

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Nichole Marden

Opinion No. 21-20WC

v.

By: Beth A. DeBernardi  
Administrative Law Judge

Carrols LLC d/b/a Burger King

For: Michael A. Harrington  
Commissioner

State File No. KK-60001

**OPINION AND ORDER**

Hearing held via Skype on October 5, 2020  
Record closed on November 9, 2020

**APPEARANCES:**

Patrick L. Biggam, Esq., for Claimant  
Krystn M. Perettine, Esq., for Defendant

**ISSUES PRESENTED:**

1. Did Claimant sustain a left upper extremity and cervical injury arising out of and in the course of her employment with Defendant on January 26, 2018?
2. What is the extent, if any, of Claimant's permanent partial disability referable to her cervical spine condition?

**EXHIBITS:**

Joint Exhibit I: Medical records  
Claimant's Exhibit 1: *Curriculum vitae* of William Spina, MD  
Defendant's Exhibit 1: *Curriculum vitae* of Andrew Haig, MD

**CLAIM:**

Permanent partial disability benefits pursuant to 21 V.S.A. § 648  
Interest, costs and attorney fees pursuant to 21 V.S.A. §§ 664 and 678

**FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in the Vermont Workers' Compensation Act.

2. I take judicial notice of all forms in the Department's file relating to this claim.

Claimant's Employment with Defendant

3. Claimant is a 47-year-old woman who lives in Bristol, Vermont. Prior to working for Defendant, she worked as a personal care assistant for a visiting nurse association. Before that employment, she held a variety of jobs, including several periods of employment with Burger King.
4. In November 2015, Claimant began working for Defendant at its Burger King restaurant in South Burlington, Vermont. Over time she worked her way up to shift manager. Claimant was in charge of the breakfast shift Monday through Friday, starting at 5:00 am and ending at 3:00 pm. Her duties included opening the restaurant, counting the cash drawers, checking inventory, ordering supplies, and setting up the appliances and workstations for breakfast production. After completing these set-up tasks, she oversaw daily operations and took orders from customers.

Claimant's Work Injury and Subsequent Medical Course

5. On January 26, 2018, Claimant was setting up Defendant's milkshake machine. This task required pouring the liquid shake mixture from a metal bucket into the top of the machine, which was higher than her head. Claimant extended her arms upward and used both hands to raise the heavy bucket over her head; she then twisted her arms towards the machine and began pouring the liquid. As she did so, she felt a twinge in her left elbow and the onset of pain. Nevertheless, she filled the machine and completed her workday.
6. Claimant called her doctor's office when she got home from work that day. She was advised to apply ice, take Tylenol, and make an appointment if her pain did not improve.
7. On January 31, 2018, Claimant sought treatment from nurse practitioner Sarah Dudley at the Thomas Chittenden Health Center. Claimant described a burning pain in her left arm centered around her elbow, with pain radiating up to her left shoulder and down into her forearm. She also complained of stiffness and achiness around her left shoulder. NP Dudley suggested wearing a sling and returning if symptoms did not improve. When Claimant returned for more treatment, NP Dudley diagnosed her with lateral epicondylitis (tennis elbow) and referred her for physical therapy.
8. The initial physical therapy record in February 2018 reflects that Claimant had pain, weakness and limited range of motion in her left shoulder and elbow, as well as ulnar nerve compression and inflammation. The note states that Claimant had a history of left shoulder pain dating back to a 2008 assault and that she received physical therapy for her shoulder in 2014 and 2016.
9. Claimant saw her primary care provider again in February 2018. She reported that her left arm pain interfered with her work duties, such as counting money or lifting a cup.

Her provider took her out of work, stating that even light duty tasks were “exacerbating her symptoms and contributing to ongoing inflammation that is prolonging the healing process.” *Joint Exhibit I*, at 12.

10. In April 2018, Claimant was referred to physician assistant Stephanie Burch at UVM Orthopedics. She reported left elbow pain, left shoulder pain and small finger numbness. In May 2018, Claimant underwent a left elbow MRI scan that revealed a torn tendon.
11. In July 2018, Claimant saw orthopedic physician David Lisle, MD. Dr. Lisle agreed with the lateral epicondylitis diagnosis, but also noted severe pain, numbness and tingling radiating to Claimant’s left hand. He ordered EMG testing to see whether other diagnoses were indicated.
12. Physiatrist Carol Talley, MD, conducted the EMG testing in August 2018. She reported no abnormal findings, including no evidence of cervical radiculopathy. However, she cautioned that the absence of findings for cervical radiculopathy on an EMG examination “does not rule out this diagnosis.” *Joint Exhibit I*, at 80.
13. Claimant then returned to Dr. Lisle. He noted continuing complaints of pain in her left elbow, left shoulder and neck, and he referred her to a spine specialist to evaluate her cervical condition. In October 2018, Claimant saw orthopedic physician assistant Robert Hemond. He noted pain in her left elbow, shoulder and neck, with radiation to her fourth and fifth fingers.
14. Claimant saw Dr. Lisle again in October 2018. He noted that the EMG study did not show evidence of cervical radiculopathy, but he nevertheless thought that her primary pain generator was in her neck. Accordingly, he ordered an MRI of her cervical spine, which revealed disc osteophyte complexes at the C5-6 and C6-7 levels consistent with degenerative disc disease.
15. In December 2018, Claimant saw orthopedic physician assistant Jennifer O’Connor. PA O’Connor recommended cervical facet injections at the C5-6 and C6-7 levels. Defendant denied coverage for the proposed injections as not causally related to the work injury, and Claimant has not received them.
16. Claimant continued to engage in physical therapy for her left elbow, shoulder and neck pain through October 2019.

