STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Tammy Berard	)	State File No. M-05023
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
The Silo and Dover Forge	)	
	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 28–00WC

Hearing held in Rutland on October 8, 1999 and Montpelier on January 21, 2000.
Record closed on February 16, 2000.

APPEARANCES:

Sam W. Mason, Esquire, for the Claimant
Tammy Besaw Denton, Esquire, for the Defendant, the Silo (Acadia Insurance)
Andrew C. Boxer, Esquire, for the Defendant, Dover Forge (Travelers)

ISSUES:

1. Whether the claimant's rib condition is compensable.

2. Whether the claimant's disc condition is compensable.

3. If the claimant has a compensable injury, whether such injury was caused by claimant's employment at the Silo or at Dover Forge.

4. Whether the Silo is entitled to reimbursement of workers' compensation benefits paid to and/or on behalf of claimant during periods claimant received unemployment benefits.

5. Whether claimant is entitled to additional workers' compensation benefits.

THE CLAIM:

1. Payment of medical bills.

2. Payment of all liens by North American Health Plans for medical expenses paid after denial by Acadia (Silo).

3. Temporary total disability benefits.

4. Temporary partial disability benefits.

5. Attorney fees and costs.

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant Exhibit 1:	Curriculum vitae for Dr. Oakley M. Frost
Defendant Silo Exhibit 1:	Dr. Mark J. Bucksbaum
Defendant Dover Forge Exhibit A:	Curriculum vitae for Dr. Robert S. Block

FINDINGS OF FACT:

1. The defendants, the Silo and Dover Forge, were employers as defined under the Vermont Workers' Compensation Act and Rules at all times relevant to this action.

2. Claimant Tammy Berard was an employee as defined under the Vermont Workers' Compensation Act and Rules.

3. Claimant Tammy Berard was employed as a server at the Silo, a restaurant in Dover, Vermont, from July 1996 to August 31, 1998.

4. During her employment at the Silo, claimant was required to carry large, heavy oblong food trays with six to ten plates on each tray in her left hand. She often was required to carry these trays, which weighed 30-35 pounds, up and down a flight of stairs, and was required to twist and turn while carrying the trays to avoid restaurant patrons using the same stairs. The trays would be balanced above her head while she leaned to the right and carried the trays in her left hand.

5. Claimant's work schedule at the Silo differed with the seasons. Winter, summer, and holidays made the restaurant busier.

6. While employed at the Silo, claimant would sometimes be required to work 12-13 hours a day. During the winter, the Silo could serve as many as 500 dinners a night.

7. During the winter season, claimant worked 5-7 nights per week and worked 2-3 double shifts per week.

8. During the winter, claimant worked downstairs at the Silo 1-3 times per week. When she worked downstairs, the claimant spent her entire shift downstairs and was required to use the stairs constantly because the Silo's kitchen was located on the upper level.

9. Claimant began to experience abdominal pains and leg and toe heaviness and numbness during her period of working at the Silo between September and October of 1997. Her pain would usually recede after a few hours or overnight. The claimant testified that she never experienced this pain prior to working at the Silo. Claimant continued to work.

10. Claimant began experiencing severe stomach and abdominal pains in January of 1998 while employed at the Silo. Claimant continued to work despite abdominal pain and leg

numbness. At its height, the claimant experienced this severe pain up to three times per week.

11. Her symptoms worsened, particularly after working long shift hours, and she sought treatment at the Deerfield Valley Health Center on January 14, 1998. Claimant was diagnosed with an ulcer and began treatment for such. Claimant received no relief from this treatment.

12. Claimant spoke of her abdominal and leg pain with several other employees at the Silo: Melanie Finkleday, her supervisor; Donna Hawes Cunningham, the hostess; and Melissa Swim, a coworker.

13. Claimant again sought treatment for her back and leg symptoms at the Deerfield Valley Health Center on February 25, 1998. The diagnosis was right leg pain, possibly sciatica.

14. Claimant left the employment of the Silo on August 31, 1998 to look for less physically demanding work with fewer hours.

15. Claimant does not recall any specific incident while working at the Silo that caused an injury to her back or ribs. Claimant never missed any time from work at the Silo as the result of any back or rib injury.

16. Next the claimant worked at Dover Forge from September 1, 1998 to September 17, 1998. Dover Forge has no stairs and no lunch shifts. Servers at Dover Forge do not work double shifts. The claimant experienced her work at Dover Forge as easier and less stressful than her work at the Silo. She remembers that the weeks she worked there were slow.

