STATE OF VERMONT
DEPARTMENT OF LABOR

Joanna McNally

v.

State of Vermont
Department of PATH

Opinion No. 43-09WC

By: Phyllis Phillips, Esq.
Hearing Officer

JP Isabelle, Law Clerk

For: Patricia Moulton Powden
Commissioner

State File No. Z-4152

OPINION AND ORDER

Hearing held in Montpelier on May 20, 2009
Record closed on June 19, 2009

APPEARANCES:

Stephen Cusick, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's bilateral enthesopathy of the wrist, carpus and elbow causally related to her work for Defendant?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Marilyn Lindquist notes, May 16, 2007
Claimant's Exhibit 2: E-mail exchanges, April 26th and 27th, 2007
Claimant's Exhibit 3: Computer Workstation Assessment, 5/25/07
Claimant's Exhibit 4: Dr. Kiely progress note, 2/20/08
Claimant's Exhibit 5: Dr. Kiely progress note, 3/18/08
Claimant's Exhibit 6: Dr. Kiely progress note, 4/3/08
Claimant's Exhibit 7: Dr. Kiely progress note, 4/23/08
Claimant's Exhibit 8: Computer Workstation Assessment, 4/7/08

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Temporary partial disability benefits pursuant to 21 V.S.A. §646
Medical benefits pursuant to 21 V.S.A. §640
Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in 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 has worked for Defendant in various administrative positions for sixteen years. For the past three years she has worked as a Benefits Program Specialist in the Division of Health Access. Her role is to process applications and determine eligibility for state-funded health care programs.

4. Claimant's job requires constant typing and data entry. Ninety-five percent of her day is spent on the computer. Claimant held similar jobs in the past, but none involved as much constant and intense keyboarding as her current position does.

5. Shortly after beginning her current job, Claimant's hands began to feel tired towards the end of her work week. She did not seek medical treatment, but did discuss her symptoms with a co-worker, Nicole McAllister. Ms. McAllister advised that at one point her hands had ached at work, but the problem resolved after she asked for an ergonomic assessment of her workstation and began using an ergonomic keyboard. Ms. McAllister suggested that Claimant try the same approach.

6. In April 2007 Claimant sent an e-mail to her supervisor in which she stated that her hands were "pretty tired" by the end of the day and asked that her office be assessed for possible ergonomic improvements. Upon receipt of this request, Claimant's supervisor took the necessary steps to schedule an assessment.

7. During this same time period Claimant also mentioned at a routine visit with Defendant's wellness nurse that her hands were becoming fatigued by the end of her work week. The nurse suggested hand stretch exercises and Advil as needed. She recommended as well that Claimant have her office checked for possible ergonomic changes.

8. In May 2007 Claimant's office was ergonomically assessed. Her chair was adjusted to the proper height, and a new keyboard was recommended so that her shoulders and wrists would be in a neutral position. Claimant testified that despite these changes, her hands continued to be tired and achy by the end of her work week. Still she did not seek medical treatment, however. Instead, she medicated with Advil and took occasional Fridays off to rest her hands.

9. Between August 2007 and February 2008 Claimant visited Dr. Kiely, her primary care provider, five times – four times for acute problems and the fifth time, in January 2008, for a routine annual exam. She did not mention at any of these visits that her hands were tired or achy, and therefore she did not receive any medical evaluation or treatment for these symptoms.

10. On February 18, 2008 Claimant assisted her husband and son shoveling snow from the roof of their home. Claimant testified that this was an activity they typically did at least once each winter. On this day, Claimant estimated that she spent about an hour and a half at the task.

11. When Claimant awoke the next day, her hands were swollen and painful. Claimant testified that this had never happened to her before, and she was very concerned by it, enough so that she sought immediate treatment with Dr. Kiely.

12. Dr. Kiely treated Claimant for bilateral upper extremity pain from February 20, 2008 until August 2008. His diagnosis was bilateral enthesopathy, or damage to the tendons, in Claimant's wrist, carpus and elbow region. For treatment, he prescribed occupational therapy, Advil as needed and reduced work hours.

13. Claimant gradually improved with therapy, but only slowly. By mid-August 2008, she reported that her pain had decreased significantly and was back to the baseline level she had experienced for some time prior to the February snow shoveling incident.

14. From the beginning Dr. Kiely attributed Claimant's condition primarily to overuse caused by her work. He conceded that clearly the snow shoveling incident was the event that caused her to seek medical treatment, and acknowledged that there was no way to know when, or even if, she would have done so otherwise. In Dr. Kiely's opinion, however, in order for that event to have been as significant as it was, Claimant already must have been suffering from a more chronic underlying dysfunction. Otherwise, the snow shoveling incident would not have caused such sustained symptoms, and Claimant likely would have recovered within a relatively brief period of time. The fact that she did not do so, combined with what Dr. Kiely understood to be the ergonomically deficient workstation at which she worked, convinced him that her problem was more one of repetitive stress, not acute insult.

