

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

Susan Nadeau

Opinion No. 49R-04WC

v.

By: Margaret A. Mangan
Hearing Officer

State of Vermont
Department of Public Safety

For: Laura Kilmer Collins
Commissioner

State File No. U-05586

RULING ON MOTION FOR RECONSIDERATION

Claimant moves for reconsideration and reversal of the decision dated October 26, 2004 denying her claim. Specifically, she argues that the findings do not reflect the evidence presented, that the Department improperly discounted her expert's opinion and that a finding regarding her height was speculative.

The official record of the hearing are audiotapes of all testimony presented at the September 27, 2004 hearing. That testimony amply supports the findings and conclusions made.

Claimant alleges that repetitive work caused her shoulder pathology that requires surgical intervention. Yet her own expert testified that repetitive arm movement at or above shoulder level caused that condition. Although claimant testified, and demonstrated during her testimony, that her dispatcher work required such movements, that testimony was rejected in favor of more objective evidence of the workstation and her work duties. Claimant's height is relevant to an analysis of ergonomics of the workstation as described by a coworker who was shorter than she. Even at the dispatcher job, the shorter coworker did not need to hold his hands at shoulder height.

Furthermore, her expert testified that claimant's job was that of dispatcher for the state police, a job she left several years before she sought treatment from him. Her failure to seek treatment for shoulder pain between 1999, when she left the dispatcher job, and 2002 belies her testimony that she had shoulder pain during that time.

In sum, the record supports the conclusion. The motion for reconsideration, therefore, is DENIED.

Dated at Montpelier, Vermont this 20th day of December 2004.

Laura Kilmer Collins
Commissioner

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

Susan Nadeau

Opinion No. 49-04WC

v.

State of Vermont
Department of Public Safety

By: Margaret A. Mangan
Hearing Officer

For: Michael S. Bertrand
Commissioner

State File No. U-05586

Expedited hearing held in Montpelier on September 27, 2004
Record closed on October 14, 2004

APPEARANCES:

Matthew Colburn, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Is claimant's shoulder condition a result of a work-related injury arising out of and in the course of her employment with defendant?

EXHIBITS:

Joint I: Medical Records
Joint II: Ergonomic Assessments

Defendant's A: Curriculum vitae of Nelson S. Haas, MD

STIPULATIONS:

1. Claimant has been an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act) since 1978.
2. Defendant has been claimant's employer within the meaning of the Act since 1978.
3. Claimant seeks a determination that her shoulder condition and June 4, 2004 shoulder surgery to her right shoulder and her proposed left shoulder surgery are compensable claims.
4. For the twelve weeks prior to claimant losing time from work as a result of the shoulder condition, claimant's average weekly wage was \$865.54 resulting in an initial compensation rate of \$577.06.

5. Claimant returned to full-time but light duty work on August 9, 2004.
6. At all relevant times, claimant has had no dependents within the meaning of the Act.
7. The parties agree to the admission of Joint Exhibits I and II.
8. The parties agree that the Department may take judicial notice of any and all official forms in the claimant's file relative to this or any of her other workers' compensation claims.

FINDINGS OF FACT:

1. Claimant has worked for the State Department of Public Safety since 1978.
2. From 1978 to 1999 claimant worked as a full-time dispatcher for the State Police in the Middlesex barracks.
3. In her work as a dispatcher, claimant took telephone calls from the public and radio calls from the police. She checked criminal records, transcribed phone messages and typed reports. Most of her time was spent keyboarding.
4. When claimant began her work as a dispatcher, the workstation had a phone with handset, two-way radio, and a typewriter on a typing stand, a motor vehicle computer and computer keyboard on a separate table.
5. In 1992, claimant's workstation changed. She then had two computers and two computer keyboards, with one monitor directly in front of her chair and the other to her right. Both keyboards were in front of her, the first on the desk surface and the second six to eight inches in and elevated on two masonry bricks.
6. Claimant used both keyboards equally in her work. To reach the second, she needed to extend her arms. Claimant is six feet tall. Although she needed to extend her arms, it is unlikely that they reached shoulder level or higher when she used the second keyboard. Claimant worked with this two-keyboard system from 1992 to 1999, when she changed jobs.
7. The new job claimant assumed in 1999 was as administrative assistant in Waterbury with word processing transcription and data entry duties. With a high volume of work, claimant often worked overtime hours.
8. Two ergonomic assessments were made of claimant's Waterbury workstation, on in November 2000 and the other in August of 2001. The first assessment resulted in the recommendation that claimant be provided with an "articulating keyboard with attached mouse tray." The second recommended an adjustable keyboard.

