J. H. v. NSK Corporation (December 3, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

J. H.

v.

NSK Corporation

Opinion No. 50-08WC

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. Y-03544

OPINION AND ORDER

Hearing held in Montpelier on August 18, 2008
Record closed on October 1, 2008

APPEARANCES:

Erin Gallivan, Esq. for Claimant
David Cleary, Esq. for Defendant

ISSUES:

1. Are Claimant's left shoulder and arm complaints causally related to her employment and if so, to what workers' compensation benefits is she entitled?

2. Is Claimant's right elbow injury causally related to her employment and if so, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: Video of NSK employee simulating Claimant's work duties
Joint Exhibit III: Video of Claimant simulating her work duties

Claimant's Exhibit A: Photograph of L-shaped desk
Claimant's Exhibit B: Photograph of "problem desk"
Claimant's Exhibit C: Photograph of "problem desk"
Claimant's Exhibit D: Photograph of "problem desk"
Claimant's Exhibit F: E-mails between Claimant and Nurse LaTour, November 2-3, 2006
Claimant's Exhibit G: E-mail from Claimant to Nurse LaTour, November 6, 2006
Claimant's Exhibit H: E-mails between Claimant and Nurse LaTour, November 8, 2006
Claimant's Exhibit I: E-mail from Cindy Knapp to Willis Conklin, November 10, 2006

Claimant's Exhibit J: E-mails between Claimant and Nurse LaTour, November 20, 2006
Claimant's Exhibit L: Letter from Dr. Timura to Dr. Storey, June 12, 2007

Defendant's Exhibit 1: Transcribed interview between Claimant and Michelle Haussmann
Defendant's Exhibit 2: Note from Dr. Timura to Claimant regarding causes of rotator cuff injuries

CLAIM:

1. Temporary partial disability benefits from September 13, 2007 until end medical result pursuant to 21 V.S.A. §646;

2. Medical benefits for treatment of Claimant's left shoulder and right elbow pursuant to 21 V.S.A. §640;

3. Vocational rehabilitation benefits pursuant to 21 V.S.A. §641;

4. Attorney's 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 of Defendant and Defendant was an employer within the meaning of Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.

3. Claimant worked for Defendant for more than fifteen years. For the past several years, her job was Data Entry/Control Clerk. Part of this job involved checking a daily transaction register against a pile of lot control sheets for accuracy. To do so, Claimant had to sort 100-150 pieces of paper multiple times into anywhere from two to fifteen piles on her desk. This part of her job took between two and four hours daily and had to be completed as soon as possible every morning.

The injury

4. Historically Claimant had worked at an L-shaped desk where she was able to spread the piles of paper comfortably within her reach. However, in April or May 2006 Claimant's work station was changed – the L-shaped desk was removed and replaced with a smaller rectangular desk. With this new work station, Claimant could fit only seven piles of paper on the rectangular desk in front of her, and therefore had to put some piles on a small end table to the left of her desk. Claimant brought in the end table because her work station was no longer large enough to accommodate her work assignments.

5. Placement of the piles of paper on the small end table on the left required a significant reach for Claimant with her left arm. On an average day, she would have to lean over to her left with her left arm fully extended approximately 75 to 100 times.

6. In the summer of 2006 Claimant started having pain in her left arm at the end of the work week. By the end of September 2006, the pain was occurring daily and she was taking ibuprofen several times a day. The pain would be worse by the end of work week and feel somewhat better after the weekend.

7. Claimant's arm felt weighted down as if a toddler was pulling on it and she also had some numbness and tingling. The pain had begun to interfere with her ability to sleep. By the end of October and early November Claimant was in significant pain that interfered with her daily life.

First Report of Injury

8. In early November 2006 Claimant reported to Defendant's "in-house" nurse, Bonnie LaTour, that she was having left arm pain that she believed was work-related. Initially, Nurse LaTour advised Claimant to see her primary care physician. However, after speaking with Human Resources personnel, Claimant realized that Nurse LaTour did not understand that she believed her pain was work-related. She informed Nurse LaTour of this fact and an appointment was scheduled with Defendant's company doctor, Dr. Timura.

9. Although Claimant had reported her injury as work related, Nurse LaTour did not file a First Report of Injury with the Department of Labor until two and a half months later, in late January 2007. The date of injury on the First Report was back-dated to the time it was initially reported.

