STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. F-00085
Elizabeth Vivian	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Eden Park Nursing Home	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 01–00WC

Hearing held in Montpelier, May 10, 1999
Record closed December 20, 1999

APPEARANCES:

David A. Gibson, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUES:

1. Whether claimant suffered an injury out of and in the course of her employment with Eden Park.

2. If the answer to the first question is in the affirmative, whether claimant's current health problems are causally related to her work-related injury.

3. For what period of time was claimant temporarily totally disabled?

4. What is claimant's permanent partial disability rating?

EXHIBITS:

Joint Exhibit A	:	Medical Records
Joint Exhibit B3	:	Transcript of Deposition of Ervin Moffitt, November 18, 1992
Joint Exhibit B4	:	Transcript of Deposition of Chris Rouleau, December 9, 1992
Joint Exhibit B5	:	Transcript of Deposition of Philip Gates, November 18, 1992
Joint Exhibit B6	:	Transcript of Deposition of Jon C. Thatcher, M.D., March 17, 1999
Joint Exhibit B7	:	Transcript of Deposition of Donald L. Kinley, M.D., March 24, 1999
Joint Exhibit B8	:	Transcript of Deposition of Craig N. Anderson, D.C., April 14, 1999
Claimant's Exhibit 1	:	Transcript of Deposition of David J. Coffey, M.D. (to be taken and submitted, but never received)
Claimant's Exhibit 2	:	Transcript of Deposition of A. Douglas Lilly, M.D. (4/ 29/1999, filed 12/20/99)

Claimant's Exhibit 3 : Transcript of Deposition of Joseph M. Phillips, M.D. (4/23/99, filed 12/20/99)
Defendant's Exhibit A: Transcript of Deposition of Mark J. Bucksbaum, M.D. July 2, 1999

Witnesses who testified at the hearing:
Elizabeth Vivian, the claimant; Fred Lindsell and David Selover for the employer

FINDINGS OF FACT:

1. Elizabeth Vivian was an "employee" and Eden Park Nursing Home her "employer" as those terms are defined in the Workers' Compensation Act. Claimant worked as a Nurse's Aide, a job that consisted of assisting patients on the second, third, and fourth floors of the building.

2. The incident at issue in this case occurred in the basement break room, two floors away from patients while claimant was on a break. The room was for employees only.

3. On June 26, 1992 claimant was sitting at a table in the break room with her back to the door. A co-worker, Ervin Moffitt, jokingly entered the room, moved quickly to claimant's table, and tapped her in the back of the head with his hand. He testified that his tap was so gentle it would not have hurt a baby. Claimant testified that she was surprised and hurt. She further testified that her head moved forward when Moffitt hit her, then went backward. Another co-worker, Philip Gates, who was sitting across from the claimant at the same table, testified as follows:

> [Ervin Moffitt] came in running, sort of like a gallop-type of thing, slid to a stop, his arm came up from behind her, and I don't know if it was an open or closed hand or where he struck her in the back. I just know that her head came forward and then we laughed. We thought it was a joke. And she didn't laugh, said it was not a joke, and that it wasn't funny. I shut up; I didn't laugh any more. I thought she was embarrassed. And that was the end of that at the time in the break room.

4. Fred Lindsell, Maintenance Supervisor at Eden Park Nursing Home, was working on June 26, 1992. He could not recall if the incident occurred during the morning break or the afternoon break. However, he does recall seeing claimant and Ervin Moffitt that day before they went into the break room. He was behind them as they were walking down the hall and observed claimant push Moffitt on the shoulder. Lindsell testified that claimant and Moffitt were laughing, talking, and joking. Moffitt went into the men's locker room before he went into the break room. Lindsell did not observe the incident in the break room. But he testified that claimant stayed around afterwards, laughing, and joking with her co-workers.

5. Lindsell testified that later the same day he saw claimant chase Moffitt down a hallway on one of the upper floors. Because he was Moffitt's supervisor, he took Moffitt aside and explained that such behavior was not acceptable in a nursing home. Lindsell and David Selover, the Administrator of Eden Park Nursing Home, both testified that physical assault is not acceptable behavior in the Eden Park Nursing Home.

