STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No.R-24600
	)	
Donna Chamberland	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
Himolene, Inc.	)	Commissioner
	)	
	)	Opinion No. 04-03WC

Hearing held in Montpelier on May 9, 2002
Record closed on May 29, 2002

APPEARANCES:

Charles Powell, Esq. for the claimant
Keith J. Kasper, Esq. and Jason Ferreira, Esq. for the defendant

ISSUES:

1. Did the Claimant suffer a compensable personal injury arising out of her employment with Defendant?

2. If the Claimant is found to have suffered a compensable injury for what period of time, if any, is she entitled to temporary total or temporary partial disability benefits?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Transcript of deposition of Ann Stein, M.D.
Claimant's Exhibit 2:	Claimant's sketch of shaft
Defendant's Exhibit A:	Job description
Defendant's Exhibit B:	Recorded interview of Michelle Basham
Defendant's Exhibit C:	Recorded interview of Richard Gray
Defendant's Exhibit D:	Recorded interview of David Bartlett

STIPULATED FACTS:

1. At all relevant times in this proceeding, Claimant was an employee of Himolene Corporation within the meaning of the Vermont Workers' Compensation Act.

2. At all relevant times in this proceeding, Himolene Corporation was the employer of Claimant within the meaning of the Vermont Workers' Compensation Act.

3. On April 5, 2001 Claimant left work alleging a personal injury arising out of and in the course of her employment with Defendant.

4. For the twelve weeks preceding April 5, 2001, Claimant's average weekly wage was $485.34, which would result in an initial compensation rate of $323.53.

5. At all relevant times, Claimant has had four dependents within the meaning of the Act.

6. For the purposes of this hearing only, the parties agree that, if successful in this matter, Claimant would be entitled to $6,781.20 for temporary total disability benefits for the weeks June 16, 2001 to November 23, 2001; $880 in dependency benefits for that same period; temporary partial disability benefits in the amount of $806.04 for the weeks April 7, 2001 to June 9, 2001; permanent partial disability benefits in the amount of 7% whole person or $9,612.35, and all medical benefits for the treatment of her alleged work-injury currently in the amount of $5,661.93 for a medical lien (but payable directly to the lien holder and subject to the WC Rule 40 fee schedule).

7. There is no dispute as to the qualifications of any of the treating or examining health care professionals in this matter.

FINDINGS OF FACT:

1. The workers' compensation insurer for Himolene at times relevant to this action was Gallagher Bassett Services, Inc.

2. Himolene, defendant in this matter, manufactures plastic garbage bags. Claimant's job, which she began in April 2000, was that of an extruder operator. The job involved handling bags coming off the extrusions machine, pack them in boxes, label them and stamp the labels. If the machine malfunctioned, an occasional occurrence, Claimant manually pulled the plastic to feed the machine and get it operating again. Her job also included lifting and installing a shaft she estimated weighted 46 pounds and her supervisor estimated weighed 15 to 18 pounds. She needs both hands to lift and install the shaft.

3. Over a three-day weekend beginning March 31, Claimant was at home with her family.

4. On Monday, April 2, 2001, Claimant was scheduled to work the 8:00 p.m. to 8:00 a.m. shift. When she awakened before going to work, she felt an ache in her right arm, as if she had slept on it. She reported to work and began her shift. She also mentioned the achy feeling to a co-worker, Michelle Basham.

5. Claimant went about her work as usual, lifting and installing a few shafts as usual. With the last of the shafts, she was at the point where the shaft was at the uppermost point and her arms were extended when she felt a sharp, severe pain in her right wrist, causing her to drop the shaft. It landed with a noise that attracted attention.

6. Claimant remained at her shift, although her supervisor lifted and installed shafts when that became necessary.

7. On Tuesday, April 3, 2001, Claimant went to work with an ace bandage, but did not finish her shift. At 9:15 p.m., she went to the Rutland Regional Medical Center Emergency Department, where she was diagnosed with overuse of her right wrist, instructed to rest, ice, elevate the wrist in a sling and to restrict use of the right hand for repetitive tasks for 2 weeks. She was instructed to remain out of work for three days. At a visit to the Castleton Family Associates on April 13, 2001, she was told she should work light duty for a week. Then, on April 21, she was told she could return to work on April 25, 2001.

8. Claimant was out of work from April 3, 2001 until April 25, 2001 when Castleton Family Health Associates released her to return to work.

9. Claimant remained in regular duty until May 1, 2001 when she had trouble with a particular machine that kept breaking down, requiring her to pull the plastic. For the duration of her 12 hours shift, she found herself in a cycle of pulling for two to three minutes, followed by 5 minutes of normal machine operation, then a return to pulling, etc. By the end of the shift, she was in considerable pain.