*Claimant’s Prior Medical History*

17. Claimant has type 2 diabetes, for which she takes an oral medication. Although her diabetes is often not well-controlled, she credibly testified at the hearing that she makes an effort to keep it under control.
18. In 2008, Claimant sustained a left shoulder injury during an assault. She was treated conservatively with physical therapy and had an almost complete recovery, although she would feel some occasional “catching” in her shoulder. *Joint Exhibit I*, at 283.

She most recently had physical therapy for this injury in 2016. Thus, I find that her left shoulder was largely asymptomatic at the time of her January 2018 work injury.

Claimant's Current Medical and Employment Status

19. Claimant continues to experience symptoms in her left elbow, neck and shoulder. She has not received any medical treatment for this condition since she completed a lengthy physical therapy course in October 2019.
20. In December 2019, Claimant began working full time as a licensed nursing assistant at the Helen Porter Nursing Home in Middlebury, Vermont. Her job duties include getting patients up in the morning, helping them bathe and dress, serving meals, and providing other assistance, as needed. If pain prevents her from performing any particular job duty, she asks a co-worker for help. As of the hearing date, Claimant had not missed any time from work at her new job as a result of her elbow, shoulder and neck symptoms.

Expert Medical Opinions

21. The parties agree that Claimant suffered lateral epicondylitis in her left elbow from the January 26, 2018 work incident. They presented conflicting expert testimony concerning the cause of her shoulder and neck symptoms and the extent of any permanent impairment referable to her work injury.

(a) William Spina, MD

22. Dr. Spina is a board-certified orthopedic surgeon. He graduated from the UVM College of Medicine in 1978 and completed his residency in orthopedic surgery at McGill University in 1982. Dr. Spina had a busy orthopedic surgical practice for over 30 years; since his retirement from surgery several years ago, he has been performing independent medical examinations. Dr. Spina has substantial experience diagnosing patients with cervical radiculopathy, having seen such patients in his medical practice several times per week for decades.
23. At Claimant's request, Dr. Spina performed an independent medical examination of her on July 23, 2019. He interviewed her concerning her medical history and pain complaints, reviewed her medical records, and performed a physical examination. Dr. Spina noted that Claimant's cervical range of motion was limited, and he felt a spasm in her left levator scapulae muscle, which is located on the side of the neck. He also noted diffuse tenderness from the base of her neck to the border of her left shoulder blade. A nerve impingement test was slightly positive on the left.
24. In Dr. Spina's opinion, Claimant has cervical radiculopathy causally related to the January 2018 work incident. He based this opinion on several factors.
25. First, at the time of her injury, Claimant had immediate pain in her elbow that radiated down to her forearm and up to her shoulder. Dr. Spina testified that pain usually radiates distally (downward and away from the trunk) and not proximally (upward and

towards the trunk). When arm pain appears to radiate proximally, as it did here, it signifies a cervical injury. Thus, even Claimant's earliest pain complaints indicate a cervical injury to Dr. Spina.