17. The claimant worked a total of nine shifts at Dover Forge, two of which were spent in training. Her last shift was on September 17, 1998.

18. On September 19, 1998, after suffering severe abdominal pain the evening before, claimant was admitted to Southwestern Vermont Medical Center. She was not working at the time of that incident.

19. On September 23, 1998 a CT guided needle injection was done on the claimant's right 12^{th} costovertebral rib with results Dr. Oakley Frost interpreted as positive for right 12^{th} costovertebral joint syndrome.

20. Dr. Frost examined claimant, diagnosed a 12^{th} right costovertebral joint syndrome (CJS) and removed her from work. He testified that carrying trays caused claimant's rib condition that in turn led to her abdominal attacks. He explained that carrying trays up and down stairs was a significant factor in the development of costovertebral joint syndrome due to "bumping" from walking stairs. He testified that if claimant's physical condition worsened, there would be a corresponding change in symptoms. He could find no evidence indicating that her work at Dover Forge worsened her12^{th} rib condition and opined that the rib condition was well established by the time she began work at Dover Forge.

21. Dr. Frost further explained that CJS is a condition with symptoms that wax and wane and could be set off with almost anything. For example, a large meal on the evening of the 18th most likely expanded the stomach cavity and put pressure on the claimant's rib.

22. Dr. Frost also diagnosed a disc problem in claimant's back. He opined that either an episodic injury or repetitive motion caused both. Dr. Frost conferred with orthopedist, Dr. Robert Block, regarding surgical intervention.

23. Dr. Frost's physical examination of November 3, 1998 demonstrated that claimant had clonus in both feet, particularly the right.

24. A MRI done at the Southwestern Vermont Medical Center on September 24, 1998 indicated, "Moderate central and minimally rightward disk protrusion at T12-L1 level with encroachment upon the anterior aspect of the cord. Mild to moderate central disk protrusion at L5-S1. Narrowed intervertebral disks, mild desiccation of the disk at T12-L1, L1-2, and L5-S1."

25. Together the CT injection and MRI demonstrated two separate conditions: the 12th rib syndrome and the disc problem.

26. Dr. Block's September 25, 1998 diagnosis of claimant's back problem was thoracolumbar disc. He agreed with Dr. Frost's opinion that claimant's work at the Silo caused both her rib injury and her disc injury. He later opined that the claimant's rib condition was caused by carrying trays and walking up and down stairs at the Silo. In his opinion, the work at Dover Forge (also known as Andirons) did not cause or aggravate her underlying degenerative disc disease at T12-L1. He based that opinion on the fact that claimant's pain pattern did not change during her period of employment there. Furthermore, Dr. Block opined that repetitive carrying of trays at the Silo also caused claimant's disc injury, especially while on stairs which would have increased the impact on claimant's spine. In fact, he concluded that walking up and down stairs carrying heavy trays was the primary cause of claimant's disc injury. Dr. Block recommended an intensive conservative management program, as well as epidural blocks, oral steroids, a brace, and a walking program.

27. Dr. Frost's report of October 6, 1998 concluded that claimant had sustained a disc problem and a 12th costovertebral joint problem, both of which were work-related.

28. Claimant has denied that there was any specific incident or injury that occurred while she was employed at Dover Forge. Claimant has specifically indicated that her pain began while working at the Silo, not at Dover Forge.

29. On November 5, 1998, Dr. Block recommended a T12-L1 diskectomy. The claimant decided to talk it over with her family and then decide whether she wanted the spinal surgery.

30. Claimant then obtained a second opinion. On December 7, 1998 Dr. Joseph Phillips at the Spine Center in Hanover, New Hampshire, examined claimant. He opined that the spinal surgery was not necessary. Conversely, he felt that the symptoms referable to the right 12th rib might need surgical intervention via rib resection.

31. All three physicians, Doctors Frost, Block, and Phillips, were in agreement about performing the rib resection.

32. Claimant had her 12th rib removed on December 29, 1998. Dr. Frost's notes indicated good results from the surgery. It was noted in the subsequent surgical pathology report that there were "degenerative cartilage changes consistent with osteoarthritis." Dr. Frost testified that the two years claimant worked at the Silo was a sufficient time for the development of the condition and that the condition does not develop overnight. In his opinion, it is a condition that takes "months rather than weeks and years rather than months" to develop.

33. In his note of January 19, 1999, Dr. Frost noted that claimant would be following up with Dr. Block regarding the thoracic disc condition.

