury to his shoulder near in time to the fall of December 2000. His misstatements about the source of the injury were clarified at least by March 2001 and the employer ultimately accepted that injury (the right shoulder) as well as the neck injury. Thus, the Claimant's credibility problem, if one exists, is remote from the subject injury and is not of great significance to the issue of causation.
18. When Dr. Robinson was presented with the history, which was related to the VA by the Claimant, it did not change his opinion about the causation of the cervical injury to the fall of December of 2000.

### Attorney Fees

19. Claimant's counsel expended 188.5 hours of billable attorney time associated with the Claimant's claim. The representation of the Claimant by counsel was important to the development of the evidence of the history of his claim, as well as to the presentation of his claim at the hearing. The Claimant incurred costs of \$1,535.28.
20. The Claimant hired counsel in October of 2001. During the next two years (after he hired counsel) the Claimant had a second shoulder surgery, a spinal fusion of his neck, changes of several doctors, and a move to Florida. The attorney assisted him in various ways in assuring that the insurer accepted the neck condition as compensable. She also assisted him in securing medical providers in Florida who would accept the Vermont Workers Compensation insurer.
21. Counsel worked on both the shoulder injury and the neck injury. The Insurer accepted both injuries but controverted the neck injury as unrelated to the fall. The hearing took one day. There were two witnesses for the Claimant (himself and Dr. Robinson) and one witness for the Defendant, Dr. Boucher. The Claimant's Attorney conducted no depositions although she had prepared the medical file by numerous letters to various doctors so that the medical file, for the most part, addressed the issues of causation.

22. Prior to the hearing, the counsel for the employer contested whether the claim had been accepted by the insurer. This issue was fully prepared by Claimant's counsel, but before the hearing, counsel for the employer stipulated that the neck condition had been accepted.
23. The hearing addressed only the issue of causation between the neck injury and the fall. There were few, if any, other issues. There was only one employer (as compared with cases of multiple employers) and maximum medical improvement had not yet been reached, so permanent impairment rating was not an issue.

#### **CONCLUSIONS OF LAW:**

1. In order for an employer to be liable for workers' compensation benefits to a Claimant, there must be a personal injury by accident arising out of and in the course of employment. 21 VSA Sec. 601(11)(A). It is the burden of the Claimant to establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963).
2. Sufficient competent evidence must be submitted verifying the character and the extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). When the causal connection between an alleged work accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, there must be expert medical testimony to sustain the burden of proof. *Jackson v. True Temper Corporation*, 151 Vt. 592 (1989); *Hasey v. Northeast Well Drilling*, Op. No. 82-95 WC (1995)
3. The burden of justifying the termination of benefits shifted to the employer due to its acceptance of the injury by the employer. *Merrill v. University of Vermont*, 133 Vt. 105 (1974). The employer has failed to sustain its burden on this issue (it did not prove that the injury was unrelated to the work fall); moreover, the claimant submitted ample, cogent evidence that his cervical neck injury is causally related to his fall at work in December of 2000 (irregardless of who had the burden of proof).



4. When evaluating and choosing between conflicting medical opinions, the Department has considered several factors: (1) the nature of the treatment and the length of time there has been a patient-provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination, and (5) the qualifications of the experts including professional training and experience. *Miller v. Cornwall Orchards*, Op. No. 20-97 WC (1997). These factors are addressed below.
5. Dr. Robinson was the treating surgeon for the Claimant's spinal fusion. He operated upon the site where the spinal cord injury took place. He formed his opinion as to the causation issue before he undertook the surgery, but his diagnosis was based upon his review of the MRI images and his belief that such bulging and herniation of a cervical disc into the spinal cord did not result from degenerative arthritis, but, rather, from a traumatic injury. Dr. Boucher was not a treating physician and had no personal contact or examination of the Claimant.
6. Dr. Robinson was not provided with the initial VA records when he first met the Claimant, and, thus, he was not aware of the Claimant's misrepresentation relating the shoulder injury to the Navy incident in 1986. He did testify, however, that the fact that there was a severely torn rotator cuff injury provided ample evidence that there was a recent injury of sufficient violence to have caused the traumatic injury to the Claimant's neck. Having learned of the VA report, it did not change his opinion since that history primarily related to the shoulder problem. On the other hand, Dr. Boucher did not have the surgical report of Dr. Robinson's surgery. Dr. Boucher essentially discounted disc herniation as the cause of the compression on the spinal cord, which was evident to Dr. Robinson. Dr. Boucher either was not aware of any disc herniation or he discounted it. Had he seen the operative report where Dr. Robinson removed large pieces of bulging herniated disc, it might have changed his opinion. It certainly would have been important for him to review the operative report before rendering his testimony. Without that information, his opinion carries less weight.

