

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

)	State File No. J-06290
Eileen Holmes)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
)	Commissioner
James Gold, D.D.S.)	
)	Opinion No. 31-00WC

Hearing held in Montpelier, Vermont, on January 28 and March 17, 2000.
Record closed on April 26, 2000.

APPEARANCES:

R. Peter Decato, Esq, for the claimant
Christopher J. McVeigh, Esq, for the defendant

ISSUES:

1. Whether the statute of limitations bars this claim;
2. If the statute of limitation does not bar this claim, to what benefits is the claimant entitled?

EXHIBITS:

Joint I:	Medical Records
Claimant's 1:	Transcript of deposition of Emmanuel Green, Ph.D., May 26, 1999
Claimant's 2:	Transcript of deposition of Peter A. Mason, M.D., October 29, 1999
Claimant's 3:	Claimant's resumé
Claimant's 4:	Letter from Dr. Gold to the claimant dated November 13, 1995
Claimant's 5:	Letter from the claimant to Dr. Gold dated November 24, 1995
Defendant's A:	Time records

FINDINGS OF FACT:

1. At all times relevant to this action, claimant, Eileen Holmes, was an employee and defendant, James Gold, D.D.S., her employer within the meaning of the Workers' Compensation Act (Act).
2. The claimant graduated from the Forsyth School for Dental Hygienists in 1967. From that time until 1995 she worked as a dental hygienist at several dentists' offices, often on a part time basis.

3. The claimant began working for the defendant in his East Thetford dental practice as a dental hygienist in 1987 and worked there until she left his employ on November 27, 1995. She testified that for years she had symptoms in her hand and wrist that she believed were caused by her work. However, a health care provider never confirmed that impression. On her own, at a physician-patient's suggestion, she began to wear a "bubble mitt." It is unclear if anyone in the office noticed the mitt because she generally wore it mid forearm under a long sleeved lab coat. If the mitt had covered the wrist, her coworkers, including Dr. Gold, undoubtedly would have seen it.
4. The claimant testified that by 1993, she was using a wrist brace to relieve her right wrist symptoms. She did not use the brace at work, but kept it in her car, putting it on and taking it off as she drove to her work and back home again.
5. Dr. Gold testified that he never saw the claimant use a wrist brace at work, nor did he ever see her with the bubble mitt. Rhonda Welch, an employee at Dr. Gold's office whose tenure overlapped with the claimant's, testified that she never heard the claimant complain about right wrist symptoms. Although the defense seems to suggest that the claimant was hiding her condition and thereby prejudicing the employer, I interpret the fact that no one knew of her symptoms to mean that they were not significant at that time, as Dr. Mason's 1994 later indicated.
6. As a dental hygienist, claimant frequently had to use ultrasonic equipment to help her clean patients' teeth. In doing so she had to hold her arm in an elevated position with her 4th and 5th fingers placed on the patient's jaw. The equipment she used vibrated. The hand and arm movements required in that job were repetitive.
7. Peter Mason, M.D., is the claimant's primary care physician and was deposed in this case on October 29, 1997. The transcript from that deposition has been admitted into evidence. Dr. Mason testified that he is a board-certified family practice physician who has done extensive work in occupational health.
8. On September 15, 1994, the claimant saw Dr. Mason with a complaint of right forearm and wrist pain off and on. Significantly, when the claimant was examined at that visit she demonstrated no weakness and no pain on resisted rotation or on resisted extension or flexion of the wrist. At his deposition, Dr. Mason explained that at the time of that examination, he had no basis from which to diagnose carpal tunnel syndrome. He prescribed ice, anti-inflammatory medications, rest breaks, and a decrease in hours for what he diagnosed as an overuse syndrome that he fully expected would improve.
9. The claimant followed Dr. Mason's advice for ice and medication and altered her schedule to work fewer days each week. She testified that she favored her right hand, was conscious of what not to do, and wore a splint to avoid straining it. However, she did not tell Dr. Gold about Dr. Mason's recommendation and no effort was made to make formal job modifications. Dr. Mason acknowledged that it is preferable to treat carpal tunnel syndrome or an "overuse" condition, which often presages carpal tunnel syndrome, sooner rather than later to prevent more long lasting damage to the patient. However, he also said he never suspected carpal tunnel syndrome until after the claimant had left Dr. Gold's employ in 1995. He fully expected her to recover from what he had diagnosed as overuse syndrome a year earlier.

