STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jeffrey Hatin	)	State File No. R-00098 and P-12831
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Our Lady of Providence	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 21S-03WC

RULING ON CLAIMANT'S MOTION FOR EXPERT WITNESS FEES

This matter came before the Department on the claimant's post hearing motion for fees filed by his attorney, Mary G. Kirkpatrick, Esq. The defense, by and through its counsel, Marion T. Ferguson, Esq. and Glenn Morgan, Esq., opposes the motion.

Mr. Hatin requests reimbursement for outstanding costs associated with the hearing testimony and preparation for the deposition of Claimant's expert witness, Dr. Tandan, as well as for the deposition of defendant's expert witness, Dr. Bucksbaum. Defendant has paid the remainder of the costs.

A prevailing claimant is entitled to necessary costs pursuant to 21 V.S.A. § 678(a). Fees for experts constitute one such cost. WC Rule 10.3000. The Workers' Compensation Fee Schedule, WC Rule 40, establishes the maximum fee to be to be charged for medical services. It also contains a section for depositions and mileage for health care providers, using CPT code 99075, which the American Medical Association publication, Current Procedural Terminology 2003, defines simply as "medical testimony." Although the Vermont WC rules do not include a separate section for hearing testimony, the section on depositions, Rule 40.111, has served as a basis for an expert fee award in prior hearing cases because it also involves testimony, See *Fredericksen v. Georgia-Pacific Corp*, Opinion No. 28 97WC (1997). This is consistent with the AMA CPT code used. In those instances where no code is listed, "the maximum allowable payment shall not exceed 90 percent of the charge for the service." Rule 40.012 (I).

A claimant need only prevail in part of his claim to be entitled to an award of costs as a matter of law, *Gale v. Vermont Precision Tools*, Op. No. 50-96WC (1996). Such an award is for those costs clearly related to the successful aspect of the claim. *Brown v. Whiting*, Op. No. 07-97WC (1997). In this case, claimant prevailed in his claim against Our Lady of Providence (OLP) for temporary benefits and medical expenses associated with nerve treatment. Since Claimant is requesting expert fees for the

testimony of Dr. Tandan, and Dr. Tandan's testimony related to the claim against OLP, these costs are clearly related to the successful claim, and should therefore be awarded.

Claimant also seeks reimbursement for the cost of deposing the defendant's expert Dr. Bucksbaum, who theorized a new mechanism of injury for the Claimant. WC Rule 10.3000 does not delineate between claimants' experts and defendants' experts, for entitlement to expert fees. Therefore, because the cost is related to the successful claim, it should be awarded.

In *Peabody v. Comprehensive Rehabilitation & Home Ins. Co.*, Op. No. 15-01WC (2001), a claimant's motion to amend for expert witness fees was granted where the expert witness provided persuasive testimony and defendants failed to provide any substantial objection to the amount requested. Similarly, in this case Dr. Tandan provided persuasive testimony and, although the defendant objects to the amount requested, those objections pertain to the amount requested, not the entitlement itself.

Specifically, Mr. Hatin requests $2,500 to pay Dr. Tandan for 2 hours of live testimony. WC Rule 40.111(a) limits the fee for testimony to $300.00 for one hour or less plus $75.00 for each additional 15 minutes. Therefore, the fee for Dr. Tandan's two hours chargeble to the defense is limited to $600.00. Because the testimony was live however, Dr. Tandan should also receive reimbursement for travel time and mileage.

Next, claimant requests $150 for the time Dr. Tandan spent in a meeting preparing for his depostion. Defendant argues that any time spent on preparation should not be reimbursed. There is no provision in the Fee Schedule for the payment of preparation time. *Bodwell v. Webster Corp*. Op. No. 62-96WC (1996). Under the "necessary" standard of 21 V.S.A.§ 678 (a), research is appropriately included, but the time conversing with Claimant's attorney and preparing for deposition are not because that time goes to litigation strategy, not to the expert opinion. *Emerson v. Transport Dynamics, et. al.*, Op. No. 40A-02WC (2002). Dr. Tandan's meeting with Claimant's attorney falls under litigation strategy, and should not be included.

The Commissioner has considerable discretion in determining whether a request for fees, including fees charged by an expert witness, are reasonable. *Hall v. Maple Grove Farms, Inc*. (1995), citing *Pratt v. Georgia Pacific Corp.*, Op. No. 32-91 WC (1991). Claimant in this case should be awarded an additional amount of $600 for the costs in controversy for Dr. Tanden's testimony plus mileage and time for travel. Within the limits or Rule 40.110 he is also awarded fees for the deposition of Dr. Bucksbaum.