10. When she went home, she showered and when toweling off felt a pop and more pain in her wrist. On May 3, 2001 she returned to Castleton Family Practice where her complaints and examination led to a diagnosis of a probable re-aggravation of right wrist strain. She was referred to an orthopaedic surgeon.

11. Claimant was out of work from May 4, 2001 until May 14, 2001.

12. Then, on May 11, 2001 James Hollingshead, PA at Vermont Orthopaedic Clinic saw the Claimant and diagnosed an overuse wrist strain. He recommended a wrist brace and a return in three days. On May 15, 2001 Todd Lefkoe, M.D. evaluated the claimant, recorded the history of lifting a large shaft into place at work, the acute onset of pain and the presence of sharp pain over the ulnar aspect of the right wrist. Dr. Lefkoe advised the Claimant not to do repetitive pushing, pulling, twisting or lifting with the right hand and to wear a wrist splint at all time at work.

13. On May 14, 2001 claimant returned to work with a release from Mr. Hollingshead, wearing the wrist brace. She was put on light duty.

14. Deborah Hartenstein, OTR at Vermont Sports Medicine saw the Claimant on May 24, 2001. She took a history, examined the Claimant and recorded her suspicion of a triangular fibrocartilage (TFCC) tear. An MRI was then ordered.

15. In June, the employer rescinded its offer of light duty work upon learning that the carrier was denying the claim.

16. Claimant knew she was under a duty to look for work within her abilities but chose not to do so until after her surgery.

17. Next, Claimant saw Ann Stein, M.D., who, based on history and MRI, diagnosed a tear of the TFCC for which she recommended surgery. Dr. Stein performed arthroscopic surgery and debrided the torn cartilage on June 27, 2001. On October 2, 2001, Dr. Stein recommended a gradual return to her previous work, which her employer was not able to accommodate.

18. On October 18, 2001, Claimant signed up for unemployment benefits she received until her return to work. On November 13, 2001, Dr. Stein released Claimant to return to work at regular duty. Then, on November 23, 2001, Claimant returned to work for the defendant where she remains employed.

Medical Opinions

19. Mark Bucksbaum, M.D., board certified in physical medicine, rehabilitation and independent medical examination, evaluated the Claimant for the defense on November 28, 2001. Dr. Bucksbaum determined that Claimant was at medical end result with a 7% whole person impairment to her right wrist based on the 5th edition to the AMA Guides to the Evaluation of Permanent Impairment. However, he characterized the issue of causation as a "dilemma." In his opinion, a TFCC tear does not occur without a twisting mechanism and because he found no such description in the history from the Claimant he could not find a link to work. Furthermore, he found her complaints of pain before work on April 2, 2001 as inconsistent with the shaft being the mechanism of injury. He attributed the cause to the toweling incident of May 2 with an undisputed twisting mechanism and an audible pop.

20. Ann Stein, M.D., a board certified orthopedic surgeon with a specialty in surgery of the hand, testified for the Claimant by deposition in this case. In her opinion, it was unlikely that the toweling incident with the pop was the causative mechanism leading the TFCC tear. In fact she gave no significance to the pop. In her opinion it was the lifting of the shaft that gave rise to the tear. Typically a traumatic tear occurs with athletes, in sports such as tennis, volleyball or sometimes snowboarding when one twists her wrist "in just the wrong way." It can also occur in the workplace. The mechanism is one involving twisting and force. Dr. Stein's opinion that work caused the tear is based on the history of the Claimant, objective findings and her experience with the diagnosis and treatment of TFCC.

21. Although she found the fact that Claimant had some achiness before the incident leading to her dropping the shaft, such a fact did not alter Dr. Stein's opinion that the work involving the shaft caused the tear. She did not believe that a toweling incident would involve force necessary to cause a TFCC.

22. Claimant submitted evidence of her contingency fee agreement with her attorney, an activity log documenting 38.8 attorney hours in this case and $342.02 in necessary expenses.

DISCUSSION:

1. Underlying the defense in this case is the employer's belief that claimant did something at home to have caused the TFCC tear. That belief undoubtedly began with the fact that Claimant had not worked over the weekend, with her initial complaint of achiness in her wrist when she went to work on April 2, 2001, then with her supervisors interpretation of what the Claimant told another co-worker. The defense position that Claimant said she hurt her wrist "at home," however, is too vague to be credible. Understandably, an employer becomes suspicious when a worker complains of work related injury on a Monday after a weekend off. Such a pattern challenges the Claimant's credibility, thereby creating a need for more objective measures in assessing the reliability of facts presented.

