

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

)	State File No. H-18916
Lisa Hodgdon)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Steve Janson
)	Commissioner
George Rigby)	
d/b/a Hob Knob Inn)	Opinion No. 04-99WC
)	

Heard in Montpelier, Vermont on October 20, 1998.
Record Closed: December 4, 1998.

APPEARANCES:

Rodney F. Vieux, Esq. for Claimant Lisa Hodgdon
Edward R. Kiel, Esq. for Defendant George Rigby d/b/a Hob Knob Inn

ISSUES:

1. Whether the claimant suffered an injury to her lower spine as a result of a March 5, 1995 work related accident.
2. Whether the claimant suffered an injury to her upper spine as a result of a March 5, 1995 work related accident.
3. Whether the claimant suffered an injury to her right wrist as a result of a March 5, 1995 work related accident.
4. What is the appropriate amount of permanent partial disability compensation attributable to the claimant's March 5, 1995 work-related injury (injuries).
5. Whether claimant is entitled to medical benefits for treatment of her March 5, 1995 work related injury (injuries).
6. Whether the claimant is entitled to a recumbent bicycle for treatment of her March 5, 1995 work related injury (injuries).

THE CLAIM:

1. Pursuant to 21 V.S.A. § 648, permanent partial disability compensation for impairment of claimant's lower spine, upper spine and right wrist.

2. A recumbent bicycle pursuant to 21 V.S.A. § 640.
3. Medical and hospital benefits pursuant to 21 V.S.A. § 640.
4. Attorney's fees and costs pursuant to 21 V.S.A. § 678 (a).

EXHIBITS:

Joint Exhibit I: Medical Records
Defendant's Exhibit A: Correspondence from John M. Peterson, (marked for identification only) D.O. - 10/19/98
Defendant's Exhibit B: Employee's injury report - 4/24/95

PRELIMINARY RULING ON THE SCOPE OF THE CLAIM:

At the outset, to properly resolve the issues presented in this case, the Department must determine the precise scope of the instant claim. By reviewing the formal pleadings filed with the Department and the evidence submitted at the Hearing, it is clear that the claim extends only to those injuries which resulted from the claimant's March 5, 1995 work accident. Initially, in an employee injury report dated April 24, 1995 and completed by the claimant, the date of the subject work injury was listed as March 5, 1995. Subsequently, in her Form 6, the Notice and Application for Hearing, claimant cited March 5, 1995 as the date of her work related injury. Furthermore, in her pretrial disclosure statement, when presented with the final opportunity to identify the basis of her claim, the claimant reiterated her contention that she sustained injuries as a result of her March 5, 1995 work related accident. As such, in evaluating the compensability of this claim, the Department can only consider the incident of March 1995 as the causal event which injured the claimant.

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department in this matter. Joint Exhibit I and Defendant Exhibit B are admitted into evidence.
2. Claimant began working full time at the Hob Knob Inn as a chambermaid in 1978. At all times relevant to this case, specifically March 5, 1995, claimant was an employee within the meaning of the Vermont Workers' Compensation Act. In addition, the Hob Knob Inn was an employer within the meaning of the Vermont Workers' Compensation Act.

A. BACK INJURY:

3. On March 5, 1995, while bending down to clean mop boards at the defendant Inn, claimant injured her back. As a result of her injury, she sought medical care from Charles Vartanian, D.C. At this time, Dr. Vartanian noted that claimant only complained of lower back pain. While diagnosing her with lumbalgia and sciatic radiation due to sacral derangement and lower dorsal myofascitis with underlying segmental derangement, the doctor made no reference to any pain/problems with the claimant's upper back and/or upper extremities.