Medical Treatment for Shoulders

9. The first specific reference to shoulder complaints reflected in medical records is in 2002. Although a hand written note dated December 7, 1999 suggests probable thoracic outlet syndrome, at a time when claimant had wrist and elbow complaints, the note says nothing about the shoulder. And a December 15, 1999 physical therapy note identified as one goal to improve shoulder range of motion, but, again, it does not state that claimant had shoulder complaints.
10. In June and July 2002 claimant treated with Dr. Cove for soreness in her neck and upper back.
11. On August 5, 2002, claimant reported bilateral shoulder pain at a visit to Occupational Health & Rehabilitation Services, Inc. Over time, it was clear that the pain was worse in her right shoulder.
12. Dr. Bean treated claimant's shoulder complaints from September 2002 through approximately September of 2003. Until 2004 most physicians, including Dr. Bean diagnosed a torn rotator cuff.
13. Examination and studies ordered by orthopedic surgeon, Claude E. Nichols, M.D., confirmed his diagnosis of subcoracoid impingement, a rare diagnosis. A congenital elongation of the coracoid process, a bony structure located within the shoulder rotator cuff, causes this impingement. Repetitive reaching at or above shoulder height causes the coracoid process to rub against the surrounding structures, causing pain and inflammation. Once the condition exists, ordinary repetitive activity, such as keyboarding, worsens the symptoms.
14. Dr. Nichols surgically corrected the corocoid impingement in claimant's right shoulder on June 4, 2002. Postoperatively, she was out of work until August 9, 2004, and then was released for work with restrictions. She is not yet at medical end result.
15. Dr. Nichols recommends that claimant have the same operation on the left shoulder.

Expert Medical Opinions

16. Dr. Nichols has performed approximately sixty (60) subcoracoid impingement surgeries in the last fifteen years. In nearly all of those cases, the impingement was due to overuse. Bilateral instances are not common, but he has seen one before this one.
17. Dr. Nichols opined that repetitive reaching at or above the claimant's shoulder while at the dispatcher job caused the subcoricoid impingement. He based this opinion on surgical findings, experience with this diagnosis and a history from which he understood that claimant had symptoms while doing the dispatcher job and sought medical treatment at that time. He understood that claimant had pain with awkward reaching at an awkward workstation, pain that resolved when she did not work.

18. The defense obtained three independent medical examinations, but none from a surgeon experienced in the diagnosis and treatment of subcoracoid impingement. At hearing, Nelson Haas, M.D., an occupational medicine expert, offered a detailed report and opinion that the subcoracoid impingement is not work-related. He offered alternative explanations for causation. However, Dr. Haas has never diagnosed nor treated such a case. His knowledge of the disorder is based purely on research conducted for purposes of this case.
19. Claimant submitted a copy of her fee agreement with her attorney; evidence of 49.8 hours worked on this claim; and \$1,000.00 incurred in costs in support for her claim for attorney fees and costs under 21 V.S.A. § 678 (a)

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 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. 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).
4. Because Dr. Haas has had no experience with subcoricoid impingement, I must discount his opinion despite its painstaking detail. Therefore, the medical opinion governing this case is the one from Dr. Nichols, which supports causation if his factual underpinnings are accurate.
5. Dr. Nichols first saw the claimant in 2004, when he was under the impression that she was doing dispatcher work with repetitive reaching at and above shoulder height to reach the second keyboard. Yet she left that job five years earlier, in 1999. Given her height, it is not logical to accept her suggestion that reaching to the second keyboard ever brought the arms to shoulder height or higher, even though the ergonomics of that workstation were less than ideal. Further, the medical records do not support her claim that she had shoulder problems in 1999 while still doing dispatcher work, with the exception of a vague reference to thoracic outlet syndrome. In fact, the first reference to shoulder pain was in 2002, three years after she left the job she now alleges caused the problem. That was the first time she received treatment for shoulder symptoms.

6. Because I reject the factual bases for Dr. Nichols's opinion—onset of pain while doing work as a dispatcher, work he believed was at or above shoulder height—I cannot accept his conclusion. Consequently, claimant fails to sustain her burden of proof.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 26th day of October 2004.

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.