STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File Nos. D-08145; B-07257
Wilma O'Neill	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Steve Janson
	)	Commissioner
Manchester Wood	)	
	)	Opinion No. 24-99WC

Heard in Montpelier, Vermont, on December 22, 1998.
Record Closed: March 22, 1999.

APPEARANCES:

Sam W. Mason, Esquire, for claimant
Steven A. Bredice, Esquire, for General Accident Insurance Co.
John W. Valente, Esquire, for New Hampshire Insurance Co.

ISSUE:

1. Whether claimant suffered an aggravation or recurrence of her pre-existing compensable injury.

2. Whether claimant should be denied benefits as a result of concealing her pain from her treating physician in 1991.

CLAIM:

1. Pursuant to 21 V.S.A. § 642, temporary total disability payments for the period of June 3, 1994 through August 5, 1997.

2. Permanent partial disability compensation pursuant to 21 V.S.A. § 648.

3. Medical benefits pursuant to 21 V.S.A. § 640.

4. Attorney fees and expenses pursuant to 21 V.S.A. § 678.

EXHIBITS:

Claimant's Exhibit 1:	Decision of New York Workers' Compensation Board
Claimant's Exhibit 2:	Deposition transcript of Wilma O'Neill
Joint Exhibit I:	Deposition transcript of Edwin D. Harrington, M.D.

Joint Exhibit II: Medical Records

PRELIMINARY PROCEDURAL COMMENT:

In 1990, claimant sustained a compensable work related injury to her right upper extremity for which she received compensation. Subsequently, in 1991 she returned to her employment and thereafter, in 1992, claimant was transferred to her employer's New York plant, where she continued to work until 1994, when claimant began to again experience pain in her upper extremities.

Seeking workers' compensation for this condition, claimant was referred to the New York Workers' Compensation Board, since she was working at a New York plant in 1994. A Hearing was held before this tribunal and a decision rendered finding no new injury in 1994, which equates with a "recurrence" determination under the Vermont workers' compensation system. As such, the claimant's New York case was closed. Following this denial, claimant returned to the Vermont Department of Labor and Industry, Workers' Compensation Division, seeking benefits for her medical condition. Since claimant's 1994 injury possibly related to her prior 1990 injury, which occurred in Vermont, the Department accepted jurisdiction over the claim. Moreover, the Department also placed the workers' compensation carrier at risk during the 1994 injury on notice, asserting jurisdiction pursuant to 21 V.S.A. § 619, since claimant was hired in the State of Vermont.

While there is no dissension that claimant's symptomatology increased to a disabling level in 1994, claimant has been without her due benefits since that time, simply because of the dispute between the carriers. As such, the primary issue presented for resolution in the instant case is whether claimant sustained a recurrence or an aggravation of her prior 1990 compensable injury.

STIPULATIONS:

1. Claimant was employed by Manchester Wood, Inc. in Manchester, Vermont.

2. In 1990, claimant suffered a compensable injury while working for Manchester Wood, Inc. in Vermont and allowed to return to work in January, 1991, with a new job description.

3. On October 22, 1990, the claimant, Wilma O'Neill, filed a Notice of Injury and Claim for compensation with the Department under File No. D-08145 alleging elbow and shoulder problems arising from an accident on February 27, 1990, during her work as a sprayer at Manchester Wood's Manchester Depot, Vermont, operation. She sought compensation for lost time and payment of medical and/or hospital bills. The condition was diagnosed as tendonitis. New Hampshire Insurance Company was the carrier on the risk at the time.

4. On October 29, 1990, Ms. O'Neill signed an Agreement for Temporary Total Disability Compensation for tendonitis of the right elbow and shoulder calling for temporary total disability payments beginning on August 4, 1990 and medical services benefits by New Hampshire Insurance Company under File No. D-08145.

5. On December 18, 1990, the Department mailed a Notice to Commissioner and Employee of Intention to Discontinue Payments stating that Ms. O'Neill had returned to work full-time as of that date and that New Hampshire Insurance Company was discontinuing payment of temporary disability compensation under File No. D-08145.

6. On January 30, 1991, an Affidavit as to Payment of Compensation was entered by New Hampshire Insurance Company under File No. D-08145 stating that Ms. O'Neill received $1,798.60 in medical compensation and $2,700.98 in temporary total disability payments running from August 4, 1990 through December 17, 1990.