10. The delay in filing the First Report of Injury may have been due in part to Claimant's own doubts as to work-relatedness. Initially, Claimant ascribed the cause of her pain to her altered work station. After meeting with Nurse LaTour and Dr. Timura, however, Claimant herself began to question whether an activity as innocuous as moving pieces of paper from one pile to another could cause an injury. Nevertheless, Claimant had experienced no prior shoulder or arm injuries, and ultimately concluded, in her own mind at least, that her work could be the only cause of her injury.

Medical Treatment

11. Claimant first saw Defendant's company physician, Dr. Timura, on November 9, 2006. Dr. Timura received his medical degree from Tufts Medical School and is certified in internal medicine. As Defendant's company doctor, he is experienced in evaluating the types of injuries employees there typically suffer. He also has attended a variety of seminars on both orthopedic and other types of injuries.

12. Dr. Timura diagnosed Claimant with left upper extremity pain of unclear etiology, though probably originating from her shoulder. He refrained from making any conclusion as to whether the injury was work-related until Nurse LaTour completed an ergonomic evaluation of Claimant's work station. Nurse LaTour has attended some work shops in ergonomics, and has undertaken work station evaluations for Dr. Timura in the past.

13. After viewing Claimant's work station, Nurse LaTour concluded that the arm reach to the left end table was "uncomfortable" for Claimant. Therefore, she strongly recommended changes to Claimant's desk setup. Nurse LaTour moved articles on Claimant's desk to make additional room and suggested pulling out desk drawers in front of her to make space for sorting piles of paper. Nurse LaTour took no measurements of either the distance Claimant had to reach with her left arm or the height of her work station.

14. Despite the problems she noted with Claimant's work station and the suggestions she made to address them, Nurse LaTour nevertheless concluded that Claimant's shoulder problem had not been caused by repetitive reaching with her left arm over to the left end table. Nurse LaTour reported the results of her evaluation to Dr. Timura.

15. With the results of Nurse LaTour's evaluation of Claimant's work station in hand, Dr. Timura concluded that Claimant's left shoulder pain was not causally related to her job duties. Dr. Timura again stated that he did not know what was causing Claimant's pain.

16. In late November 2006 Dr. Timura referred Claimant to Dr. Whittum, an orthopedic surgeon. Claimant reported to Dr. Whittum that the shoulder and arm pain she was experiencing was caused by her work. Dr. Whittum administered a subacromial injection in her shoulder which temporarily alleviated most of her arm and shoulder pain.

17. Dr. Whittum's opinion as to the cause of Claimant's left shoulder pain was somewhat inconsistent. In his January 7, 2007 office note he remarked that upon his first examination of her, Claimant had stated that she believed her injury was causally related to her job duties. Dr. Whittum stated that he agreed with that assessment and on those grounds he requested that Defendant pay for the MRI he was recommending through its workers' compensation program.

18. Following his request, however, Dr. Whittum had telephone conferences with both Nurse LaTour and Dr. Timura. Dr. Timura advised Dr. Whittum that based on Nurse LaTour's ergonomic assessment of Claimant's work station and job duties, he had concluded that Claimant's injury was not work-related. Subsequently, in his January 13, 2007 note Dr. Whittum wrote that he concurred with Dr. Timura's and Nurse LaTour's conclusions. Notably, Dr. Whittum did not ask Claimant for further information regarding her work station or job duties before changing his opinion on the causation issue.

19. In January 2007 Claimant underwent an MRI of her left shoulder at Southwestern Vermont Medical Center. The results showed "mild undersurface hypertrophic change and some other inflammatory change in the AC joint." The MRI did *not* show any rotator cuff tear, bursitis or acromial spur – all findings that later were seen on the MRI done at Dartmouth Hitchcock Medical Center.

20. Claimant continued to have pain. In March 2007 she underwent an evaluation with Dr. Joseph Kratzer, a neurologist, to determine if her pain might be related to a nerve injury. Dr. Kratzer diagnosed a left brachial plexopathy involving the left medial nerve. Based on Claimant's description of her job duties and work station, Dr. Kratzer concluded that this problem was work-related. Claimant continued working even though her symptoms were painful.

21. At Defendant's request, in June 2007 Claimant underwent an independent medical evaluation with Dr. James Storey, a neurologist. Dr. Storey disputed Dr. Kratzer's conclusion that Claimant had suffered a neurological injury. Instead, he diagnosed left-sided tendonitis, which in his opinion was not work-related.

22. Dr. Storey's causation opinion was based in part on a video Nurse LaTour had made that purported to simulate Claimant's paper-sorting job duty. Although Nurse LaTour had represented to Dr. Storey that the individual in the video was of the same or similar stature as Claimant, in fact it depicted a gentleman who was seven inches taller than Claimant, with what appears to be a significantly longer arm span.

