

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

	)	State File Nos. M-16266; M-16265
	)	
Kelly Lewis	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Ethan Allen and	)	Commissioner
Green Mountain Wood Products	)	
	)	Opinion No. 41-00WC

Hearing Held in Montpelier on June 30, 2000.  
Record Closed on August 7, 2000.

**APPEARANCES:**

Heidi S. Groff, Esq. (then Haught) for the Claimant.  
John W. Valente, Esq. for Ethan Allen/Travelers.  
Andrew C. Boxer, Esq. for Green Mountain Products/Lumber Insurance

**CLAIMANT SEEKS:**

Temporary Total Disability Benefits pursuant to 21 V.S.A. §642. (Already paid pursuant to an Interim Order dated August 11, 1999).

Medical and hospital benefits pursuant to 21 V.S.A. §640. (Already being paid pursuant to an Interim Order dated August 11, 1999).

Permanent Partial Disability Benefits pursuant to 21 V.S.A. §644.

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

**ISSUES:**

Whether the claimant bilateral carpal tunnel syndrome is causally connected to her work at either employer.

Which employer, Ethan Allen or Green Mountain Wood Products, should be responsible for worker's compensation benefits for the claimant's right carpal tunnel syndrome.

Which employer, Ethan Allen or Green Mountain Wood Products, should be responsible for worker's compensation benefits for the claimant's left carpal tunnel syndrome.

## **FINDINGS OF FACT**

1. Claimant was an employee of both defendant employers within the meaning of the Vermont Worker's Compensation Act ("Act") at all relevant times.
2. Defendant Ethan Allen was an employer within the meaning of the Act at all relevant times.
3. Defendant Green Mountain Wood Products was an employer within the meaning of the Act at all relevant times.
4. The Travelers was the worker's compensation insurance carrier for defendant Ethan Allen at all relevant times.
5. Lumber Insurance was the worker's compensation insurance carrier for defendant Green Mountain Wood Products at all relevant times.
6. On or around January 20, 1999, claimant suffered a personal injury by an accident arising out of and in the course of her employment.
7. Ethan Allen contends that there was an aggravation of this injury once the claimant left her employment at Ethan Allen and began working for Green Mountain Wood Products.
8. Green Mountain Wood Products contends that there was no aggravation during the claimant's employment with them severing the causal connection from the original injury at Ethan Allen.
9. In either case, the claimant has now had bilateral carpal tunnel release surgeries performed by Dr. William Minsinger.
10. The parties agree that the Department may take Judicial Notice of any and all forms or agreements between the parties in its file in this matter.
11. There is no dispute as to the qualifications of any of Claimant's treating or examining health care professionals.
12. Claimant asserts through her expert treating physician, Dr. William E. Minsinger, and the Travelers' independent medical examiner, Dr. Paul Scibetta, that she developed carpal tunnel syndrome as a result of her work at Ethan Allen and Green Mountain Wood Products. Defendant Travelers (Ethan Allen) argues that the right sided carpal tunnel syndrome, while caused by her employment at Ethan Allen, was later aggravated by her work at Green Mountain Wood Products. The Travelers also contends that the left-sided carpal tunnel syndrome was caused by her work at Green Mountain Wood Products, and not her work at Ethan Allen. Defendant Lumber Insurance (Green Mountain Wood Products) asserts that claimant's bilateral carpal tunnel syndrome is a pre-existing condition not related to her work with either employer.

