STATE OF VERMONT
DEPARTMENT OF LABOR

MICHELE MARINO, Claimant	)	
	)	
v.	)	Arbitration
	)	State File No. U-9843
VERMONT STATE EMPLOYEES CREDIT UNION, Employer	)	

ARBITRATION DECISION

This is a dispute between two insurers for Vermont State Employees Credit Union (hereinafter "VSECU"). Cardinal Comp alleges that after its workers' compensation insurance was terminated on August 10, 2005 and that of MEMIC had commenced, Claimant Michelle Marino suffered an aggravation of a pre-existing injury to her right shoulder.

Appearances:

Eric A. Johnson, Esq. for Cardinal Comp, VSECU's workers' compensation insurer from August 10, 2002 to August 10, 2005.

Jeffrey W. Spencer, Esq. for MEMIC, VSECU's workers' compensation insurer at all times material since August 10, 2005.

Exhibits:

Joint medical exhibit referred to as "JME."
Deposition of Claimant taken April 14, 2008.
Deposition of Robert McLellan, M.D., M.P.H., taken October 28, 2008.

Issues:

1. On or about December, 2006 while MEMIC was the workers' compensation insurer for the Employer, did Claimant suffer an aggravation or a recurrence of her previous shoulder injury that occurred in October, 2003?

2. Which Insurer, Cardinal Comp or MEMIC is liable for benefits associated with Claimant's 2007 surgery? The parties have previously stipulated that the benefits in question have been identified and agreed upon by them and that no specific order is necessary.

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Findings of Facts:

1. At all times material to the above-captioned matter, Claimant Michelle Marino was an employee of VSECU.

2. At all times material, VSECU was Claimant's Employer within the meaning of the act.

3. Cardinal Comp was the workers' compensation carrier for VSECU for the periods of August 10, 2002, until August 10, 2005.

4. Defendant MEMIC has been VSECU's workers' compensation carrier on the risk from August 10, 2005, to the present.

5. Claimant suffered an injury to her right shoulder in late-2003. On October 16, 2003 Claimant complained of right shoulder symptoms to Christine Payne, M.D. The office notes mention throwing a ball and lifting heavy bags of coins. Dr. Payne recommended NSAIDs and rest. JME at 157. A follow-up office note for the right shoulder on February 25, 2004 mentions ongoing physical therapy without any improvement. Claimant stated she was being careful at work and not lifting anything heavy. Dr. Payne's assessment was of persistent shoulder pain and she ordered an MRI. JME 158. Claimant testified that her daily work schedule during this period of time required her to carry 6-7 bags of coins each weighing 50-60 lbs. Clt. Depo. 13

6. Claimant was seen by orthopedic surgeon Christian Bean, M.D. on January 8, 2004 on referral from Dr. Payne. Claimant mentioned both wrist and right shoulder pain. She denied any specific accident or trauma, and mentioned a problem at work with the work shelf height that seemed to be bothering both her wrists and right shoulder. In her deposition, Claimant testified that when speaking with Dr. Bean, she had forgotten to mention an incident where she had wrenched her shoulder while dealing with one of these heavy bags of coins. Clt. Depo. 14-15. Claimant told Dr. Bean that the shelf height situation had been fixed and this relieved the wrist symptoms, however, the shoulder symptoms persisted. Claimant stated that her problems began "a few months ago." Dr. Bean's assessment was an impingement syndrome of the right shoulder and he recommended stretching and strengthening under guidance of physical therapy. JME 135.

7. The physical therapy program commenced at CVH on January 14, 2004. Claimant told the therapist she had experienced a gradual onset of a constant dull ache in her right shoulder. She said at

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work she lifts 50-60 lb coin bags above her waist 6-7 times daily. There were 6 physical therapy visits but the expected program was discontinued due to "drop arm" symptoms that caused the therapist to send Claimant to Dr. Payne as described in paragraph 5 above.

