STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Alice Martell

v.

Dowlings, Inc.

Opinion No. 15-04WC

By: Margaret A. Mangan
Hearing Officer

For: Michael S. Bertrand
Commissioner

State File No. R-12584; R-03872

Hearing Held in Montpelier on November 12, 2003
Record Closed on December 23, 2004

APPEARANCES:

Joshua L. Simonds, Esq., for the Claimant
Christopher McVeigh, Esq., for the Defendant CNA
Keith Aten, Esq., for the Defendant Guard Insurance

ISSUES:

1. *Did claimant Alice Martell sustain a compensable physical injury resulting in a herniated disc on March 12, 2000?*

2. *If claimant sustained a compensable work related injury in 2000, what is the permanent partial impairment rating related to that injury?*

3. *Has claimant's medical treatment been reasonable?*

4. *Does claimant have a compensable psychological injury? If so, what permanent partial impairment does she have as a result?*

5. *Is the claimant entitled to vocational rehabilitation services?*

6. *If this is a compensable claim, is it an aggravation for which Guard Insurance is liable or a recurrence for which CNA is on the risk?*

CLAIM HISTORY:

1. *CNA insured Dowlings until June 30, 2000; Guard Insurance assumed the risk after that date.*

2. *Guard initially assumed payment for the medical care claimant received after an August 2000 incident, but later filed a denial on the basis that claimant's condition was a recurrence for which CNA should be deemed liable.*

3. *On March 30, 2001, when Guard was the insurer, claimant filed a claim for a March 12, 2000 incident, when CNA was on the risk, a claim CNA denied.*

EXHIBITS:

Joint I:	*Medical Records*
Joint II:	*Deposition of Jacques Archmbault, M.D.*
Claimant's 1:	*Vocational Rehabilitation Plan dated 3/4/03*
Claimant's 2:	*Vocational Rehabilitation Plan dated 10/24/03*
Claimant's 3:	*Deposition of Mark Bucksbaum, M.D.*
Claimant's 4:	*Dowlings's Tote- Exemplar*
	Attorney Client Agreement
	Itemized Attorney Fees
	Itemized Costs and Expenses
CNA A:	*60 carton cigarette box*
CNA B:	*MMPI II test results from Dr. Packer*

FINDINGS OF FACT:

1. *At all times relevant to this action, claimant was an employee and Dowlings/Burlington Drug her employer within the meaning of the Workers' Compensation Act (Act).*

2. *Claimant is 5'3" and weighs about 112 pounds.*

3. *Claimant began working for Burlington Drug, later Dowlings, in March of 1987. At first she was a stock clerk/picker, a job that involved selecting health and beauty aid products from aisles of shelving according to an order list. The shelves ran from floor level to over claimant's head. Picking products involved*

4. *On those days when she finished her work as a picker, claimant helped on the loading dock, lifting and moving totes. Under company policy, totes were not to weigh more than 40 pounds, although occasionally they were heavier. The average weight was 20 to 30 pounds.*

5. *Claimant's next job was that of shipper. Work then consisted of taking totes off the conveyor belt at the loading dock, sorting them by truck run and staging the totes by stop behind delivery trucks. She lifted and moved totes for about 6 ½ hours of her 8-hour shift, 5 days a week.*

6. *While working for Burlington Drug, claimant sometimes also drove a truck, a job that included loading the truck at the dock and unloading it at the customer's store.*

7. *In 1990 or 1991 Burlington Drug purchased Dowlings, Inc., a wholesale grocery distributor. The companies combined their physical location and moved to a two-story warehouse in Milton, Vermont. Aisles of product were stacked on shelves in different departments and a central network of conveyor belts transported totes from the departments to the loading docks.*

8. *At the loading dock there were two conveyor belts. The high one was at claimant's shoulders, the low one at mid thigh. Claimant handled the Dowling grocery products that were typically heavier than the Burlington Drug health and beauty products.*

9. *Shortly after the move to the Milton facility, claimant became the Dowlings shipper, a job titled Dock Supervisor. She removed totes from both conveyor belts, sorted them by truck run and staged the loads for the various truck runs. Totes were moved on dollies. Eight to ten trucks were loaded each night, more than had been loaded with Burlington Drug, with totes averaging 40 pounds.*

10. *While working as a Shipper at Dowlings, claimant moved from a five-day workweek to four.*