ORDER

Therefore, Claimant is awarded:

1. $600 for hearing testimony plus mileage and payment for travel time for the testimony of Dr. Tanden;

2. fees within the limits of Rule 40.110 for the deposition of Dr. Bucksbaum.

Dated at Montpelier, Vermont this 22nd day of October 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.

Hatin v. Our Lady of Providence and ICV Construction (April 29, 2003)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jeffrey Hatin	)	State File No. R-00098 and P-12831
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Our Lady of Providence	)	For: Michael S. Bertrand
and ICV Construction	)	Commissioner
	)	
	)	Opinion No. 21-03WC

Hearing Held in Burlington on June 20 and in Montpelier on August 21, 2002 after which the record remained open for deposition testimony of experts.

Record closed on December 23, 2002

APPEARANCES:

Mary Kirkpatrick, Esq., for the Claimant
Marion Ferguson, Esq. and Glenn Morgan, Esq. for Defendant, Our Lady of Providence
Keith Kasper, Esq. and Nicole Reuschel-Vincent, Esq. for Defendant, ICV Construction

ISSUES:

1. Did the Claimant sustain an injury that arose out of and in the course of his employment with Our Lady of Providence (OLP)?

2. Did subsequent work at ICV Construction (ICV) result in an aggravation or recurrence of a previous injury?

3. Are Claimant's upper body issues, including the surgery for his bilateral carpal tunnel and cubital tunnel syndromes related to his original workplace injury?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Work Log
Claimant's Exhibit 2:	Medical Bills
Claimant's Exhibit 4:	3/3/00 letter from OLP
Claimant's Exhibit 5:	3/21/00 letter from OLP
Claimant's Exhibit 6:	3/29/00 letter from OLP
Claimant's Exhibit 7:	Return to work statement from Dr. Scott
Claimant's Exhibit 8:	Return to work statement from Dr. Salay
Claimant's Exhibit 9:	Calculations re: TTD and TPD
Claimant's Exhibit 10:	Dr. Tandan short form CV
Claimant's Exhibit 11:	Dr. Tandan complete CV
Claimant's Exhibit 12:	Dr. Tandan's rebuttal letter dated 11/18/02
Claimant's Exhibit 13:	Letter from Halle Sobel, M.D. dated 11/25/02
Claimant's Exhibit 14:	Affidavits of attorney fees and costs
Claimant's Exhibit 15:	December 4, 2002 office note, Dr. Tandan
Defendant ICV Exhibit X:	Dr. Backus CV
Defendant OLP Exhibit A:	Photo
Defendant OLP Exhibit B1,2:	Depositions of Andres Roomet, M.D.
Defendant OLP Exhibit C:	Deposition of Mark J. Bucksbaum, M.D.
Defendant OLP Exhibit D:	Records from Bon Davenport

CLAIM:

1. Temporary total disability compensation from December 21, 1999 to May 1, 2000; from June 29, 2000 to October 23, 2000; and from March 1, 2001 to August 8, 2001. 21 V.S.A. § 642 (a).

2. Temporary partial disability benefits from October 24, 2000 to November 7, 2000 and from November 7, 2000 to November 21, 2000. 21 V.S.A. § 646.

3. Medical benefits associated with the medical and surgical treatment of his upper extremity problems. 21 V.S.A. § 640 (a).

4. Interest at the statutory rate on the unpaid compensation. 21 V.S.A. § 664.

5. Attorney fees and costs. 21 V.S.A. § 678 (a).

STIPULATION OF FACTS:

1. Claimant was an employee of Defendant Our Lady of Providence within the meaning of the Vermont Workers' Compensation Act (Act) from October 1987 through March 29, 2000.

2. Defendant Out Lady of Providence terminated Claimant on March 29, 2000.

3. Claimant became an employee of Defendant ICV Construction within the meaning of the Act on May 1, 2000.

FINDINGS OF FACT:

1. Claimant began working at Our Lady of Providence (OLP) in October 1987 as a maintenance worker. That job involved maintaining the outside grounds and the building itself, including mechanical functions. He cleaned floors, painted and did repairs. He used a weed whacker, drove a tractor and snow blower, shoveled snow, salted and lifted supplies. He worked full time and was on call 24 hours a day.