### Claimant's Initial Right Arm Injury

13. Before her employment at Ethan Allen, the claimant had never experienced right or left arm pain. She never sought medical treatment for right or left arm pain until after she began working at Ethan Allen and Green Mountain Wood Products. The claimant testified to this at the hearing and the medical record supports her testimony.
14. Before starting work at Ethan Allen, the claimant was given a post-offer, pre-employment physical. This physical was performed on January 7, 1999 by Dr. Coxon of the Gifford Medical Center. Dr. Coxon noted in his examination report that during the physical examination of the claimant, he found no musculoskeletal or extremity problems, and no other "problems and/or diagnosis." He concluded that the claimant was "acceptable with no limitations."
15. On January 20, 1999, the claimant began experiencing right upper extremity pain while working an eight hour shift operating a heavy spray gun with her right hand, which involves constant triggering and side to side sweeping movement. She was spraying large pieces of furniture with finish and moving the pieces in and out of her booth.
16. The functional requirements of the claimant's job at Ethan Allen included, but were not limited to, moderate lifting (15-44 pounds) for nine hours; moderate carrying (15-44 pounds); straight pulling (1 hour); pushing (3 hours) wheeled racks in and out of area; reaching above shoulders to place parts on racks, sand, spray, and or stain parts: use of fingers, grasping, triggering spray gun; walking (9 hours) on cement floor; standing (9 hours) on cement floor; kneeling (1-2 hours) to wipe or spray all areas, knee pads available; and repeated bending (3-4 hours) not sustained, to spray, sand or wipe all areas. Environmental factors included, but were not limited to, unusual fatigue factors like overtime and protracted or irregular hours of work, overtime is required as business conditions dictate.
17. The claimant continued working with the right arm and wrist pain for two days. She testified that at that time she did not know what was causing the pain in her right arm and she simply hoped that her symptoms would resolve without medical treatment.
18. The claimant testified that on January 22, 1999, the pain in her right arm and wrist was getting worse with continued work. She reported her right arm pain to a lead worker, Tim, whose last name she does not know. She then reported the injury to Ethan Allen's plant nurse, Mary Maxham. She reported that she was having pain in her right arm and wrist when she was spraying since January 20, 1999 and it was getting worse and becoming constant, with the pain continuing even when she was not spraying.
19. The claimant did not work over the weekend. When she returned the following Monday or Tuesday she continued her job spraying. She was again experiencing severe pain in her right arm and wrist and again she reported her injury to Mary Maxham who gave the claimant a wrist brace to support her right wrist while she continued spraying. Claimant continued to spray. When the pain continued to worsen over the next day or two, the claimant returned a third time to speak with Mary Maxham. This time, the claimant

requested to be seen by a doctor for her condition. Ms. Maxham told the claimant that as the plant nurse, she had to schedule any appointment for a worker. The claimant insisted that the appointment be made with her primary care physician, Dr. Joanna Goulding, and not the company doctor.

20. According to the claimant, Ms. Maxham told her that she had called Dr. Goulding's office and the office had an opening the following day, January 27, 1999, but that they would "wait and see" what happens. The claimant understood this to mean that no appointment was made because the nurse wanted to wait and see whether the problem resolved on its own. The claimant did not arrive for any appointment on that date.
21. The following day the claimant did not go to work. She testified that her right arm pain was worsening and she felt that her employer had ignored her request to see a doctor for her injury. She also testified that she returned to work the next day giving two-week notice that she would be leaving employment with Ethan Allen. Despite the notice that was given, her supervisor terminated her employment that same day.
22. Within a few days of leaving Ethan Allen, the claimant began looking for another job. The claimant is a single mother with an eight-year-old daughter, who at the time was receiving no health insurance coverage. She testified that she needed a job as soon as possible to pay her bills and get health insurance so she could go see a doctor about her right arm and wrist problems.
23. The claimant was hired by Green Mountain Wood Products ("GMWP") and began her employment there on February 1, 1999. She was hired by Walter Delia but she was trained by Andrew Bothfeld. The claimant believed she was hired as a general machine operator, and would be operating several different kinds of machines such as sealer, sanding, belt sanding, drilling, nailing trivets, wiping stain, and possibly spraying. In the interview there was no discussion of the claimant's right arm problems. When the claimant began her employment she was trained on several machines and worked on several machines but she also began working again as a spray booth operator.
24. Claimant testified that throughout her employment at Green Mountain Wood Products, her right arm and wrist pain stayed the same as when she left her job at Ethan Allen.
25. The initial pain in the claimant's right arm at Ethan Allen was sharp and got worse while she continued to spray at Ethan Allen. The pain in her right arm stayed the same from the date she left Ethan Allen and the date of her right carpal tunnel release.