11. *Claimant also became an assistant night supervisor, although she had no authority to hire, fire or evaluate*

12. *In 1998 or 1999 claimant became a checker in the cigarette department, keeping the same hours. At the beginning of her shift, she still worked as a checker. When pickers were not able to fill an order from inventory, claimant pulled needed items from back stock with open cases or from closed full cases of cigarettes. Each full case contained 60 cartons and weighed about 40 pounds.*

13. *The majority of claimant's work from 1988 to 1991 or 1992 was as a shipper until became a checker in the cigarette department in 1998 or 1999. Work of a shipper involved repetitive lifting and bending. Work as a checker still involved some lifting and much bending.*

14. *In March of 2000, claimant's average weekly wage was $520.00.*

15. *Prior to the injuries at issue here, claimant socialized, danced and was active with her partner's son. Although physically capable of doing some of these activities today, she is self-conscious because of her limp and no longer enjoys those experiences.*

Claimed Physical Injuries

16. *On Sunday, March 12, 2000, claimant awoke with a "crick" in her back. Soon afterwards, she had severe pain, which prompted her to seek care in an emergency department.*

17. *After missing a few days at work, claimant returned, albeit in pain.*

18. In late March of 2000, claimant's treating doctor, Dr. Jacques Archambault, obtained an MRI, diagnosed a bulging disc and recommended a discectomy. He performed that surgery on April 7, 2000.

19. Slightly less than a month after the surgery, on May 1, 2000, claimant returned to work with a ten pound weight restriction and instructions to change positions frequently. She continued to see Dr. Archambault in follow-up. Although not specifically noted in his records, she had normal post-operative pain.

20. While working as a cigarette checker on August 7, 2000, claimant was retrieving a case of cigarettes when she experienced sharp low back pain. She reported the incident to her employer and her doctor. The employer filed a First Report of Injury. Guard Insurance accepted the claim and paid some medical benefits.

21. Claimant lost no time from work for the August 2000 incident. After a short period of time with increased pain, she was not able to distinguish the pain she had before and after that incident.

22. However, it was not until after the August 2000 incident that claimant was prescribed physical therapy and received a series of epidural injections for pain. In addition, in 2002 claimant participated in a three-week multidisciplinary pain management program.

23. Claimant last worked for Dowlings on December 31, 2000 when she was fired.

24. After one week she and her partner began working for Bobby T's, a commercial cleaning service. Ms. Lampman, her partner, does all of the heavy work. Claimant works 30 to 33 hours per week. Claimant continues to look for work within her restrictions but has found none. She continues to work out of necessity although she had been told that the work exceeds her physical capacity.

Expert Medical Opinions: Causation and Permanency

25. Mark J. Bucksbaum, M.D., an expert in physical medicine, rehabilitation, and pain management, opined that claimant's back problems are a result of thirteen years of repetitive lifting and bending at her work. He explained:

> *repetitive lifting creates stresses and strains on the supporting structures of the lumbar spine, which are durable, and over a course of time wear out and this is a cumulative effect, and it gets to the point where the spine tries to initially take some defense reactions by building up some calcium or what we would observe to be an osteophyte, but at a certain point, if it goes long enough, there's failure, and the discs can bulge and then herniate and then ultimately rupture if it keeps going.*

Preservation deposition of Mark J. Bucksbaum, M.D. at 11.

26. Based on degenerative changes seen on diagnostic tests, Dr. Bucksbaum ruled out an acute cause of the claimant's disc herniation, including any non-work-related cause. He also determined that as a result of her gradual-onset work-related injury, claimant had reached a medical end result with a DRE Category III, 13 % whole person impairment.

27. Dr. John Johansson, who has treated the claimant in a pain program, is an expert in non-surgical orthopedics and pain management. Like Dr. Bucksbaum, Dr. Johansson opined that claimant's back injury arose out of her work. He, too, ruled out a non-work event. He bases his opinion on claimant's condition before the injury, lack of medical records showing chronic back problems, and the requirements of the job in relation to her small frame. He agreed that her back problems took a while to develop and most likely were caused by work. The actual herniation of the disc may have happened at home when she experienced the severe pain, but the cause was her work that had built up over time.

28. Dr. Johansson assessed claimant's permanent partial impairment at 12% whole person. The one per cent difference between his and Dr. Bucksbaum's rating relates to a range available under the Guides for a discretionary rating for pain.

