

Belinda Brace v. Jeffrey Wallace, DDS

(July 22, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Belinda Brace

Opinion No. 28-09WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

Jeffrey Wallace, DDS

For: Patricia Moulton Powden
Commissioner

State File No. Z-02907

OPINION AND ORDER

Hearing held in Montpelier on February 4, 2009

Record closed on March 4, 2009

APPEARANCES:

Joe Galanes, Esq. for Claimant

Jason Ferreira, Esq. for Defendant

ISSUES:

1. Is Claimant's bilateral carpal tunnel syndrome causally related to her work as a dental hygienist?
2. If yes, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I: Joint medical exhibit

Claimant's Exhibit 1: *Curriculum vitae*, Dr. Daniel Wing

Claimant's Exhibit 2: Deposition of Dr. Daniel Wing, January 28, 2009

Defendant's Exhibit A: *Curriculum vitae*, Dr. Verne Backus

Defendant's Exhibit B: Medical journal articles cited by Dr. Backus

CLAIM:

Temporary partial disability benefits pursuant to 21 V.S.A. §646

Medical benefits pursuant to 21 V.S.A. §640

Interest pursuant to 21 V.S.A. §664

Attorney fees and costs pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.
3. Claimant is in her early fifties. She has been a dental hygienist for twenty years, the last thirteen for Defendant. At the time of her injury, Claimant worked seven days every two weeks, eight hours daily with no lunch hour.
4. In addition to her regular duties as a hygienist, Claimant performed all of the periodontal work for her employer. This entailed more strenuous types of work, such as scaling and root planing. These tasks required Claimant to grip a sharp tool in her right (dominant) hand and make scraping motions to remove difficult plaque from patients' teeth. The twisting motion to scrape the teeth took forty or fifty minutes per appointment.
5. Claimant's work also required her to hold a small mirror in her left hand with which to push back a patient's cheek, gum or tongue so that she could have an effective line of sight.

Claimant's Work Injury

6. Over the course of Claimant's twenty-year career she sometimes experienced hand or wrist discomfort following a particularly difficult day at work. Before August 2007, the discomfort would disappear after a few days off work, which her regular schedule accommodated well.
7. After August 2007, however, the discomfort became more pronounced. Claimant experienced pain, tingling, numbness and weakness in her wrists and hands. The pain was strong enough to wake her at night and no longer was totally relieved after a few days off from work.
8. In September 2007 Claimant experienced a dramatic increase in her wrist and hand symptoms. Not only had her symptoms become more painful, but they were now constant as well. After working on three difficult patients who needed a lot of heavy scraping she told Defendant that she could no longer perform three periodontal procedures in one morning.

Claimant's Medical Treatment

9. Claimant sought medical treatment from her primary care provider, Richard Fletcher, FNP (Family Nurse Practitioner) in January 2008. FNP Fletcher diagnosed her condition as bilateral carpal tunnel syndrome. He advised her to reduce her work hours to three seven-hour days per week rather than the seven eight-hour days every two weeks that she had been working. He also recommended that she take a daily lunch hour. These two schedule changes, which Defendant implemented in January 2008, resulted in a reduction in Claimant's work hours from approximately 28 hours weekly to only 21 hours weekly.
10. In FNP Fletcher's opinion, Claimant's work as a dental hygienist caused her to develop bilateral carpal tunnel syndrome. In support of this opinion, he noted that dental hygienists must use both of their hands in a repetitive way and in awkward positions for long periods of time. In FNP Fletcher's 29 years of practice, he has seen numerous cases of dental hygienists with carpal tunnel syndrome. He acknowledged that science is not clear as to why some people are more prone to carpal tunnel syndrome than others, but was confident nonetheless that in Claimant's case, her work was the cause of her carpal tunnel syndrome.
11. In February 2008, Erin Fournier Boxer, a registered occupational therapist, performed a work risk analysis of Claimant's job. Ms. Boxer analyzed five potential ergonomic risk factors for carpal tunnel syndrome: pinching, gripping, highly repetitive motion, hand-arm vibration and repetitive keyboarding.
12. Ms. Boxer concluded that the awkward wrist positioning Claimant had to maintain while scaling teeth was a risk factor for carpal tunnel syndrome in her right hand. She did not find any significant risk factors for Claimant's left hand.
13. Aside from her dental hygienist work, Claimant did not regularly engage in any activities that involved the ergonomic risk factors identified by Ms. Boxer other than occasional bead work with jewelry. This is distinguishable from the type of strenuous bending of metal, with forceful pinching and gripping, that might be required in a professional jeweler's job and therefore might be a risk factor for carpal tunnel syndrome.
14. In addition to reducing her work schedule, Claimant also has undergone occupational therapy. These two measures have combined to give her some pain relief.