4. Similarly, in an employee injury report, claimant indicated that her lower back was injured due to a March 1995 work accident. She failed to delineate any other areas of injury.
5. However, in opposition to this initial report, claimant, during the formal Hearing in this matter, testified that immediately following the March 5th incident, she experienced not only a sharp pain in her lower back, but also a tightness in her upper back which radiated into her neck. In support of this contention, claimant proffered the testimony of Letitia Tallman, her mother, Judy Kinneson, her sister and Reginald Hodgdon, Jr., her son. Overall, each witness corroborated claimant's assertion that she experienced pain in her upper back and neck after the March 1995 incident. Although on the surface this evidence substantiates claimant's version of events, the objectivity of the testimony is called into question due to the close family relations involved and, therefore, the reliability and credibility of the evidence has been significantly discounted.
6. In the spring of 1995, claimant continued to treat medically for her work injury. In particular, on May 24, 1995 claimant was evaluated by John Peterson, D.O. When describing the March 5, 1995 on the job injury, Dr. Peterson, like Dr. Vartanian, only referenced claimant's complaints of lower back pain, officially diagnosing claimant with lumbosacral/sacroiliac strain/sprain. Once again, the medical provider's notes do not reference either upper spine or upper extremity pain/problems.
7. After rendering several months of treatment to claimant, Dr. Vartanian, in a June 29, 1995 correspondence directed to the defendant's workers' compensation carrier, provided an update on claimant's medical condition. At that time, the doctor explained that claimant progressed to a point where her injury related symptoms were mild and intermittent.
8. Notwithstanding the improvement in her lower spine, Dr. Vartanian's medical notes during the summer of 1995 reflect claimant's development of pain in her upper back and neck. This episode of upper spinal pain was the first occasion in which claimant began to experience problems with her upper back since her preceding March work related accident.
9. In August 1995, although the claimant's upper back complaints continued, Dr. Vartanian prepared a final report on his impairment evaluation for claimant's lower back injury. After designating claimant as reaching a maximum medical improvement, Dr. Vartanian utilized the A.M.A. Guides to the Evaluation of Permanent Impairment, 4th Edition to assign claimant with an 8% spinal impairment rating for her lower back injury.
10. In October 1995 Dr. Peterson also evaluated claimant for the purpose of determining her end medical result and permanent partial disability. Although Dr. Peterson concurred with Dr. Vartanian's medical end result assessment, his permanent impairment rating for claimant's lower back varied slightly. Based upon his examination and according to his application of the A.M.A. Guides to the Evaluation of Permanent Impairment, 4th Edition, Dr. Peterson opined that claimant sustained a DRE Category II lumbosacral spine impairment which equates with an 8.5% permanent spinal impairment rating.

11. In November 1995 claimant initiated treatment with Leonard P. Jennings, M.D. Dr. Jennings diagnosed claimant with thoracolumbar, as well as cervicothoracic strain. However, he also explained that claimant initially developed pain mainly in her lower back following an on the job incident and only after several months did she note pain in the center of her back and into her shoulders and neck.
12. On May 10, 1996 Dr. Vartanian issued an updated report on claimant's condition wherein he explained that the frequency and severity of the low back pain complaints remained within the permanent impairment limits previously reported. However, Dr. Vartanian further noted that claimant's dorsal and cervical problems had developed into the most frequent and aggravating areas of complaint. Since claimant's chronic dorsal and cervical pain failed to fully resolve, despite claimant's relative inactivity, Dr. Vartanian opted to assign a work related impairment. After completing a physical examination of claimant, the doctor employed the A.M.A. Guides to the Evaluation of Permanent Impairment, 4th Edition, and assigned an 8% spinal impairment to the cervical and dorsal areas of injury, in addition to the previously assessed 8% spinal impairment to the lower back.
13. Both parties in the instant matter have submitted expert opinions on the cause of claimant's medical condition. Claimant relies upon the medical reports and proffered testimony of her treating physician, Dr. Vartanian. To validate its position, defendant depends upon the medical opinion of Dr. Peterson, an Independent Medical Evaluator.
14. Both physicians agree that the March 5, 1995 work related accident resulted in claimant sustaining an injury to her lower spine. Dr. Peterson opined, in his November 11, 1995 report, that claimant developed chronic low back pain as a result of her on the job injury while employed by the defendant Inn. Similarly, Dr. Vartanian concluded that claimant's work activities caused her low back problem.
15. Conversely, in regards to her upper spine pain and discomfort, both experts fail to causally connect claimant's complaints with her March 5, 1995 work accident. In fact, during his testimony, Dr. Vartanian unequivocally opined that claimant's thoracic and cervical spine problems were neither caused nor aggravated by the March 5, 1995 work injury. Rather, he concluded that the seeds of claimant's mechanical problems derived from problems which developed several years prior to 1995 when he treated claimant for complaints of pain and discomfort in the upper back, neck and shoulders. In addition, Dr. Peterson, in his June 3, 1996 report, determined that the medical records failed to establish any connection between these injuries and the March 5, 1995 work incident.
16. Finally, in treatment for her spinal injuries, claimant requests that the defendant be ordered to supply her with a recumbent bicycle. In support of this claim, claimant testified that the bicycle would help her move better. As for a supporting medical opinion, claimant advanced the December 16, 1996 office note of Dr. Jennings which references a physical therapist's recommendation to have claimant utilize a treadmill. Furthermore, Dr. Vartanian, in a written report to defendant's workers' compensation carrier, also recommended the purchase of a treadmill for claimant's home use.