29. Dr. Victor Gennaro, an orthopedic surgeon, based his opinion on the claimant's medical records. He did not examine her. He opined that her repeated lifting was a causative factor in the development of her degenerative disc disease and probable disc herniation in March of 2000.

30. As claimant's counsel clearly points out, Doctors Bucksbaum, Johansson and Gennaro all refer to medical literature supporting a correlation between postures such as bending and twisting and degeneration of structures in the spine. They also agree that when lifting is added to the activities of bending and twisting, degeneration of the spine is accelerated.

Aggravation or Recurrence

31. Between April of 2000 when claimant had back surgery and August 2000 when she lifted a case of cigarettes, her condition had not stabilized, she had not treated medically and she had not reached a medical end result.

32. In June of 2000, Dr. Archambault gave claimant a lifting limit of ten pounds.

33. Dr. Genanaro opined that the August 2000 cigarette carton-lifting incident cascaded her into treatment she did not need beforehand, including physical therapy and epidural injections. He opined that August 2000 incident, not a normal postoperative course from the first injury, necessitated the additional treatment.

34. The treatment claimant had after her August 2000 incident was for pain. Her underlying condition had not changed. In fact, reflexes improved after the August 2000 incident, other tests remained unchanged and she continued to work.

35. By September of 2000, Dr. Archambault increased claimant's lifting restriction to 15 pounds.

Expert Opinions on Work Capacity

36. Dr. Bucksbaum evaluated the claimant's work capacity as sedentary to light for lifting with frequent changes in position.

37. *Dr. Johansson found that claimant has a light duty work capacity with an infrequent 20-pound lifting capacity and continuous sitting and standing tolerance of 30 to 45 minutes.*

Psychological Condition

38. *Ms. Martell also claims that her physical injuries led to depression and anxiety, compensable psychological conditions. Mary-Ellen Giroux, a Licensed Psychologist, determined, based on testing and a clinical interview, that anxiety and depression were potential roadblocks to recovery. Ms. Giroux diagnosed a pain disorder associated with psychological factors and a general medical condition.*

39. *Dr. Johansson opined that claimant's injury to the spine caused the depression and sleep disturbance identified at the initial stage of the VCOR.*

40. *Dr. Joanne Packer, licensed clinical psychologist, also evaluated the claimant by meeting with her three times for a total of six hours and administering a battery of tests. Based on her clinical observations and test results, Dr. Packer opined that one with the claimant's tendency to work hard to present herself in the best possible light could mislead even a trained interviewer in a preliminary interview because she guards the signs of her psychological distress.*

41. *Dr. Packer concluded that claimant tries to look as good as possible, but that she is depressed and that her depression impacts her work, recreation, social interactions and normal life activities. Her diagnosis is major depression, at an end point with a 25% psychological impairment.*

42. *Dr. James Rosen, psychologist and former psychology professor, determined the claimant does not have a psychological diagnosis or impairment. He, too, administered psychological tests and conducted a clinical interview. He obtained the same results on the MMPI as Dr. Packer had, which revealed normal ranges for depression and anxiety. Claimant also scored within normal range on the Beck depression inventory.*

43. Dr. Rosen acknowledged that claimant has experienced depressed and irritable moods, but not for the duration or extent found with major depression. He noted that she is a strong-willed individual with a strong work ethic who is committed to function as well as she can despite her physical condition. She has good coping mechanisms and strong family supports. In Dr. Rosen's opinion, claimant's psychological condition is not disabling.

Vocational Rehabilitation Claim

44. Claimant asserted her claim for vocational rehabilitation (VR) as a workers' compensation benefit, should the claim be found compensable, at the first pre-hearing conference in April 2003. She seeks a determination of entitlement to VR as well as approval of an Individual Written Rehabilitation Plan (IWRP).

45. Because this workers' compensation claim had been denied, claimant sought vocational rehabilitation services through the State of Vermont, Rural and Farm Family Vocational Rehabilitation Program (RFFVR), to help her obtain a job within her restrictions. Consistent with her interests and personal goals, the focus of her plan has been on pursuing an accounting degree.

46. In support of her workers' compensation claim for VR, claimant retained the services of John Halpin, a Certified Rehabilitation Counselor with a wealth of experience in the field and knowledge of the relevant job market.