6. Claimant testified that Moffitt was a fellow employee and that prior to the incident at issue they would occasionally joke around. However, on June 26, 1992, she claims he hit her without any provocation.

7. Claimant testified that by the time she was back up on her floor and her shift had ended, she had pain "pretty good" and difficulty moving her neck. She said she could move her neck, but only with difficulty. Although she was familiar with the Incident Reporting system at Eden Park, she did not fill out an incident report that day. On one occasion she justified her failure to fill out the Report by explaining that she had to leave to pick up her daughter. On another occasion, she explained that an event going on in the building at the time kept her from filling out the form. At her deposition she said that she did not take an Incident Report because she did not know how severe her injury was, a version of the events that she denied at the hearing.

8. At the hearing she testified that, although it hurt to turn her neck, she was able to drive home. However, her deposition testimony was that someone picked her up from work and drove her home.

9. At the hearing, claimant denied that she had a history of headaches, but that she had a headache when she left Eden Park on June 26. She testified that if a doctor were to ask her whether she had a history of headaches, she would say no. However, Dr. Anderson's February 4, 1993 note documents a history of headaches.

10. Claimant testified that her headaches do not respond to Advil or Nuprin. However, Dr. Kinley's notes indicate that her headaches usually respond to those two medications.

11. To health care providers, claimant described the June 26 incident as a playful one, as reflected in Dr. Thatcher's October 6, 1992 note.

12. Dr. Kinley saw claimant on June 30, 1992, four days after the break room incident. She told him that she was sitting in a break room at work when another employee came in and hit her in the back of the head with his hand, with resultant immediate onset of pain and tenderness over the back of her head. On examination, Dr. Kinley observed no obvious swelling and no bruising or other observable signs. Strength in her arms was normal. Reflexes were normal. X-rays revealed mild degenerative arthritic changes unrelated to the June 1992 incident. The doctor diagnosed a cervical muscular injury. Dr. Kinley gave her a note stating that she could return to work on a light duty status with no lifting or pulling of patients.

13. On July 10, 1992 after several visits at which claimant complained of headaches and pain in her neck, Dr. Kinley determined that "she is not going to be able to work for at least 2 weeks."

14. On July 19, 1992, claimant was seen in the Emergency Department at the Brattleboro Memorial Hospital with complaints of seizure-like symptoms. She was diagnosed with panic attack/anxiety disorder, worsened by prednisone. The physician decreased her prednisone dose and sent her home with instructions to follow up with her family doctor.

15. In September 1992, claimant enrolled in classes at the Community College of Vermont (CCV) where she took two to three courses per semester until she graduated with an Associate of Arts Degree in Human Services in June 1997.

16. On October 12, 1992, Dr. Thatcher noted that although "whiplash injuries commonly take 6 to 12 months to heal, it is best that she get on with her life as best she can tolerating her symptoms." He then noted, "with this in mind I have given her the okay to return to work, light duty with restrictions of no lifting, pushing, or pulling greater than 10 pounds and she should be allowed to sit and rest five minutes out of every half hour. If the workplace can comply with this I think it is in her best interest to return at this time."

17. On November 25, 1992, Dr. Thatcher again wrote that claimant was still having symptoms, but that he was "sending her back to work at Eden Nursing Home with restrictions of no lifting patients by herself, and she is going to start four hours a day for the first week, working toward 5 and 6 hours as symptoms allow, finally with a goal of an 8 hour day."

18. Claimant testified that her employer did not want her back to work in a light duty capacity. In contrast, administrator David Selover testified that it is Eden Park's practice to provide light duty work for its employees and that it has a light duty policy in place.

19. A January 18, 1993 MRI scan was read as showing " degenerative disc disease at C5-6 and C6-7 levels with mild canal stenosis."

20. During her testimony, claimant recalled an incident in February 1993 when a three or four year old boy pulled her arm forward as if to ask her to go with him. At an earlier time she suggested that the child pulled her arm backward. She told Dr. Anderson about that incident when she saw him on February 11, 1993. In his note, Dr. Anderson noted that she had hyperextended her right arm two days earlier and was complaining of pain across her shoulder blades as well as headaches and an achy neck. Claimant indicated on a diagram that she had pain in a symmetrical area that included her lower neck, upper back, and upper part of both arms.

