

*Lunna v. SOV, Department of Corrections* (November 12, 2004)

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

*Jay Lunna*

*Opinion No. 50-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*State of Vermont,  
Department of Corrections*

*For: Michael S. Bertrand  
Commissioner*

*State File No. T-16650*

*Pretrial conference held on February 16, 2004  
Hearing held in Montpelier on June 28, 2004  
Record Closed on July 20, 2004*

**APPEARANCES:**

*Christopher J. McVeigh, Esq., for the Claimant  
Keith J. Kasper, Esq., for the Defendant*

**ISSUE:**

*Did claimant Jay Lunna suffer an injury to his shoulder that arose out of and in the course of his employment with the Department of Corrections?*

**EXHIBITS:**

<i>Joint 1:</i>	<i>Medical Records</i>
<i>Claimant's 1:</i>	<i>Claimant's work performance evaluations</i>
<i>Claimant's 2:</i>	<i>Explanation of payment</i>
<i>Claimant's 3:</i>	<i>Dr. Long's deposition transcript</i>
<i>Defendant's A:</i>	<i>Dr. Smith-Horn's deposition transcript</i>

**CLAIM:**

- 1. Temporary total disability benefits from March 26, 2003 to October 23, 2003*
- 2. Dependency benefits for the same time period*
- 3. Medical benefits associated with his shoulder injury pursuant to WC Rule 40*
- 4. Interest, attorney fees and costs*

**STIPULATION:**

1. *Claimant was an employee of the defendant from July 31, 2000 to October 23, 2003 within the meaning of the Vermont Workers' Compensation Act (Act).*
2. *Defendant was the employer of claimant within the meaning of the Act.*
3. *Claimant began losing time from work due to an alleged work-related injury on March 26, 2003.*
4. *On March 26, 2003 and all times thereafter, claimant had one dependent within the meaning of the Act.*
5. *Claimant alleges that he suffered an injury to his shoulder arising out of and in the course of his employment.*
6. *The parties agree to the submission of the exhibits listed above and to the statement of the issue.*
7. *The parties agree that the hearing officer may take judicial notice of all official forms filed in this matter with the Department.*
8. *No dispute exists as to the qualifications of any of claimant's treating or examining physicians.*

**FINDINGS OF FACT:**

1. *In 2000, when claimant was 23 years old, he began working as a corrections officer in work that regularly involved restraining unruly inmates. The need to restrain inmates was particularly great on the Delta Unit where claimant worked.*
2. *At the time he began his corrections work, claimant did not have any shoulder problems.*
3. *Claimant has been a member of the Army National Guard since 1997.*
4. *In June 2002 claimant had an episode of shoulder discomfort that resolved. Then, in October 2002 after a weekend at Guard duty, he went to an emergency department with a complaint of shoulder pain.*

5. *Dr. Long treated claimant for his shoulder problem in November 2002. Because he thought the problem would not resolve on its own, Dr. Long recommended surgery, but claimant's personal life kept him from committing to the time needed for an operation and its recovery. He continued to work full time at full duty while taking narcotic medication for pain. Over time, the shoulder pain lessened.*
6. *On March 14, 2003 Dr. Long noted that he was going to proceed with the surgery originally recommended the previous November.*
7. *On March 26, 2003, while involved in a physical scuffle with an inmate, claimant was pushed to the floor onto his left shoulder, with two colleagues and the inmate on top of him. He finished the little time left on his shift that day, and then went to an emergency room. Claimant did not return to work after that incident until October 23, 2003.*
8. *From the emergency department, claimant was referred to Dr. Melissa Smith-Horn, an Occupational Physician, who initially suspected a fractured clavicle because he complained of exquisite shoulder pain and had impaired arm movement. Dr. Smith-Horn referred claimant back to Dr. Long.*
9. *Dr. Long's examination showed a positive impingement test, limited range of motion in the shoulder and pain. An MRI revealed a Type III acromium and AC joint hypertrophy. Dr. Long performed the arthroscopic surgery, subacromial decompression and acromioplasty, on September 16, 2003. Claimant was then able to return to work the next month, on October 23, 2003.*

#### Expert Opinions

10. *Dr. Smith-Horn opined that claimant suffered a mild soft tissue injury of the left shoulder in March 2003 during the altercation with the inmate. She attributed the need for the surgery to the lesion diagnosed the previous November. She based her opinion on claimant's continued pain from November forward, necessitating pain medication; Dr. Long's decision to perform the surgery before the March 26<sup>th</sup> work related incident; and her determination that he had returned to his pre-injury status by the time she examined him on May 20, 2003. She further opined that the March 26<sup>th</sup> incident aggravated the claimant's left shoulder condition.*
11. *Dr. Long agrees that the March 26, 2003 incident aggravated claimant's shoulder when he fell on it and three others fell on him.*

*Further, he opined that claimant's work as a corrections officer likely explained the earlier shoulder symptoms, particularly given claimant's young age because young people do not get shoulder pain "out of the blue." He based that opinion on his knowledge of orthopedics, the absence of any other injuries and experience treating other corrections officers.*

### Attorney Fees and Costs

12. *Claimant's counsel has worked 84.9 hour pursuing this claim and incurred \$1,433.98 in necessary costs.*

### **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 (1962). 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 from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*
3. *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).*
4. *In considering conflicting expert opinions, this Department has traditionally examined 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 (1997).*
5. *Both Dr. Smith-Horn and Dr. Long have treated the claimant. Dr. Long has an advantage as the orthopedist who operated on the claimant's shoulder and who saw the claimant in November of 2002, months before the inmate incident. Both physicians provided comprehensive evaluations, including review of the relevant medical records. Both agree that the March 2003 incident likely aggravated the preexisting shoulder condition. On balance, the weight tilts in favor of Dr. Long's opinion.*

6. *Claimant's age, the type of work he did, the nature of the fall onto his shoulder, claimant's inability to work after that incident and the support of the surgeon who operated on the claimant and managed his post operative course combine to convince me that claimant's work was the cause of the claimant's shoulder condition.*
7. *Therefore, claimant is entitled to temporary total disability benefits for the time he was out of work and medical benefits for treatment of the shoulder, subject to WC Rule 40. He is also entitled to permanent partial disability benefits once a rating is determined.*
8. *As a prevailing claimant, he is entitled to a discretionary award of reasonable attorney fees and mandatory award of necessary cost. 21 V.S.A. § 678(a). WC Rule 10.000. Given the necessary discovery, it is reasonable to base fees on the 84.9 hours worked and the necessary costs of \$1,433.98.*

**ORDER:**

*Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to adjust this claim, pay fees specified above and interest from the date of this order.*

*Dated at Montpelier, Vermont this 12<sup>th</sup> day of November 2004.*

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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.*

*C*