STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-04675
Teresa Moran	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
M & M Beverage	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 06-00WC

Hearing held in Montpelier on September 29, 1999.
Record closed on October 25, 1999.

APPEARANCES:

Heidi S. Haught, Esq. for the claimant
Keith J. Kasper, Esq. for the employer

ISSUES:

1. Did claimant know that her shoulder injury was related to her work and thus create an obligation to report the injury to her employer?

2. If so, did claimant's delay in reporting the injury to her employer prejudice the defendant?

EXHIBITS:

Joint Exhibit A	:	Medical Records
Joint Exhibit B	:	Curriculum Vitae of Stephanie J. Landvater, M.D.
Joint Exhibit C	:	Transcript of deposition of Dr. Landvater

STIPULATION:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") at all relevant times.

2. Defendant was an employer within the meaning of the Act at all relevant times.

3. Acadia Insurance was the workers' compensation insurance carrier for defendant at all relevant times.

4. Claimant alleges that on or about February 26, 1998 she suffered a personal injury by accident arising out of and in the course of her employment with defendant.

5. Claimant seeks all workers' compensation benefits associated with the claim, including temporary total disability benefits, medical benefits and potentially temporary partial disability benefits, permanent partial disability benefits, vocational rehabilitation benefits and, if successful, attorney fees and costs of the formal hearing process.

6. The parties agree that the Department may take judicial notice of any and all forms or agreements between the parties in its files in this matter.

7. There is no dispute as to the qualifications of any of claimant's treating or examining health care professionals.

FINDINGS OF FACT:

1. Claimant was hired by M & M Beverage as a bottle clerk on August 8, 1996. Gilles Moreau, storeowner, hired her. At the hearing claimant testified that from the time she was hired, she was aware of the existence of a workers' compensation system and that she had an obligation to report work-related injuries.

2. Moreau testified that as an employer he has a policy of accommodating employees for physical conditions regardless of whether the condition is work-related. He said that he does this to assure a healthy work force and to minimize his workers' compensation costs and exposures.

3. Claimant's duties as a bottle clerk included: sorting and counting bottles; stocking coolers with either single sodas, six-packs or cases of soda; using the can crusher to reduce the size of recycling materials; exchanging propane canisters, which weighed 20 pounds when full and were stored on a shelf above shoulder height; carrying 20 pound bags of ice for customers; and climbing on a large ladder outside to change notices on the billboard.

4. Claimant was also responsible for cleaning the store, including mopping, sweeping, and emptying large trash receptacles. She lifted cases of beer and soda on a daily basis. She testified that she was responsible for moving displays, which sometimes would contain ten or more cases. Upon request, she moved quarter and half kegs. She manually lifted and carried the quarter kegs, which he said weighed 20 pounds. She used a dolly to lift and carry the half kegs. Daily, she stacked liter plastic bottles over her head, which involved standing tiptoed, reaching up and stretching.

5. Claimant is right-hand dominant.

6. On November 11, 1996 claimant sought medical treatment for pain in her left wrist. She saw Dr. Lavalette who diagnosed her with intermittent wrist pain with grinding.

7. Claimant then began treating with Dr. Stephanie Landvater for her wrist injury. Dr. Landvater saw her five times between July 1997 and January 1998. In December 1997 Dr. Landvater operated on the wrist for what was reported as "synovial chrondromatosis." Dr. Landvater explained that she had inflammatory arthritis.

8. After her wrist surgery, the employer offered claimant a job as cashier, but she refused it because she did not feel qualified. The employer then modified her job to accommodate her injury.

9. Claimant testified that in December 1997 or January 1998, when she first had pain in her shoulder, she assumed that the non-rheumatoid arthritis she had in her wrist was progressing.

10. On February 26, 1998, at a follow-up appointment claimant had with Dr. Landvater for her wrist problem, she mentioned that she also had shoulder pain. At her deposition, Dr. Landvater testified that the first time claimant ever mentioned shoulder pain was at the February 1998 visit.