8. Dr. Payne ordered an MRI of Claimant's right shoulder. The March 2, 2004 MRI exam was interpreted by radiologist Bartum at CVH as showing "...some minor arthropathy in the acromioclavicular joint which causes slight impingement on the rotator cuff tendon. There is no abnormal signal in the tendon however and I do not see any evidence of tendinosis or tearing. The remainder of the shoulder is normal." JME 8.

9. Dr. Bean saw Claimant again, his second visit, on March 15, 2004. On exam, Dr. Bean noted significant limitation with internal rotation. Minimal pain with adduction. Dr. Bean wrote that he "would not recommend surgery at this point" but offerred a corticosteroid injection instead with the objective reducing the irritation. He wanted Claimant to resume PT. JME 138.

10. Dr. Bean's final visit was on May 18, 2004. Claimant said her right shoulder is "certainly improving" and that the injection seemed to help. In her deposition, Claimant confirmed that her shoulder symptoms improved following the injection. Clt. Dep. 19. Claimant was doing the PT. On examination, Dr. Bean found "pretty smooth and symmetric" range of motion and function of the shoulder. He wanted to wait until the fall before "closing the claim" because he was unsure of the whether the effects of the corticosteroid injection would last. Claimant was told she could continue to work full duty without limitation. Dr. Bean wrote that in the fall, if the symptoms were still tolerable, he would not recommend either surgery or further intervention. In other words, things were going well and he adopted a conservative wait and see attitude. JME 139. Claimant did not return to Dr. Bean.

11. The next medical record presented is that of Waterbury Medical Associates on December 11, 2006. JME 159. This visit was in excess of 2 years, i.e. just about 30 months, after the final May, 2004 visit with Dr. Bean. Claimant stated her right shoulder had gotten worse over the past 3-4 months with pain all the time with most movements, radiation down the arm and accompanied by some neck pain. A new MRI was obtained on December 19, 2006 that was interpreted as showing partial tears of the biceps tendon and the subscapularis tendon and tendinosis in the rotator cuff tendons. JME 11. The radiologist in 2006 interpreted the 2004 and 2006 studies as "essentially unchanged" even though the 2004 film was said to

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show no tendinosis or tearing but the 2006 films were said to show both. Douglas Goodwin, M.D., radiologist at DHMC reviewed the 2004 and 2006 films at Dr. McLellan's request. JME 96-97. Looking at the two imaging studies, Dr. Goodwin felt that rotator cuff tendinopathy had increased slightly, the biceps tendon subluxation and partial thickness tearing had worsened, and a cyst had formed on the undersurface of the acromion that may have been related to impingement but was of uncertain clinical significance. Eventually, Claimant was referred to Dr. Landvater for a visit on January 5, 2007. JME 159. According to Dr. McLellan's notes, surgery was performed in February, 2007 and included repairs of the biceps tendon among other things. JME 146.

12. Claimant testified that during the 30-month interval between May 18, 2004 and December 11, 2006, the cortisone shot "wore off". Clt. Dep. 21. She initially had no pain at rest but she had minor, manageable pain with certain activities. Clt. Dep. 22. Claimant worked full time without restriction for the rest of 2004 and all of 2005 continuing until late 2006. At some unspecified point in time that Claimant could not clarify, the number of coin bags she was required to handle daily started increasing to 15 or so; however, the workers were allow to drag the bags instead of lifting them. Clt. Dep. 22-23. The December 11, 2006 note of Waterbury Associates recorded that the condition of her shoulder had deteriorated in the past 3-4 months to the extent that it hurt all the time and with most movements. Claimant has been inconsistent with the question of whether the original 2003 injury came on gradually or was provoked by an incident, and she has been similarly inconsistent with the question of whether the late 2006 increase in symptoms came on gradually or was provoked by an incident on December 12, 2006. However several times in her deposition, Claimant was quite detailed and specific about a 2006 incident – whether she could recall the specific date is important but not critical – where she grabbed and pulled "wrong" one of these 50-60 lb bags of coins and felt an increase in her symptoms. Clt. Dep. 29. She also mentioned an incident in December, 2006 to Dr. Ensalada. JME 116. Claimant also described difficulties she had in late 2006 with handling pneumatic tubes and she testified that on one occasion in late 2006 she lifted one of these tubes above her head and this provoked increased pain. Clt. Dep. 28. A similar mention was made about difficulties with the pneumatic tube system to the physical therapist and to Drs. Davignon, McLellan and Dr. Ensalada. JME 33, JME 116, JME 147, JME 102. MEMIC argues there is no evidence of a specific injury on December 12, 2006. It further argues that Claimant has denied or been silent with respect to such a specific event several times and she made no mention of it to the employer at the time. JME 103.