2. Atlantic Mutual was the workers' compensation carrier for OLP at the times relevant to this claim.

3. On July 22, 1998 Claimant went to Dr. Hayes, a chiropractor, for treatment of back pain after moving furniture. He had a neck sprain at the time, but continued with his normal activities, including work.

4. On April 28, 1999 Claimant saw Dr. Salay at Fletcher Allen Health Care/University Health Center (FAHC/UHC) for a regular examination. The notes for that visit make no mention of upper body complaints.

5. In the spring and summer of 1999 Claimant treated at the Given Health Center, but had no complaints of back, neck or arm symptoms.

6. On or about September 14 or 15 while at work, Claimant used a hammer drill, drilling through cement for two to three hours each day in order to install some posts.

7. Also in mid-September 1999 Claimant awoke one night with pain in his elbows.

8. On September 22, 1999 Claimant saw Dr. Salay at FAHC/UHC for pain in his elbows. He reported a two-month history of his elbow bothering him, including pain with lifting at work. At that time Claimant was wearing self-prescribed braces for his elbows, which Dr. Salay suggested he continue. She prescribed Naprosyn and recommended that he avoid heavy lifting.

9. Although Claimant went bow and rifle hunting in the fall of 1999, he did so after the onset of his elbow symptoms. He was at a hunting camp where he spent only a half hour with his bow, firing no more than a dozen arrows.

10. In November 1999 Claimant saw Dr. Leland Scott, a neuromuscular specialist, to whom he reported pain and numbness in both arms and shoulders. An MRI Dr. Scott ordered revealed a "focal left disc herniation at C5-6."

11. In mid-December 1999 Claimant telephoned Dr. Scott four or five times with complaints of severe pain in his shoulders, although no injury.

12. On or about December 21, 1999 Claimant stopped working at OLP. He had gone to work, but was uncomfortable. He was told to stop working for fear of re-injury. Dr. Salay took him out of work until January 4, 2000 when evaluated by Dr. Roomet.

13. Claimant was seen at the Ortho-Rehabilitation Health Care Service at FAHC where it was noted that Claimant's symptoms began the previous September with no specific trauma and that his pain, initially limited to his upper extremity, had developed into his neck as well.

14. Dr. Timothy Fries interpreted a December 1999 EMG as consistent with ulnar neuropathy at the left elbow. It revealed no evidence of radiculopathy.

15. After Claimant consulted with him for a second opinion, Dr. Roomet, a neurologist, described a spontaneous onset of pain and "no clear cut incident or activity that seemed to have set this off." He opined that the source was a C-6 radiculopathy. Dr. Roomet found no causal relationship to work.

16. Claimant denied "trauma" when questioned by his physicians because he interpreted the term to mean a fall or an accident. After he received Dr. Roomet's report, Claimant discussed the situation with Mr. Davenport at OLP and then reviewed his work log to determine if anything in the workplace could have caused the pain. The search revealed an entry in mid September when Claimant was using a hammer drill in cement for 2 hours on two days. During the pneumatic hammering, Claimant held the drill in a horizontal position. In response to Claimant's report of the drilling, Dr. Roomet opined that given the temporal relationship, "this certainly could be work-related."

17. In January of 2000 Claimant told Dr. Scott that three or four days before his symptoms he had worked using a pneumatic hammer drill, drilling in concrete for three hours per day for two days. Later, in response to the Claimant's specific request, Dr. Scott wrote that Claimant's condition most probably was aggravated by the recent use of the pneumatic drill.

18. On March 1, 2000 Dr. Salay released Claimant to work at medium duty.

19. On March 14, 2000 Dr. Leland Scott diagnosed the Claimant with "cervical radiculopathy and ulnar neuropathy" and released him to work with minimal restrictions.

20. OLP terminated Claimant's employment. In a letter to the Claimant, the treasurer and coordinator explained that the required work at OLP did not fit within the doctor's restrictions.

21. In March 2000, based on "the weight, vibration and torqueing" of the hammer drill, Dr. Scott opined that it was "reasonable to think that the activity was primarily responsible for the patient's symptoms. The fact that it took two to three days before the onset is also consistent with acute trauma to the disc with subsequent swelling/edema which then resulted in neurogenic pain." A month later, Dr. Scott wrote a letter stating that Claimant's entrapment neuropathy in his right arm likely resulted from work and that all his entrapment neuropathies are related.

