

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

Joanne Hall)	State File No. M-07496
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Burger King (Sawtooth, Inc.))	
)	For: R. Tasha Wallis
)	Commissioner
)	
)	Opinion No. 24-01WC

Hearing held in Rutland on January 29, 2001
Record Closed on February 26, 2001

APPEARANCES:

Kerry G. Spradlin, Esq., for the claimant
Harold E. Eaton, Jr., Esq., for the defendant

ISSUE:

1. Did the claimant suffer any injury arising out of or in the course of her employment with Burger King on or about October 1, 1998?
2. Is claimant's alleged injury of October 1, 1998 a recurrence or continuation of an earlier injury?
3. If claimant incurred a work related injury on or about October 1, 1998, while employed by Burger King, for what benefits is she eligible?

STIPULATIONS:

1. On October 1, 1998, Burger King (Sawtooth, Inc.) was an employer for purposes of the Vermont Worker's Compensation Act and was insured for worker's compensation claims by Peerless Insurance Company.
2. On October 1, 1998, the claimant, Joanne Hall, was an employee within the meaning of Vermont's Worker's Compensation Act.
3. Joanne Hall had started work at Burger King the week of August 9, 1998. Her rate of pay was five dollars eighty cents per hour.
4. Prior to working at Burger King, Joanne Hall had a history of right arm pain.

5. Joanne Hall had a prior work related injury to her right arm occurring on May 22, 1997 when she was an employee at Williams Smokehouse (Jordan's Meats, Inc.)
6. Joanne Hall brought a worker's compensation claim concerning her right arm injury of May 22, 1997 against Williams Smokehouse, bearing State File Number K-23113.
7. Joanne Hall received worker's compensation benefits for her right arm injury of May 22, 1997 arising out of her work at Williams Smokehouse.
8. Joanne Hall's claim against Williams Smokehouse for her right arm injury was settled in October 1999 on a Form 15 basis.
9. Joanne Hall had reported the prior injury to her right arm to her supervisors at Burger King at the time she was hired in August 1998.
10. On September 30, 1998, Joanne Hall worked at Burger King, primarily being responsible for working french fries on that day.
11. On October 1, 1998, Joanne Hall reported to work indicating that her right arm hurt.
12. Joanne Hall last worked at Burger King on November 17, 1998.
13. At no time after November 17, 1998 did Joanne Hall ever return to work at Burger King or contact them to be scheduled for work.
14. Judicial notice may be taken of all medical records concerning this claim and all medical records submitted in connection with claimant's previous claim State File Number K-23113.
15. Judicial notice may be taken of all Department of Labor and Industry forms submitted in connection with this claim or in connection with State File Number K-23113.

EXHIBIT LIST:

Joint Exhibit I:	Stipulation
Joint Exhibit II:	Medical Records
Claimant's Exhibit 1:	Dr. Robert L. Van Uitert: letter to Dr. Nancy Scattergood dated 1/09/01
Claimant's Exhibit 2:	Dr. William Ketterer report dated 8/21/00
Claimant's Exhibit 3:	Curriculum Vitae for Dr. Robert L. Van Uitert
Claimant's Exhibit 4:	Vermont Department of Employment and Training records
Claimant's Exhibit 5:	Harsh Employer Record, (i.d.)
Claimant's Exhibit 6:	H&R Block Employer Record, (i.d.)

Defendant's Exhibit A:	Department of Labor and Industry Form 25-Wage Statement
Defendant's Exhibit B:	Department of Labor and Industry Form 6-Notice and Application for Hearing
Defendant's Exhibit C:	Department of Labor and Industry Form 1(electronic)-Employer's First Report of Injury
Defendant's Exhibit D:	Department of Labor and Industry Form 1(Handwritten)-Employer's First Report of Injury
Defendant's Exhibit E:	Peerless case management alert dated December 8, 1998
Defendant's Exhibit F:	Peerless questionnaire dated October 16, 1998
Defendant's Exhibit G:	Recorded statement of Joanne Hall dated December 10, 1998
Defendant's Exhibit H:	Department of Employment and Training records (7 pages)
Defendant's Exhibit I:	Claimant's medical records

FINDINGS OF FACT:

1. Stipulations 1 through 13 are adopted as true and the exhibits except claimant's 5 and 6 are admitted into evidence.
2. Claimant's prior claim for workers' compensation insurance (State File Number K-23113) involved lateral epicondylitis in her right elbow or as it is more commonly known, "tennis elbow." Claimant contracted her condition through her employment at Williams Smokehouse where she had worked for eleven months (June 1996 through May 22, 1997). Claimant's duties at Williams included operating a meat-slicing machine. For at least six months prior to her injury, claimant would handle between 4,000 and 6,000 slices of bacon per day. Claimant used both left and right arms to slice bacon on the machine.
3. Claimant prevailed in her 1998 workers' compensation hearing and the employer, Williams Smokehouse, was required to pay all reasonable and necessary medical bills related to the accident, total temporary disability benefits for dates claimant was unable to work, and attorney fees.
4. Defendant Williams Smokehouse appealed the department's decision on June 25, 1998 to Bennington County Superior Court. The appeal ended when the court accepted the parties' settlement of the claim under the department's Form 15 on November 3, 1999.
5. Kurt Wieneke, Jr., M.D found claimant to have reached a medical end point for her elbow condition on June 15, 1998. Williams Smokehouse filed a Form 27 to discontinue benefits associated with the claimant's elbow claim. On July 15, 1998, the department approved the form.

Burger King

6. Burger King hired claimant on August 6, 1998 as a counter cashier. Claimant's duties at Burger King involved normal cashier motions such as exchanging money for trays of food, making change, and preparing individual meal trays. As a fast food employee, claimant repeated her tasks several times during a shift, especially during the lunch hour. In addition to cashier duties, the claimant was also expected to wash windows and tables when the counter was not busy or the store was exceptionally dirty.
7. Prior to September 30, 1998, claimant had no record of wrist pain or symptoms of carpal tunnel syndrome. Claimant did however have, at least in her right arm, a history of paresthesias pre-dating the onset of her arm symptoms.
8. Claimant never worked more than 30 hours a week at Burger King and worked a daily shift of 6 hours or less.
9. On September 30, 1998, claimant worked a six-hour shift at Burger King. During her shift, she worked at the "drive-thru" window, which mirrored the duties and responsibilities of her normal counter cashier position. The main difference is that the customers remain in their cars at the "drive-thru" window.
10. Also on the September 30th shift, claimant worked the french fry machine for the first and only time during her employment at Burger King. Working the french fry machine involved filling a metal basket with french fries, and then lifting the filled basket, weighing about ten pounds, in and out of vat of hot oil. Claimant repeated this motion several times during her shift using both hands.
11. Following her shift, claimant complained of right arm pain to her husband. On the following day, October 1, 1998, claimant reported the pain to her supervisors at Burger King. Claimant did not work the french fry machine again.
12. At the same period of time, claimant was moving to a different home. Claimant testified that she did not lift any boxes but did help pack several of the boxes.
13. After October 1, 1998, claimant did not work a regular schedule. For the rest of October and the first two weeks of November, claimant only worked two or three times.
14. On October 5, 1998 claimant went to Dean D. Measeck, RPAC, about her right arm problems. Mr. Measeck found no visible problems with the claimant's right elbow but recommended further neurological examination to establish the etiology of the complaints. Mr. Measeck found claimant's wrist complaints and responses consistent with carpal tunnel syndrome but made no diagnosis. Mr. Measeck released the claimant to return to full time work pending further neurological examinations.

15. On November 17, 1998, claimant worked at Burger King for the last time. At this time claimant was placed under a two week no-work restriction by Paul Donovan, D.O. for her right elbow. Following the release of Dr. Donovan's restriction on November 30, 1998, claimant did not seek to return to Burger King. At no time did any treating physicians advise claimant not to return to Burger King or terminate her relationship with them. Burger King and their insurance carrier, Peerless, attempted several times throughout November and December 1998 to contact claimant and offer her work that would accommodate any restrictions she was under. Claimant did not return any of their messages, went on trip out of town for the month of December, and, in essence, voluntarily quit her employ at Burger King from November 30, 1998 forward.
16. Burger King did have light duty work available for the claimant during November and December. Burger King was willing and wanted to employ claimant as strictly a cashier, to stock shelves, or in any capacity she was comfortable working in.
17. In January 1999, claimant began volunteering for Bennington Project Independence. She continued to volunteer until May 1999. Claimant worked at this time in a nursing home, providing companionship and basic assistance to the residents. Although she was not compensated for her work, she needed to volunteer to remain eligible for government assistance. Claimant ended her participation in May when Dr. Donovan recommended she only participate in light duty and non-repetitive activities.