34. Dr. Block's January 1999 note reflects claimant's report of feeling better and her willingness to return to work. Dr. Block recommended that claimant should not do any waitressing or lifting except light work.

35. Claimant returned to work at Dover Forge as a bartender in February 1999.

36. Claimant worked at Dover Forge for an additional six weeks in February and March of 1999 after her surgery and during the time she reached a medical end result for her CJS.

37. Claimant has been treating with Dr. Block for her back since September 25, 1998. He diagnosed a thoracic disc problem, which he believes is responsible for claimant's leg and toe symptoms. Dr. Block opined that it is possible that carrying and lifting trays could have worsened claimant's condition. Initially, he noted early improvement in claimant's back condition but subsequently made objective findings revealing a worsening of her back problem by February 18, 1999.

38. In his February 18, 1999 report, Dr. Block found that claimant had right ankle clonus, and recommended Dr. Daniel Robbins at Orthopaedic and Hand Surgery for a second opinion regarding her back problems.

39. Dr. Robbins noted significant lower back and leg symptoms and recommended intervention with interdiscal electrothermal annuloplasty (minimally invasive outpatient procedure) which would give claimant a chance for pain improvement without requiring the only other choice of interbody fusion.

40. On March 22, 1999, Dr. Mark J. Bucksbaum, the Silo's independent medical examiner, opined that the claimant's condition was the result of a degenerative process and not the result of a work related injury. He believed the condition stemmed from a horseback riding incident in 1975. He also opined that costovertebral joint syndrome was not an accepted medical diagnosis, and that Dr. Frost's rib resection procedure was experimental and was not a reasonable and necessary medical treatment. Although he performed a test for the indication of clonus, he did not find evidence of any.

41. Dr. Bucksbaum further testified that the claimant's first incident or "attack" within the first three weeks of her employment at the Silo could not have been causally related to her work at the Silo. He opines that the claimant's condition was a long-standing degenerative process that was created before her employment at the Silo. He placed claimant at a medical end result, but did not assign a permanency rating because he did not believe her problem was work-related.

42. On April 28, 1999, the Department entered an Interim Order of Benefits directing Acadia Insurance, the Silo's workers' compensation carrier, to pay temporary total disability, dependency and medical benefits dating from September 17, 1998.

43. Acadia Insurance paid benefits to and on behalf of claimant pursuant to the Interim Order.

44. Acadia Insurance filed a Form 27 on April 30, 1999, notifying claimant of its intent to discontinue benefits as of May 10, 1999.

45. Acadia's Form 27 was approved by the Department on May 4, 1999, and claimant's benefits were discontinued on the basis of a medical end result with no permanent partial disability.

46. Prior to the discontinuation of her benefits, interdiscal electrothermal annuloplasty had been recommended for the claimant's back and leg symptoms. Acadia refused payment. Claimant then sought payment from her husband's private health insurer. Although their policy excludes payment of any benefits that may be due under any workers' compensation law, this carrier agreed to pay.

47. In a June 22, 1999 office note regarding a telephone conversation about the MRI scan, Dr. Robbins wrote that the claimant had both thoracic and lumbar disc herniations. He explained that he believed that the lumbar area was the source of the most pain and therefore would be the focus of an anticipated surgical procedure. His plan was to operate in the thoracic area only if the lumbar procedure proved ineffective. In a July 23, 1999 letter to the claimant's attorney, Dr. Robbins opined that to his best medical judgment that claimant's mid and low back complaints are work related.

48. In a September 20, 1999 admission note, Dean Measeck, physician's assistant at the office of Dr. Robbins, noted that the claimant had a disc herniation at T12-L1 and also a disc abnormality at L-5-S1.

49. In a November 23, 1999 office note, Dr. Robbins described claimant as doing "wonderfully well" after the interdiscal electrothermal annuloplasty (IDET), at L5-S1 three weeks earlier. Her right leg pain was gone, although she still had a slight ache on the left side.

50. Claimant seeks costs in the amount of $873.96 and attorney fees based on 45.78 hours.

CONCLUSIONS OF LAW:

1. Claimant asserts that her treating physicians, Doctors Frost, Block, and Robbins, have stated without doubt that her injuries are a result of her employment at the Silo.