7. Claimant worked at Manchester Wood, Inc. in the State of Vermont until transferred to the Manchester Wood plant in New York State in August 1992.

8. An Employer's Report of Injury filed with the Chairman of the New York Workers' Compensation Board stated that Ms. O'Neill stopped working at Manchester Wood's Granville, NY, operation on June 3, 1994, because of "tendonitis" listing a "date of accident" as April 5, 1994. The carrier on the risk was listed as General Accident Insurance.

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department in this matter. The exhibits are admitted into evidence.

2. Claimant was an employee of Manchester Wood since 1975. Originally, she served in a variety of employment capacities. Eventually, in the 1980s, she was assigned to and worked on a constant basis as a sprayer. In this position, claimant repeatedly reached upward and sprayed furniture pieces, which were transported over head by a mechanical assembly line.

1990 WORK RELATED INJURY:

3. In 1990, after consistently performing the repetitive motions of the sprayer position for numerous years, claimant sustained a work related injury to her right upper extremity. Specifically, in February 1990, claimant consulted with Max Crossman, M.D., her family physician, for complaints of right wrist, elbow and shoulder pain.

4. As a result of this initial consultation, Dr. Crossman diagnosed claimant with lateral epicondylitis and he continued to treat her through May 1990, with prescription medications, cortisone injections, and an elbow band.

5. Since the treatment with Dr. Crossman was not relieving her condition, claimant also sought medical care from Northshire Medical Associates in the summer and fall of 1990. After an examination, claimant was diagnosed with tendonitis/overuse syndrome and epicondylitis in the right arm. By way of treatment for claimant's condition, the medical personnel prescribed medications and physical therapy and utilized steroid injections. In

addition, claimant was urged to perform light duty work activities.

6. Claimant was also examined by Myron Ritrosky, M.D., of the Southwestern Vermont Medical Center in August 1990. In his report, Dr. Ritrosky summarized claimant's condition. Specifically, the doctor explained that claimant was experiencing persistent right arm pain in the elbow, wrist, and shoulder. Although the various methods of treatment provided some symptomatic relief, any resumption of work activities generated a recurrence of claimant's pain symptoms. As such, Dr. Ritrosky recommended that claimant participate in an industrial rehabilitation evaluation.

7. In November of 1990, at the referral of Northshire Medical Associates, claimant received medical care from Edwin Harrington, M.D., an orthopedic surgeon. During his initial examination of claimant, Dr. Harrington noted tenderness in the claimant's right lateral epicondyle, as well as her right shoulder in the region of the rotator cuff. In addition, after performing numerous physical manipulations of claimant's right upper extremity, Dr. Harrington recorded claimant's pain complaints. Overall, the doctor diagnosed claimant with chronic supraspinatus tendonitis of the right shoulder with impingement syndrome and underlying chronic lateral epicondylitis right elbow. As a course of treatment, Dr. Harrington referred claimant for physical therapy with ultrasound and prescribed a tennis elbow band, a wrist splint, and 600 mg of Ibuprofen. At this time, claimant had been out of work for a month and Dr. Harrington, having opined that claimant's condition totally disabled her from employment, kept claimant out of work.

8. When claimant was next evaluated by Dr. Harrington in December 1990, he described claimant's condition as "significantly improved" and related that claimant denied shoulder pain. On physical exam, the doctor further noted that there was no demonstrable tenderness in claimant's right shoulder or elbow. In addition, the physical manipulations he performed did not produce a painful response from claimant. As such, Dr. Harrington opined that the right shoulder symptoms were resolved and the elbow symptoms had almost completely resolved. Therefore, the doctor released the claimant to return to work; however, he restricted her from performing overhead or shoulder height repetitive activities.

9. As follow up in January 1991, Dr. Harrington examined claimant once again. At this time, he related that claimant had no shoulder pain, and only occasional elbow pain, which was minimal in nature. Moreover, he recorded claimant's report that she was working without difficulty. On physical exam, Dr. Harrington noted that claimant continued to demonstrate neither tenderness nor pain with physical manipulations. Consequently, he determined that claimant's condition had fully resolved without a permanent disability or impairment. However, as a final cautionary note, he recommended that claimant avoid her previous occupation as a sprayer because it placed her arm mid air in an abducted position while performing repetitive activities.