Claimant's Left Arm Injury:

26. Sometime after March 26, 1999, claimant began developing pain in her left arm and wrist while doing work at GMWP. The pain in the claimant's left arm, which she described as dull and achy felt different from the pain she was experiencing in her right arm.
27. Claimant reported arm and wrist pain to her supervisor, Andrew Bothfeld, two or three times between February 2, 1999 and March 8, 1999. She complained about wrist

problems primarily when she was working in the spray booth. This spray booth job was similar to the one at Ethan Allen except the pieces to be sprayed were much smaller and the hours in the spray booth were much shorter. Claimant began working in the spray booth about a week after starting at GMWP. Within the first day of spraying she complained to Mr. Bothfeld that her wrist hurt. She was rotated out of the spray room to different jobs in the plant. She would only occasionally return to spraying and only for short periods of time.

28. Andrew Bothfeld believed at that time that the injuries had really occurred at Ethan Allen and that they were taking care of medical treatment relating to the injuries. The third time the claimant mentioned wrist pain, Mr. Bothfeld took her to Paul Lackey who had some experience with worker's compensation. Mr. Lackey urged the claimant to contact the Department of Labor & Industry about her case against Ethan Allen. He also urged her to seek medical attention.

#### Medical Treatment:

29. On March 26, 1999 the claimant saw her primary care physician, Dr. Joanna Goulding. At that appointment, Dr. Goulding noted the claimant was working at Ethan Allen spraying and in January, 1999 she noticed pain and swelling in her right wrist and numbness in her fingers while working. At that first appointment, Dr. Goulding indicated in her notes that she believed the claimant was suffering from right carpal tunnel syndrome. She referred her to Occupational Therapy.
30. On April 12, 1999 Dr. Goulding, after consulting with the Occupational Therapist, recommended that the claimant be "assigned to light duties preferably with left hand use only." Green Mountain Wood Products adhered to this restriction.
31. On May 3, 1999 Dr. Goulding took the claimant out of work due to her continued pain from her work injury. On May 17, 1999 Dr. Frederick Fries performed a nerve conduction study after which he concluded that claimant had "bilateral carpal tunnel entrapment neuropathy, moderate on the R [right] and mild to moderate on the L [left]."
32. On May 27, 1999 the claimant began treating with Dr. William Minsinger. On that date he examined the claimant and reviewed her medical records. Dr. Minsinger concluded that the claimant's "case is clearly one that her condition is work aggravated and this came on suddenly and she has remained symptomatic since that time." He also wrote in a letter to the adjuster at the Travelers the following day that the claimant "developed right and left carpal tunnel syndrome symptoms after working at a spraying job at Ethan Allen in Randolph...clearly there was an over use aggravation of the problem that occurred in January 1999. Her symptoms have not resolved since that time."
33. As the claimant continued to work at GMWP, her symptoms did not resolve. She testified at the Hearing that her right-sided symptoms began at Ethan Allen and worsened while she was spraying there. She testified that her right-sided symptoms remained the same, and persistent, after she left Ethan Allen. She testified that once she began her job at GMWP her right-sided symptoms neither worsened nor improved. The claimant also

testified that the left-sided carpal tunnel symptoms began at her job at Green Mountain Wood Products.

34. Conservative treatment and job modification did not successfully resolve the claimant's bilateral carpal tunnel pain. Thus on September 10, 1999 she elected to have a right-sided carpal tunnel release which Dr. Minsinger performed. His operative findings were consistent with moderate carpal tunnel syndrome.
35. Due to continuing pain, the claimant had a left-sided carpal tunnel release on October 15, 1999. As a result of this operation, Dr. Minsinger found a very thick ligament through her hand. The claimant returned to Occupational Therapy on February 1, 2000 and was seen there through March 7, 2000.