2. The Silo posits that the claimant had a pre-existing condition when she began working at the Silo and consequently, could not have suffered a compensable injury there. The Silo further asserts that Dr. Frost performed an experimental surgical procedure on claimant that is not an accepted standard of care for a condition that is also not accepted. As such, the Silo asserts a right to deduct any payments made for expenses relating to Dr. Frost's surgery. Additionally, the claimant received unemployment benefits during the spring of 1999 when Dover Forge was closed. The Silo asserts that there was no medical or other evidence indicating that claimant's lost income was related in any way to her alleged work injuries. Thus, they would also like to be reimbursed for benefits paid to or on behalf of the claimant during the spring of 1999. In the alternative, the Silo argues that if claimant suffered a compensable injury at the Silo, she subsequently aggravated that injury while working at Dover Forge. Accordingly, the Silo seeks reimbursement from Dover Forge for all workers' benefits paid to and on behalf of claimant.

3. Dover Forge argues that there is no evidence suggesting that claimant's work at Dover Forge caused her injuries. In support, it argues that the medical evidence and opinions in this case support only two possible causes of claimant's injury: (1) that claimant's work activities at the Silo caused her injuries; or (2) that claimant's injuries are degenerative in nature and not work related at all.

4. Furthermore, Dover Forge maintains that the claimant did not suffer an aggravation of a pre-existing condition either. Additionally, Dover Forge asserts that the "last injurious exposure" rule is inapplicable for two reasons: (1) the claimant's "exposure" during her employment at Dover Forge was not the same as her exposure during her employment at the Silo; and (2) utilization of the rule's analysis is restricted only to those situations where there is some difficulty allocating liability among several potentially liable employers. Dover Forge requests that the Silo be held liable for any and all benefits that may be due the claimant.

5. In workers' compensation cases, the claimant has the burden of proof, and must establish all the facts essential to rights asserted. *King v. Snide,* 144 Vt. 395 (1984*); Goodwin v. Fairbanks, Morse Co.,* 123 Vt. 161 (1962*)*. 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)*.

6. 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 to establish the claim. *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." *Brown v. E.B. & A.C. Whiting,* Opinion No. 21-94WC (Aug. 1, 1994); *Burton v. Holden & Martin Lumber Co.,* 112 Vt. 17 (1941).

7. An employer is obligated to provide a claimant with reasonable, surgical, medical, and nursing services. 21 V.S.A. § 640(a). The statute places no other limitation on the receipt of the benefits. Yet, a proposed surgery cannot be accepted as reasonable when it lacks an objective foundation or basis. *Beaudin v. H.P. Hood, Inc*., 39-99WC (Sept. 3, 1999).

8. When evaluating and choosing between conflicting medical opinions, the Department has traditionally considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience. *Morrow v. VT Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain,* Opinion No. 41S-98WC (Sept. 1 & Jul. 20, 1998).

9. Three physicians were consulted regarding the causation issue: Dr. Frost, Dr. Block, and Dr. Bucksbaum. Two of them, Drs. Frost and Block, were claimant's treating physicians.

10. All of the physicians have comparable professional training and experience. Dr. Bucksbaum had reviewed all of claimant's medical records. Dr. Frost had not. An analysis of the qualifications of the experts, including professional training and experience, favors none.

Rib Condition:

11. The questions whether costovertebral joint syndrome (CJS) is an accepted medical condition, whether it is causally related to the claimant's employment and whether the rib resection surgical procedure was reasonable are all at issue. The answers to these questions turn on the persuasiveness of the several physicians who have offered opinions.

12. The only physician to discount the costovertebral joint syndrome diagnosis as an accepted medical condition and rib resection procedure was Dr. Bucksbaum. Claimant's treating doctors agreed with the diagnosis and felt that a rib resection was necessary. As claimant's treating physician for the rib condition, Dr. Frost has had the opportunity to conduct numerous physical examinations of claimant, and he has been responsible for managing claimant's care. Conversely, Dr. Bucksbaum, being an independent medical evaluator, only examined claimant on one occasion. However, Dr. Bucksbaum did review and evaluate an all-inclusive collection of claimant's medical records, and offered his opinion based upon a review of claimant's extensive treatment records.

13. This Department has considered CJS and its surgical treatment in at least one other case. *Briggs v. Maytag Homestyle Repair, Inc.,* Opinion No. 57-96WC (Oct. 5, 1996). Although he admits that the surgery is experimental, it has been reported in a medical journal. A treatment is not necessarily unreasonable because it is experimental. *Briggs.*

14. Although Dr. Block and Dr. Frost testified that claimant's T12-L1 and right 12th costovertebral joint syndrome were caused by her employment as a server, Dr.