B. WRIST PAIN:

17. During the Hearing, claimant testified that although she knows that her first onset of right wrist pain occurred while she was cleaning at work, she was unable to provide any indication as to the exact date when she first experienced any problems. As for Dr. Vartanian's recollection, he testified that the claimant's wrist problems first surfaced in early 1996, almost a year following the March 5, 1995 work incident.
18. Claimant explained the symptomatology of her right wrist injury as pain and achiness in which radiated into her fingers. In addition, she stated that her wrist swells frequently, especially when it is actively utilized. Officially, claimant's medical providers diagnosed her with right extension wrist tendinitis with a small tender ganglion on the dorsum of her wrist.
19. After treating claimant for her on-going complaints of right wrist pain, Dr. Vartanian noted that the injury failed to respond to the prescribed course of care, including the use of a wrist brace, a course of anti-inflammatory medication, and an application of therapeutic modalities. Accordingly, Dr. Vartanian determined that the injury developed into a permanent impairment. As such, the doctor, after estimating claimant's loss of extension and flexion, employed the A.M.A. Guides to the Valuation of Permanent Impairment, 4th Edition and assigned a 5% upper extremity impairment rating.
20. As to the cause of claimant's wrist problems, both parties again rely upon the opinions of their respective medical experts.
21. Claimant's expert, Dr. Vartanian, testified that he does not equate the March 5, 1995 work related incident with the cause of claimant's right wrist impairment. However, he does attribute claimant's injury to her scrubbing activities while employed by the defendant Inn. With reasonable medical certainty, Dr. Vartanian concluded that claimant's right wrist sustained an injury due to on-going, cumulative work related trauma.
22. In regards to the causal link between claimant's right wrist injury and the March 5, 1995 work accident, Dr. Peterson offered a similar opinion. Specifically, since the claimant never complained of wrist pain during his examinations of her and because the medical records of Dr. Vartanian failed to document any wrist complaints following the accident, the doctor opined that the injury cannot be related to the March 5, 1995 work incident.
23. Claimant has presented evidence of her contingency fee agreement with her attorney. In addition, she has introduced evidence that her attorney has spent 77.25 hours in preparation of this case. Finally, claimant has submitted evidence of expenses incurred in the amount of \$1.20.

CONCLUSIONS OF LAW:

1. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support her claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161

(1963). Sufficient competent evidence must be submitted verifying 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. Where the causal connection between an accident and an injury is obscure and a lay-person 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. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. At issue in the present case is the compensability of claimant's injuries as a result of her employment activities with defendant Hob Knob Inn. Claimant maintains that she injured her back, both in the lumbar region and the thoracic/cervical region, and her right wrist as a result of a work related incident which occurred on March 5, 1995.
4. After reviewing the submitted medical evidence, it is apparent that claimant's lower spine injury is compensable. However, having failed to satisfy the requisite burden, the remaining claims for injuries to the upper spine and the right wrist must fail.