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13. So, between the visits by Dr. Bean's May, 2004 and by Waterbury Associates in December, 2006 Claimant's shoulder symptoms and function deteriorated. She had gone from pain that was mild and manageable, a 2 out of 10, to pain that was severe and unmanageable, a 7 or 8 out of 10. The condition had gone from not bothering her sleep to interrupting her sleep. She had gone from working without restriction to working with restrictions. The shoulder had gone from not bothering her at rest and bothering her with only certain activities, to bothering her all the time with most movements. During the December 11, 2006 visit at Waterbury Medical Associates, Claimant said she had shoulder problems that had gotten worse over the past three to four months. The shoulder hurt all the time with most movements and radiated down her arm, as well as new neck pain. JME 159.

14. Leon Ensalada, M.D. and Robert McLellan, M.D., MPH have examined Claimant at the request of Cardinal Comp, and Philip J. Davignon, M.D., MS has examined Claimant at the request of MEMIC. Dr. McLellan is Board Certified in Occupational and Environmental Medicine and Chief of the Section of Occupational and Environmental Medicine at Dartmouth-Hitchcock Medical Center. A transcript of Dr. McLellan's October 28, 2008 deposition was provided with a waiver of signature.

15. Dr. McLellan examined Claimant in March, 2007, reviewed the medical records, and reviewed the MRI films along with a DHMC radiologist. Dr. McLellan concluded that the original 2003 injury shown in the 2004 MRI involved arthritic changes in the acromioclavical joint, fatty infiltration of the rotator cuff muscles consistent with atrophy and a minor finding of thinning of the biceps tendon. Dr. McLellan consulted with DHMC radiologist Douglas Goodwin, M.D. (as described in paragraph 11 above) for guidance in interpreting the MRI films. Prior to his deposition in October, 2008, Dr. McLellan also reviewed Claimant's April, 2008 deposition and Dr. Ensalada's IME report. Dr. McLellan testified that the 2006 MRI showed the same conditions seen in 2004, but now the biceps tendon showed evidence of a partial thickness tear, a cyst appeared in the distal clavical consistent with chronic impingement and tendonosis or tendonopathy appears in the tendons of the rotator cuff. Dr. McLellan was of the opinion that Claimant reached a plateau in her medical recovery process in 2004 and halted medical treatment. Dr. McLellan reviewed Dr. Bean's notes and the physical therapy notes and concluded that Claimant had no ratable impairment as of May, 2004. Claimant returned to full duty work without restrictions. After she resumed work, Claimant's lifting duties changed. The number of heavy coin bags she had to handle daily doubled. She had difficulties with the pneumatic tube system. As a result of these physical

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stresses, Claimant's symptoms became much more severe, constant in nature and more extensive anatomically than they had been. The increase in work stressors provoked degeneration in the right shoulder and resulted in a crescendo acceleration of the condition over a period of a few months. Dr. McLellan could find no other explanation for this sudden and significant change. Dr. McLellan testified that each of the factors we refer to as the "Trask" factors was positive for an aggravation. The earlier condition had reached a medical end result, Claimant had stopped treating and experienced a successful return to work, and this was followed by a destabilization of Claimant's condition due to work in 2005 and 2006 that contributed to Claimant's final disability and resulted in further medical treatment including surgery. The work-caused worsening in 2005 and 2006 including constant rather than intermittent pain, pain that went from mild to severe, and more anatomically extensive symptoms. The worsening and increase in disability necessitated the surgery that had not been necessary in 2004 and created permanent impairment that had not been present in 2004.