2. In this case, further confusion arose when the Claimant as well as her health care providers originally attributed her complaints to repetitive work, not a TFCC tear. It is complicated by the Claimant's initial denial that positioning the shaft involved twisting. Yet, this claim is well supported by Dr. Stein's opinion that Claimant's pattern fit the typical pattern of a TFCC, involving both rotation and force. The rotation, in Dr. Stein's words, means twisting "in the wrong way." That Claimant initially denied rotating her wrist is not surprising if she did not think of the work — or any other activity — in those terms. In fact, to have developed a TFCC tear, she had to have twisted her wrist at some point, even though she did not remember a twisting incident initially.

3. Nor is the defense of the toweling incident as a causative mechanism persuasive because toweling does not involve the force even a 15-pound weight would involve and because the toweling incident followed the work-related complaints.

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. When determining the weight to be given expert opinions in a case, this Department has looked at several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional's qualifications, including education and experience; 3) the evaluation performed, including wither the expert had all relevant medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Op. No. 38-00WC (2000); see also *Miller v. Cornwall Orchards*, Op. No. 20-97WC (1997).

4. In this case, the balance shifts in favor of Dr. Stein who has specialized expertise in orthopedic surgery of the hand, who did the surgery on this Claimant and who supported her opinion with experience based on athletes who had TFCC caused by twisting as well as force.

5. Claimant's credible testimony together with persuasive expert medical opinion convince me that her TFCC arose out of an in the course of her employment, specifically when she was positioning a heavy shaft into place.

Temporary disability

6. When an employee's work-related injury causes "total disability for work," the employer shall pay the employee weekly temporary total disability benefits. 21 V.S.A.§ 642. "Incapacity for work…means loss of earning power as a workman in consequence of the injury, whether the loss manifests itself in inability to perform such work as may be obtainable or inability to secure work to do." *Roller v. Warren*, 98 Vt. 514 (1925). On this issue, the Claimant bears the burden of proof.

7. At issue are three periods of claimed disability. The first, from April 3, 2001 to April 25, 2001, began with Claimant's visit to the emergency department, where she was told that she could return to work in three days. She did not. Although subsequent records support her decision not to work, there is insufficient medical evidence supporting her claim that she could not have worked after the three-day period and no factual evidence that she tried to work with restrictions. Therefore, she is not entitled to TTD during this first period. The same conclusion applies to the second period, from May 4, 2001 to May 14, 2001. As with the first period, there is a lack of evidence supporting the claim that Claimant was unable to work during this period and that she sought work within her restrictions. Consequently, she is not entitled to TTD for those ten days in May.

8. For the sake of clarity, the third period from June 16, 2001 until November 23, 2001, can be divided into the pre and postoperative phases. Claimant had been working light duty before her surgery and before the carrier rescinded the light duty offer on the mistaken belief that her injury happened at home and not at work. To deny the Claimant TTD in the pre-operative period would be to penalize her for an employer error and insist that she look for work with another employer in the few weeks leading up to surgery. Such an impracticable and inhumane approach will not prevail. Because the employer rescinded the light duty work for a claim now found to be compensable, Claimant is entitled to TTD from the date of that decision until her surgery.

9. For the postoperative period, Claimant contends she is entitled to TTD until she returned to work in November. However, there is clear evidence that she was capable of working when Dr. Stein release her to limited work on October 2. At that point, Claimant was under duty to seek work, as the defendant did not have limited work available to her. See, *Hotaling v. St. Johnsbury Trucking Co*., 153 Vt. 581 (1990)(test is one of capacity to earn: whether the claimant is employable or able to sell his or her services on a regular basis in an open market). Because she had not proven inability to work after October 2, 2001, her entitlement to TTD ends with that date.

10. Pursuant to 21 V.S.A.§ 678(a) and WC Rule 10, a prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. Reasonable attorney fees in this case should be based on 20% of the total award, not to exceed $9,000. The necessary expenses of $342.2 are awarded as costs.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law, Claimant is awarded benefits associated with the injury to her right wrist that arose out of and in the course of her employment with Himolene. Those benefits include:

1. Temporary total disability benefits from June 6 until October 2, 2001;

2. Medical benefits associated with her injury and subject to WC Rule 40;

3. Permanent partial disability benefits based on a 7% whole person impairment;

4. Attorney fees based on 20% of the amount awarded and costs of $342.02;

5. Interest at the statutory rate computed from the date this order is mailed.

Dated at Montpelier, Vermont this 16th day of January 2003.

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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 V.S.A. §§ 670, 672.