47. Mr. Halpin reviewed the RFFVR plan, her medical records, deposition testimony, and the VR file. He also spoke with the RFFVR counselor working with the claimant.

48. Next, Mr. Halpin addressed the question whether claimant would be entitled to VR services under the workers' compensation system if this claim is compensable, and concluded that she would be entitled. He based this opinion on the light duty work capacity identified by Doctors Bucksbaum and Johansson, her work history of medium and heavy capacity jobs in unskilled and semi-skilled jobs and her educational background.

49. *Mr. Halpin relied on his knowledge of the relevant, Franklin County, labor market, but did not formally survey the market. He opined there were no positions available to the claimant that would return her to suitable employment. Specifically he conclude that there were no entry level light duty jobs available in Chittenden or Franklin counties which would pay her between $10.40 and $13.00 per hour, a suitable wage based on her average weekly wage of $520. 00.*

50. *Then Mr. Halpin developed an IWRP. He ruled out a return to Dowlings because she had been fired. He ruled out a return to a different employer because he concluded there was no suitable work available to her in the general labor market. He ruled out on-the-job training because none were available for a worker with a light duty capacity. He ruled out continued work at her current employer, Bobby T's, because it is not physical or financially suitable.*

51. *The IWRP Mr. Halpin proposes is one for new skill training toward an Associates Degree in Accounting from the Community College of Vermont in St. Albans. He identified that program as less expensive than competing ones, within an appropriate travel distance, and one that would lead to a suitable wage.*

52. *Claimant agrees with the plan Mr. Halpin proposes and is prepared to sign the contract for it.*

53. *Claimant has filed support for her claim for attorney fees of $22,698.00 and expenses totaling $10,484.03. It is based on total attorney time of 221.8 hours at $90.00 per hour and total paralegal time of 45.0 hours at $60.00 per hour.*

CONCLUSIONS OF LAW:

Physical Condition

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 (1963). 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. *Vermont recognizes that some work place injuries come about gradually from frequent stress on the body. See Campbell v. Savelberg, 139 Vt.31 (1980). Therefore, to be compensable, an injury need not be instantaneous.*

4. *Medical opinions amply support the claim that claimant's work, with lifting and bending over several years, caused her degenerative disc disease and ultimate disc herniation. In their opinions, Doctors Bucksbaum, Johansson and Genarro, all support that theory, offering reasons based on their experiences and expertise in the areas of orthopedics and rehabilitation. Medical science linking disc degeneration to repetitive lifting and bending, diagnostic images of the claimant's spine, her work history and small frame, all support the claimant theory of a causal connection. Claimant's work on or around March 12, 2000 and the specific lifting incident of August 7, 2000 are both compensable claims.*

5. *Because the March 2000 work was under CNA's watch, CNA is responsible for all associated benefits.*

<u>Aggravation–Recurrence</u>

6. *Although the cigarette carton-lifting incident on August 7, 2000 increased the claimant's pain, it did not change her underlying condition. Therefore CNA remains liable.*

7. *In cases such as this when a claimant has had two injuries, the insurer on the risk when the first injury occurred remains liable "if the second accident did not causally contribute to the claimant's disability." Pacher v. FairdaleFarms 166 Vt. 626, 629 (1997) (mem). However, if the second incident "combined with a preexisting 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." Id.*

8. *"Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.110. "Recurrence" means the return of symptoms following a temporary remission WC Rule 14.9242.*

9. *Facts this Department examines to determine if an aggravation occurred, with the greatest weight being given the final factor, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. Trask v. Richburg Builders, Opinion No. 51-98WC (1998).*

10. *Claimant's condition had not stabilized before the August 2000 incident. She had not stopped treating medically and not yet reached medical end result, although she had returned to work.*

11. *On the most important criteria, the August incident did not change her underlying condition, although she required treatment for pain.*

12. *Therefore, CNA is responsible for benefits, including payment for the surgery.*

Reasonableness of medical treatment

13. Because there is no credible evidence opposing the claimant's position, supported by Dr. Bucksbaum, that the medical, surgical and nursing services and supplies have been reasonable, they are compensable under § 640 (a).

Permanent Partial Impairment

14. When a work-related injury results in a permanent partial impairment, the claimant is entitled to benefits under 21 V.S.A. § 648, based on a percentage of whole person impairment.