11. Dr. Landvater was concerned that claimant had an overuse syndrome of her shoulders. Claimant complained that the shoulder pain seemed to come on while working. They discussed that claimant's overextending her arm could be why she was having shoulder pain. Dr. Landvater prescribed an anti-inflammatory medication. Although claimant and Dr. Landvater discussed claimant's work activity during their discussion of her shoulder pain, Dr. Landvater did not take the claimant out of work or specifically outline accommodations or modifications that needed to be followed.

12. Dr. Landvater told claimant that her work "could be a reason why she was in pain." From that statement, claimant did not believe that the job actually caused the pain.

13. Claimant testified that she was looking for a less physically demanding job and was not able to find one between February and October of 1998. Claimant was not in a financial position where she could quit working and felt no urgency to do so given the conversations she had with Dr. Landvater.

14. The claimant did not report her shoulder injury to anyone at work as being "work-related." However, she casually mentioned that she was having shoulder pain on a regular basis to the manager, Jerry Chaloux, and a co-worker, Mike Elliot. Moreau, the storeowner, admitted that claimant may have complained of shoulder pain, but not in a way that made the employer aware that it was serious or in any way work-related.

15. At the next appointment claimant had with Dr. Landvater in March 1998, the doctor wrote that claimant's right shoulder had been bothering her from recurrent work that was overhead and in front of her.

16. On April 2, 1998 Dr. Landvater injected claimant's shoulder with an anesthetic and a steroid to reduce the inflammation in the shoulder bursa. In her note for that visit, Dr. Landvater wrote in her plan that "I will have her follow-up in about four to six weeks after she has rested one week and then started exercise." Claimant did not take time off from work at that time. Nor did she tell her employer about her shoulder pain. Although Dr. Landvater referred to a week's rest, she did not give claimant a note excusing her from work.

17. Dr. Landvater testified that at one appointment between March and September 1998, she told claimant that if claimant "thought her injury was a work-related issue, that she should go talk to work and get back to [Dr. Landvater] about it." Dr. Landvater did not tell the claimant that the injury should be reported until the August 13, 1998 appointment when the MRI results were interpreted.

18. Dr. Landvater testified that it was claimant's responsibility to talk with her employer about claimant's belief that the injury was work-related. She also testified that as of February and March 1998, her treatment plan included an attempt to modify what claimant was doing so that she did not cause further problems with her shoulder.

19. Dr. Landvater did not write a note for the claimant excusing her from work. Nor did she write any work notes recommending formal modification of work duties until after the results of the MRI were obtained, and a rotator cuff tear diagnosed, on August 13, 1998.

20. Dr. Landvater opined that claimant's shoulder injury had a gradual onset, but she could not identify an exact date when the rotator cuff tore.

21. Claimant testified that her shoulder was painful when she was at home and when she was working. It seemed no worse with any particular activity than with inactivity.

22. On August 13, 1998 when claimant saw Dr. Landvater to discuss the findings of the recent MRI of her shoulder, the doctor told her specifically that repetitive motions at work caused her injury. Since conservative treatment options had not been successful, Dr. Landvater recommended arthroscopic acromioplasty. Using pamphlets and illustrations, the doctor spent a great deal of the time at that appointment explaining what was wrong with claimant's shoulder.

23. Immediately after her appointment with Dr. Landvater, claimant went home and telephoned Gilles Moreau, owner of M & M Beverage. She told him that she had a shoulder injury that was caused by her work as a bottle clerk. Moreau told her that he would complete the necessary paperwork.

24. Dr. Landvater recalls a conversation with claimant during which the claimant said that she did not know if her injury would be covered by workers' compensation "because it had been such a long period of time." Dr. Landvater does not remember when that conversation took place.