22. Claimant was employed as a maintenance worker for ICV Construction, (ICV) his statutory employer on May 1, 2000. Acadia Insurance Company was the workers' compensation carrier for ICV.

23. His job entailed grounds keeping, building repairs, window washing and grass cutting. In May of 2000 he was still treating with Dr. Scott and Dr. Salay and was taking prescribed medications, including Celebrex and Neurontin. After a couple of weeks on the job he saw Dr. Scott and reported that his arm symptoms, while not absent, were improving and that he was able to take breaks at work when numbness occurred.

24. However, Claimant's symptoms soon worsened, prompting Dr. Backus to opine that the work at ICV had exacerbated Claimant's preexisting condition. He diagnosed ulnar neuropathy of both elbows. A subsequent opinion from Dr. Backus made it clear that any worsening was in Claimant's symptoms, not in his underlying condition.

25. On June 27, 2000 Claimant reported that he could no longer work at ICV due to pain in his elbows. That pain, while increased in intensity, was the same pain Claimant had when he began the job at ICV.

26. He was out of work for surgery from June 27, 2000 to November 1, 2000 when he returned to work after his surgery.

27. An August 2000 EMG was positive for bilateral ulnar nerve entrapment at the elbow (cubital tunnel syndrome) and negative for cervical radiculopathy and negative for carpal tunnel syndrome. Although positive the EMG was an improvement over the one performed in December 1999. The 2000 EMG record reflects that symptoms began in September 1999. Dr. Benoit performed surgery on the right side on August 25, 2000.

28. In October 2000, Dr. Scott stated "beyond a reasonable doubt" that Claimant's cervical radiculopathy and ulnar neuropathies are directly related to the work he performed. On October 25, he released Claimant to work part-time with no heavy lifting or repetitive activities.

29. Medical records generally from the fall of 2000 indicate a general improvement in the Claimant's elbow symptoms. He worked part time, light duty in November. In mid November, it was noted that he had no significant elbow problems. However by the end of that month, he reported problems with his left arm. Those symptoms followed the median nerve distribution, suggesting carpal tunnel syndrome, a diagnosis that an EMG confirmed was bilateral.

30. In April 2001 Claimant underwent surgical release for carpal tunnel syndrome on the left and in June surgery on the right. Dr. Scott opined that the original injury probably caused the carpal tunnel syndrome because modifications in activities resulted in compression elsewhere.

31. Nerve conduction studies revealed a worsening between August 2000 and February 2001. The examiner, Dr. Zweber, expressed concern that Claimant might have some predisposition to nerve entrapment from a metabolic, acquired or hereditary basis, although subsequent tests by Dr. Scott ruled out any hereditary basis.

32. Dr. Rup Tandan, a neurologist at FAHC, began treating the Claimant in September 2001 on Dr. Scott's departure from the practice and testified on behalf of the Claimant at the hearing.

Medical Opinions

33. In Dr. Tandan's opinion, the Claimant's herniated disc was most likely the result of wear and tear and degeneration.

34. Dr. Tandan further testified that the use of the hammer drill triggered the onset of Claimant's bilateral ulnar nerve condition (cubital tunnel) and that the carpal tunnel syndrome was likely due to the modifications of activities due to pain from the elbows. All the nerve entrapments, in Dr. Tandan's opinion, are related to the Claimant's work at OLP. This opinion is based on a review of the Claimant's records, a time line and the Claimant's testimony. Although Claimant had symptoms while working at ICV, they were the same symptoms he had while at OLP and were symptoms for which Claimant was treating when he began the ICV job.

35. Although the temporal relationship between the use of the hammer drill and the Claimant's condition was part of the basis of Dr. Tandan's opinion regarding causation, it was not the sole basis. His opinion also is supported by the lack of previous problems with ulnar nerve entrapment, the clear indication that something new happened, the known irritation of a nerve by a vibratory disruption such as that from the drill and the nature of Claimant's symptoms.

36. After reviewing the medical records and conducting a medical examination of the Claimant on behalf of the Defendant OLP, Dr. Mark Bucksbaum opined that there is insufficient evidence to support a finding to a reasonable degree of medical certainty that Claimant's multifocal neuropathies and cervical spine disease are related to his work at OLP. In his opinion, the neuropathies are not related to any work related injury. In support of this opinion, he contrasted mononeuropathy, which is typically caused by trauma, to Claimant's condition, with multiple neuropathies. The ulnar and median nerves are involved and the cervical spine affected in the overall picture.

