

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

Jane Griffin)	Opinion No. 23-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Eden Park Nursing Home)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. S-05592

RULING ON CLAIMANT’S MOTION FOR SUMMARY JUDGMENT

Joseph Paul O'Hara, Esq., for the Claimant
Jason R. Ferreira, Esq., for the Defendant

This motion came before the department on claimant’s theory that she suffered diaphragmatic paralysis from the treatment for a work related shoulder injury. The defense rejects that theory, urging the department to deny the motion.

The material undisputed facts are:

1. On September 4, 2001 claimant, Jane Griffin, was an employee and Eden Park her employer within the meaning of the Workers’ Compensation Act (Act).
2. On September 4, 2001, claimant injured her left shoulder when a patient twisted her arm.
3. The orthopedic treatments followed, first conservative non-surgical treatment, and later shoulder surgery on May 2, 2001. Prior to the operation, claimant had a physical examination.
4. Post operatively claimant had respiratory difficulty, treated by Stephen Gorman, M.D.
5. When the surgeon, Melbourne Boynton, M.D., placed claimant at medical end result for her shoulder on Mary 19, 2003, he noted that she still had difficulty with breathing, a difficulty that was disabling and kept her out of work.

6. Claimant continues to suffer from symptoms of shortness of breath for which she has undergone extensive diagnostic testing.
7. Claimant has been diagnosed with idiopathic diaphragmatic paralysis.
8. Dr. Gorman opined that claimant respiratory problems are likely the result of the surgery because of the temporal relationship. Dr. Siegel, who provided an opinion for the defense, opined the respiratory problems are not related to the injury or surgery.

CONCLUSIONS OF LAW:

1. The Vermont Rules of Civil Procedure apply to workers' compensation hearings to the extent they do not defeat the informal nature of the proceedings. Workers' Compensation (WC) Rule 7.1000. Since the pending motion does not defeat the informal nature of these proceedings, summary judgment is appropriate if the claimant demonstrates that there is no genuine issue of any material fact and that she entitled to judgment as a matter of law. V.R.C.P. 56(c), *Toy, Inc., v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).
2. To prevail in this worker's compensation case, claimant must prove that her condition arose out of an in the course of her employment. 21 V.S.A. § 618. Complications from treatment necessitated by a work related injury certainly fall within that requirement because when a primary injury is shown to have arisen out of and in the course of employment, every natural consequence flows as well. See 1 Larson's Workers' Compensation law. § 10.01. She must prove something more than a possibility, suspicion or surmise that the surgery necessitated by the work related injury was the cause of her respiratory difficulties. "The inference from the facts proved must be the more probable hypothesis." *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). A temporal relationship alone is insufficient. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983).

3. The record before me demonstrates a temporal relationship between the surgery and respiratory problems. Still disputed are the material facts underlying the crucial question of causation.

Therefore, because genuine issues of material fact remain, summary judgment is hereby DENIED.

Dated at Montpelier, Vermont this 6th day of April 2005.

Laura Kilmer Collins
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.