Dr. Robert VanUitert

18. Robert VanUitert, M.D. is neurologist in private practice in North Adams, Massachusetts. Dr. VanUitert examined the claimant on October 23, 1998 after a referral by her primary care physician, Dr. Nancy Scattergood. He diagnosed claimant's right elbow complaints as a return of her prior lateral epicondylitis. While he reported that her work at Burger King had caused the recurrence, his report notes that the symptoms were simply a return and not a worsening of the condition following a period of remission after her 1997 surgery.
19. Dr. VanUitert also tested the claimant's wrists for carpal tunnel syndrome. While Dr. VanUitert found symptoms of CTS in both wrists, EMG and nerve conduction studies revealed CTS only in her right wrist. As a result Dr. VanUitert prescribed a right wrist splint for the claimant and recommended that she see Dr. Paul Donovan for treatment.
20. According to Dr. VanUitert's, claimant's right elbow condition and right arm CTS are separate injuries and do not share the same causal links. While Dr. VanUitert attributed the recurrence of the elbow condition to claimant's work, he testified strongly and to a reasonable degree of medical certainty that the right arm CTS was directly and causally related to the claimant's work at Burger King.
21. Dr. VanUitert saw the claimant for a follow-up visit on November 11, 1998. At that time, he classified the claimant as prone to recurring lateral epicondylitis in her right arm. After the visit, Dr. VanUitert did not see the claimant again until January 5, 2001 when he diagnosed her as having bilateral CTS.

22. Following his November 11, 1998 examination of the claimant, Dr. VanUitert had no contact with the claimant until the January 2001 visit. Dr. VanUitert testified, in fact, that he had no knowledge of the claimant's activities during the period between visits. Additionally, Dr. VanUitert was unaware of the exact duties claimant had performed at Burger King and had little to no knowledge of her prior history at Williams Smokehouse. Dr. VanUitert, nevertheless, believes the claimant is not at a medical end result for her bilateral carpal tunnel syndrome.

Dr. Paul Donovan

23. Paul Donovan, D.O. first saw claimant on November 17, 1998 from a referral by Dr. VanUitert. Dr. Donovan diagnosed the claimant with a recurrence of lateral epicondylitis in her right arm. He opined that inadequate rehabilitation was the main cause of the flare up and pointed out that the claimant had not done strengthening exercises following her surgery in 1997 to correct the lateral epicondylitis.

24. Dr. Donovan, like Dr. VanUitert, also found evidence of carpal tunnel in the claimant's right wrist. However, Dr. Donovan treated the claimant primarily for her elbow. He scheduled a re-evaluation for November 30, 1998 and restricted her from working due to her right elbow condition.

25. When Dr. Donovan saw the claimant on November 30, 1998, he found her condition improved and released her for light duty work. Dr. Donovan saw the claimant two more times once on December 29, 1998 and again on May 4, 1999. The December 29th visit dealt primarily with the claimant's continued complaints of right arm pain, which extended into her forearm. Dr. Donovan found mild tenderness over the elbow and a general worsening of chronic symptoms. He put claimant at a medical end point for her elbow and released her for limited duty work.

26. During the May 4th visit, Dr. Donovan focused his treatment on the claimant's right wrist pain. At the end of the examination Dr. Donovan recommended surgery. Dr. Donovan never fully speculated on the causative sources of claimant's wrist pains. Most of his treatment of claimant centered on claimant's elbow condition and not the right wrist. Following the May 4, 1999 visit, Dr. Donovan did not see the claimant again.

Dr. William Ketterer

27. William Ketterer, M.D. began to treat the claimant in June 1999 following Dr. Donovan's recommendation of surgical intervention on her right wrist to release the median nerve associated with carpal tunnel syndrome. Dr. Ketterer recommended an endoscopic release to relieve the claimant of her carpal tunnel symptoms. Like Dr. VanUitert, Dr. Ketterer also believed the wrist pain and elbow were separate injuries. As a result, Dr. Ketterer could not guarantee that the endoscopic release would relieve claimant's forearm pain because there was no way to determine which injury was causing the forearm pain.