Bucksbaum disagrees. Dr. Bucksbaum opines that claimant's condition was degenerative and caused from falling off a horse when she was a child.

15. Although Dr. Frost did not review all of the medical records, he testified that a fall from horse years earlier would not change his opinion in light of this claimant's continuous work history at the Silo. Furthermore, he testified that at the time of surgery, he saw osteoarthritis only in the affected rib joint.

16. Dr. Frost and Dr. Bucksbaum agree that there is no scientific study that demonstrates a causal relationship between a 12th costovertebral joint syndrome and the occupation of serving customers in a restaurant. At the same time, Dr. Frost's opinion supports the claimant's theory that carrying heavy trays in one hand and tilting to one side to maintain balance has to have some toll on the body. Specifically, he observed at the September 23, 1998 office visit that "raising her [claimant's] arm overhead made the pain worse at the costotransverse joint #12 on the right and, by turning her neck hard to the right, it accentuated the pain and she felt a locking sensation in her neck."

17. The Silo contends that the claimant's failure to tell her treating physicians about prior incidents of abdominal pain undercuts this claim. However, I find that her failure to give Dr. Frost and Dr. Block her complete previous medical history is not dispositive of whether her current condition is work-related or not. Claimant may have had previous complaints of abdominal pain and treatment, but there is no evidence that it was ever as severe or persistent as that which hospitalized her.

18. Because of the specific observations Dr. Frost made of this claimant, the success of the rib resection surgery and the precedent in this Department holding that rib resection surgery is compensable, deference is given to Dr. Frost. I therefore accept his opinion that there was an objective basis for diagnosing the claimant with CJS, that the work the claimant did caused the CJS, and that the rib resection surgical procedure was reasonable and necessary. Accordingly, that surgical procedure is compensable.

Disc Condition:

19. Claimant has been treating medically with Dr. Block for her back condition since September 25, 1998.

20. Dr. Block and Dr. Bucksbaum agree that falling from a horse can cause significant spinal injuries that may not manifest symptoms for ten or twenty years. Yet, Dr. Block opined that claimant's T12-L1 condition was caused by repetitive carrying of heavy trays at the Silo. He testified that he could find no evidence that she had a pre-existing condition and that if she had such a condition, she would not have been able to perform the work she did at the Silo for two years.

21. More specifically, Dr. Block opined that the stairs were the major contributor because they increased the impact on the disc; carrying heavy trays simply worsened it. Dr. Block further opined that the work the claimant did at Dover Forge did not exacerbate or change her pain pattern in any way and, therefore, was in no way contributory.

22. Additionally, as of the first hearing day on October 8, 1999, reference was made to claimant's ongoing and worsened condition of leg swelling and increased back pain to date. This is clear suggestion that the claimant had not reached a medical end result for her thoracic disc condition at that time.

23. The MRI and CT scan indicated that the claimant suffered from both a rib and thoracic and lumbar disc conditions in September of 1998. By the time of Dr. Bucksbaum's examination in March of 1999, the claimant had undergone surgical intervention for the rib condition. Conversely, nothing had been done regarding claimant's thoracolumbar disc condition by the time of Dr. Bucksbaum's examination.

24. In his hearing testimony, Dr. Bucksbaum stated that his independent medical examination for defendant the Silo on March 22, 1999 had not demonstrated any "physical examination finding that was consistent with a thoracic disc diagnosis." Yet, he also stated that claimant's thoracic disc condition began before her employment at the Silo. Even if I accepted his theory that the claimant had a pre-existing disc problem, the evidence supports the conclusion that her work at the Silo aggravated it; therefore, supporting the claimant's theory that this is a compensable claim.

25. The claimant has met the burden of proof for a causal connection between her disc condition and her employment. Accordingly, claimant's thoracolumbar disc condition is compensable.

Liability Between Carriers:

26. In disputes between carriers, the burden of proving which carrier is on the risk for a particular injury is generally placed upon the carrier that is attempting to relieve itself of liability. *Bressette-Roberge v. Personnel Connection*, Opinion No. 03-99WC (Jan. 26, 1999); *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 26, 1998).

27. Since Acadia/The Silo is attempting to relieve itself of liability, it must prove that the claimant's work under its watch did not cause her costovertebral joint syndrome or thoracolumbar disc condition.

28. It is black-letter law that an employer takes each employee as is and is thus responsible under our workers' compensation law for an accident or trauma which disables one person but which might not disable another. *Taft v. Blue Mountain Union School*, Opinion No. 10-99WC (Mar. 24, 1999)(citing *Morrill v. Bianchi*, 107 Vt. 80 (1935).