21. Claimant's pain diagram for the February 19, 1993 visit marked the upper neck and both arms down to the wrists. The pain diagram on February 23, 1993 marked the neck, upper left arm, and right arm down to the tips of the fingers. On February 26, 1993, claimant marked that she had pain in the neck and right shoulder, the left shoulder and upper arm, and both hands. On examination, Dr. Anderson noted that her fingers were puffy. On March 3, 1993, claimant indicated on the diagram that she had pain in the lower back, neck, both shoulders, and entire left arm down to, but not including the fingers. On March 5, 1993, claimant marked on the neck and both shoulders as the areas that hurt. On March 9, 1993 she complained of pain in the neck, upper back, and lower back. The pain included the neck, both arms, upper back, and both shoulders on March 12 and March 16, 1993. Both hands, the right shoulder, neck, and entire left arm hurt on March 19, 1993.

22. In his June 18, 1993 office record, Dr. Anderson checked the box marked "no" in response to the questions whether claimant had restrictions. He determined that she had

reached a medical end result, with a 6% whole person, 10% spinal impairment based on the 3rd edition of the *AMA Guides*.

23. On June 29, 1993 Dr. Lilly also found that claimant had reached a medical end result. He rated her impairment at 6% whole person for the spine. That opinion was based on a January 1993 MRI study that provided evidence of degenerative disc disease and on the injury she sustained at work on June 26, 1992.

24. Dr. Bucksbaum rejected both impairment ratings. He observed that x-rays revealed degenerative arthritic changes in claimant's neck from the outset, changes that could not be attributable to an injury four days earlier. As such, he concluded that because the degenerative changes caused the impairment, the work-related injury did not.

25. On August 20, 1993, claimant saw Dr. Anderson with the complaint that she had fallen the day before, twisted her ankle, and hit the back of her head on the floor. Dr. Anderson diagnosed cervicolagia and degenerative disc disease and treated her with chiropractic adjustment and ultrasound.

26. After three more visits to Dr. Anderson for chiropractic adjustment and ultrasound, she returned to him on September 10, 1993 with the complaint that a lampshade had fallen on her head the previous Wednesday, although the neck and arm pain did not seem to worsen.

27. By the fall of 1993, her problem was stabilized and claimant was asymptomatic according to Dr. Anderson's March 1, 1994 letter to Dr. Coffey.

28. In October 1993, she was working at Ames, hanging up clothes.

29. In May 1994 she had an anterior scalenectomy on the right side for a right thoracic outlet syndrome. Dr. Joseph Philips performed the surgery that involved dividing a fibrous band in the back of muscle, a band that is a normal part of anatomy, not as a result of any trauma. Dr. Phillips was not able to relate the work-related incident in June 1992 to the necessity of the surgery he performed.

30. At his deposition, Dr. Phillips testified that it is possible that "somebody could get slapped in the back of the head and end up with thoracic outlet syndrome." Furthermore, two years from the time of an incident to the diagnosis of thoracic outlet syndrome "fits okay" in Dr. Philips's opinion. However, he conceded that the further from the time of the incident that he meets the patient, the more difficult it is to make cause and effect determinations. He did not know how hard claimant had been hit or how hard one must be hit for thoracic outlet syndrome to develop. And he does not think that anyone could answer those questions. Variables include gender because the syndrome is more common in women who have a smaller neck that is easy to bend. A slight tap on the head is not likely to create the syndrome, although Dr. Phillips was not willing to accept the testimony of Irwin Moffitt who stated that the tap was not enough to hurt an infant. If she had been laughing and her head did not move, it would be less likely that she would develop the syndrome.

31. An October 18, 1995 letter from Dr. Coffey to Dr. Taylor-Olson clearly documents the evolution of claimant's symptoms that at that time suggested "occipital neuralgia type syndrome." She was still having difficulty with her arm despite the surgery for thoracic outlet syndrome.

32. In a July 16, 1996 letter to Dr. Tayler-Olson, Dr. David Coffey opined that claimant had a posttraumatic headache and associated symptoms with an 11% impairment using the criteria for Permanent Impairment for Posttraumatic Headache Rating Scale of the American Associate for Study of Headache. In addition, using table 211 and Table 14 of the *AMA Guides*, he rated a 3% impairment of the right upper extremity on the basis of pain and sensory change due to injury of the brachial plexus, middle trunk. He concluded that the combined total was 14%.