10. In November 1995 the claimant and Dr. Gold had an employment dispute that led to an exchange of letters and hard feelings. In a November 24, 1995 letter, the claimant told Dr. Gold that she had right wrist symptoms and that she would not be returning to work.
11. On November 25, 1995, the claimant returned to Dr. Mason with several complaints, including discomfort in her right arm. On November 27 she stopped working and has not worked since. At his deposition, Dr. Mason testified that he took her out of work on November 27 for a blood pressure problem, not the hand and wrist complaints.
12. Although the claimant clearly had hand and wrist symptoms, she left her job in November 1995 because of a conflict with her employer, not because of the wrist complaints.
13. The claimant returned to Dr. Mason's office on December 1, 1995 with specific complaints of numbness in her right hand, thumb, and adjacent fingers as well as pain radiating up her arm. She said that although she had had those symptoms off and on for about two years, they had gotten worse in the previous couple of months. On examination, Dr. Mason noticed positive Tinel's and Phalen's signs, clinical indicia of carpal tunnel syndrome. Therefore at that December 1, 1995 visit, the diagnosis of carpal tunnel syndrome was made for the first time. Although the claimant had had wrist and hand examinations in the past, this was the first time that she exhibited positive clinical signs.
14. On March 25, 1996, Dr. Mason noted that claimant's carpal tunnel syndrome was slowly improving, although she had occasional symptoms when she used her right hand for small tasks. At night she used a splint to relieve the symptoms.
15. In an April 5, 1996 letter, Dr. Mason expressed his opinion that claimant's work as a hygienist caused her wrist symptoms and that she was disabled from her regular job.
16. Victor Gennaro, M.D., whom the defendant retained, also diagnosed claimant's hand and wrist problem as occupationally related carpal tunnel syndrome. Dr. Gennaro testified that permanent damage, with resultant increased symptoms, probably resulted from not having claimant's condition addressed sooner. Furthermore, he characterized as "absurd" the claimant's position that she is vocationally disabled. He observed that the claimant is a lively engaging individual and opined that her residual skills and personal attributes would allow her to obtain employment.
17. After Dr. Donald W. Ayres, a neurologist, met with the claimant in July 1998, he assigned a permanent partial impairment of 10% of the upper extremity or 6% of the whole person.

Vocational Rehabilitation Benefits

18. Emmanuel B. Green, Ph.D., testified as the claimant's vocational rehabilitation expert. Dr. Green holds a Ph.D. in Clinical Psychology and has done graduate study in economics for vocational rehabilitation professionals. He currently works as a vocational psychologist in Brookline and Worcester, Massachusetts, and provides evaluations that

are used in various judicial settings. On October 15, 1998, he evaluated the claimant in an effort to determine her ability to perform her previous work or to perform any work on a sustained basis. His evaluation included an assessment of the claimant's vocational background, standardized testing, dexterity evaluations and self-described functional limitations.

19. At his deposition on May 28, 1999, Dr. Green opined that the claimant's right upper extremity impairments resulted in occupational limitations that preclude her from returning to her former work as a dental hygienist and that those impairments precluded her from performing, on a sustained basis, any other work in the competitive work market. His evaluation included a letter from Dr. Mason stating that the claimant was occupationally disabled and results of the dexterity tests demonstrating that the claimant was unable to perform any work activities that require ongoing consistent finger dexterity with her dominant right hand or both hands together. It also included the self-assessment where the claimant explained that she could carry items, such as a bag of groceries, only with her non-dominant left arm and when she is in a seated position she needed support for her right arm. She said that reaching overhead brought on numbness, as did extreme cold and vibrations. Activities involving only the lower extremities, including climbing stairs, bending, stooping, kneeling and crouching were not affected.
20. Dr. Green did not do a labor market survey to analyze potential employments that suited the claimant's aptitude and physical capacity.
21. The defendant objected to the admissibility of Dr. Green's opinion on any vocational rehabilitation issues on the basis that he is not a qualified vocational rehabilitation counselor under the rules that this Department has established. See Rule 26(d), 1995 *Vermont Workers' Compensation Rules*.
22. John May, a certified vocational rehabilitation counselor who has been practicing in Vermont, assessed the claimant's vocational rehabilitation needs for the defendant. Mr. May concluded that the claimant has transferable skills that have provided her with employability ever since November 1995 when she left work with Dr. Gold. Mr. May also observed that the claimant possessed many personal attributes that positioned her well for obtaining employment. His review of the labor market in Vermont demonstrated that positions such as a dental health education position were available to the claimant without her needing any retraining or additional education. Dr. Mason supported that opinion with his testimony that many of the activities of a dental hygienist, including taking x-rays, performing oral examinations and reviewing patients' charts, would not be a problem for the claimant despite her carpal tunnel syndrome.
23. Although Dr. Mason stated in an April 5, 1996 letter to CNA that he did not think the claimant could return to work as a dental hygienist, he later qualified that opinion stating that she could perform dental hygienist duties that did not aggravate her carpal tunnel condition.
24. The claimant concedes that she has made no effort to look for work since she left Dr. Gold's office. Her activities consist of travel, work on volunteer nonprofit boards, and playing golf a few days per week when the weather permits. She drives and performs