Diagnosis of Carpal Tunnel Syndrome:

36. Five different doctors examined claimant and/or reviewed her medical history; (1) Dr. William E. Minsinger (orthopedic surgeon), (2) Dr. Joanna Goulding (primary care doctor), (3) Dr. Frederick Fries (neurologist) (4) Dr. Paul Scibetta (osteopath), (5) Dr. Kuhrt Wieneke (orthopedic) (record review only). Dr. Minsinger with the professional consultation of Dr. Fries, diagnosed claimant with bilateral carpal tunnel syndrome. Likewise, Defendant Travelers (Ethan Allen's) expert, Dr. Paul Scibetta, diagnosed claimant with carpal tunnel syndrome. Similarly, defendant Lumber Insurance's (GMWP's) doctor, Dr. Kuhrt Wieneke, does not dispute the fact that the claimant had bilateral carpal tunnel syndrome.
37. Dr. Minsinger, claimant's primary treating physician and surgeon, concluded based on claimant's longstanding reports of increased pain, numbness and tingling in her hands and wrists extending into her first and second fingers and the electrodiagnostic tests and the consultative examination of Dr. Fries that claimant suffered from bilateral carpal tunnel syndrome. A right-sided carpal tunnel release was performed on September 10, 1999 and a left-sided release was performed on October 15, 1999. Since that time claimant's complaints of numbness and pain have improved.

Expert Medical Testimony:

38. Dr. Minsinger testified in his deposition that "I had felt that from [the claimant's] history the most likely immediate cause of [her bilateral carpal tunnel syndrome] had been aggravation at work— at Ethan Allen." Dr. Minsinger also testified that he and the claimant talked "about her work at Ethan Allen. She was spraying at that time. I believe she is right-handed. And that at least seemed to aggravate the onset of her symptoms and she talked about bilateral symptomatology. Again, I can't say that I specifically asked whether she only developed right-hand side or left-hand side when she was doing the spraying work."

39. The claimant testified that her left-sided symptoms did not appear until she began working at Green Mountain Wood Products. She does not recall whether she discussed her right-sided problems as separate from her left-sided problems with Dr. Minsinger because by the time she began seeing him, she had problems on both sides and had been diagnosed with bilateral carpal tunnel syndrome.
40. In his deposition, Dr. Minsinger opined that if the claimant's recollection of events was that her left-sided symptoms did not begin until she began working at GMWP, that he would agree that "Certainly the type of work she was doing at Green Mountain Wood Products would irritate her left hand, but irritate her right hand as well. I do think it's quite clear that her right hand became symptomatic or remained symptomatic under her employment at Ethan Allen. With this further information that you've offered from her deposition I would say that, yes, Green Mountain Wood Products work would have aggravated her left hand more." He went on to add that "In this particular case clearly the right hand could go back to the January episode at Ethan Allen. The left hand, again, I would be happy to say might be related at a later date under her employment at Green Mountain Wood Products at least by her disposed history."
41. Contrary to Dr. Wieneke's position, Dr. Minsinger (the surgeon that performed both carpal tunnel releases), said this about the timing of the injury based upon his operative findings: "I think they were consistent with the electrical findings that we had which was mild to moderate carpal tunnel. I can't specifically say it was three months, six months or ten years worth of pressure. Again, I see this much more as a cross-sectional fact that applies here that leads to sort of chronic pressure on the nerve."
42. Dr. Minsinger recognizes that in his experience with thousands of carpal tunnel patients, that he "certainly [has] seen that in [his] own experience and patients do seem to become symptomatic quickly obviously there are patients who can spray for one week, ten days, two weeks and get in trouble and need to leave that job." When asked directly whether a person can develop CTS inside a week, Dr. Minsinger replied "I have seen that occur and I think that probably is what happened in this particular case. I've seen that occur in other cases where someone cannot tolerate that continuous motion of spraying."
43. Dr. Paul Scibetta, hired by the Travelers (Ethan Allen), testified that he believed that the claimant's right carpal tunnel was caused by her work at Ethan Allen. And his report dated July 27, 1999 states "As it relates to causation, I can state within a certain degree of medical probability, that this patient's injury occurred while working for Ethan Allen, Incorporated." He goes on in that report to conclude that "Kelly Lewis's employment at Green Mountain Wood Products has aggravated the pre-existing condition of bilateral carpal tunnel syndrome."
44. In a February 9, 2000 in a letter to Defense Counsel he opined that "I do not believe that the carpal tunnel syndrome in [the claimant's] left hand was caused by the patient's work at Ethan Allen." And at the hearing he testified that the right-sided carpal tunnel syndrome was caused by the claimant's work at Ethan Allen and the left-sided carpal tunnel syndrome was caused by the claimant's work at GMWP. Dr. Scibetta changed his opinion based upon the claimant's deposition testimony that she did not begin