7. Another criteria in weighing contradictory medical opinions are the clarity and thoroughness of their reports. The reports of the two physicians, Dr. Robinson and Dr. Boucher, are clear enough, however, Dr. Boucher's report often reported unverified facts and misstatements of fact. For example, Dr. Boucher repeatedly referred to he Claimant as the "examinee" despite never having examined him. His report of January 5, 2003 indicated that "the MRI's of the cervical spine in 2001 revealed only degenerative changes, but more recently have revealed a left center C6-7 disc bulge with possible left C7 root impingement". This seems inconsistent with the C4-5 disc herniation that was so evident to Dr. Robinson and which was reported in September 17, 2001 MRI report (Joint Exhibit W, page 70), the October 16, 2002 report (page 203), and the images from Radiology Imaging Associates as interpreted by Dr. Robinson (page 215). In fact, it was the clear white streak showing spinal cord injury and spinal cord compression at the C4-5 level, which caused Dr. Robinson to recommend surgery so quickly. Dr. Boucher discounted this spinal cord compression "of no clinical significance" in his letter of March 23, 2003 (Joint Exhibit W, page 298). Dr. Boucher's medical records report referred to Mr. Wilson's left shoulder pain as chronic and as preexisting the December 2000 fall, but when asked for his source of that information, he could not identify the source because he did not have those records with him during his testimony. It appears that he did not make an independent evaluation of many of the MRI films but, rather, took the radiology reports for his information. Dr. Boucher did not review the medical records of Susan Anderson, P.A., or Dr. Woodcock. Dr. Boucher's report addresses "causation" and concluded that it was more likely than not that the fall of December 2000 did not occur and that the right shoulder condition is not related. Since the parties stipulated that the fall did in fact occur, this section of the report which casts doubt on the veracity of the fall at work, and then concludes that there is no causation, reduces the persuasiveness of Dr. Boucher's report. Dr. Robinson's report was clear, accurate, thorough, and strengthened by supporting data, MRI films and clear explanations when he was asked about his conclusions.
8. Dr. Robinson's examination of the Claimant was thorough, while Dr. Boucher did not have the opportunity to examine the Claimant.

9. The education, experience and overall qualifications of Dr. Robinson and Dr. Boucher are impressive. Given the added information that was available to Dr. Robinson (actual examination of the Claimant, actual viewing of the site of the spinal compression, review of more imaging of the cervical spine of the Claimant) Dr. Robinson's specific qualifications to diagnose the cause of this injury are found to be greater than that of Dr. Boucher. The opinion of Dr. Robinson is found to be more persuasive and convincing than that of Dr. Boucher.
10. It should be noted that the employer filed a Motion in Limine to exclude from evidence certain letters, which were solicited by the Claimant's counsel. It was ruled as a preliminary matter that the letters constituted "reports" within the hearsay exception of Worker's Compensation Rule 7.13. It should be noted here that the Claimant's evidence of causation was primarily Dr. Robinson's testimony, which was adequate to establish his claim. Those reports that the employer sought to exclude (except the report of Dr. Robinson who testified at the hearing) were not, and are not, the basis for these findings of fact and conclusions.
11. The Claimant's cervical condition, the surgery needed to treat that condition, and the post surgery physical therapy related to the cervical surgery are causally related to the December 2000 employment injury and are compensable. As of the date of the hearing, the Claimant had not reached a medical end result from the surgery.
12. The employer's termination of benefits was not justified.

#### Attorneys Fees

13. At the discretion of the Commissioner, the prevailing party may be awarded attorneys fees. 21 VSA Sec. 678 (a). WC Rule 10.1000. The Claimant prevailed in this formal proceeding and is entitled to reasonable attorney fees.
14. Although the case was well-tried by Claimant's counsel, the claim for \$16,965.00 in attorneys fees will be allowed only in part for the following reasons.