28. Surgery for the claimant's right wrist was scheduled for August 12, 1999 and Dr. Ketterer performed the procedure at the Southwestern Vermont Medical Center. No complications arose during surgery and the procedure was successful in releasing the nerve from the carpal tunnel.
29. Dr. Ketterer met with the claimant one month following the surgery. The area had healed and showed only normal swelling. Claimant was instructed in a rehabilitation program involving stretching and exercising the area and was released for light duty work. Claimant returned to Dr. Ketterer one month later in October 1999 and two months later in November complaining of soreness in the area. Dr. Ketterer found nothing unusual in claimant's complaints and released her to unrestricted work in November 1999.
30. Dr. Ketterer met with claimant again in July 2000 at the behest of claimant's attorney to establish the extent of her impairment due to her elbow and wrist conditions on the right side. Dr. Ketterer restated his opinion that the two injuries were separate and occurred at different times. He found that the claimant had an excellent recovery from the carpal tunnel syndrome and had no impairment. Instead Dr. Ketterer stated that the claimant's problem was in her forearm. He found that the forearm was particularly sensitive to gripping and repetitive motions. However, Dr. Ketterer noted that the elbow had no limitations in its range of motion. Based solely on the pain limitations of the forearm, Dr. Ketterer placed her permanent loss of grip strength at 20% which translates to a 10% impairment of the upper extremity and a 6% whole person permanent impairment.
31. The department accepts Dr. Ketterer's findings and places the claimant as medical end result for her right wrist carpal tunnel syndrome on July 3, 2000.
32. At no time during the July 2000 examination or before did Dr. Ketterer examine or make note of the claimant's left wrist. Dr. Ketterer treated the claimant once more on August 21, 2000 and found some signs of carpal tunnel syndrome on the left side. Dr. Ketterer, however, found that the symptoms were part of a two-week history of increased symptoms in her right side as well. Claimant was given new prescriptions for Neurontin and night splinting of the wrists. Dr. Ketterer could not establish and did not conjecture as to the cause of the sudden rise in symptoms. Claimant did not treat with a physician again until she went to Dr. VanUitert in January 2001.
33. Since January 29, 2000, claimant has been working part-time as a receptionist at Harsh and Associates. She has also worked as a part-time, seasonal receptionist at H&R Block. In both jobs claimant uses a headset and has limited typing duties.

CONCLUSIONS OF LAW:

1. Claimant has requested the department to award workers' compensation benefits for injuries stemming from her employment at Burger King and specifically from injuries sustained on September 30, 1998 as a result of claimant's work on the french fries machine. Claimant claims an aggravation of her right side lateral epicondylitis condition, which stems from her prior claim against Williams Smokehouse in 1997. Claimant also claims that her work at Burger King caused her right wrist carpal tunnel syndrome and left wrist carpal tunnel syndrome. Claimant seeks all associated benefits that flow from her injuries under workers' compensation laws and seeks temporary and permanent disability benefits.
2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962).
3. Furthermore, the claimant must establish by sufficient credible evidence the character and extent of the injury, as well as, the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
4. 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).

Right Side Lateral Epicondylitis

5. As a prior condition to claimant's employment at Burger King, claimant's lateral epicondylitis must be examined under an aggravation/recurrence analysis. See *Smith v. Chittenden Bank*, Opinion No. 17-01WC (Jun.27, 2001).
6. Under an aggravation-recurrence analysis the goal is to determine that nature of the injury or disease as either a recurrence of an older injury or the aggravation of an existing but stable condition. *Pelky v. Rock of Ages Corp.*, Opinion No. 74-96WC (Jan. 3, 1997).
7. The department defines aggravation as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Workers' Compensation and Occupational Disease Rules, Rule 2.1110. As an aggravation, the new employer is considered liable. Recurrence, however, means the return of symptoms following a temporary remission. Workers' Compensation Rules and Occupational Disease, Rule 14(p)(2)(D)(2). As a recurrence, the former employer under whom the injury occurred is liable while the new employer is not. See *Rodger Parker v. Albert Decel*, Opinion No. 58-94 (March 1, 1995), and *Paul Cote v. Vermont Transit and St. Johnsbury Academy*, Opinion No. 33-96 (June 19, 1996).

8. While there are several tests to apply to determine aggravation/recurrence, the medical testimony supplied by Dr. VanUitert and the medical reports of Dr. Donovan and Dr. Ketterer are persuasive in establishing claimant's problems with her right side lateral epicondylitis as a recurrence of her prior injury. Dr. VanUitert's testimony was especially persuasive. His October 23, 1998 report stated that the claimant was suffering a return of symptoms in her elbow associated with her prior injury. His November 11, 1998, report also diagnosed the claimant as prone to recurring lateral epicondylitis. Dr. VanUitert's opinion that the claimant suffered a return of symptoms after a period of remission also concurs with Dr. Ketterer's opinion that the elbow and wrists were separate injuries and with Dr. Donovan's treatment of the claimant's elbow problems as an established and recurring injury.
9. Furthermore, claimant presents no evidence to demonstrate that the lateral epicondylitis condition following her work at Burger King was marked by increased symptoms, more intense pain, or an exceptional worsening of her condition as compared to her symptoms following her work at Williams Smokehouse. Based on the findings of Dr. Wieneke in June 1998, the more likely conclusion is that claimant had a remission of symptoms that returned during the fall of 1998 when she returned to work at Burger King and began packing for her family's move. Therefore claimant's right side epicondylitis condition and any problems associated with it are recurrences of her earlier condition from working at Williams Smokehouse and present no liability for Burger King.
10. Under claimant's prior Form 15 agreement, however, the employer, Williams Smokehouse, is released from any further liability for compensation benefits with the claimant associated with her right elbow condition. *Workers' Compensation Rules and Occupational Disease*, Rule 17(f).