experiencing left-sided symptoms until she began working at GMWP. He did not recall whether he and the claimant discussed her two injuries separately at the IME, or whether because she already had bilateral problems, they discussed the injuries together. The claimant testified that they discussed the bilateral problems together and did not distinguish between right and left.

45. Only one medical expert challenges the causal relationship between the claimant's bilateral carpal tunnel syndrome and its relationship to the claimant's work at Ethan Allen, Dr. Kuhrt Wieneke. His opinion, contrary to the testimony of both Dr. Minsinger and Dr. Scibetta, is based on the assumption that one cannot develop carpal tunnel syndrome from a short period of work.

#### Attorney's Fees and Costs:

46. The claimant's attorney, retained on a contingency fee basis, incurred \$759.20 in disbursements. She submitted a copy of the fee agreement and an affidavit itemizing expenses. In addition to the contingent fee agreement, however, claimant has also submitted an itemized statement to document that claimant's counsel spent 110.50 hours litigating this claim. Due to the protracted and contentious discovery in this case, claimant requests an award of attorney's fees at the statutory rate of \$60.00 per hour for the hours listed in the itemized statement and attached letter. The award requested for the hours spent exceeds the statutory maximum, so an award of \$6,000.00 in attorney fees is requested.

#### **CONCLUSIONS OF LAW:**

1. "If a worker receives a personal injury by accident arising out of and in the course of employment by an employer subject to this chapter, the employer or the insurance carrier shall pay compensation in the amounts and to the person hereinafter specified." 21 V.S.A. § 618. Compensation for personal injury. Claimant has the initial burden of establishing the facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse and Company*, 123 Vt. 161 (1962). She must establish by sufficient competent evidence the character and extent of the injury or disability, and the causal connection between the injury and the employment. *Rothfarb v. Camp Awanee, Inc.*, 116 Vt. 172 (1949); *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. There is general agreement that under Vermont Workers' Compensation law, gradual onset injuries sustained on the job are compensable. See *Jeannett Bressett-Robarge v. Personnel Connection and Ethan Allen*, Opinion No. 03-99WC (Jan. 26, 1999) Citing *Campbell v. Savelberg*, 139 Vt. 31 (1990). Carpal tunnel syndrome is one such gradual onset injury this Department has long recognized is suffered by workers who perform repetitive motions with their arms. *Jeannett Bressett-Robarge* Opinion No. 03-99WC (Jan. 26, 1999) (Citing e.g., *McCrillis v. Vermont Castings*, Opinion No. 62-98WC (Nov. 7, 1998), *Frederick v. Metromail Corp.* Opinion No. 25-97WC (Sep. 22, 1997); *Suskawicz v. The Book Press*, Opinion No. 18-94WC (May 6, 1994)).