15. Under 21 VSA Sec. 678 an award of *reasonable* attorneys fees is discretionary with the Commissioner (emphasis added). In the past the Commissioner has considered various factors in exercising discretion concerning awards of attorney fees. The Commissioner has looked to whether the efforts of Claimant's attorney were integral to the establishment of compensation; the difficulty of the issues presented; the time and effort expended; the skill of counsel in preparing and presenting the case; and whether the fees are proportional to the efforts of counsel. See *Estate of Lyons v. American Flatbread*, Op. No. 36A-03 WC (2003). When a claimant is partially successful, the fee will be based upon the degree of success. *Brown v. Whitting*, Op. No. 07-97 WC (1997).
16. The fees in this case are greater than one would expect considering the issue presented. This was a medical causation case with essentially a disagreement between two doctors. While Claimant's counsel did an admirable job of preparing the case and grooming it by assuring that all issues were addressed by the various doctors, this work could not have, or should not have, amounted to 188 hours of billable attorney time. Counsel for the Claimant points out that the medical history and the meandering path of treatment in this case, required more attorney supervision than usual. Moreover, she points out that she had to work on various issues, which evaporated just prior to trial. The Commissioner in the past has allowed attorney fees when there has been "a settlement on the courthouse steps" and such behavior by defense counsel should not be used to avoid the necessary expense of preparing the case. See *Aker v. ALIIC and Sternberg Const.*, Op No. 53A-98 WC (1998). Nonetheless, the issue of "acceptance" which was settled in this case at the last minute, was not a critical issue. Claimant offered sufficient evidence to prove the case independently of the acceptance issue.
17. This case has not yet reached final resolution. The only issue tried in this expedited hearing was the issue of causation between the cervical injury and the work-related fall. While that is a critical issue, the amount of attorney fees must bear a reasonable relationship to the position of the case overall and the issue, which was decided in the hearing. Here the amount, which is claimed, is beyond reasonable given the posture of the case.

18. The attorney fees are itemized and well documented. Neither party offered affidavits of reasonableness/unreasonableness by independent experts. There is a contingent fee agreement, however, a contingent fee agreement is not the best measure for the fee in this case because the nature of this decision is not easily translated into a monetary amount. An hourly rate calculation is more appropriate. See generally *Lewis v Ethan Allen*, Op. No. 41-00 (December 20, 2000). Claimant's counsel spent 17.2 hours on legal research between October, 2001 and May of 2003. During that time however, other issues such as vocational rehabilitation and the right shoulder injury were also being dealt with. Since those issues were settled or were not at issue in this hearing, it would seem inappropriate to award attorneys fees for them in relation to this contested hearing. In some cases the Commissioner has allowed broad ranging attorneys fees, where there has been a broad-brush denial of liability without justification. See *Paini v. Twin City Subaru*, Op. No. 17-99 WC (May 17 and April 2, 1999). Where, on the other hand, the position of the Defendant also has merit, the Commissioner has tailored the allowance of attorney fees to the specific facts of that case. See *Wells v. Gingras*, Op. No. 24-00 WC (August 30, 2000) (citing the "unique" facts of that case and the "interests of fairness to both parties"). An award of attorney's fees should not simply be based on which party was right or wrong in asking for a hearing, but should be based on ultimate fairness.
19. In this case, there is another factor affecting the compensability of attorney fees. The Claimant essentially fabricated a story about the history of his medical history in order to secure Veterans' Hospital treatment. That fabricated history, although not central to the medical evidence of causation, did confuse the case. Dr. Boucher cited this history when he determined that there was no causation (Dr. Boucher went far beyond this by determining that there was no fall during employment at all) but some of the controverted evidence related to the Claimant's own misrepresentations. The Defendant should not be penalized in attorney's fees for the Claimant's misrepresentations, which confused the evidence.

20. The amount of the attorneys fees billed in this case appear to be beyond what other counsel have charged in similar cases. It is impossible to compare one case to another since no two cases are identical. Nonetheless, the Commissioner is expected to exercise his discretion about such matters with the expertise, experience, and broad view of many cases. The Commissioner has examined cases in which similar legal issues and trial preparations were required. Generally, the fees in these cases were less than are being claimed here. Cases where the attorney hours were comparable to those being billed here were more complex, longer in trial, and had more at stake.

21. Counsel for the Defendant has argued, using the case of *Lewis v. Ethan Allen*, supra, that an award of 80 hours is reasonable. Considering the issues and difficulty involved, the actual preparations and trial of the case, the unique facts of this case, the actions of the Claimant, and the other considerations set forth above, the Commissioner determines that the billed amount should be reduced by 30% for an allowed attorney fee of \$11,880.00.

**ORDER:**

THEREFORE, based upon the foregoing findings of fact and conclusions of law, the employer is required to continue temporary workers' compensation benefits to the Claimant and Claimant's claim for continued temporary benefits is GRANTED consistent with the above findings and conclusions. Attorney's fees of \$11,880.00 and costs of \$1,535.28 are awarded to the Claimant.

Dated at Montpelier, Vermont this 28<sup>th</sup> day of January 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 VSA Sec. 670, 672.