29. Furthermore, a personal injury need not be instantaneous to be compensable as a work-related injury in Vermont. *Campbell v. Savelberg, 139 Vt. 31 (1980).* The Department has long recognized that cumulative micro-trauma arising out of and in the course of employment is compensable. *Petit v. North Country Union High School*, Opinion No. 20-98WC (Apr. 30, 1998*) (*citing Rule 2(f), *Workers' Compensation and Occupational Disease Rules,* May 15, 1996*).*

30. All of the physician opinions actually integrate well. Based upon the pathology report from the rib resection procedure, claimant's condition was a degenerative process that preceded her employment at the Silo, as Dr. Bucksbaum has indicated. However, the

existence of a degenerative condition alone does not preclude a finding of compensability.

31. As all of the doctors consulted in the causation issue have indicated, claimant's employment at the Silo irritated her condition to the extent that she became more symptomatic than she had ever been before. Claimant's symptomology then progressed into full-fledged medical conditions that necessitated medical attention and intervention.

32. Although medical intervention did not occur until after claimant had terminated her employment at the Silo and began employment at Dover Forge, the evidence fails to support the Silo's position that claimant's work at Dove Forge contributed to her medical conditions. *Pelkey v. Rock of Ages Corp.,* Opinion No. 74-96WC (Jan. 3, 1997 and Mar. 20, 1997). Furthermore, there is no evidence that claimant sustained any "injurious exposure" during her brief employment at Dover Forge. Claimant's condition was simply a continuation of a problem. No second episode contributed independently to claimant's injuries. *Id.*

33. In the case before the Department, the evidence has sufficiently established a causal connection between all of claimant's injuries and her employment activities. Accordingly, the claimant's injuries are compensable.

34. Claimant's consistent and regular work carrying trays at the Silo compared with the less strenuous, short-duration work at Dover Forge and the convincing medical opinions causally linking her resulting medical conditions to her employment situation at the Silo support Dover Forge's position that the Silo is liable in this case.

35. Having concluded that claimant's conditions are causally related to her work activities with defendant, the Silo, it follows that her temporary total disability benefits were improperly terminated on May 10, 1999. Furthermore, although it appears that the claimant reached a medical end result for her rib condition prior to the termination of temporary total disability benefits on May 10, 1999, it is clear that she did not reach a medical end result for her thoracolumbar disc condition. Specifically, claimant's treating physician for her disc condition had not yet put her at a medical end result because he believed that claimant needed further medical treatment for her back. As such, the defendant the Silo is responsible for any benefits due from May 10, 1999 to the date when claimant reaches a medical end result for her back condition.

36. The defendant Acadia/The Silo asserts that in response to Department's Interim Order to pay benefits to the claimant, it reimbursed the Vermont Department of Employment and Training for unemployment benefits claimant received during the period Dover Forge was closed in the spring of 1999. However, the order instructed the carrier to pay the claimant, not the Department of Employment and Training. It is not up to this Department or to the workers' compensation carrier to determine whether the claimant was entitled to unemployment compensation and whether the claimant was to repay the Department of Employment and Training. Accordingly, the Silo is not entitled to reimbursement of workers' compensation benefits paid to and/or on behalf of the claimant during periods claimant received unemployment benefits.

37. The claimant has prevailed on the merits of her claim and is therefore entitled to an award of her costs as a matter of law and attorney's fees as a matter of discretion. *21 V.S.A. § 678(a); Workers' Compensation Rule 10(a).* The claimant has presented an itemized statement for $873.96 in costs and 45.78 hours in attorney time. Since she has prevailed because of the efforts of her attorney, she is awarded those costs as a matter of law and $60 per hour for a total of $2,746.80 in attorney fees as a matter of discretion.

ORDER:

Therefore, based on the foregoing Findings of Fact and Legal Conclusions, Acadia/The Silo is hereby ORDERED to:

1. Pay all medical bills, including liens, associated with claimant's rib and thoracolumbar disc conditions.

2. Pay temporary disability benefits consistent with this opinion.

3. Pay permanent partial benefits after the claimant reaches a medical end result and a determination of permanency has been made.

4. Pay attorney fees in the amount of $2,746.80 and costs in the amount of $873.96.

Dated at Montpelier, Vermont, this 24th day of August 2000.

_____

R. Tasha Wallis
Commissioner