16. Philip Davignon, M.D. saw Claimant at MEMIC's request on January 20, 2009. He reviewed all of the pertinent medical records and MRI reports plus the reports of Drs. McLellan and Ensalada. He refers to Dr. McLellan's deposition but does not state he has read it. From Dr. Davignon's review of the Trask factors, he concluded that with Dr. Bean's treatment, Claimant's condition had been stable and after May, 2004 she stopped treating for some period of time. However, he didn't feel her return to work was successful because she avoided using her right arm. On page 7 of his report Dr. Davignon states Claimant's condition was not stable but on page 8 he states this condition was stable. On page 7 in the report Dr. Davignon states one could argue that medical end result had occurred, but on page 8 he states Claimant was not placed at medical end result ("MER"). With respect to whether Claimant's continued work contributed to the final disability, Dr. Davignon is somewhat ambiguous. He states, "this was a continual that worsened over time," and he states there is no evidence of an actual new injury on December 12, 2006. However, Dr. Davignon also states on page 8 that Claimant's condition worsened "because of the repetitive nature of the claimant's work and a change in her body mechanics." The legal test provided by the Vermont Supreme Court does not necessitate a specific traumatic event. The Court has stated, "...the causation test becomes whether, due to a work injury or the work environment, 'the disability came upon the claimant earlier than otherwise would have occurred.'" Stannard v. Stannard Co., Inc. et al., 2003 Vt. 52, 175 Vt. 549 citing Ethan Allen Inc. V. Bressett-Roberge, 174 Vt. 518, (2002).

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17. Leon Ensalada, M.D. evaluated Claimant on September 10, 2008 at the request of Cardinal Comp. He wrote a follow-up letter dated April 11, 2009. Dr. Ensalada reviewed the relevant medical records and imaging reports, Dr. McLellan's report, Dr. Goodwin's radiological review of the MRIs, and Claimant's deposition. An oral history was taken and a physical exam was made. In particular, Claimant told Dr. Ensalada that the physical demands of the job increased significantly in 2005 and 2006. She said that during that time she was required to handle significantly more of the heavy coin bags and she was required to use the pneumatic tube system that involved overhead lifting. Claimant described a specific incident in December, 2006 where handling the coin bags caused an acute worsening of the right shoulder pain. Based on the information he obtained, Dr. Ensalada concluded that Claimant sustained an aggravation of the original 2003/2004 work injury to the right shoulder. Dr. Ensalada reviewed the five Trask factors and he, like Dr. McLellan, concluded that all five factors came down on the side of an aggravation. Dr. Ensalada wrote a supplemental report in April 2009 addressing Dr. Davignon's conclusion that Claimant's situation was a recurrence and the questioning of the alleged December 12, 2006 incident. Dr. Ensalada stated that his original report did not depend so much on an alleged incident but rather on Claimant's description of increased physical job demands in 2005-2006 that was linked to the shoulder becoming increasing painful during the same period of time and the need for surgical intervention. He concluded that the deterioration in Claimant's condition was not due to a recurrence but rather an aggravation, i.e. it was an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events."

<u>Conclusions of Law</u>:

1. 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). 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). Because the medical issues involved are beyond the ken of a layperson, expert testimony is required. See *Lapan v. Berno's Inc.,* 137 VT. 393 (1979). 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).

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2. This is an aggravation/recurrence dispute between two Insurers for the same employer. The terms "aggravation" and "recurrence" have legal significance and have been given precise definitions by the Vermont Supreme Court and by the Commissioner of Labor. The Commissioner has provided Regulatory definitions for these terms and many administrative decisions establishing factors to be weighed and balanced.

3. Pursuant to 21 VSA §662(c), MEMIC is the insurer at the time of the most recent injury for which Claimant has claimed benefits and it has the burden of proof. *Farris v. Bryant Grinder Corporation, et al.* 2005 VT 5, 177 Vt. 167 (2005).