other activities, but her carpal tunnel syndrome prevents her from engaging in other activities.

Occupational Disease

25. The claimant's work as a dental hygienist over many years caused her to develop carpal tunnel syndrome. Because Dr Mason testified that carpal tunnel syndrome is an occupational disease for dental hygienists, the defendant maintains that this case should have been filed under the Occupational Disease Act.

Refusal of Medical Services

26. Dr. Mason and Dr. Gennaro discussed surgery for the relief of claimant's carpal tunnel symptoms. However, the claimant rejected a surgical approach because of what to her is too great a risk. She prefers to use a wrist splint when needed.
27. Dr. Gennaro explained the process of performing an endoscopic carpal tunnel release. After the administration of a local anesthetic, a small surgical tool cuts the ligament to free the obstruction causing pressure on the carpal tunnel nerve. In his estimation, the risk of complications is small. He opined that the claimant's symptoms would improve substantially, although not completely.
28. Surgery is likely to improve the claimant's symptoms but it is not expected to restore her hand and wrist functioning completely. It is unlikely that the claimant would be able to return to all the duties of a dental hygienist even if she had the surgery.

CONCLUSIONS OF LAW:

Statute of Limitations

1. The parties agree that the claimant suffered an injury that arose out of and in the course of her employment with Dr. Gold. However, the defendant argues that he should not be liable for workers' compensation benefits because the claimant failed to give timely notice of the injury and that, as a result, Dr. Gold was prejudiced. Alternatively the defendant argues that this claim is an occupational disease claim, not appropriately filed under the Workers' Compensation Act and that even if this claim is found to be compensable, the claimant is not entitled to temporary total disability payments or vocational rehabilitation benefits.
2. Pursuant to 21 V.S.A. § 656 (a), notice of an injury is to be given to the employer as soon as practicable after the injury and "within six months after the date of the injury." Failure to give notice within the six months, however, "shall not be a bar to proceedings under the provisions of this chapter if it is shown that the employer ... had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice." The date of injury for purposes of giving notice and filing a claim is the point in time when an injury becomes reasonably discoverable and apparent. *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443 (1985); 21 V.S.A. § 656 (b). The employee necessarily must have knowledge of the injury in order to make a claim. *Fitch v. Parks & Woolson Machine Co.*, 109 Vt. 92 (1937).

3. A cause of action is generally said to accrue upon the "discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery." *Union Sch. Dist. v. Lench*, 134 Vt. 424, 427 (1976).
4. When the claimant saw Dr. Mason in 1994, he told her that she should take work breaks and reduce the number of hours she worked. He diagnosed an overuse syndrome that he fully expected would resolve. Although Dr. Mason now believes that the claimant was suffering from carpal tunnel syndrome at the time, he had not assigned that diagnosis to her condition back in 1994. Regardless of the precise diagnosis, however, the claimant had knowledge in 1994 that she had a hand and wrist condition that was related to work. At that time, her injury was reasonably discoverable and apparent. The statute of limitations, therefore, began to run on September 15, 1994.
5. Because the claimant did not tell the employer of her work-related condition within six months of September 15, 1994, this claim is barred by 21 V.S.A. § 656 (a), unless the claimant can prove that the defendant was not prejudiced by the delay. § 660; *Larrabee v. Citizens Telephone Co.*, 106 Vt. 44 (1934).
6. The defendant argues that the claimant should have known that her condition would worsen even though her physician expected it to improve. Dr. Gold testified that he would have made work place modifications if he had known the claimant had a work-related injury. However, the claimant has proven that she took reasonable measures to minimize stress on her hands and wrist, even though she did not specifically tell her employer about her hand and wrist pain. Although the employer did not modify her work place, the claimant has proven lack of prejudice by following the instructions her treating doctor had given her. She did not leave the problem unattended. She took anti-inflammatory medications, applied ice, took breaks and cut back on her working hours. With a diagnosis of over use syndrome and those specific instructions from Dr. Mason, it is unlikely that the employer would have done more than what the claimant did herself.
7. Not until the carpal tunnel diagnosis was made in November of 1995 were the claimant and her employer on notice that work place modifications were probably needed. The fact that the claimant and Dr. Gold had a dispute that month may have been enough to make the employer suspicious of the claim. But the convincing medical evidence demonstrates that the concurrence of the two events was purely coincidental.
8. Because the claimant has proven lack of prejudice to the employer and filed the claim within six years of the date the work-related nature of her condition became reasonably discoverable and apparent, this claim is not barred by the statute of limitations.