25. Between the date that claimant reported her injury to her employer, on August 13, 1998 and September 17, 1998, the employer made no modifications to claimant's job duties. She continued to lift heavy objects and close the store on a shift involving more heavy lifting than other shifts.

26. On September 4, 1998, a representative of Acadia Insurance wrote a letter to Dr. Landvater asking her whether she believed that surgery would be necessary for claimant if back in February of 1998 her job duties had been modified to avoid repetitive overhead work and lifting. Dr. Landvater responded by stating that "we can still try modification and perhaps avoid surgery. Her job is creating the problem." The employer does not dispute that this injury is work-related.

27. Dr. Landvater testified that she could not know if claimant's condition would have deteriorated at the same rate had her work been modified in February or March of 1998.

28. On September 13, 1998, Dr. Landvater wrote the first and only note recommending modifications or restrictions for the claimant at work, specifically that claimant not close the store by herself, and that she should avoid lifting excessive weight and overhead lifting.

29. On September 15, 1998, Acadia officially denied claimant's worker's compensation claim. Its denial stated, "the medical information in [our] possession, including insurance forms, indicate that your current condition is not related to your work at M & M Beverage." The carrier also claimed prejudice to the employer due to a delay in reporting.

30. On September 17, 1998 the owner of M & M Beverage, Gilles Moreau, and the manager of the Barre store, Jerry Chaloux, organized a meeting with the claimant to modify her job duties. They reduced their list of modifications to writing, discussed them, and signed the list. From that point on, the modifications were followed.

31. On October 29, 1998, claimant separated form M & M Beverage for reasons unrelated to her work injury.

32. Claimant has not received and is not seeking any temporary disability benefits for the period from October 1998 when she left M & M Beverage until May 10, 1999 when she had surgery.

33. On February 9, 1999 the Department issued an Interim Order directing Acadia to pay medical benefits and temporary disability benefits from the day of surgery. Those benefits have been paid.

34. On February 17, 1999 the claimant attended a Physical Therapy Intake at Central Vermont Hospital. In her note from that evaluation, physical therapist Deborah Harris noted in her history that claimant did "repetitive work--overhead work, lifting of kegs of beer and cases of beer onto truck, slow progressive onset. Assumed pain was arthritis. 7/98 saw Dr. Landvater."

35. On May 10, 1999 claimant had the right shoulder acromioplasty with subacromial decompression, originally scheduled for September 1998, but delayed because Acadia had denied workers' compensation benefits. After the surgery, claimant participated in physical therapy from June until September 1999.

36. On September 15, 1999 Dr. Landvater prescribed medication for chronic pain and stated that the claimant "will be ready for gainful employment starting October 1, 1999 with no restrictions."

37. The claimant's attorneys incurred $106.55 in disbursements and submitted evidence of their contingency fee agreement with the claimant, as well as a statement documenting that counsel spent 54.10 hours litigating this claim. Given what claimant describes as the complex nature of this claim and the fact that the defendant seeks to discontinue benefits,

the claimant seeks an award of attorney's fees at the rate of $60 per hour. The employer argues that the attorney fee rule in effect at the time of injury should govern. The rule in effect at that time specified that the fee was limited to $35 per hour.

38. On September 13, 1999, Workers' Compensation Rule 10 was amended to allow for an hourly attorney fee rate of $60.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984); *Goodwin v. Fairbanks, Morse & Co*., 123 Vt. 161, 166 (1962).

2. The Workers' Compensation Act is remedial in nature and should be construed liberally in favor of the injured worker to accomplish its humane purpose. *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). No injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits.

3. In this case, the cause of claimant's injury is not an issue. Claimant's partial rotator cuff tear clearly was a personal injury that arose out of and in the course of her employment with M & M Beverage, an insured employer subject to the Act.

4. The employer, however, denies that this claim is compensable on a two-prong theory. First, it alleges that claimant knew that her shoulder injury was related to her work and therefore had an obligation to report it earlier than she did. Second, the employer argues that the delay in reporting caused prejudice because the employer was not on notice to modify her job.