4. The Vermont Supreme Court has explained, "In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a 'recurrence' of the first injury, i.e. if the second accident did not causally contribute to the claimant's disability (cite omitted). If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point." *Pacher v. Fairdale Farms* & *Eveready Battery Company,* 166 Vt. 626(1997) (mem.) "Mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement." *Stannard v. Stannard Company, Inc., et at.,* 2003 VT 52 ¶ 11. The Supreme Court has defined a third type of situation, the flare up, which is neither an aggravation nor a recurrence. A flare up is a temporary worsening of a pre-existing disability caused by a new trauma for which the new employer is responsible for paying compensation benefits until the worker's condition returns to the baseline and not thereafter. *Cehic v. Mack Molding, Inc.,* 17 VT.L.W. 38 (2006).

5. The Regulatory definitions provided by the Commissioner follow: "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1110, Vermont Workers' Compensation and Occupational Disease Rules (2001). This has been explained as "a destabilization of a condition which has become stable, although not necessarily fully symptom free." *Cote v. Vermont Transit,* Opinion No. 33-96 WC (June 19, 1996). A "recurrence" means the return of symptoms following a temporary remission. Rule 2.1312. A "medical end result" means the point at which a person has

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reached a substantial plateau in the medial recovery process such that significant further improvement is not expected regardless of treatment. Rule 2.1200.

6. The Commissioner has decided many cases by applying the Regulatory definitions in addition to a five factor test described by the Supreme Court without specific approval in *Farris.* In *Trask v. Richburg Builders,* Opinion No. 51-98WC (1998), the Commissioner explained that recurrence is the return of symptoms following a temporary remission or a continuation of a problem, which had not previously resolved or become stable. An aggravation means an acceleration or exacerbation of a previous condition caused by some intervening event or events; it is a destabilization of a condition, which had become stable, although not necessarily fully symptom free.

7. The five factors used by the Vermont Department of Labor and Industry when analyzing whether a condition is an aggravation or recurrence are: (1) whether a subsequent incident or work condition destabilized a previously stable condition; (2) whether the claimant had stopped treating medically; (3) whether the claimant had successfully returned to work; (4) whether the claimant had reached a medical end result; and (5) whether the subsequent work contributed to the final disability. *Trask v. Richburg Builders,* Opinion No. 51-98 WC (Aug. 25, 1998) and cases cited therein. D.F. v. Valley Floors, Inc., Opinion No. 18-09WC (June 8, 2009). The Vermont Supreme Court has stated that it has never adopted this list of factors or required that they be used in an analysis such as this. *Farris v. Bryant Grinder Corp. and Wausau Insurance Co.*, 2005 VT 5, ¶13,177 Vt. 456 (2005).

8. With respect to burden of proof, in disputes such as this, where a payment of an otherwise compensable claim is denied on the basis that another insurer is liable, Section 662[c] of the Workers' Compensation Act provides that in review the facts, the trier of fact shall presume the insurer at the time of the most recent injury to be liable and that more recent insurer shall have the burden of proof with respect to the earlier insurer's liability. *Farris v. Bryant Grinder Corp. and Wausau Insurance Co.*, 2005 VT 5,¶ 11, 177 Vt. 456 (2005).

9. Application of these factors in this case is challenging and the competing carriers have presented different and colorable interpretations and arguments arising from the same set of facts, medical evidence and