33. Dr. Mark J. Bucksbaum reviewed claimant's medical records for the employer. He holds an undergraduate degree in engineering as well as a medical degree. After reviewing all of the records and some depositions, he concluded the slap on the back of claimant's head occurred from the side of the head, what he described as the northwest quadrant. This type of blow along a diagonal vector, the doctor explained, would not cause a whiplash-like injury that is caused by a blow from directly behind or in front of the head. He rejected outright an eyewitness's testimony that the blow was to the center of claimant's head as being beyond the ken of a witness who was sitting across the table from the claimant. Dr. Bucksbaum's conviction that the tap on the head was slight was reinforced by the examination four days later when diminished range of motion was the only positive sign.

34. Dr. Bucksbaum opined to a reasonable degree of medical certainty that the June 1992 injury claimant described did not cause her subsequent complaints and did not lead to the necessity of thoracic outlet surgery. He explained that the injury model was inconsistent with her subsequent complaints. For example, before deep tissues are injured, the superficial ones sustain an injury that can be observed by an examiner. Because this claimant had no observable signs of superficial soft tissue injury after the accident, it is unlikely that she suffered thoracic outlet syndrome, a deep tissue injury, at that time. The more probable and common mechanism is a hyperextension injury of the arm, which claimant sustained in a non-work-related incident with a child, an incident that prompted her to seek medical attention from Dr. Anderson in February 1993.

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). She must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. The employer contests this action on the theory that claimant did not suffer an injury that arose out of and in the course of her employment. "An injury arises out of employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured." *Clodgo v. Rent-A-Vision, Inc.*166 Vt. 548, 551 (1997), citing *Miller v. International Business*

Machines, 161 Vt. 213, 214 (1993); *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993). Generally, "injuries occurring on the premises during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment." *Larson's* § 21.02[1][a]. The same principle applies to an on-premises break such as the one this claimant was on at the time of the alleged injury. "But for" her employment at Eden Park, claimant would not have been in the break room at the time she was injured. Under the well-established positional risk doctrine, therefore, any injury she suffered arose out of her employment. See *Shaw*, 160 Vt. 594 (unprovoked stabbing in the bunkhouse after work arose out of employment).

3. Whether the injury occurred in the course of claimant's employment, however, is a separate question and one the employer strongly contests. Specifically, it argues that this action is barred as horseplay, under the doctrine articulated in *Clodgo v. Rent-A-Vision, Inc.*166 Vt. 548 (1997). In *Clodgo*, the Vermont Supreme Court explained and adopted the criteria established in *Larson's Workers' Compensation Law* § 23.00 when it held that the eye injury a claimant suffered in a staple gun incident at work was not compensable.

4. Professor Larson explained that minor acts of horseplay do not automatically constitute departures from employment. Therefore, whether "initiation of horseplay is a deviation from course of employment depends on: 1) the extent and seriousness of the deviation; 2) completeness of the deviation (i.e. whether it was commingled with the performance of duty or involved an abandonment of duty); 3) the extent to which the practice of horseplay had become an accepted part of employment; and 4) the extent to which the nature of the employment may be expected to include such horseplay." *Id*. It is doubtful that the teasing claimant was engaged in earlier that day would meet the four-prong test. More importantly, however, is that the claimant in this case, unlike the worker in *Clodgo*, was neither the instigator nor an active participant at the time of the injury.

5. Even if we accept the employer's testimony that the claimant was clowning with Moffitt before they entered the break room, there is absolutely no evidence to suggest that claimant was involved in any type of horseplay after she entered that room. In fact, it is uncontested that she was sitting at table with her back to the door, obviously not expecting to be hit, even in play. When Mr. Moffitt hit her, she was not participating in any type horseplay. Any role she had in horseplay ceased when the co-workers parted ways in the corridor, Moffitt went to the locker room, and claimant entered the break room. The employer has cited no authority for its theory that by teasing a co-worker in a hallway, this claimant should be considered an instigator of an unprovoked slap on the head from behind some minutes later. The slap on the head, therefore, arose out of and in the course of claimant's employment. Under the well-established principle that "injury to a non-participating victim of horseplay is compensable," *Larson's* § 23, if claimant suffered an injury as a result of the slap on the head, it is compensable.