Independent Medical Evaluations

Dr. Verne Backus

15. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Verne Backus in May 2008. Dr. Backus is well known to the Department as an expert in occupational medicine. He is board certified in occupational medicine with a subspecialty certified with the American Board of Preventative Medicine. He is in private practice and serves as Medical Director at Northwestern Occupational Health Center. He also is a medical consultant on employee workers' compensation claims for both the State of Vermont and Fletcher Allen Health Care.
16. In Dr. Backus' opinion, Claimant suffers from bilateral carpal tunnel syndrome, but he does not believe that it is causally linked to her work as a dental hygienist. Citing to research articles that were entered into evidence,¹ Dr. Backus testified that many people are predisposed to getting carpal tunnel syndrome, most notably women, who are three times as likely to suffer from the condition as men. Research indicates that this may be anatomical – a female's nerves are smaller, and therefore more easily compressed than a male's. Age and obesity also are predisposing risk factors.
17. According to Dr. Backus, only a minority of carpal tunnel cases are related to a person's work activities. Research has shown that the types of work that are most likely to cause carpal tunnel are assembly line work, sewing and poultry or fish packing. This is because those activities require the same muscle pattern to be repeated two or three times per minute for many hours. Generally, however, according to Dr. Backus, the available research establishes that the strength of the evidence supporting occupational risk factors is considerably less than that supporting genetic or inherited risk factors.
18. Dr. Backus testified that in order for work to cause carpal tunnel syndrome there needs to be a combination of forceful and/or sustained gripping in awkward non-neutral postures, particularly if cold and vibration are also present. In his opinion, Claimant's work did involve some risk for carpal tunnel syndrome in her right hand, given the scraping motion she had to use, but he concluded that the motion was neither repetitive nor forceful enough to have caused her to develop the condition.
19. As for Claimant's left carpal tunnel syndrome, Dr. Backus concluded that she had no work-related risk factors at all. In his opinion, the fact that Claimant had to hold a mirror in her left hand while performing dental hygiene and/or periodontal procedures did not pose a significant risk for carpal tunnel syndrome.

¹ Nathan, PS Meadows, KE Istvan JA, "Predictors of Carpal Tunnel Syndrome in an 11 Year Study of Industrial Workers", *Hand Surg* 2002; 27A 644-661; Nillson: *Arbete Och Vetenskaplig Skirfersie* 1995; 5:117-120 (8597); Ring, MD, David, 74th Annual Meeting of AAOS, February, 2007.

20. Although Dr. Backus disputed that Claimant's condition was work-related, he acknowledged that the treatment she had received was both reasonable and necessary. He also acknowledged that Claimant was not yet at end medical result, and that if her condition persists she likely will require surgery.