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testimony. The evaluation of this claim is made difficult because six years have passed since the initial injury in 2003, because Claimant concedes her memory is not the best, because Claimant suspended treatment with Dr. Bean at a time that is critical for the aggravation-recurrence analysis and because Claimant's current orthopedic surgeon, the parties stipulate, would refuse to be deposed or to testify which led one of the parties to request the exclusion of her records on the grounds of prejudice. In addition, it can be hard to discern the fine line between progression of a degenerative condition versus progression of a degenerative condition caused by the work environment. It is probably for this reason that the Department developed the so-called Trask factors, a 5 point analysis that considers a series of important factors that occur over time. *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998). Drs. McLellan and Ensalada both feel Claimant reached a substantial plateau in 2004-2005. Dr. Davignon makes different statements on this point preceded by "one could argue" Claimant's condition was not stable on page 7 and "one would submit" Claimant's condition was stable on page 8. Keep in mind that as stated by the Vermont Supreme Court, "....some treatment such as physical or drug therapy continues to be necessary is not inconsistent with finding a medical end result." *Pacher v. Fairdale Farms et al.*, 166 Vt. 626 (1997). I find that in the 2004-2005 time frame, Claimant was medically stable and at medical end result as the Commissioner defines that term. Claimant had a successful return to work in that she returned to work full time without restrictions for a substantial period of time. Dr. Davignon's point about Claimant working with some minor discomfort with certain activities and being careful does not change this conclusion. Drs. Ensalada and McLellan agreed that the admitted medical evidence shows that Claimant stopped treating medically. The explanations offered to negate this conclusion are either unpersuasive or unsupported by admitted evidence. Claimant's condition does appear to have deteriorated significantly in late 2006 and therefore I find the condition was destabilized. Claimant's testimony confirms she had gone from pain that was mild and manageable, a 2 out of 10, to pain that was severe and unmanageable, a 7 or 8 out of 10. The condition had gone from not bothering her sleep to interrupting her sleep. She had gone from working without restriction to working with restrictions. The shoulder had gone from not bothering her at rest and bothering her with only certain activities, to bothering her all the time with most movements. New symptoms such as radiating arm pain developed. Claimant stated that in late 2006, she could not deal with the increasing pain anymore. I find the condition destabilized because of Claimant's work and not because of progression in the condition itself. Dr. McLellan testified the increased

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physical demands of Claimant's work, especially the handling and dragging of the heavy coin bags and the repetitive handling of the pneumatic tubes in 2006 caused a significant crescendo aggravation of a pre-existing stable condition. Dr. Davignon and Dr. Ensalada both comment on the repetitive nature of Claimant's work. Finally, with respect to the subsequent work contributing to the final disability, Drs. Ensalada and McLellan concur that the subsequent work caused further degeneration in the regional shoulder structures of the clavicle, the biceps tendon and the rotator cuff tendons as shown on the MRI as described in paragraph 14 above. The increased physical requirements of the job caused both a worsening of the pain and a worsening of the condition of the shoulder and the resulting disability and impairment. *Stannard v. Stannard Company, Inc., et al.*, 175 Vt. 549 (2003).

10. The three conditions shown in the 2006 MRI demonstrated a change for the worse in the condition of the structures of the shoulder region, namely a worsening of the biceps tendon that was interpreted to be a partial tear, the development of a cyst in the distal clavicle and thickening in the tendons of the rotator cuff . Dr. McLellean reviewed the findings described by Dr. Bean in May, 2004 and concluded these would have resulted in zero permanent impairment under the 5th Edition of the AMA Guides. I find that the increased physical demands and requirements of the job in 2005 and 2006 caused a worsening of the condition of the shoulder such that the disability occurred earlier than it would have otherwise. *Farris v. Bryant Grinder Corp.*, 177 Vt. 456 (2005) citing *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997).

ORDER:

Based upon the foregoing, it is hereby ORDERED as follows:

MEMIC shall pay Claimant or reimburse Cardinal Comp for all temporary and permanent weekly indemnity benefits, vocational rehabilitation and medical and nursing benefits related to the aggravation of Claimant's pre-existing condition in or about December, 2006.

Dated: Aug 19, 2009

Glen L. Yates, Jr., Esq.
Arbitrator

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cc: Eric A. Johnson, Esq.
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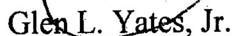
RE: Michelle Marino v. Vermont State Employees Credit Union
State File # U-9843

Gentlemen:

Enclosed please find a copy of my ***Arbitration Decision*** in connection with the above-referenced matter.

Please do not hesitate to call me with any questions.