Temporary Total Disability Benefits

9. The claimant maintains that she has been temporarily totally disabled since November 1995. The defendant points to the claimant's own physician's testimony that he took her out of work in November 1995 for one week because of her blood pressure problem, not her carpal tunnel syndrome. Consequently, she lacks the medical evidence necessary to demonstrate that her carpal tunnel syndrome totally disabled her in November.

10. "The general rule is that a claimant who voluntarily quits [her] job for reasons having nothing to do with the injury is not entitled to temporary total disability compensation." *Andrew v. Johnson Controls*, Opinion No. 3-93 (June 13, 1993) (citations omitted). The reason underlying the rule is that it is not the work injury that leads to a loss of earnings. To avoid harsh results, exceptions to this general rule have been carved out for a claimant who can demonstrate: 1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors. *Id.* at 9.
11. This claimant voluntarily removed herself from the work force in November of 1995 for reasons wholly unrelated to her carpal tunnel syndrome. Why she was able to work before her November departure and not afterwards has never been explained. She has made no attempt to return to the work force. Although Dr. Green opines that she is unable to do any kind of work, his conclusion lacks the support needed to be accepted. For example, he relied on a statement to that effect from Dr. Mason who has since opined that the claimant is able to work. And he accepted the conclusions from the claimant whose statements about her own lack of abilities seem to be unrealistic given the objective testing, permanency rating and her daily activities.
12. Therefore, the claim for temporary total disability benefits must fail.

Surgical Treatment

13. The defendant characterizes the claimant's decision not to have her carpal tunnel condition treated surgically as an unreasonable refusal to undergo medical treatment. Dr. Gennaro testified that the recommended surgery would be helpful and posed little risk. The claimant's treating physicians discussed treatment options with her, including surgery.
14. This Department held in *Bradley v. Giroux Body Shop*, Opinion No. 3-88WC (Sept. 30 1988) that a claimant's refusal to undergo treatment for any aspect of the psychological aspect of his claim barred him from receiving benefits during the time of the refusal in light of clear evidence that the claimant could not engage in a rehabilitation program successfully without that treatment. However, in *Knight v. Ames Department Stores*, 1-93WC (May 5, 1993) a claimant's decision not to undergo injection therapy for back pain was not considered unreasonable even though the employer had produced testimony that the therapy had minimal risks and a good chance of providing significant benefit to the claimant. The evidence in *Knight* demonstrated that it was possible to get prolonged relief from the injections, but that they did not always afford long-term relief. Obviously the injections in *Knight*, like the proposed surgery in this case, can be characterized as elective with the choice clearly that of the claimant. Although some physicians recommend the surgery for the claimant, no one can say that she could return to the full duties of a dental hygienist even with the surgery. The claimant's choice to pursue only non-surgical approaches to her carpal tunnel condition is a reasonable medical option presented to her. The defendant has not convinced me otherwise.

