

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

)	State File No. L-07725
)	
Jessica Pinsonneault)	By: Margaret A. Mangan
)	Hearing Officer
)	
v.)	For: R. Tasha Wallis
)	Commissioner
NASTECH)	
)	Opinion No 37-01WC

Hearing held in Montpelier on May 2, 2001
Record closed on June 4, 2001

APPEARANCES:

Berkeley D. Johnson, Esq. for the claimant
Frank E. Talbott, Esq. for the defendant

ISSUES:

1. Whether the claimant's shoulder injury arose out of and in the course of her employment with the defendant.
2. Whether the claimant is entitled to workers' compensation benefits for her shoulder injury.

STIPULATION OF FACTS:

1. The claimant, Jessica Pinsonneault, was an employee and Nastech her employer within the meaning of the Workers' Compensation Act on October 7, 1997.
2. The claimant was involved in a motor vehicle accident on October 7, 1997 while in the employ of Nastech.
3. Wausau Insurance Companies was the workers' compensation insurer for Nastech on October 7, 1997.
4. The parties agree to the admission of a Joint Medical Exhibit.
5. The parties agree that the hearing officer may take judicial notice of all forms on file with the Department of Labor and Industry.

EXHIBITS:

Joint I:	Medical Records
Claimant's 1:	Curriculum Vitae of Dr. Block
Claimant's 2:	Transcript of deposition of Dr. Block 8/18/00
Claimant's 3:	Report of Accident
Defendant's A:	Curriculum vitae of Dr. Wieneke
Defendant's B:	Transcript of deposition of the claimant

FINDINGS OF FACT:

1. On October 7, 1997 while acting in the scope of her employment, claimant was involved in a motor vehicle accident while making a delivery for her employer. At the time of the collision she gripped the steering wheel tightly.
2. To rescue personnel at the scene and to hospital emergency department staff after the accident, claimant complained of neck pain radiating down both arms, tingling and limited movement in her hands. X-rays of her neck and back were negative. She was treated and released from the hospital with restrictions against driving or heavy lifting. Afterwards she was treated for left knee pain and a sprain of her left rib cage.
3. Shortly after the accident the claimant completed a form for her employer on which she identified her shoulder as an area of injury.
4. Claimant saw orthopedist Dr. Thatcher on November 3, 1997. The doctor made no mention of shoulder pain in his record for that visit. Nor did he make any mention that the claimant was having pain when she moved her arm up over her head or rotated her shoulder. In fact, there is no indication that Dr. Thatcher conducted any physical examination of the claimant on that visit to address any shoulder pain.
5. In the months following the accident, the claimant had an operation to each of her wrists and to her left knee. She was also treated medically for back and neck pain. The carrier approved benefits for claimant's back, neck and knee injuries as resulting from the motor vehicle accident.
6. Although physicians did not document complaints of shoulder pain in their notes about this claimant, there are two references in the medical records to such a complaint. The first appears on a MRI scan report on March 20, 1998 on which the claimant's history includes bilateral shoulder pain. No one knows how that information made it to the form. Dr. Wieneke ordered the MRI, but he does not recall any history related to shoulder pain and his notes reflect none.

7. The second is an April 23 note from Bennington Physical Therapy, which documents the claimant's complaint of pain and popping in the shoulders.
8. Claimant did not work between the time of the motor vehicle accident and when she first treated with Dr. Block for her shoulder injury on October 13, 1998. In his note for that visit, Dr. Block documented her complaint of bilateral shoulder pain with the right greater than the left. On examination, he noted swelling in her right shoulder. He diagnosed a Grade II AC Joint Strain in her right shoulder.

MEDICAL EVIDENCE:

1. Dr. Block testified in support of the claimant's position. He explained that having swelling show up in a joint a year after an accident would be consistent with an injury at the time of the accident if the claimant had not been using the arm, then after a year started using it more.
2. Dr. Block's conclusion that the AC joint strain he diagnosed one year after the accident was related to the motor vehicle accident is based on two key opinions. The first, based on the claimant's history, is that her shoulders took the force of the accident. Second, again based on the claimant's history is that she had shoulder pain from the outset. He explained both the gate theory of pain and referred pain. The gate theory posits that when one has pain in more than one area, she feels the pain where it is most severe. In this case that would mean that the claimant did not make much of the shoulder pain after the accident because other injuries were more severe. Under the concept of referred pain, he explained that the claimant felt pain in one area on the body that stems from an injury in another area. It would then follow that the claimant's arm, neck or back pain was really referred from the shoulder.
3. Dr. Wieneke offered opinions in support of the defense position in this case. When he examined the claimant on March 4, 1998, he found no indications that she was experiencing any shoulder pain. At that time, he diagnosed the claimant's condition as a chronic T11-12 thoracic strain/sprain and ordered a MRI. As noted above, that report references shoulder pain, although there are no clinical data corresponding with it.
4. Dr. Wieneke testified and that had the claimant suffered a Grade I AC joint sprain at the time of the accident in 1997, she would have experienced severe pain which would have been clearly documented in the records.
5. Dr. Wieneke also opined that had the claimant suffered a Grade I injury and been has inactive as she says she was, that injury would have resolved in six weeks. In contrast, a Grade II injury might degenerate but the associated pain would have been severe enough to warrant a complaint and documentation.

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, Morse Co.*, 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 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. In this case, Dr. Block opined to a reasonable degree of medical certainty that the Grade II AC Joint Strain he diagnosed in October of 1998 was causally related to the motor vehicle accident the claimant experienced in October 1997. That opinion is based on the testimony of the claimant that she had shoulder pain from the outset. And it is based on the premise that the claimant had been essentially inactive from the time of her accident to the time of her shoulder joint strain diagnosis.
5. The medical evidence to support this claim is based on a history I cannot accept. The mechanism of the collision, with the claimant gripping the steering wheel at the time and was jarred in the impact, could have caused a shoulder joint sprain, but such a complaint would have appeared in treatment notes long before a year's time. Although the medical records show that claimant advised the rescue squad that she was feeling pain and tingling down her arms immediately after the collision, there are no corresponding treatment notes to document a shoulder problem at that time.
6. It is simply not credible that this claimant, who sought medical care freely, injured her shoulder in the motor vehicle accident yet was unaware of it for a year.
7. The more persuasive medical evidence is from Dr. Wieneke who explained that had the claimant suffered a Grade I AC shoulder sprain at the time of the accident, such a minor problem would have resolved had she been as inactive as she says she was. And a Grade II sprain at the time of the accident is not an injury that would have escaped her attention.
8. In sum, the claimant has failed to establish by sufficient credible evidence that her shoulder problems are causally connected to her work-related automobile accident. See, *Egbert*, 144 Vt. 367.

ORDER:

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

Dated at Montpelier, Vermont this 25th day of October 2001.

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.