Sincerely yours,



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GLY:cah

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cc: Vermont Department of Labor ✓

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	)	
v.	)	Arbitration
	)	State File No. U-9843
VERMONT STATE EMPLOYEES CREDIT UNION, Employer	)	

POST-DECISION RULING ON ALLOCATION OF ARBITRATOR FEES AND COSTS

This matter has come before the Arbitrator on Cardinal Comp's Motion for Payment of Arbitrator's Fee's and/or Cardinal's costs dated September 4, 2009. MEMIC has opposed the Motion by letter dated September 10, 2009 and Cardinal Comp has filed a supplemental statement specifying the items for which it seeks reimbursement. Cardinal Comp does not seek reimbursement of its own attorneys fees. It does seek reimbursement for a list of rather traditional items of costs such as court reporters fees and mileage, but it also seeks reimbursement for the payment of the fees of experts (Drs. McLellan and Ensalada) that it hired as well as the arbitrator's fees.

The parties to this dispute were ordered to arbitrate by the Commissioner pursuant to 21 V.S.A. § 662(e), so that statutory provision and Rule 8 of the Department of Labor's workers' compensation rules govern the matters at hand. The "costs" provisions of V.R.C.P. 54(d) and 21 V.S.A. § 678 lend to the analysis.

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The parties elected not to come to an agreement within the context of this Department-ordered process with respect to the costs of arbitration. Section 662(e)(2)(A) clearly allows for such an agreement, and in the absence of a cost-sharing agreement, the arbitrator is authorized to apportion costs among the parties. Because there is no such an agreement, the provisions of Vermont Arbitration Act, 12 V.S.A. § 5665 ("unless otherwise provided in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses incurred in the conduct of the arbitration, shall be paid as provided in the award") probably cannot be extended to this case. No discussion of or claims for costs, litigation expenses and arbitrator's fees and interest attended any of the several conferences that preceded the submission of the claim in late May, about four months ago. Our first conference was held in November, 2008, the second on January 7, 2009, the third on March 3, 2009 and a fourth on April 10, 2009 and no mention was made of cataloging costs, calculating litigation expenses or computing interest. Perhaps no discussion of these claims was necessitated because the parties clearly were adversarial and the claims were implied by the context of the dispute; however, the claims were not made.

Cardinal Comp has prevailed in the merits arbitrated by the parties.

1. <u>What are "costs" of litigation</u>? This term is not defined by 21 V.S.A. § 662. V.R.C.P. 54(d) allows recovery of costs other than attorney's fees

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as a matter of course to the prevailing party unless the court otherwise directs. The arbitrator therefore has discretion in awarding costs. *Peterson v. Chichester*, 157 Vt. 548 (1991). The costs of depositions is specifically covered by Rule 54(g).

2. <u>IME doctors fees</u>. Cardinal Comp seeks reimbursement for the costs of its two expert witnesses, Drs. McLellan and Ensalada. Neither was a treating physician. Both were hired by Cardinal Comp or its attorneys for purposes of litigation. Dr. McLellan was deposed and his deposition was admitted in evidence. Dr. Ensalada was not deposed. Fees charged by experts witnesses are not recoverable. *Ianelli v. Standish*, 156 Vt. 386, 390 (1991). Therefore the items "check to Dr. McLellan for IME, report" and "check to Leon Ensalada, M.D. for IME, report" and "check to Leon Ensalada M.D. for review of documents, supplement report" are not recoverable costs.

3. <u>Deposition fees charged by stenographers</u>. Deposition fees are clearly within the scope of "costs" under both V.R.C.P. 54 and Section 662(e). The two items listed for checks to "Court Reporters Associates" fit in this category. Both depositions were reasonable and necessary for the parties to take and both were important evidence presented to the arbitrator. MEMIC shall reimburse Cardinal Comp for the sum of these two entries, i.e. $560.25.

4. <u>Litigation expenses</u>. There is a distinction between expenses of litigation and "costs" that may be reasonable and necessary and recoverable

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"costs" of litigation. *In Re Appeal of Gadue*, 149 Vt. 322 (1987). I find that attorneys' mileage charges are litigation expenses and not "costs" of litigation. In addition, following the analysis discussed in *Gadue*, there is nothing significant in the circumstances of this case, no particular equities, no particular "exceptional or dominating reasons of justice" to take these mileage charges out of the general rule also known as the American Rule. *In Re Appeal of Gadue* at 328. The claim for reimbursement of unspecified long distance telephone charges of $1.56 is deemed an expense of litigation.