Vocational Rehabilitation

15. Because Dr. Green is not an expert certified to provide vocational rehabilitation services in Vermont, the defense argues that he is not qualified to render an expert opinion in this case. Although our vocational rehabilitation rules may prevent him from offering direct services in this state, there is nothing in our cases or rules that disqualifies an out of state expert from rendering an opinion in a case. The choice between that opinion and the defense expert opinion depends on the factors typically evaluated in choosing between experts including the qualifications of the experts' professional training and experience, the comprehensiveness of the evaluation, and the objective support for the opinions expressed. See, *Morrow v. VT Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Sept. 1 & July 20, 1998) (listing criteria to be considered for the evaluation of medical expert opinions).
16. Under 21 V.S.A. § 641 the claimant must show that "as a result of an injury covered by this chapter, [she] is unable to perform work for which [she] has previous training or experience." The worker's compensation rules provide: "Vocational rehabilitation shall be provided by an employer when, as a result of a compensable injury or occupational disease, an injured worker is unable to return to suitable employment using his/her previous training or experience." The Vermont Worker's Compensation and Occupational Disease Rules, Rule 27.
17. The defense expert, Mr. May, testified that the claimant has a work capacity and that should she undergo the endoscopic carpal tunnel release, with improved symptoms, she would have an even broader range of vocational choices to which her transferable skills would apply. Mr. May performed a limited market survey and identified jobs such as public health educator and dental health educator that she could perform now without any additional on the job or short term training. Furthermore, he testified that on the job training would qualify the claimant for suitable employment as a personnel manager and sales representative for dental and mental equipment and supplies.
18. On behalf of the claimant, Dr. Green rendered an opinion that was based at least in part on the assumption that the claimant left her job because of hand and wrist discomfort and on a report from Dr. Mason that the claimant had no work capacity at all. Dr. Green concluded that the claimant could not do her previous work or any other kind of work.
19. The experts both have professional training and experience that make them qualified to render opinions in this case. Both conducted thorough interviews and relevant evaluations of the claimant. Mr. May identified specific jobs for which this claimant is qualified.
20. However, Dr. Green's opinion cannot be accepted because it is based on a faulty premise and because it runs counter to objective facts. He based his opinion that the claimant cannot engage in any type of work on a note to that effect from the claimant's primary care physician, Dr. Mason. Yet Dr. Mason testified that the claimant has a work capacity. Dr. Mason also testified that his earlier statement to the effect that the claimant left work in 1995 because of her hands was an error. He took her out of work for a week in 1995 because of her blood pressure, not carpal tunnel syndrome. Mr. May convincingly contradicted Dr. Green's opinion with a list of specific suitable jobs for which this claimant has had previous training and experience. His opinion that the

claimant has the skills to return to suitable work is based on an accurate assessment of the claimant's medical problems and her job-related abilities.

21. Mr. May has convinced me that with the wealth of training and experience this claimant possesses, she is well positioned to return to suitable work. Her failure to do so is not due to a work-related injury. Therefore, her claim for vocational rehabilitation benefits must be denied.

Occupational Disease

22. An occupational disease is a "disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and to which the employee is not ordinarily subjected or exposed outside of or away from his employment 21 V.S.A. § 1002(5) (repealed in 1999); see also 21 V.S.A. § 601 (23). The defendant argues that this case should be characterized as an occupational disease claim, not a workers' compensation claim, because Dr. Mason opined that the syndrome was an occupational disease for dental hygienists. However I cannot agree that carpal tunnel syndrome comes within the definition of an occupational disease and cannot ignore the long line of cases in this Department recognizing carpal tunnel syndrome as a worker's compensation injury. See e.g., *Jefts-Martin v. Claussen's Florist & Greenhouse*, Opinion No. 43-96WC (July 15, 1996); *Kelly v. Webster Corp.*, Opinion No. 08-97 WC; (June 13, 1997); *Savage v. International Cheese Co., Inc.*, Opinion No.60-95WC (Oct. 23, 1995). The claimant's injury is not an occupational disease claim in this state.
23. In sum, the claimant has proven that she suffered a compensable worker's compensation injury. She is, therefore, entitled to medical expenses and permanent partial disability benefits. However, she has not proven her entitlement to temporary total disability or vocational rehabilitation benefits.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, I conclude that the claimant suffered a compensable injury in the course of her employment with Dr. Gold and hereby order Dr. Gold to provide to the claimant:

1. Payment for medical care necessary for the treatment of her carpal tunnel syndrome;
2. Permanency benefits based on a 6% whole person impairment.

The claims for temporary total disability and vocational rehabilitation benefits are DENIED.

Dated at Montpelier, Vermont, this 2nd day of October 2000.

R. Tasha Wallis
Commissioner