23. At some later point Dr. Storey did view a video of Claimant herself at her work station, simulating the movements involved in her paper sorting task. After seeing this video, Dr. Storey stated that he could understand how Claimant could develop tendonitis from the repetitive reaching to the left that that task required. Dr. Storey testified that he still did not believe that the task involved sufficient torque on Claimant's upper arm to cause a partial rotator cuff tear, but admitted that as a neurologist, he would defer on that issue to an orthopedist.

24. Continuing to have problems with her shoulder, and confused about whether she had a neurological or orthopedic injury, Claimant saw both a neurologist and an orthopedist at Dartmouth Hitchcock Medical Center in September 2007. The neurologist, Dr. Lawrence Jenkyn, confirmed that Claimant did not have a neurological injury but rather an overuse syndrome of her left shoulder, which in his opinion was work-related. Dr. Jenkyn took Claimant out of work for eight weeks beginning September 13, 2007 and placed her in the care of Nikki Gerwitz, PA.

25. Dr. John-Eric Bell, an orthopedic surgeon, also evaluated Claimant at DHMC. He obtained a new MRI study, which showed both bursitis and a partial rotator cuff tear. It also revealed "a slightly inferior tilt to the acromion with curved undersurface." In Dr. Bell's opinion, this anatomical feature should have been visible in the prior MRI done at Southwestern Vermont Medical Center, but due to the poor resolution of the images produced by the machine there it was not discernable.

26. Dr. Bell testified that people with acromial spurs on the top of their shoulders have a greater frequency of partial rotator cuff tears and other shoulder problems than do those without that anatomical feature.

27. In March 2008 Dr. Bell performed arthroscopic surgery on Claimant's left shoulder. After viewing her shoulder arthroscopically, Dr. Bell concluded that Claimant had suffered a partial tear of her left rotator cuff, partial subacromial bursitis, and a degenerative "slap" tear in her left shoulder – a fraying of the cartilage, or labrum, surrounding the shoulder socket. Dr. Bell determined that these injuries resulted from the repetitive reaching Claimant did with her left arm at work. In his opinion, Claimant's need for surgery was due to wear and tear on her shoulder causally related to her long work history with Defendant and the reaching she had to do after the configuration of her work station changed in the spring of 2006. Absent evidence of a trauma, Dr. Bell found no other reason for Claimant's condition.

28. Dr. Bell was adamant in his testimony that Claimant's injury "more likely than not" was causally related to the amount of reaching she had to do with her left arm at work. He testified that he was not familiar with the term "to a reasonable degree of medical certainty."

29. Following Dr. Bell's surgery, Claimant has experienced significant relief of her left arm and shoulder pain. She has been referred to physical therapy, with a goal of twelve to twenty weeks before engaging in full active motion. There was no evidence presented at hearing that she is yet at end medical result.

30. Defendant did not present any evidence of other specific trauma or injuries that could have caused Claimant's shoulder to be injured. Defendant noted that Claimant did some lifting when her mother moved in 2007 and also did some raking in the summer of 2006. There was some evidence that Claimant had to ice her shoulder after these events, but there is no evidence that either of these incidents necessitated medical treatment.

31. At some point after she stopped using her left arm at work, Claimant's right elbow began to bother her. Physician's Assistant Gerwitz diagnosed Claimant with right elbow epicondylitis, causally related to the overuse that resulted when Claimant was instructed not to use her left arm. Claimant's right elbow pain resolved with physical therapy, and no further treatment was advised.

32. Claimant was terminated from her employment with Defendant on September 13, 2007 due to her work limitations.

33. Claimant testified that she liked her job, and did not want to leave Defendant's employment. She kept working for a full year even though she was experiencing a significant amount of pain. She only stopped working when Dr. Jenkyn advised her to do so. Thereafter, she tried to return to work but was terminated by Defendant due to her physical limitations. Claimant did not submit any testimony as to either her job search efforts or employment thereafter.

34. There was no evidence submitted that Claimant was dishonest or did not testify accurately. Nurse LaTour corroborated that Claimant was honest and agreed that there was no reason to doubt the accuracy of Claimant's description of her work duties.

CONCLUSIONS OF LAW:

1. It is the claimant's burden to establish all facts essential to support a workers' compensation claim. In order to do so, he or she must establish a medical condition arising out of and in the course of employment. *Goodwin v Fairbanks, Morse and Co.*, 123 Vt. 11 (1963).