3. The overwhelming evidence from the persuasive medical opinions, with support from the medical records and the testimony of the lay witnesses, is that this claimant suffered bilateral carpal tunnel syndrome in the course of her employment. Dr. Wieneke's opinion to the contrary cannot be accepted in light of the more convincing and clearly contradictory testimony from the other physicians.
4. The true dispute in this gradual onset injury case, is which employer(s) should be liable for the claimant's injuries. In a case where a carrier is attempting to relieve itself of the burden of paying compensation pursuant to a departmental order or preliminary determination, the burden of proof generally lies with the insurance carrier who is trying to relieve itself of the burden of paying compensation. See *Jeannett Bressett-Robarge*, Opinion No. 03-99WC (Jan. 26, 1999) (Citing *Trask* Opinion No. 51-98WC; *Frederick v. Metromail Corp*, Opinion No. 25-97WC (Sept. 23, 1997); *Bushor v. Mower's News Service*, Opinion No. 75-95WC (Oct. 16, 1995); *Smiel v. Okemo Realty Development Corp.*, Opinion No. 10-93WC (Aug. 24, 1993)). Here, the Travelers (Ethan Allen) was ordered by the Department to pay interim benefits on August 5, 1999. Therefore, Ethan Allen bears the burden of proof on the aggravation- recurrence issue.
5. This Department has applied two analytical tests in determining which carrier is liable: (1) traditional aggravation-recurrence analysis, and (2) the last injurious exposure rule. See *Jeannett Bressett-Robarge v. Personnel Connection and Ethan Allen*, Opinion No. 03-99WC. When presented by a gradual onset case in the aggravation-recurrence context, the Department usually asks a series of questions to determine which carrier is responsible. According to *Jeannett Bressett-Robarge v. Personnel Connection and Ethan Allen*, the Department asks: Did a subsequent incident or work conditions destabilize a previously stable condition? Had the claimant reached a medical end result in her recovery while one carrier was on the risk before moving to work under another carrier? Had she stopped treating medically before her work moved from one carrier to another? Had the claimant successfully returned to work? Did her subsequent work, in this case the work under Green Mountain Wood Products, contribute to the final disability? An affirmative answer to each of the questions as worded here would lead to a conclusion that the claimant suffered an aggravation. See, *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 26, 1998) (and cases cited therein). Here, the answers to questions one through four would be in the negative. This is no clear answer to question five. The claimant's right-sided symptoms started at Ethan Allen and neither improved nor worsened with her work at GMWP. The Claimant had not stopped treating medically before changing jobs, and she clearly had not reached a medical end point. She did not successfully return to work because she was only able to tolerate her new job for a few short months.
6. The claimant's right-sided symptoms were caused by her work at Ethan Allen and her symptoms at Green Mountain Wood Products constituted merely a recurrence or continuation of her previous condition. Dr. Minsinger, the treating doctor, believes that the claimant's right-sided problems were caused by her work at Ethan Allen in January 1999 and never stopped. Dr. Minsinger's deposition testimony was very credible and convincing since he is the claimant's treating surgeon and is the most familiar with her condition. Dr. Minsinger does not believe there was an aggravation of the right-sided

injury at GMWP, and his opinion should be given substantial weight.

7. Even the defendant's own expert, Dr. Scibetta, agrees that the right-sided carpal tunnel problems were initially caused by the claimant work at Ethan Allen. He does not however agree that the claimant's right-sided symptoms were a recurrence of an earlier injury. Dr. Scibetta testified that the claimant's right-sided carpal tunnel syndrome was aggravated by her work at GMWP. This opinion is not supported by the medical record or the claimant's testimony that her right arm and wrist neither worsened nor improved after she left Ethan Allen. Her right-sided problems only worsened during her job at Ethan Allen, after that time they simply stayed the same.
8. The left-sided symptoms are quite different. The claimant testified credibly that her left upper extremity did not start bothering her until she began work at GMWP. The treating orthopedic surgeon, Dr. Minsinger, testified in his deposition that he believed that if the claimant's left-sided symptoms did not start until she was employed at GMWP, that it is likely that her job there caused the injury. Dr. Minsinger has seen the claimant more than any other doctor for this injury, and he is in the best position to evaluate causation. His testimony was logical, well supported by facts and credible.
9. Dr. Scibetta, hired by the Travelers, testified at the hearing that the left-sided carpal tunnel syndrome was caused by the claimant's work at GMWP and not Ethan Allen. Dr. Scibetta has examined the claimant, taken a history from her, and reviewed the relevant medical records. His testimony at the Hearing as to this injury was also logical, well supported by facts and credible.
10. 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). 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. *Jacquelyn Parker v. Corcoran Auto, Inc.*, Opinion No. 59-95WC (Citing *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941)). The Travelers own expert, Dr. Scibetta, testified that the Claimant's right-sided carpal tunnel syndrome was caused by her work at Ethan Allen. But he did not offer a substantive medical basis for his opinion that the claimant's condition was aggravated at GMWP, especially in light of this Department's aggravation-recurrence analysis. The fact that the type of work the claimant was doing could aggravate her symptoms does not meet the burden of proof here.
11. Dr. Minsinger also testified in his deposition that the claimant's right-sided carpal tunnel syndrome was caused by her work at Ethan Allen spraying. But since the claimant's symptoms continued since her job at Ethan Allen and neither worsened nor improved at GMWP, he correctly found no aggravation at GMWP.
12. The evidence and testimony does not meet the defendant Travelers' requisite burden of proof as to the right arm injury.