Dr. Daniel Wing

21. At her attorney's referral, Claimant underwent an independent medical evaluation with Dr. Daniel Wing in July 2008. Dr. Wing is also well known to this Department as an expert. He is board certified in physical medicine and rehabilitation. Dr. Wing has been conducting independent medical evaluations for twenty years.
22. Dr. Wing concurred with Dr. Backus' diagnosis of bilateral carpal tunnel syndrome. In his opinion, Claimant's carpal tunnel syndrome really consists in the symptoms of tingling, numbness and pain in her wrists and hands. He found demonstrable inflammation in her wrists bilaterally, and concluded that her nerves were not only malfunctioning but actually injured. Consistent with Dr. Backus' opinion, Dr. Wing also expects that Claimant likely will need surgery in both wrists.
23. As to the likely cause of Claimant's condition, Dr. Wing disagreed with Dr. Backus. Based both on Claimant's work history and on her symptoms, Dr. Wing definitely believes that her carpal tunnel syndrome is causally related to her work. According to Dr. Wing, Claimant probably was predisposed to carpal tunnel syndrome because of her age, gender, weight and prior medical history (which includes tendonitis).
24. In Dr. Wing's opinion, Claimant developed carpal tunnel syndrome both because she was predisposed to it and because she then engaged in an activity that was likely to create its symptoms. As an analogy, he likened Claimant's situation to a glass filled with fluid. For those who are not predisposed to carpal tunnel syndrome, the glass might only be one-quarter full. For those who are predisposed, however, the glass is already three-quarters full. When activities involving forceful wrist motions or awkward hand positions are added to the mix, the three-quarters-full glass will overflow, and that person will develop carpal tunnel syndrome. A person with fewer predisposing factors will not develop the condition, even though they might engage in the same activities.
25. Thus, Dr. Wing found that when Claimant used her right hand to scrape patients' teeth, this involved the type of forceful motion that combined with her predisposition to cause carpal tunnel syndrome. Holding a mirror with her left hand in an awkward position had the same effect on that side.
26. Dr. Backus countered Dr. Wing's analogy with one of his own – that of an employee who is legally blind when hired. This person's job responsibilities might strain his or her visual acuity and thereby cause symptoms, but the work-related activities themselves would not have caused the blindness to occur. Thus, in Dr. Backus' opinion, Claimant suffers from carpal tunnel syndrome because she is female, over age fifty and overweight for her height. Her work as a dental hygienist might exacerbate her symptoms, but it cannot be identified as the cause of her condition.

27. Claimant has filed a request for litigation costs in the amount of \$1,960.30 and attorney fees totaling 20% of any award of retroactive temporary disability benefits, not to exceed \$9,000.00.

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 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 v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. In the instant case, Claimant has produced unrefuted evidence that she suffers from bilateral carpal tunnel syndrome. The dispute centers on whether her predisposing factors – age, gender, weight and prior medical history – have caused her condition, or whether her work as a dental hygienist has played a causative role as well.
3. Dr. Backus relies primarily on research findings that document a causative relationship between certain predisposing factors and the likelihood that a person will develop carpal tunnel syndrome as support for his conclusion that Claimant's work did not cause the condition to occur. This may be true, but in workers' compensation matters it is well-settled that an employer takes its employees as it finds them. *Petit v. North Country High School*, Opinion No. 20-98WC (April 28, 1998). Thus, the employer remains responsible when work activities cause what began as a predisposition to develop into a disabling injury or condition. *Id.* This is true even if the disease, if left to itself, would in time inevitably produce the same result independent of any work-related occurrence or activity. *Marsigli's Estate v. Granite City Auto Sales*, 124 Vt. 95 (1964).
4. There may come a time when the medical research demonstrates with absolute certainty that at a particular age or a specific weight an individual most definitely will develop carpal tunnel syndrome, regardless of any work-related risk factors. We have not yet reached that point, however. Instead, as Dr. Wing cogently stated, we are faced with a claimant whose glass already was three-quarters full with factors that predisposed her to develop carpal tunnel syndrome. Her work added enough risk factors to cause the condition to occur. I find that sufficient to establish compensability.

5. I conclude that Claimant has sustained her burden of proving that her bilateral carpal tunnel syndrome was work-related. As a result of this condition, beginning in January 2008 Claimant had to reduce her work hours from 28 weekly to 21 weekly. Under 21 V.S.A. §646, Claimant is entitled to temporary partial disability benefits beginning with her first week of reduced hours and continuing until she either reaches an end medical result or returns to her pre-injury work schedule, whichever occurs first.
6. As Claimant has prevailed, she is entitled to an award of costs and attorney fees.

ORDER:

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

1. Temporary partial disability benefits from January 2008 until Claimant either reaches an end medical result or returns to her pre-injury work schedule, whichever occurs first;
2. Medical benefits covering all reasonably necessary medical services and supplies causally related to Claimant's bilateral carpal tunnel syndrome;
3. Interest on the above amounts in accordance with 21 V.S.A. §664; and
4. Costs totaling \$1,960.30 and attorney fees totaling 20% of all retroactive temporary partial disability benefits or \$9,000.00, whichever is less.

DATED at Montpelier, Vermont this 22nd day of July 2009.

Patricia Moulton Powden
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.