5. Arbitrator fees. Arbitrator fees are an important consideration in circumstances where a regulatory board is empowered by the legislature to compel private arbitration of matters that would otherwise be handled by a Hearing Officer paid by the State. However, I find I have no right to apportion the arbitrator's fees and I find Cardinal Comp has no right to reimbursement of the arbitrator's fee. Even if there were the authority to allocate these fees, I would not exercise such discretion under the facts of this case.

- Neither of the workers' compensation provisions on point, i.e. Section 662(e) and Rule 8.3, expressly authorizes the arbitrator to assign responsibility for the arbitrator's fees to the parties in any manner whatsoever. This is an interesting contrast to the specific provision contained in the act dealing with arbitration agreements, 12 V.S.A. § 5665. The legislature and the Commissioner could easily have copied the simple language of 12 V.S.A. § 5665

into 21 V.S.A. § 662 and the Department's Rules if that were the intent.

- Cardinal Comp cites to a Florida appeals court decision which upheld an arbitrator's allocation of arbitrator's fees in a partnership dissolution matter. That decision hinged on powers and duties assigned to the arbitrator by the partnership agreement and by the Florida arbitration act. The Florida arbitration act is the same as Vermont's 12 V.S.A. § 5665 with minor exceptions, i.e. it expressly authorized the arbitrator to allocate the arbitrator's fees and costs. However, there is no arbitration agreement here to trigger Vermont's version of the arbitration act. So, the Florida decision does not help with the analysis.

- The Arbitrator prepared and forwarded a bill for his expenses to the parties and included the understanding, apparently unfounded, that the parties would pay equal shares.

- This matter has been the subject of significant pre-hearing and post-hearing litigation and legal disagreements for what the parties described as a "thin file" and a "small dollar case." That thin file is now over three inches thick. As this decision is written, a supplemental request for interest has been filed.

- In sum, I do not see any express statutory authority to allocate the arbitrator's fees on any basis other than equal shares. The Vermont Arbitration Act is not relevant because there is no arbitration agreement.

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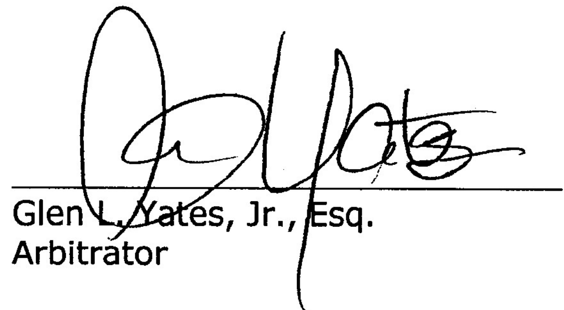
Section 662(e) and the Commissioner's Rules give no guidance. The fees of an arbitrator are not "costs" as that term is used in V.R.C.P. 54 or Section 678 of the Workers' Compensation Act. Concluding that the arbitrator's fees have to be shared equally by the parties may in and of itself be an allocation; however, equal sharing of alternative resolution dispute fees seems to be the model adopted by the legislature for workers' compensation mediation, 21 V.S.A. § 663a(b), and this approach also treats the arbitrator's fee as an expense of litigation rather than as a claim. The parties shall equally share the arbitrator's fee.

6. Interest. This claim is not ripe for decision because MEMIC has not had an opportunity to respond.

Dated: 9.24.09



Glen L. Yates, Jr., Esq.
Arbitrator

cc: Eric A. Johnson, Esq.
Jeffrey W. Spencer, Esq.
Vermont Department of Labor

SEP 25 2009

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RE: Michelle Marino v. Vermont State Employees Credit Union – ***Arbitration***
State File # U-9843

Gentlemen:

Attached please find a ***Post-Decision Ruling on Allocation of Arbitrator Fees and Costs*** in connection with the above-referenced matter.

Please call with any questions.

Sincerely yours,

Glen L. Yates, Jr.

GLY:cah
Attachment
cc: Vermont Department of Labor [Via Fax & U.S. Mail]