A. LOWER BACK:

5. Since the submitted medical records and proffered expert testimony explicitly establish the causal link between claimant's injury to her lower spine and the March 5, 1995 work related accident, claimant is entitled to recover workers' compensation benefits for the lower spine.
6. In regards to her permanent partial disability compensation for her lower spine, I conclude that Dr. Peterson's evaluation and assessment was well reasoned, supported by objective evidence, comprehensive and overall, more credible than Dr. Vartanian's opinion. As such the 8.5% spinal impairment rating is accepted as the appropriate calculation.
7. Finally, to assist in the treatment of her spinal injury, claimant requested the procurement of a recumbent bicycle. Although the claimant has opined that the bicycle would improve her medical condition, she has failed to advance the requisite supporting medical evidence. The passing references made by her medical providers as to the recommendation of a treadmill are clearly inadequate to support her entitlement to the bicycle. Accordingly, the claim for a recumbent bicycle is denied.

B. UPPER BACK:

8. In regards to claimant's upper spinal injury, the medical documentation, as well as the opinions of both medical experts, fail to demonstrate, as the more probable hypothesis, that the March 5, 1995 incident was the cause of the injury.
9. The medical evidence submitted in this case unequivocally illustrates the development of

upper spinal problems during the summer of 1995, several months after the claimant's March 5, 1995 work accident. In light of this fact, ascribing the deconditioning of claimant's upper spine to the March 5th incident would be no more than mere speculation and, therefore, the requisite causal element has not been satisfied.

10. Moreover, both Dr. Peterson and Dr. Vartanian determined that claimant's upper spinal injury did not result from the March 5, 1995 accident. Indeed, Dr. Vartanian, claimant's own expert, testified that claimant's upper spine injury originated from problems which arose several years prior to 1995.
11. Accordingly, since claimant has failed to substantiate the causal link between the March 5, 1995 work incident and her upper spine injury, she is not entitled to any workers' compensation benefits for this injury.

C. RIGHT WRIST:

12. Similarly, claimant has also failed to substantiate her right wrist impairment claim with the necessary expert medical testimony. Both medical experts, Dr. Peterson and Dr. Vartanian, explicitly opined that the claimant's right wrist impairment was not caused by the March 5, 1995 work incident. As such, the evidence clearly does not establish the causal connection between the injury and the employment and, therefore, the claim is denied.
13. Although Dr. Vartanian concluded that the specific March 5, 1995 accident did not cause claimant's right wrist injury, he did determine that claimant's overall scrubbing activities while at work caused this impairment. Even if this evidence were sufficient for cumulative trauma or repetitive use claim, it is deficient for the instant matter.
14. Claimant cannot now raise a cumulative trauma/repetitive use argument after specifically basing her claim on the March 5, 1995 work incident. The workers' compensation system requires an injured employee to provide to an employer sufficient notice of the claims asserted. Although notice may generally not be held invalid or insufficient by reason of inaccuracy, 21 V.S.A. §660 does preclude a claim for delayed or want of notification if an employer is misled to its impairment and/or prejudice. See *McKearney v. Miguel's Stowaway Lodge*, Opinion No. 6-94WC (March 27, 1994).
15. In this case, claimant, from the outset of her injury up until the submission of her final disclosure statement, consistently maintained that her injuries were the result of a March 5, 1995 work accident. To allow claimant to suddenly and abruptly change the entire basis of her claim would clearly prejudice the defendant and impair his strategically selected and designed defense. Consequently, claimant cannot presently rely upon a cumulative trauma/repetitive use argument to succeed on the merits of her case.

D. ATTORNEYS FEES AND COSTS:

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. Since claimant

prevailed on her lower spine claim, she is awarded all requested costs. However, having been defeated on all remaining aspects of her claim, the request for attorneys fees is denied.

ORDER:

1. Defendant George Rigby d/b/a The Hob Knob Inn to pay claimant permanent partial disability compensation based upon a calculation of 8.5% impairment of claimant's lower spine.
2. Defendant George Rigby d/b/a The Hob Knob Inn to pay expenses in the amount of \$1.20.
3. All remaining claims are DENIED.

Dated at Montpelier, Vermont, on this 26th day of January 1999.

Steve Janson
Commissioner