10. When questioned about Dr. Harrington's preceding reports of significant improvement, claimant contended that she was dishonest with this medical provider. Specifically, she admitted that she concealed her actual pain in order to return to work for financial reasons.

11. During his deposition, when presented with the claimant's admission of concealment, Dr. Harrington explained that it could be possible that claimant concealed her pain, but only if she was experiencing mild, as compared to significant, symptoms. However, he further stated that if he had been aware of claimant's continued pain, he would have reached a different conclusion. Specifically, he would have suspected a more resistant tendonitis or a possible rotator cuff tear, and he would have performed further studies to determine if additional treatment would improve claimant's condition.

1994 WORK RELATED INJURY:

12. Following her 1990 work related injury and subsequent return to work in 1991, claimant remained in her employment capacity with defendant on a consistent basis until 1994, working from 7:00 a.m. until 9:00 or 10:00 p.m. Monday through Friday, as well as half day schedules on Saturday. When she returned to work at this time, she was assigned to the drill press. In this position, claimant repeatedly reached upward to secure wood pieces from a pallet and then she would slide the wood from right to left on the drill press.

13. During this period, although claimant neither sought medical attention nor requested time off from work due to pain, claimant testified that she consistently endured pain symptoms in her right arm. In addition, since she was attempting to compensate for this pain in her right arm, claimant began utilizing her left arm on a more constant basis. As a result, claimant explained that she also began to experience pain in her left upper extremity. Overall, claimant described an ongoing, persistent pain complex. However, due to her financial hardship, claimant continued to work until the pain was no longer bearable.

14. As such, in the spring of 1994, claimant once again sought medical care from her treating physician, Dr. Crossman, complaining of bilateral upper extremity pain, electric shock type pains, and numbness. In addition, claimant also specifically recounted right shoulder pain. In order to treat her condition, Dr. Crossman prescribed medication, cortisone injections, and a wrist splint. Furthermore, he referred claimant to Joseph H. Vargas, III, M.D., for an orthopedic consultation and Donna Johnson, P.T., for physical therapy treatments.

15. Dr. Vargas began treating claimant in May 1994. After examination, he diagnosed her with supraspinatus syndrome with tendonitis and he treated her with cortisone injections and continuation of her physical therapy. However, since this treatment provided claimant with minimal improvement, Dr. Vargas scheduled a decompression acromioplasty in an effort to relieve claimant of her pain.

16. Dr. Vargas performed the surgical procedure in August 1994. During the operation, Dr. Vargas not only performed the decompression of the acromioplasty, as anticipated, but he also repaired a rotator cuff tear which was discovered during the procedure.

17. Post-operatively, claimant's condition initially seemed to improve. However, as time progressed, her condition deteriorated. Despite an intense physical therapy program,

which continued until September 1995, claimant continued to report significant pain, soreness, stiffness, and weakness in her right shoulder and elbow.

18. Accordingly, since there was no improvement in claimant's condition, Dr. Vargas determined that she had reached a medical end result. Furthermore, he assessed her with a 20% permanent disability for her right shoulder, which converts to 10% whole person impairment.

CAUSATION:

19. In an office note of Dr. Vargas, he indicated that it was his impression, based upon claimant's history, that her 1994 symptom complex was related to her original injury of 1990.

20. Dr. Crossman also opined on the cause of claimant's 1994 medical condition. Specifically, he explained that the tendonitis and impingement were related to her occupation and due to repetitive low level trauma, which she endured over years. Furthermore, he stated that the 1994 symptoms were a recurrence of claimant's similar 1990 work related situation. However, being no history of trauma to her shoulder with the onset of acute pain, Dr. Crossman was unable to explain the etiology of the rotator cuff tear.

21. Edwin E. Mohler, M.D., an independent medical examiner, who diagnosed claimant with right shoulder impingement syndrome, extensor tendonitis of the right forearm, and degenerative arthritis acromioclavicular joint on the right, also proffered a causal opinion. Dr. Mohler stated that claimant's condition, which causally relates to her repetitive motion occupation, represented a continuation of her symptoms from 1990, rather than a new injury.

