STATE OF VERMONT
DEPARTMENT OF LABOR

M. S.	)	Opinion No. 10-06WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Visiting Nurse Association	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. S-18345

Pretrial conference held on October 24, 2005
Case submitted on the papers without hearing
Record closed on December 19, 2005

APPEARANCES:

William B. Skiff II, Esq., for the Claimant
Tammy B. Denton, Esq., for the Defendant

ISSUES:

1. Is the Claimant's ulnar shortening surgery compensable?

2. What is the correct calculation of the Claimant's impairment rating causally related to her April 12, 2002 injury?

3. Is AIG entitled to deduct overpayments of temporary disability benefits from permanency benefits due?

EXHIBITS:

Joint A: Medical Records

Defendant:

1. Curriculum vitae of Victor Gennaro, D.O.
2. Activity notes of Beverly Bara dated 4/24/02
3. Activity notes of Beverly Bara dated 5/14/02
4. Activity notes of Beverly Bara dated 5/20/02
5. Activity notes of Beverly Bara dated 5/29/02
6. Activity notes of Beverly Bara dated 7/3/02
7. Activity notes of Susan Ford dated 5/23/03
8. Activity notes of Susan Ford dated 1/27/03
9. Claims Assist Instruction Sheet 5/29/02
10. Claims Assist Instruction Sheet 1/20/02
11. Paycard Instruction sheet 1/20/03
12. Indemnity Payment Card: 5/21/02, 5/28, 6/04, 6/11 and 6/18
13. Adding machine tapes
14. Attorney 9/19/02 letter to Beverly Bara
15. Form 10/10S
16. Form 25 of 4/22/02
17. Form 25 of 4/22/02 with adding machine tape
18. Form 25 of 4/22/02 (comp rated noted as $286)
19. Form 25 dated 9/17/02
20. Form 25s (handwritten)
21. Form 25s (typed)
22. Form 21 (handwritten)
23. Form 21 (typed)
24. Form 24 (handwritten)
25. Form 24 (typed)
26. Form 28F FY03
27. Form 22 (handwritten)
28. Form 22 (typed)
29. Vocational Rehabilitation Form 1
30. Vocational Rehabilitation Entitlement Assessment
31. Vocational Rehabilitation Closure Report
32. Payment Printout

FINDINGS OF FACT:

1. The Exhibits are admitted into evidence. Official notice is taken of Department forms and two notices from this Department to the insurance adjuster regarding missing forms.

2. The Visiting Nurse Association (VNA) was an employer and Claimant Melissa Medeiros Smith Towsley Roy its employee within the meaning of the Workers' Compensation Act.

3. American Home Assurance Company (AIG) insured VNA for workers' compensation.

4. Claimant was injured on April 8, 2002. This Department received a First Report of Injury on April 12, 2002.

Injury

5. Claimant's left hand and arm were injured when a patient grabbed her third, fourth and fifth fingers, bent them back and twisted.

6. Initially Claimant was given a splint and pain medication. She was released for light duty work.

7. Claimant returned for medical care on April 15, 2002 with complaints of achiness and a popping sensation.

8. Claimant returned to work with a one pound lifting restriction, but symptoms did not abate.

9. Eventually claimant was referred to hand specialists, first Dr. James Mogan who ordered an arthrogram that revealed a central tear of the triangular fibrocartilage on the left wrist. Dr. Mogan referred Claimant to Dr. Michael Benoit for definitive treatment.

10. Dr. Benoit first evaluated Claimant in September 2002 when he scheduled a left wrist arthroscopy for debridement of a tear and possible ligament repair.

11. Despite the surgery, claimant continued to have wrist pain along the area of the ulnar nerve.

12. Dr. Victor Gennaro evaluated the Claimant for the defense on March 5, 2003. He determined that she had reached medical end result. Dr. Gennaro also determined that she did not need further studies, or treatment, including surgery. At that time, he did not have nerve conduction studies.

13. Dr. Gennaro suggested that Claimant's pain suggested more of a wrist sprain and that her pain complaints were disproportional to any physical findings.