2. Sufficient competent medical evidence must be admitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. Book Press,* 144 Vt. 592 (1989).

3. As in the instant case, when the causal connection is obscure and a lay person would have no well-grounded opinion as to causation, there must be expert medical testimony to sustain the burden of proof. *Jackson v True Temper Corporation,* 151 Vt. 592 (1989).

4. Claimant argues that when her work station was changed in the spring of 2006, she had to stretch beyond her normal reach almost a hundred times daily in order to complete the paper sorting task involved in her job. There are conflicting medical opinions as to whether this work-related activity caused her left shoulder and right elbow injuries.

5. Where expert medical opinions are conflicting, 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 (Sept. 17, 2003).

6. I find Dr. Bell's opinion to be the most credible in this case. Not only was he Claimant's treating physician, but as an orthopedic surgeon he fully understood the unique physiology of Claimant's shoulder, particularly the anatomical defect in her acromion, and how the types of movements her work tasks required of her, when superimposed on that anatomy, likely caused her injuries. Dr. Bell reached his conclusions as to causation after having viewed Claimant's shoulder surgically and therefore having confirmed the findings of the higher quality MRI taken at Dartmouth Hitchcock Medical Center. All of these factors combine to make his opinion the most persuasive.

7. In contrast, the causation opinions propounded by the other medical experts are problematic. Although Dr. Whittum is an orthopedic surgeon, his opinion is somewhat tainted by the fact that he relied on the poorer quality MRI taken at Southwestern Vermont Medical Center, which did not reveal any of the findings apparent on the MRI that Dr. Bell reviewed. It is troubling, furthermore, that Dr. Whittum apparently changed his causation opinion based solely on Dr. Timura's and Nurse LaTour's assertions that Claimant's work station and job tasks did not cause her injury, without investigating further what the basis of these assertions was and whether Claimant might have provided further illumination on the matter. His conclusion is rendered less credible as a result.

8. As for Dr. Storey, he admitted that as a neurologist he would have to defer to an orthopedic expert as to the causation of what ultimately was determined to be an orthopedic injury. On those grounds, his opinion must be discounted as well.

9. Defendant argues that Claimant's injury must have occurred between the dates of the two MRI examinations because the later one showed the rotator cuff tear when the first one did not. This argument is unpersuasive. The first MRI was of such poor quality that it showed almost nothing. In particular, it did not even depict the peculiar formation of Claimant's acromion, a finding that even Defendant's expert agreed was anatomical and therefore must have existed all along. It is far more likely than not, therefore, that findings revealed on the later MRI were not "new" *per se*, merely more observable because of the higher quality images produced by a better MRI scan.

10. Defendant also argues that Dr. Bell's use of the "more likely than not" standard for his opinion as to causation rather than the "reasonable degree of medical certainty" standard is problematic. I find no reason to conclude that Dr. Bell's use of the standard with which he was more familiar necessarily means that the standard typically used in workers' compensation matters has not been met. There is nothing magical about using one phrase over the other unless the expert intends that such a distinction be made.

11. I find, therefore, that Claimant has sustained her burden of proving that her left shoulder injuries were causally related to her work station and job activities, and that therefore she is entitled to workers' compensation benefits.

12. As to Claimant's right elbow epicondylitis, the medical evidence substantiates that this condition resulted from her treating physician's instruction that she not use her left arm, which in turn precipitated an overuse injury in her right elbow. Thus, I find this injury to be compensable as well.

13. The evidence establishes that Claimant reached an end medical result for her right elbow injury following a course of physical therapy. As to the left shoulder injury, however, Claimant has not yet reached an end medical result. Depending on her job search efforts and employment after Defendant terminated her, Claimant may be entitled to temporary disability benefits. Insufficient evidence was submitted from which to fashion an award of these or other workers' compensation benefits, however, including permanency and/or vocational rehabilitation benefits. Claimant is left to her further proof on these issues, which can be addressed through the informal process if necessary.

14. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $2,625.00 and attorney's fees totaling $14,328.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find that they are appropriate here, and therefore these are awarded as well.

ORDER:

Based on the foregoing findings of facts and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Workers' compensation benefits causally related to Claimant's compensable left shoulder injury, in amounts to be proven in accordance with Conclusion of Law 13 above;

2. Medical benefits related to Claimant s compensable left shoulder and right elbow injuries; and

3. Costs in the amount of $2,625.00 and attorney's fees in the amount of $14,328.00.

DATED at Montpelier, Vermont this 3rd day of December 2008.

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.