6. 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). Because of the specialized subject matter, expert testimony is essential to establish the causal relationship.

7. The inconsistencies in claimant's version of events coupled with a four-day delay in seeking medical attention suggest that the slap on claimant's head was not nearly as serious as she now alleges. In addition, the medical records created four days after the incident revealed no objective signs that claimant had suffered more than a light tap. There was no bruising, even though claimant admitted to bruising easily. There was no redness or swelling. In short, there was no sign that claimant suffered any more than slight discomfort, despite later reports of significant and migrating pain.

8. Claimant was laughing in the break room after the incident. She was seen running down a corridor. Dr. Kinley who saw her four days later told her she could work, albeit on a light duty capacity. Claimant never convincingly testified that she could not work. And the medical evidence does not support her position that she was temporarily totally disabled for any period of time as a result of the tap on her head. Consequently she is not entitled to any temporary total disability benefits.

9. Furthermore, the lack of objective findings at the doctor visit four days after the incident supports the defense argument that the slap did not lead to an injury significant enough to have caused thoracic outlet syndrome. Dr. Bucksbaum credibly explained that before the deeper tissues, such as those injured in thoracic outlet syndrome, would be injured, the blow causing the injury would first inflame the superficial tissue with signs a physician would observe and document. When this claimant presented to a physician, she had no observable signs of inflammation. Furthermore, her reflexes were normal, providing further support for the diagnosis made at the time of the injury of a minor cervical strain.

10. The medical records later indicate that claimant injured her head twice, once when she fell and once when a lampshade fell on her head, events that clearly were not work-related.

11. Although, as Dr. Phillips testified, the causal relationship between the slap on the back of claimant's head and her subsequent thoracic outlet syndrome is a possible one, it does not rise to the necessary level of probability to support the claim for the compensability of that syndrome and surgery for its correction.

12. The next issue for decision is the degree of permanency, if any, to which claimant is entitled. Dr. Coffey assessed her impairment at 14% by combining his headache rating with one from one source and rating for her arm from the *Guides*. Dr. Anderson determined that she had reached a medical end result, with a 6% whole person, 10% spinal impairment based on the 3rd edition of the *AMA Guides*. Similarly, Dr. Lilly also found that claimant had reached a medical end result. He rated her impairment at 6% whole person for the spine. Dr. Bucksbaum rejected all three impairment ratings. He observed that x-rays revealed degenerative arthritic changes in claimant's neck from the outset, changes that could not be attributable to an injury four days earlier. As such, he concluded that because the degenerative changes could have caused the impairment, the work-related injury did not. Finally, Dr. Bucksbaum rejected Dr. Coffey's rating because it combined ratings from dissimilar sources.

13. The employer correctly challenges the validity of Dr. Coffey's rating. Unless both ratings are gleaned from the *Guides*, they cannot simply be added together. Furthermore, Dr. Coffey failed to address the *Guides* determination that pain is not a ratable impairment

per se, although it "should trigger assessments with regard to ability to function and carry out daily activities." Consequently, Dr. Coffey's rating cannot be accepted.

14. Dr. Lilly attributed his 6% rating, based on the 3rd edition revised of the *Guides*, to a combination of a preexisting condition and the June 1992 work-related accident. The applicable provision of the *Guides* states "unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative changes on structural tests."

15. Dr. Bucksbaum concluded that any permanency claimant has suffered is a result of degenerative condition and not to any work-related injury. His conclusion is supported by evidence of degenerative changes in claimant's cervical spine four days after the break room incident. It is undisputed that recent trauma would not have caused such changes. Claimant, therefore, is not entitled to permanency benefits.

Based on the foregoing Findings of Fact and Conclusions of Law, Elizabeth Vivian's claim for workers' compensation benefits related to the June 1992 break room incident is DENIED.

Dated at Montpelier, Vermont, this 14th day of February 2000.

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Steve Janson
Commissioner