Right Wrist Carpal Tunnel Syndrome

11. The department has long recognized Carpal Tunnel Syndrome as a gradual onset injury suffered by workers who perform repetitive motions with their arms. *Lewis v. Ethan Allen and Green Mountain Wood Products*, Opinion No. 41-00WC (Dec. 20, 2001) (Citing *Jeannett Bressett-Robarge*, Opinion No. 03-99WC (Jan. 26, 1999)). In turn, the state has long acknowledged the compensability of gradual on-set injuries. *Campell v. Savelberg*, 139 Vt. 131 (1980). Thus, the central dispute concerning claimant's right wrist carpal tunnel syndrome is whether Burger King should be liable for the claimant's injuries.
12. Claimant's medical record, along with the testimony of Dr. VanUitert, establishes that the claimant had carpal tunnel syndrome in her right wrist as early as October 1998. Claimant has further established that prior to her employment at Burger King, she had no history of carpal tunnel syndrome.
13. Claimant argues that the evidence presented proves that claimant's right wrist carpal tunnel syndrome is the result of stress and repetitive motions caused by claimant's job at Burger King, especially on September 30, 1998. Defendant Burger King argues that claimant did not injure her wrist at work but rather at home while packing boxes.

14. 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.*, 1372 Vt. 393 (1979).
15. Here Dr. VanUitert testified that the cause of claimant's right wrist problems is her work exposure at Burger King. Indeed, tests given to claimant within a month of her complaint do show objective signs of CTS in the right wrist. While Dr. Ketterer and Dr. Donovan do not go as far as Dr. VanUitert in connecting the right wrist carpal tunnel problems to the claimant's work at Burger King, their records suggest the possibility.
16. Dr. VanUitert's testimony is shaded by limitations that discredit his testimony, particularly with regard to knowledge of the precise work claimant did at Burger King. Furthermore, the brevity of her work there casts doubt on a causal relationship. Without a more precise basis, Dr. Van Uitert's opinion, like the opinions of Dr. Ketterer and Dr. Donovan, prove only a possibility that the claimant's right carpal tunnel syndrome was caused by her work at Burger King. Under the mandate of *Burton* 112 Vt. 17, such evidence, without more, is insufficient as a matter of law.

Left Wrist Carpal Tunnel Syndrome

17. When claimant began treating in October 1998 for her right wrist, there were signs of carpal tunnel potentially developing in the left wrist according to Dr. VanUitert's report. However, objective medical tests, which established carpal tunnel in the right wrist, did not detect the same in the left.
18. The time interval between the claimant's departure from Burger King and the diagnosis of left carpal tunnel syndrome, from October 1998 to August 2000, makes causation even in more tenuous with the left wrist than with the right. Only in August 2000, when Dr. Ketterer's report established carpal tunnel in the left wrist, did the claimant's left wrist carpal tunnel problems fully emerge. Importantly, the left wrist problems in August 2000 only arose after a two-week period where all of the claimant's symptoms increased for an undetermined reason. Additionally neither Dr. Donovan nor Dr. Ketterer treated or reported on any condition in claimant's left wrist during November 1998 through August 2000. Dr. Donovan's reports show that he examined the left wrist but found no signs of carpal tunnel syndrome.
19. Dr. VanUitert opined that claimant's left wrist's carpal tunnel was a result of her work at Burger King. His opinion, however, was based only on work history information supplied by the claimant and was not based on any knowledge of claimant's actual work conditions and duties at Burger King or her prior work duties at Williams Smokehouse. Furthermore, his diagnosis in January 2001 that the left wrist carpal tunnel syndrome was related to claimant's work at Burger King was made without any knowledge of the claimant's activities between October, 1998 and January 2001.
20. Thus, it stretches beyond credulity to accept claimant's argument that her exposure during a single shift of making french fries led to a carpal tunnel condition in her left wrist that did not develop until two years after the exposure. Therefore, claimant's argument for compensation based on carpal tunnel syndrome in her left wrist is denied.

21. Without the requisite causal link established, it is not necessary to address the issues of temporary total, permanent partial and attorney fee benefits.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont, this 13th day of August 2001.



R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