14. After reviewing the nerve conduction studies, Dr. Gennaro agreed that release of the ulnar nerve was reasonable, but that the ulnar shortening was not.

15. Nerve conduction studies confirmed ulnar nerve compression. To treat that condition, Dr. Benoit recommended another wrist arthroscopy. During that procedure on November 5, 2003, he debrided the TFCC (triangular fibrocartilage complex), decompressed the ulnar nerve and made an ulnar shortening osteotomy.

16. Claimant considers the surgery a success.

17. In March of 2003, based on Chapter 16 in the AMA Guides to Permanent Partial Impairment (Guides), Dr. Gennaro rated Claimant's permanent partial impairment at 2% whole person for loss of range of motion at the wrist. In January of 2005 he assessed her a permanent impairment for ulnar deviation and sensory deficits, again for a total of 2%.

18. Because Dr. Benoit does not do permanency ratings, he gave Claimant a list of physicians who do. From that list, Claimant chose Dr. Phillip Davignon, who evaluated her on May 6, 2005. Dr. Davignon concluded that the treatment Claimant had received was reasonable and necessary. Further, he rated her permanent partial impairment at 11% whole person (a 19% upper extremity impairment). That rating is also based on Chapter 16 in the Guides and Dr. Davignon's findings of range of motion deficits and carpal instability.

Overpayment

19. Claimant's initial average weekly wage was $353.42 with a compensation rate of $235.61 and weekly net income of $305.37.

20. Claimant's initial benefits were calculated correctly. However, weekly checks sent from July 3, 2002 forward were in error.

21. This Department received a Form 28 Notice of Change in Compensation Rate on July 12, 2002.

22. Claimant received weekly workers' compensation indemnity checks.

23. On July 16, 2002, a specialist at this Department sent a letter to the insurance adjuster advising that three required forms were missing from the file: a Form 10/10S listing dependents; Form 25 Wage Statement and Form 21 Agreement for Temporary Total Disability benefits. Included in that letter was a warning that the carrier could risk administrative penalties if it did not file the necessary forms by September 1, 2002.

24. With a Form 21, the Claimant and the Adjuster would agree that temporary total disability benefits are due on a form stating the average weekly wage and compensation rate. Then the form would be submitted to this Department for approval. If there were an error in calculation of benefits, a worker's compensation specialist would correct the error and notify the parties accordingly.

25. On April 2, 2003, this Department received a Form 27 to discontinue benefits and a Form 22 for Permanent Partial Disability benefits, but did not receive the forms requested almost a year earlier.

26. On April 8, 2003 another specialist advised the adjuster that the Forms 10/10S, 25 and 21 still had not been filed.

27. On July 15, 2003, a Form 2 denial for the claim of ulnar shortening was filed with this Department.

28. In August 2003, the defense advised Claimant of her obligation to conduct a good faith job search.

29. In February 2005, a Form 27 to discontinue benefits was approved.

30. Also in February 2005, defense counsel advised that Claimant had been "significantly overpaid."

31. Claimant received $51,358.94 in temporary total and temporary partial disability compensation in weekly payments.

32. Not until June of 2005 did this office receive the Forms 10/10S and 25. However to this day no Form 21 has been submitted to the Department for approval.

33. In September 2005, the defendant was again advised that no Form 21 had ever been received and that the Department had never received notice that an agreement could not be reached.

34. The parties agree that Claimant received an overpayment of temporary benefits, although they do not agree on a precise figure.

Attorney Fees and Costs

35. Claimant submitted evidence that her attorney worked 60.1 hours on this case and incurred $553.51 in necessary costs.

CONCLUSIONS OF LAW:

Ulnar shortening surgery

1. Under the Workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. § 640(a).

2. Whether the ulnar shortening procedure falls within the § 640(a) reasonable standard is a decision requiring a choice between conflicting medical opinions. Orthopedist Dr. Gennaro opined that the procedure was not reasonable to relieve claimant's pain. That opinion is based on his view that Claimant's symptoms are not anatomically related to the area of surgery.