13. However, it has met its burden on the left-sided carpal tunnel injury. The claimant did not have any problems or pain in her left wrist of arm until she started her job at GMWP. While she was working at Ethan Allen, she had no left-sided pain; the pain was limited to her right upper extremity. Dr. Minsinger and Dr. Scibetta both testified credibly that the claimant's left-sided carpal tunnel syndrome was caused by her work at GMWP. Dr. Wieneke's testimony did not credibly challenge those opinions. This testimony and medical evidence does meet the defendant Travelers' requisite burden of proof as to the left arm injury and subsequently GMWP should pay the benefits relating to the left-sided injury.

Relief:

14. Claimant is entitled to the temporary total disability benefits that were already paid pursuant to an interim order. There is no outstanding TTD at this point. GMWP should reimburse the Travelers for their portion of TTD for the left arm injury.
15. Claimant is entitled to have all her related medical bills following the bilateral carpal tunnel injuries paid. GMWP should reimburse Travelers for the medical bills relating to treatment of her left upper extremity.
16. Pursuant to 21 V.S.A. § 678, claimant's entitlement to reasonable and necessary costs is a matter of law; her right to attorney's fees is a matter of discretion. *Morrisseau v. Legac*, 123 Vt. 70 (1962). Claimant is awarded costs in the amount of \$759.20.
17. The claimant, having prevailed in this case because of her attorney's efforts, is awarded attorneys' fees. Despite a contingent fee agreement, claimant has requested fees based on the statutory rate of \$60.00 for 110.50 hours of time. The benefits at stake in this claim are crucial to the injured worker but compared to a contingent fee agreement relatively small and as yet undetermined. As a result, claimant requests an award of fees based on the hourly rate. *See Bronson McMillan v. Bertek, Inc.*, Opinion No. 95-95WC. Because the nature of the award not easily translated into the basis for an award of attorney's fees based on a contingent fee - attorney's fees award based on the statutory hourly rate). See also *Zielinski v. Omya, Inc.*, Opinion No. 24-96WC. This is especially true with the contentiousness of this claim and the amount of time Counsel has had to invest. The claimant testified at the hearing that it was specifically because of Defense Counsel's actions that she found it necessary to hire a lawyer. Further, an award based on a contingent fee of 20% would penalize claimants by limiting their ability to secure competent and zealous representation in cases like this. Claimant is entitled to an award of fees based on the itemized statement at the rate of \$60.00 per hour for a total of 110.50 hours of time or \$6,000.00.

## **ORDER**

Based on the Foregoing Findings of Fact and Conclusions of Law, Defendant Travelers is responsible for:

1. Temporary total disability benefits relating to the right-sided injury. These have been paid pursuant to an interim order issued by the Department.
2. Reasonable Medical and Hospital Benefits associated with her right upper extremity injury. These have been paid pursuant to an interim order.
3. Any Permanent Partial Disability that the Claimant is given for her right upper extremity injury.
4. Its share of attorney's fees and costs as set forth above.

Defendant Lumber Insurance to pay is ordered to pay:

1. Temporary total disability benefits relating to the left-sided injury. Because this has been paid pursuant to an interim order issued by the Department, Lumber should reimburse the Travelers.
2. Reasonable Medical and Hospital Benefits associated with her left upper extremity injury. Because this has been paid pursuant to an interim order issued by the Department, Lumber should reimburse the Travelers.
3. Any Permanent Partial Disability that the claimant is given for her left upper extremity injury.
4. Its share of attorney's fees and costs as set forth above.

Dated at Montpelier, Vermont this 20<sup>th</sup> of December 2000.

---

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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.