ATTORNEY FEES AND COSTS:

22. The claimant has presented evidence of her fee agreement with her attorney for a 20% contingency. In the event that an hourly fee is more appropriate, claimant has also submitted an itemized time account, which delineates her attorney's 30.95 hours of preparation for this case. Furthermore, she has submitted as evidence a specific list of expenses totaling $245.62.

CONCLUSIONS OF LAW:

1. At issue in the present case is whether the claimant's medical condition in 1994 resulted from an aggravation of the previous 1990 compensable injury, for which defendant General Accident Insurance Co. must assume liability, or a recurrence for which defendant New Hampshire Insurance Co. would remain liable.

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 Lumber Co., 112 Vt. 17 (1941).

3. 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). 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. Bern's Inc.*, 137 Vt. 393 (1979).

AGGRAVATION/RECURRENCE:

4. A proper understanding of both an aggravation and a recurrence is absolutely necessary for an accurate and dependable inquiry. A recurrence has been defined by the Department as 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. Furthermore, an aggravation has also been explained as 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"); *Lavigne v. General Electric*, Opinion No. 12-97WC (June 17, 1997); *Jaquish v. Bechtel Construction Co.*, Opinion No. 30-92WC (Dec. 29, 1992).

5. In further clarifying the terms "recurrence" and "aggravation," the Vermont Supreme Court articulated the following:

> 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, Vermont Supreme Court Docket No. 96-434 (June 2, 1997).

6. When classifying a condition as a "recurrence" or an "aggravation of a pre-existing injury," the Department examines several factors. These include (1) whether there is a subsequent incident or work condition which destabilized a previously stable condition; (2) whether the claimant had stopped treating medically; (3) whether claimant had successfully returned to work; (4) whether claimant had reached a medical end result; and (5) whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).

After applying the facts of the present case to the initial element of the aggravation/recurrence analysis, it is evident that claimant suffered a recurrence of her 1990 injury. As demonstrated by the evidence in this matter, claimant's condition was never stabilized. As credibly and reliably testified to by claimant, her upper extremity pain was continuous and persistent. Although it had abated to mild symptoms just prior to claimant's 1991 return to work, as soon as she resumed her work activities the more significant pain reappeared. Moreover, the medical opinions in this case all concur that claimant's condition was a continuation of symptoms related to her 1990 injury. Accordingly, this factor clearly advances a conclusion in favor of a recurrence.

8. Although the second and fourth elements of the inquiry seem to suggest an aggravation finding, upon closer scrutiny, such a determination is suspect, at best. Although claimant did not seek medical treatment for her upper extremities from January 1991 through April 1994, it is evident that she continued to suffer from persistent and chronic pain symptoms. Moreover, as explained by Dr. Harrington, if he had been aware of claimant's continued pain complaints, he would have pursued possible further medical treatment, rather than discharging her from his care. As such, an aggravation conclusion in this case is clearly questionable. Rather, as demonstrated by the evidence, a recurrence finding is entirely more appropriate.

9. Regarding the third factor, whether claimant had successfully returned to work, claimant's employment history appears to illustrate an aggravation conclusion. Between 1991 and 1994, claimant worked in a repetitive manual position on a consistent basis, working from 7:00 a.m. until 9:00 or 10:00 p.m. Monday through Friday, as well as half day schedules on Saturday. However, as previously discussed, claimant credibly explained that she continued in this position, despite constant pain, due to a critical financial situation. When confronted with a similar factual scenario in *Lanoue v. Bertek*, Opinion No. 49-98WC (Aug. 24, 1998), the Department reached the "inescapable conclusion that she had not successfully returned to work.." As such, analysis of this factor favors a recurrence determination.

10. Finally, as to whether claimant's post 1991 work contributed independently to her final disability, a comprehensive evaluation of this factor also requires a finding in favor of recurrence. The medical records submitted in this case clearly illustrate that claimant's condition in 1994 was a continuation of her prior work related injury, which did not previously resolve. Although claimant's symptoms of pain increased between 1991 and 1994, no evidence exists demonstrating an increase in disability as a result of claimant's post 1991 activities. Although defendant New Hampshire Insurance Co. relies upon the increase in claimant's permanency rating between 1991 and 1995, there exists no specific and concrete medical evidence establishing a causal link between claimant's work activities between 1991 and 1994 and her subsequent impairment assessment. Rather, all medical experts have concurred that claimant's condition relates to a continuation of her 1990 injury. Therefore, the more probable hypothesis, as demonstrated by the medical evidence, is that claimant's post 1991 work activities neither worsened her condition nor produced any permanent damage. Consequently, consistent with the medical evidence, this final factor also mandates a recurrence conclusion.