37. Claimant submitted his claim for attorney fees totaling $22,776.00 based on the firm's standard billing practices for 112.2 attorney hours and 7.8 paralegal hours. The claim for out of pocket costs total $4,958.04.

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).

Compensability

3. This case requires an analysis of medical records and a consideration of the expert opinions. That consideration involves an examination of the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).

4. The true conflict here is between the opinions of Dr. Tandan and Dr. Bucksbaum. Dr. Tandan has the advantage as the treating physician; Dr. Bucksbaum has the advantage of greater objectivity. Both reviewed all medical records. Both presented cogent analyses. Dr. Tandan as the neurologist has expertise specific to the issues in this case and explained the causal association by integrating facts about the Claimant's actual work, onset of symptoms and the pathophysiology underlying the problem.

5. On balance, I accept Dr. Tandan's as the more persuasive, based on the mechanism of the injury and because a thorough workup has been done which has not produced a more convincing explanation.

6. Therefore, Claimant has met his burden of proving that his work at OLP is the most likely initial cause of his upper extremity conditions. The trauma involved with use of the hammer drill was enough to cause the ulnar neuropathy, as Dr. Tandan cogently explained. Carpal Tunnel Syndrome later resulted by Claimant's modified use of hands because of the elbow problems.

Aggravation or Recurrence?

7. A recurrence is the return of symptoms following a temporary remission, or a continuation of a problem, which had not previously resolved or become stable. Whereas, an aggravation means an acceleration or exacerbation of a previous condition caused by some intervening event or events; it is a destabilization of a condition, which had become stable, although not necessarily fully symptom free. Rule 2(i) and (j) of the Vermont Workers' Compensation and Occupational Disease Rules (April 1, 1995) ("Rules").

8. The Vermont Supreme Court explained, "In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a "recurrence" of the first injury-- i.e., if the second accident did not causally contribute to the claimant's disability (cite omitted). If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an "aggravation," and the second employer becomes solely responsible for the entire disability at that point. (cite omitted). *Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626 (1997) (mem.).

9. The only medical evidence supporting a finding of aggravation in this case was from Dr. Backus who, after reviewing all the medical records, determined that it was only the Claimant's symptoms, and not his underlying condition, that had worsened while he was working at ICV.

10. When the Claimant began his work at ICV, his condition had not become stable. He still had symptoms and was actively treating. He had not reached medical end result. At most he had a temporary remission when he took the job at ICV; the problem caused by his work at OLP continued. As such his condition in June 2000, the ulnar neuropathy, was recurrence.

11. Later, Claimant's condition not only continued, it became more involved. He developed carpal tunnel syndrome, a median neuropathy involving the wrists and hands, in addition to his ulnar neuropathy, involving the elbows. Dr. Tandan explained that because of the elbow problems, Claimant used in hands differently, thereby putting stress on the hands, which led to carpal tunnel syndrome. While such is an unusual causal link, it is an unbroken one, keeping liability on the first employer, OLP.

12. Claimant is therefore entitled to temporary disability benefits for those periods he was totally or partially disabled as a result of his work related injury 21 V.S.A. § 643(a); 646. The focus of the hearing was on the issue of causation, not on temporary disability benefits due, although the Claimant submitted an exhibit on this issue. If the parties cannot resolve the TTD/TPD issue informally within 30 days, they must submit evidence supporting their respective positions after which a second decision will be issued.

13. Pursuant to 21 V.S.A. § 640 (a), Claimant is entitled to "reasonable surgical, medical and nursing services and supplies." Therefore, those services related to the treatment of his ulnar and medial nerve problems are compensable.

14. As a prevailing Claimant, Jeffrey Hatin is entitled to reasonable attorney fees and necessary costs pursuant to 21 V.S.A. § 678 (a). The fees are subject to

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law:

1. All claims against ICV are DENIED.

2. OLP and its insurer are ORDERED to pay Claimant:

    - Temporary benefits due;
    - Medical benefits associated with the ulnar and median nerve treatment;
    - Interest at the statutory date from the dates of disability or billing date of treatment, as applicable;
    - Attorney fees and costs once an accurate determination is made.

Dated at Montpelier, Vermont this 29th day of April 2003.

_____

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.