26. Second, Dr. Spina testified that elbow pain, forearm pain, and numbness in the fourth and fifth digits are often presentations of a cervical injury. Notably, lateral epicondylitis does not cause fifth digit numbness.
27. Third, Claimant's MRI study shows foraminal stenosis and abnormalities at the C5, C6 and C7 levels of her cervical spine. Dr. Spina offered his opinion that these abnormalities predisposed Claimant to cervical radiculopathy and that her pain symptoms correspond to the MRI findings.
28. Fourth, Dr. Spina noted objective findings of a muscle spasm in Claimant's neck. He testified that lateral epicondylitis does not cause this type of muscle spasm, but cervical injuries do.
29. Dr. Spina offered his opinion that Claimant injured a structure in her neck, such as a facet joint or a disc. The injured structure then impinged on a nerve, causing inflammation. In his opinion, this is consistent with the mechanism of injury here, where Claimant lifted a heavy bucket over her head and twisted.<sup>1</sup> Dr. Spina also noted that Claimant's diabetes makes her more prone to nerve injury.
30. Dr. Spina acknowledged that Dr. Tally found no evidence of cervical radiculopathy during her EMG testing. However, she qualified her report by stating that the absence of findings did not rule out a cervical radiculopathy diagnosis. Dr. Spina explained that nerve studies are more accurate further away from spinal cord. Based on a meta-study conducted by the Seattle VA Hospital, he testified that nerve studies in the cervical region yield a false negative 51 to 70 percent of the time. For comparison, such studies of the elbow are 50 to 70 percent accurate, and wrist studies are 90 percent accurate, as the wrist is further away from the spinal cord.
31. Dr. Spina acknowledged that a levator scapulae muscle spasm may indicate a shoulder condition, as well as a cervical condition. However, he noted that Claimant's shoulder was largely asymptomatic prior to her January 2018 work injury. For this reason, and based on his other findings, Dr. Spina concluded that Claimant's muscle spasm indicated a cervical condition.
32. I find Dr. Spina's opinion that Claimant injured a structure in her neck in the January 2018 work incident and has cervical radiculopathy to be well-supported by his examination findings, his training and experience with diagnosing cervical injuries, and his explanation of the mechanism of injury. Thus, I find his testimony credible.
33. Dr. Spina placed Claimant at end medical result for both her elbow condition and her neck condition during his independent medical examination. He then used the *AMA*

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<sup>1</sup> Dr. Spina offered his opinion that Claimant's injury was in the C5, C6 or C7 level of her cervical spine. Identifying which level requires performing separate diagnostic injections at each level. As no such injections have been done, he could not be more specific as to which level is injured. I find this explanation credible.

*Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> ed.)* (“*AMA Guides*”) to assess any permanent impairment resulting from her work injuries.

34. Dr. Spina assessed no permanent impairment for Claimant’s elbow condition. As for her cervical spine, he placed her in Diagnosis-Related Estimates (DRE) Cervical Category III, relying on his determination that her pain symptoms indicate cervical radiculopathy, his observation of her muscle spasm, and the MRI findings. This DRE category provides for a 15 to 18 percent whole person impairment. Dr. Spina selected the lower end of that range and assessed Claimant with a 15 percent whole person impairment for her work-related cervical condition. *See Joint Exhibit I*, at 288. I find this analysis credible and well supported by the *AMA Guides*.

(b) Andrew Haig, MD

35. Dr. Haig graduated from the Medical College of Wisconsin in 1983 and completed his residency in physical medicine and rehabilitation at Northwestern University. He is board certified in physical medicine and rehabilitation, electrodiagnostic medicine, and pain medicine. Currently, he has a clinical practice in Middlebury, Vermont and a consulting practice. Dr. Haig has diagnosed thousands of cervical spine injuries over the course of his medical career.
36. At Defendant’s request, Dr. Haig performed two independent medical examinations of Claimant, on July 16, 2018 and February 14, 2019. Both examinations included an interview, a medical records review and a physical examination.
37. At the July 2018 examination, Dr. Haig found that Claimant likely had left elbow lateral epicondylitis related to her work injury. He found that she had not yet reached an end medical result for this condition.
38. At the February 2019 examination, Dr. Haig confirmed his previous diagnosis of lateral epicondylitis and found that Claimant had reached an end medical result. He assessed no permanent impairment for this condition.
39. In Dr. Haig’s opinion, Claimant did not sustain a cervical spine injury during the January 26, 2018 work incident, nor does she have cervical radiculopathy. In forming this opinion, he relied primarily on Dr. Tally’s EMG study, which did not find evidence of cervical radiculopathy. He acknowledged Dr. Tally’s caution that an absence of EMG findings for cervical radiculopathy does not rule out that diagnosis. However, according to his testimony, a false negative would occur only in cases of minor cervical radiculopathy. In his opinion, if Claimant had cervical radiculopathy, it would not fall into the minor category based on her significant pain complaints. Dr. Haig also based his opinion that Claimant does not have cervical radiculopathy on his physical examination of her, which did not find an anatomical basis for her pain complaints.
40. Dr. Haig testified that his physical examination of Claimant produced some non-organic findings and pain behaviors, such as a pain reaction on superficial palpation

and grunting. In Dr. Haig's opinion, these non-organic findings likely indicate a psychiatric condition such as somatoform disorder, rather than a physical pathology.