3. On the other hand, Dr. Benoit, orthopedist and board certified hand surgeon, opined that the ulnar shortening was reasonable based on his view that a significant component of Claimant's pain was the result of dynamic impaction.

4. When determining the weight to be given expert opinions in a case, this Department traditionally has looked at several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. IBM*, Opinion No. 38-00WC (2000).

5. All factors in this case favor Dr. Benoit, who has been the treating physician for three years, has particular expertise in hand surgery, assessed this Claimant's need for surgery, performed the procedure and managed Claimant's postoperative course.

Permanent Partial Impairment

6. Dr. Davignon assessed Claimant's impairment at 11% whole person; Dr. Gennaro rated it as 2%. Because Dr. Davignon's assessment includes post operative range of motion deficits consistent with Claimant's complaints and Dr. Gennaro's rating does not, I accept the total reached by Dr. Davignon 11% whole person.

Overpayment

7. Once a claim has been made, an insurance carrier has " 21 days … within which to determine whether any compensation is due. If it determines that no compensation is due, it shall, within 21 days of notice or knowledge of the injury, notify the commissioner and the claimant in writing of its denial and the reasons thereof…" WC Rule 3.0900.

8. Furthermore, "if the employer determines that compensation is due, it shall enter into a Compensation Agreement (Forms 21, 22, 23 and/or 24) with the claimant to be approved by the Director, and shall commence paying compensation immediately." Rule 3.1000.

9. As the facts illustrate, no denial or acceptance was ever made within the required 21 days. Nor were the required forms sent to the Department for approval despite specific orders from workers' compensation specialists.

10. The defense argues that the overpayment was due to mutual mistake. Although it is not asking the Claimant repay what was not due, the insurer invokes 21 V.S.A. § 651 in arguing that the overpayment should be deducted from any permanency due. Section 651 states: "Payments made by an employer or his insurer to an injured worker during the period of his disability, or to his dependents, which, by the provisions of this chapter, were not due and payable when made, may, subject to the approval of the commissioner, be deducted from the amount to be paid as compensation."

11. Claimant contends that § 651 should not apply to this case because the insurer failed to abide by Workers' Compensation Rules and specific instructions from specialists in this department. She argues that under the doctrine of waiver and for public policy reasons, the credit should not apply to this case. I agree.

12. A waiver is a voluntary relinquishment of a known right, and can be express or implied. *Anderson v. Cooperative Insurance Companies*, 2006 VT 1 ¶ 10 (citing *Green Mountain Ins. Co. v. Maine Bonding & Cas. Co*., 158 Vt. 200, 206, (1992); *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954).

13. To establish waiver, "there must be an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right at question." *Holden*, 118 Vt at 289. "The burden of establishing waiver is on the party asserting *it*." *Eastman v. Pelletier*, 114 Vt. 419, 423 (1946).

14. Claimant has satisfied her burden to prove that defendant waived its right to invoke 21 V.S.A. § 651 by expressly failing to abide by the workers' compensation rules and the specific directives of this Department. However, even without a finding of waiver, under the discretion afforded to the Commissioner by § 651, I will not permit the credit, which is more appropriately applied when a carrier in good faith extends payment beyond what was due. The statutory remedy provided in 21 V.S.A. § 651 was not intended to serve those who deliberately thwart the administration of the Workers' Compensation Act.

Fees and Costs

15. Under 21 V.S.A. § 678(a) and Workers' Compensation Rule 10.000, a prevailing claimant is entitled to a discretionary award of reasonable attorney fees and mandatory award of necessary costs. In this case, Claimant has prevailed because of the persistent efforts of her attorney. Sixty hours are reasonable given the nature of the dispute. Therefore she is awarded $90.00 an hour for each of the 60.1 hours for a total of $5,409. She is also awarded costs of $553.51.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law Defendant is ORDERED to pay:

1. Medical and associated benefits associated with ulnar shortening surgery;
2. Permanent partial disability benefits based on Dr. Davignon's rating of 11%;
3. Attorney fees and costs.

The request for a credit is DENIED.

Dated at Montpelier, Vermont this ____ day of March 2006.

_____

Patricia A. McDonald
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.