

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

)	State File No. L-02710
)	
Annette Marotta)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Michael S. Bertrand
Ascutney Mountain Resort)	Commissioner
)	
)	Opinion No. 12-03WC

Hearing held in Montpelier on September 18, 2002
Record Closed on November 4, 2002

APPEARANCES:

J. Christopher Callahan, Esq. for the Claimant
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq. for the Defendant

ISSUE:

What, if any, permanent partial disability benefits are due the Claimant?

CLAIM:

Claimant seeks permanency benefits based on a 20% whole person impairment and attorney fees and costs.

EXHIBIT:

JOINT I: Medical Records

FINDINGS OF FACT:

1. At times relevant to this action, Claimant Annette Marotta was an "employee" and Ascutney Mountain Resort her "employer" as those terms are defined by the Workers' Compensation Act and Rules.
2. Cambridge Integrated was the workers' compensation insurer for the Ascutney Mountain Resort.
3. Claimant was employed as a chambermaid and restaurant worker for the resort.

4. Claimant suffered a gradual onset work related injury, as evidenced by a Form 21 Agreement for Temporary Total Disability Compensation between Claimant and the carrier for an injury described as "carpal tunnel." This Department approved the Form 21 on March 15, 1999.
5. Claimant was out of work receiving temporary total disability compensation from June of 1997 until June of 2002. In May and July of 1998 she underwent surgical release for bilateral carpal tunnel syndrome. Preoperative testing ruled out rheumatoid factor. On March 20, 2000 she underwent arthroscopic surgery on her right shoulder.
6. The insurer accepted and paid all indemnity benefits and medical benefits related to the Claimant's upper extremity treatment.
7. There is no dispute as to the reasonableness and necessity of medical and surgical treatment Claimant received.
8. Although Claimant has a history of juvenile rheumatoid arthritis that involved her hands, there is no evidence demonstrating that the arthritis was a problem for her in her adult life.
9. In a letter dated September 18, 1997, John D. Hughes, M.D., Claimant's treating internist wrote:

After extensive and continued primary care evaluation, and after rheumatologic, neurosurgical and nerve conduction testing, and after physical therapy/occupational therapy and ongoing management here I provide the following information: Ms. Marotta has had very significant and disabling discomfort as a result of a constellation of diagnoses, 1) cervical disease short of needing surgery (for example for HNP) and not apparently from incipient rheumatoid arthritis, 2) carpal tunnel syndrome with radiation into the arm, and question of other nerve compressions and 3) a consideration of thoracic outlet syndrome. These occurred in a work-related fashion, secondary to repetitive use of her hands and upper extremities including polishing, lifting; endeavors such as vacuuming also have contributed.

10. At the request of the insurer, Harold Rosenzweig, D.O., a Board Certified Family Physician at the Sherburne Health Center, examined Claimant. At the initial visit on April 29, 1999 Dr. Rosenzweig rendered three diagnoses, including status post carpal tunnel syndrome, released. He found that she had limited ability to perform activities and determined she was not yet at medical end result.
11. At a follow-up examination on January 18, 2000, Dr. Rosenzweig evaluated her carpal tunnel relief and concluded she had reached medical end result. He assesses the permanency in her right hand at a 14% impairment of the whole person.
12. At a subsequent evaluation by Donald W. Ayres, M.D., a neurologist at Green Mountain Physical and Occupational Medicine, diagnosed myofascial pain. On August 9, 2001 he determined that the claimant had reached medical end result and that there was "no permanent partial impairment related to spine or nervous system."
13. On October 26, 2001 Dr. Hughes advised that Claimant had reached a "plateau," although he insisted she had not reached medical end.
14. On June 19, 2002 John T. Chard, M.D. examined the Claimant and reviewed her medical records. He noted that her hand impairment was not typical of a carpal tunnel surgery and "wondered" if it could have been due to pre-existing juvenile rheumatoid arthritis, although he had no documentation that it was preexisting after taking precise measurements he found that she had right upper extremity impairment of 13% and left of 8% with a combined value of 20%. If the hands were excluded from the calculation, the impairment would be 3%.
15. Claimant submitted a copy of her fee agreement with her attorney, her attorney's affidavit as to hours and costs and evidence of 42.2 attorney hours worked and \$36.35 in costs incurred. She seeks \$3,798.00 in fees or 20% of the award.

DISCUSSION AND CONCLUSIONS OF LAW:

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. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. Medical end result “means the point at which a person has reached a substantial plateau in the medical recovery process such that significant further improvement is not expected, regardless of treatment. WC Rule 21.2000. “The fact that some treatment, such as physical or drug therapy, continue to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve the condition.... the proper test is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement.” *Coburn v. Frank Dodge*, 165 Vt. 529, 533 (1996).
5. Because both the opinions of Dr. Ayres and Dr. Hughes confirm that Claimant had reached medical end result were in August and October 2001 respectively, the operative edition for the Guides is the 5th. See, *Sargent v. Town of Randolph, and Liberty Mutual*, Op. No. 37-02WC (2002).
6. The Defendant argues that Claimant has failed to prove the requisite causal connection between her alleged disabilities and her 1997 on the job injuries. Further, it argues that the ratings of both Dr. Rosenzweig and Dr. Chard are lacking because they failed to address any functional deformities from her juvenile rheumatoid arthritis. Finally, based on the notes from Dr. Ayer, the defense maintains that she has no permanent impairment.
7. The causal connection in this case has been well established by the well-reasoned opinion of Dr. Hughes, Claimant’s treating internist who linked her upper extremity problems to her work activities and who ruled out a rheumatoid factor. That Claimant has a history of rheumatoid arthritis alone is not ground for rejecting permanency ratings on her hands, when the record is devoid of any evidence to show that she had an impairment as a result. And even if such a showing had been made, it would not be an automatic bar to the recovery of a permanency award. See 648(d) (“An impairment rating determined pursuant to this section shall be reduced by any previously determined permanent impairment for which compensation has been paid...”) (emphasis added).

8. The defendant accepted a claim for carpal tunnel syndrome in this case. Dr. Chard's opinion as to the permanency incurred as a result is well supported with a thorough examination and precise measurements. It is therefore, accepted.
9. As a prevailing Claimant, Ms. Marotta is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. 21 V.S.A. § 678(a). WC Rule 10. Because she receives this permanency award due to the efforts of her attorney, an award of \$3,798 (42.2 hours at \$90.00 per hour) in fees and \$36.35 in costs is reasonable.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, Defendant is ORDERED to pay claimant:

1. Permanency based on a 20% whole person impairment;
2. Attorney fees of \$3,798 and costs of \$36.35.

Dated at Montpelier, Vermont this 10th day of March 2003.


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.