41. In further support of his somatoform disorder diagnosis, Dr. Haig testified that Claimant was abused as a child and that abused children are at higher risk for somatoform disorder. However, he could point to no evidence that Claimant was abused as a child. Claimant credibly testified that she was not abused as a child, and there is no reference to childhood abuse in her medical records.
42. Finally, Dr. Haig testified that Claimant engages in "self-destructive behavior" because she does not control her diabetes. In his opinion, this self-destructive behavior further supports his diagnosis of somatoform disorder. However, Claimant's diabetes does not prevent her from working full time. Moreover, she credibly testified that she treats her diabetes with an oral medication and makes an effort to keep her condition under control.
43. I find Dr. Haig's reliance on Dr. Tally's EMG study for his opinion that Claimant does not have cervical radiculopathy to be misplaced. Even Dr. Tally cautioned that the absence of findings for cervical radiculopathy on an EMG examination did not rule out the diagnosis. Further, Dr. Haig did not offer any basis for his testimony that false negative test results happen only in cases of minor cervical radiculopathy. Accordingly, I find his opinion about cervical radiculopathy to be unsupported and lacking credibility.
44. I further find that Dr. Haig's opinion concerning somatoform disorder lacks a solid foundation. Although he credibly testified about some non-organic findings, those findings do not necessarily rule out a physical injury. Further, there is no credible factual basis for his testimony that Claimant suffered childhood abuse or that she engages in self-destructive behavior. Accordingly, I find his somatoform disorder opinion to be speculative and unpersuasive.
45. Dr. Haig agrees with Dr. Spina that Claimant has no permanent impairment referable to her left elbow lateral epicondylitis. Further, as he has not diagnosed her with a cervical injury, he did not perform an examination to assess whether she has any permanent impairment attributable to her cervical spine condition.

#### **CONCLUSIONS OF LAW:**

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, see, e.g., *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Defendant accepted liability for Claimant's elbow injury but has denied liability for her cervical spine condition. Therefore, Claimant has the burden of proving that she has a cervical spine condition as a result of her January 26, 2018 work injury, as well as proving any permanent impairment referable to that condition.
3. The parties presented conflicting expert medical opinions concerning the cause of Claimant's shoulder and neck symptoms and the extent of any permanent impairment referable to her condition. In such cases, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

*The Cause of Claimant's Shoulder and Neck Symptoms*

4. Claimant offered Dr. Spina's opinion as to the cause of her left shoulder and neck symptoms. Defendant offered Dr. Haig's opinion. Neither physician was a treating provider, and both are well qualified by their training and experience to offer opinions on her condition. Relying primarily on the third factor set forth in *Geiger*, I conclude that Dr. Spina's opinion is the more persuasive.
5. Dr. Spina offered a clear opinion that Claimant has a work-related cervical injury that causes cervical radiculopathy. He based his opinion on his physical findings, including a muscle spasm in her cervical area, and the consistency of her symptoms with the MRI findings. Further, his training and experience in diagnosing cervical spine injuries provide him with a solid understanding of how pain radiates and of the symptoms associated with cervical radiculopathy. He also convincingly explained how the mechanism of injury is consistent with her symptoms. His testimony was clear, thorough and supported by his physical findings.
6. In contrast, Dr. Haig's opinion that Claimant's shoulder and cervical complaints were psychiatric in nature relied primarily on the EMG test results. As Dr. Spina persuasively explained, EMG test results for cervical radiculopathy are unreliable. Further, Dr. Haig's opinion that Claimant has a somatoform disorder was based on several factual assumptions that were unsupported by the evidence. His opinion therefore lacked objective support and was unconvincing.
7. I therefore conclude that Dr. Spina's opinions are the more persuasive, and I accept his opinion that Claimant's shoulder and neck symptoms are due to cervical radiculopathy from her workplace injury. Claimant has sustained her burden of proving that she suffered a left upper extremity and cervical injury arising out of and in the course of her employment with Defendant on January 26, 2018.

Claimant's Permanent Impairment

8. Dr. Spina offered his opinion that Claimant has reached an end medical result for her cervical spine condition with a 15 percent whole person impairment. I find his opinion as to Claimant's permanent impairment under the *AMA Guides* persuasive. Further, Defendant offered no evidence disputing Dr. Spina's methodology.
9. I therefore conclude that Claimant has met her burden of proving that she has a 15 percent whole person impairment referable to her work-related cervical spine condition.

Costs and Attorney Fees

10. As Claimant has prevailed on the issues determined at the hearing, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. § 678(e), she shall have 30 days from the date of this opinion within which to submit her itemized claim.

**ORDER:**

Based on the above Findings of Fact and Conclusions of Law, Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves her entitlement as causally related to her work-related cervical injury;
2. Permanent partial disability benefits based on a 15 percent whole person impairment referable to Claimant's cervical spine pursuant to 21 V.S.A. § 648, with interest calculated in accordance with 21 V.S.A. § 644; and
3. Costs and attorney fees in amounts to be determined, pursuant to 21 V.S.A. § 678.

**DATED** at Montpelier, Vermont this 15<sup>th</sup> day of December 2020.

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Michael A. Harrington  
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.