15. While it is clear that claimant has reached medical end result and has a permanent partial impairment, a discrepancy exists between Dr. Bucksbaum's 13% rating and Dr. Johansson's 12% rating. With a difference based solely on the discretionary rating for pain, I accept the objective assessment of Dr. Bucksbaum, who had never treated the claimant, that her permanency is at 13%.

Mental Health Claim

16. Although she has proven that her back condition is work-related, claimant has failed to sustain her burden of proving that she has work-related major depression.

17. To prove a physical-mental claim, that is a claim that one's work-related physical condition led to a psychological problem, claimant's burden is to prove a causal connection between the two. See Blais v. Church of Jesus Christ of Latter Day Saints, Opinion No. 30-99WC (1999). In support of this claim is the opinion of Dr. Packer who tested the claimant and had three sessions with her. Opposing the claim is the opinion of Dr. Rosen who also tested the claimant and spent one session with her.

18. The Department considers the following criteria when considering the conflicting evaluations and opinions of experts: 1) the length of time the clinician has provided care to the Claimant; 2) the expert's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion that the physician is advancing; and 4) the

19. Dr. Packer spent more time with the claimant than did Dr. Rosen. Both psychologists are well qualified by education, but Dr. Rosen has the advantage of longer and broader experience in the field of psychology. Both experts had all relevant records. Both tested the claimant and drew comparable test results. However, Dr. Packer departed more from the tests when she diagnosed major depression. Dr. Rosen's opinion stems from more congruent results between the tests and individual interview. Overall, the objective support favors Dr. Rosen's opinion. The psychological testing results and claimant's high level of functioning in her family and work support Dr. Rosen's opinion that while she may have periods with a depressed mood, she does not have the clinical diagnosis of major depression. Without that diagnosis, her claim for permanency also fails.

<u>Vocational Rehabilitation Claim</u>

20. Finally, claimant has proven that she is entitled to VR services and that she is undertaking an appropriate plan.

21. A claimant is entitled to VR services when, as a result of work-related injury she "is unable to perform work for which [she] has previous training or experience…"21 V.S.A. § 641(a); Peabody v. Home Ins. Co., 170 Vt. 635 (2000) (mem.).

22. Claimant's work history together with testimony from a VR counselor and that of Dr. Bucksbaum that she is unable, within her physical restrictions, to perform work for which she has had previous training and experience, prove that she is entitled to services. Although she his currently working, she is doing so only with her partner's assistance and contrary to Dr. Bucksbaum's advice. That economic necessity had forced her into an unsuitable job is not a justification to deny VR.

23. In an accepted workers' compensation case with a VR referral, once entitlement to VR services is determined, the counselor develops a vocational rehabilitation plan that requires department approval. See WC Rule 33.0000. In the development of the plan, a hierarchy of vocational options is followed. Rule 33.2000.

24. Because this case had been denied, the typical VR process for a workers' compensation was never implemented, yet claimant on her own initiative obtained VR services through another program and a workers' compensation counselor accepted that plan as appropriate.

25. Opinions from Dr. Bucksbaum and Dr. Johansson credibly show that claimant has a light duty work capacity, yet she has no experience at that capacity. She has been unable to find work with such restrictions. And the VR counselor concluded that no such jobs are available to her within a reasonable commuting distance.

26. Counselor Halpin properly considered the hierarchy of vocational options before he accepted the proposed new skill training/educational plan for a degree in accounting.

27. It would be inconsistent with the goals of our workers' compensation system, as CNA urges, to require the claimant to begin the VR process at the first step within this department. The plan as proposed is realistic, is likely to lead to suitable employment, is supported by the medical evidence and was prepared by a VR expert. It is approved.

<u>Attorney Fees and Costs</u>

28. A prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law when the claim is supported a fee agreement and details of costs incurred and work performed. 21 V.S.A. § 678(a); WC Rule 10.000.

29. When a claimant has partially prevailed, she is entitled to a fee award in proportion to her success, which is the case here. Claimant has 30 days from the date this opinion is mailed to

30. For the successful claims, the defendants' obligation began when the costs were incurred. Interest at the statutory rate must run from those dates. 21 V.S.A. § 664.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law:

1. *Claimant's claim for a psychological injury is DENIED.*

2. *CNA is ORDERED to adjust this claim.*

3. *Claimant has 30 days of the date this opinion is mailed to amend her claim for attorney fees and costs.*

Dated at Montpelier, Vermont this 30th day of March 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.