5. Clearly, this claimant had reason to believe that her shoulder injury was in some way related to work. However, without a written excuse from her doctor, she did not believe that she could take time from work. And without a specific instruction from her doctor, she did not believe she could make a claim. Whether such a misconception would bar a claim is largely dependent on whether the claim was ultimately filed within the statutory six-month period, and, if not, whether the claimant can demonstrate that the employer was not prejudiced by the delay.

6. The relevant statute states: "A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as reasonably practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of injury…." 21 V.S.A. § 656.

7. "Date of injury" for purposes of giving notice and filing a worker's compensation claim, is the point in time when the injury becomes reasonably discoverable and apparent. *Hartman v. Ouellette Plumbing & Heating Corp*., 146 Vt. 443 (1985) (Citing 12 V.S.A. § 511 and 21 V.S.A. § 656).

8. At the very earliest, February 26, 1998 was the first time claimant's shoulder injury was reasonably discoverable and apparent. She had not sought medical care for her shoulder at any time before that date. And even at that visit, the claimant did not have an understanding that this was a work-related injury, although she told her doctor that activities, including work, bothered her shoulder.

9. The employer maintains that this claim should be denied because it was prejudiced by the failure of the claimant to report the injury in a timely way. In support of its position, the employer cites *Larrabee v. Citizens Telephone Co.*, 106 Vt. 44 (1934) and *Burns v. Town Restaurant*, Opinion No. 30-95WC (May 25, 1995). In *Larrabee*, the Court stated that claimants bear the burden of proving lack of prejudice for late reporting of accidents. In *Burns*, this Department presumed prejudice to the employer when the employer lost the opportunity to medically manage the claim. In *Larrabee*, the delay in reporting was three years. In *Burns*, it was six years. Neither case dealt with a claimant's delay in reporting within the six-month statutory period. Neither is applicable here.

10. Under the rules in this Department, the issue of prejudice need not be disproved until after the six month period has passed:

> An employee who fails to give notice or make a claim within six months of the date of injury … may nonetheless pursue a claim for compensation … provided the employee can show either that the employer had knowledge of the accident … or that the employer has not been prejudiced… .

Workers' Compensation Rule 3 (a)(3)

11. This claimant informed her employer about the work-related nature of her injury on August 13, 1998, well within the six-month period that began to run on February 26, 1998. Her claim, therefore, was timely. Hence it is not necessary to reach the issue of prejudice.

12. To claimant's request that an award of fees be computed on an hourly fee of $60, the employer counters that the rule in effect at the time of the injury, limiting the fee to $35 per hour, should control. Generally the prohibition against retroactive application of a statute or rule is to prevent "manifest injustice." That cannot be said about an award of attorney fees for services rendered prior to the effective date of the rule. See, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974). Attorney's fees determinations are "collateral to the main cause of action and uniquely separable from the cause of action to be proved." *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). (cites omitted). Like the new fee statute in *Bradley*, revised Rule 10 "did not impose an additional or unforeseeable obligation" on the employer. *Bradley*, 416 U.S. at 721; *Lowell v. Rutland Area VNA*, Opinion No. 41R-99WC (March 22, 2000). Accordingly, claimant's attorney is awarded $60 per hour in this case .

13. Pursuant to 21 V.S.A. § 678 claimant is entitled to necessary costs as a matter of law and reasonable attorney's fees as a matter of discretion. Accordingly, claimant is awarded $106.55 in costs and attorney fees based on 53.2 hours at $60 per hour.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, M & M Beverage is ORDERED to pay claimant all benefits to which she is entitled including attorney fees based on 53.2 hours at $60 per hour and $106.55 in costs. If the parties cannot agree on the amount of benefits due, either party may request another hearing.

Dated at Montpelier, Vermont, on this 24th day of March 2000.

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Steve Janson
Commissioner