11. Therefore, the evidence establishes, as the more probable hypothesis, that claimant's condition was a continuation of a problem which neither previously resolved, nor became stable. As such, a finding in favor of recurrence is required. *See e.g. St. Arnault v. Canusa Corp. & Maurice's Service Center*, Opinion No. 23-99WC (May 19, 1999).

LAST INJURIOUS EXPOSURE:

12. Although defendant New Hampshire Insurance Co. has suggested that the "last injurious exposure rule" may pertain to the present case, this is not an appropriate matter in which to utilize such an analysis. In *Pacher, supra*, the Vermont Supreme Court restricted the rule's utilization by holding that the last injurious exposure rule should only apply where it is difficult or impossible to allocate liability among several potentially liable employers. In the case at bar, it can fairly and conclusively be determined that claimant's condition in 1994 was a recurrence of her 1990 injury. Accordingly, the "last injurious exposure rule" is clearly inapplicable to this matter.

PERMANENCY:

13. As explained by Dr. Vargas, claimant sustained a 10% whole person impairment. Although Dr. Crossman was unable to explain the etiology of the rotator cuff tear, the remaining medical experts agreed that claimant's condition was a continuation of her symptoms from 1990. Therefore, since the requisite medical evidence has been proffered, claimant is entitled to a partial permanency award.

PREJUDICE:

14. As an alternative argument to avoid liability for claimant's condition, defendant New Hampshire Insurance Co. maintains that claimant should be precluded from recovering her benefits as a result of her pain concealment from Dr. Harrington. Specifically, defendant asserts that since claimant lied about her continued pain in 1991, the defendant's ability to provide benefits and minimize the damage of her claim was prejudiced. In support of this contention, defendant relies upon the testimony of Dr. Harrington, who stated that if he had known claimant was still in pain, he would have suspected a more resistant tendonitis or a possible rotator cuff tear and, as such, he would have performed further studies to determine a proper course of treatment.

15. However, after review of the proffered evidence, it is clear that the doctor's testimony does not conclusively demonstrate a prejudicial result. Dr. Harrington only spoke in terms of possibilities; he did not definitively state that claimant's concealment prevented mitigation or avoidance of her subsequent condition in 1994. In fact, defendant does not demonstrate that claimant's treatment in 1994 was anything greater than what Dr. Harrington would have provided her in 1991, had he been aware of her pain. As such, his comments are merely speculation and conjecture, which cannot justify a denial of benefits. Moreover, since there exists no medical evidence demonstrating that claimant's underlying condition worsened as a result of her 1991 return to work, defendant's

prejudice argument must fail.

ATTORNEY 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. As such, claimant is awarded $245.62 for expenses requested. As for her attorney's fees, although a traditional aggravation/recurrence dispute between carriers does not typically require the representation of a claimant, this case is completely distinguishable. First, as a result of the confusion between jurisdictional authority of this claim, the presence of claimant's counsel was entirely appropriate. Moreover, since claimant's benefits entitlement was in jeopardy due to defendant's argument of prejudice, her attorney's involvement was more than necessary. Therefore, claimant is awarded attorney fees in the amount of 20% of her total award, not to exceed $3,000.

ORDER:

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, defendant New Hampshire Insurance Co. is ordered to:

1. Pay claimant permanent partial disability benefits pursuant to 21 V.S.A. § 648 for a 10% whole person impairment;

2. Pay claimant temporary total disability benefits pursuant to 21 V.S.A.§ 642 for the period of June 3, 1994 through August 5, 1997;

3. Pay claimant's reasonable and necessary medical expenses related to her compensable injury;

4. Pay claimant's requested attorney's fees, in the amount of 20% of her total award, not to exceed $3,000, as well as $245.62 for her expenses.

Dated in Montpelier, Vermont, this 29th day of June 1999.

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Steve Janson, Commissioner