15. Dr. Backus, the independent medical evaluator retained by Defendant, concurred with Dr. Kiely's diagnosis, but not with his opinion as to causation. According to Dr. Backus, Claimant's primary work activity – typing – involves repetitive movement of her fingers, not her hands or forearms. Thus, it would be a very unusual cause of tendon damage in the wrist or elbow, because it does not require the type of repetitive forceful movement that typically is associated with an overuse injury to those joints.

16. In contrast, according to Dr. Backus, the movements associated with snow shoveling require significant force to the tendons of the hand and wrist. Once these tendons become inflamed, it can take months, even years, for the symptoms to resolve. With that in mind, Dr. Backus concluded that the snow shoveling event caused the tendon damage for which Claimant ultimately sought treatment, not any work-related overuse.

17. Dr. Mullins, the orthopedic surgeon with whom Claimant consulted at Dr. Kiely's referral, refined Dr. Kiely's diagnosis from enthesopathy to tendinitis, but concurred nonetheless with his causation analysis. In Dr. Mullins' opinion, Claimant's symptoms were predominantly musculoskeletal, not neurologic, and most likely were due to work-related overuse. Of note, however, Dr. Mullins did not examine Claimant until mid-August 2008, by which time she already was reporting that her symptoms were back to their pre-February baseline.

18. At Dr. Mullins' referral, Claimant returned to physical therapy and was prescribed a TENS unit, which afforded her significant pain relief. In the fall of 2008 she was able to increase her hours back to full-time work. Defendant made additional ergonomic changes to her workstation, and also altered her job responsibilities to decrease the amount of computer data entry she was required to do. Despite these changes, Claimant testified that she continues to experience the same baseline pain in her hands that she suffered prior to the snow shoveling incident. She fears that these ongoing symptoms may affect her future employability. There was no indication from either party, however, that her current position is in jeopardy.

19. Claimant has not formally been placed at end medical result. Even so, it is unlikely she will be left with any ratable permanent impairment, as the *AMA Guides to the Evaluation of Permanent Impairment* consider tendinitis to be a temporary condition only and therefore not subject to permanency rating.

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. 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).

3. I am convinced by the credible evidence that Claimant most likely suffered from a chronic underlying condition even before the February 2008 snow shoveling incident. Whether Claimant's work activities caused that condition to develop is somewhat less clear. Under the circumstances, however, the outcome of this claim does not hinge on that determination. Rather, the key question is whether the snow shoveling event constituted an independent non-work-related cause of the disability and medical treatment that followed. If it did, then even if the underlying condition was determined to be work-related, the causal link back will have been severed. *See* 1 *Larson's Workers' Compensation Law* §10; *Fleury v. Legion Insurance*, Opinion No. 43-02WC (November 15, 2002).

4. The circumstances of this claim are strikingly similar to those presented in *Fleury*. The claimant there began to experience pain in his shoulder attributable to his work activities, but continued to work and did not seek medical treatment. Subsequently, while lifting a ladder at home his pain worsened acutely, enough so that he went to the hospital emergency room to be evaluated. In the course of the treatment that followed, the claimant was diagnosed with two injuries. The first, a chronic rotator cuff tear, pre-existed the ladder incident and was causally related to repetitive stress at work. The second, a ruptured biceps tendon, resulted from lifting the ladder at home. Ultimately, the claimant underwent surgery to repair the damaged rotator cuff, and sought workers' compensation benefits to cover his ensuing disability. The Commissioner denied the claim, noting that even if the claimant's work-related shoulder problems pre-existed, they were not severe enough to require medical treatment until the non-work-related ladder incident occurred. As such, the ladder incident constituted an independent intervening aggravation and the causal link back to the claimant's work activities was severed.

5. Here too, it was a non-work-related event that first compelled Claimant to seek treatment for her symptoms. Claimant admits, furthermore, that by the time the treatment at issue concluded she was back to whatever baseline symptoms she had experienced before. The inescapable conclusion from these facts is that regardless of whatever underlying condition already troubled her, it was her non-work-related injury that caused her need for medical care and ensuing temporary disability.

6. It may be that Claimant's baseline condition is in fact work-related, and if it requires medical treatment or causes disability from work at some future point her claim for workers' compensation benefits may well be compensable. Her current claim, however, is for benefits that clearly are attributable to her non-work-related aggravation. As such, they are not compensable.

7. As Claimant has not prevailed, she is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits is hereby **DENIED**.

DATED at Montpelier, Vermont this 3rd day of November 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.