STATE OF VERMONT
DEPARTMENT OF LABOR

Joanna McNally

v.

State of Vermont
Department of PATH

Opinion No. 37-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-04152

OPINION AND ORDER ON REMAND[1]

Hearing held in Montpelier on May 20, 2009
Record closed on October 7, 2011

APPEARANCES:

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

ISSUES PRESENTED:

1. Did Claimant's hand pain arise out of and in the course of her employment for Defendant?

2. Was Claimant's hand pain causally related to her snow shoveling activities on February 18, 2008?

3. If Claimant's hand pain was causally related to her snow shoveling activities, did these constitute a normal activity of daily living?

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

[1] The Commissioner's original decision, denying Claimant's claim for workers' compensation benefits, was issued on November 3, 2009. Claimant appealed to the Vermont Supreme Court, which reversed and remanded for clarification of both the findings of fact and conclusions of law. *McNally v. Department of PATH*, 2010 VT 99.

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 worked for Defendant in various administrative positions for sixteen years. For the three years preceding the formal hearing she worked as a Benefits Program Specialist in the Division of Health Access. Her role was to process applications and determine eligibility for state-funded health care programs.

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

5. Shortly after beginning this 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. Despite these changes, Claimant's 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 credibly 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. 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. 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.

16. I accept as credible both Dr. Kiely's and Dr. Mullins' opinions as to the likelihood that Claimant suffered from some underlying dysfunction in her hands even before February 2008, which caused them to be achy and tired at times. The record establishes, however, that not even Claimant considered those symptoms sufficiently serious to warrant medical treatment until her snow shoveling activities caused them to worsen.

17. Dr. Backus, the independent medical evaluator retained by Defendant, concurred with Dr. Kiely's enthesopathy diagnosis, but not with his opinion as to causation. According to Dr. Backus, Claimant's primary work activity – typing – involved 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 did not require the type of repetitive forceful movement that typically is associated with an overuse injury to those joints. I find this analysis to be persuasive.

18. In contrast, 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. Again, I find this analysis to be persuasive.

19. As for whether Claimant suffered concurrently from some underlying dysfunction as well, Dr. Backus cautioned against using her complaint of achy, tired hands while engaged in work activities as the basis for diagnosing a work-related overuse injury. Such complaints are indicative of a temporal relationship between job-related tasks and symptoms, but it would be speculative to conclude that a causal relationship exists as well.

20. 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, at the time of the formal hearing Claimant was continuing to experience the same baseline pain in her hands that she suffered prior to the snow shoveling incident. She feared that her ongoing symptoms might affect her future employability. There was no indication from either party, however, that her position was in jeopardy.

21. At the time of the formal hearing Claimant had not formally been placed at end medical result. Even so, it was unlikely she would be left with any ratable permanent impairment. 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. The dispute in this claim concerns the causal relationship between Claimant's work activities and the hand symptoms for which she treated from February through mid-August 2008. Claimant asserts that but for the hand pain associated with her job activities her snow shoveling injury, if it occurred at all, would have resolved far more quickly. Defendant argues that the snow shoveling injury alone was what compelled Claimant to seek treatment, and that to surmise that her recovery was prolonged by some underlying work-related condition is sheer speculation.

3. The starting point for any workers' compensation claim in which the causal relationship between a claimant's injury and his or her work is disputed is whether the injury arose out of and in the course of employment. 21 V.S.A. §618; *McNally v. Department of PATH*, 2010 VT 99, ¶10. This is a two-pronged test, requiring a sufficient showing of both (1) a causal connection (the "arising out of" component); and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to his or her injuries. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM*, 161 Vt. 213 (1993); *see Spinks v. Ecowater Systems*, WC 04-217 (Minn. Work.Comp.Ct.App., January 21, 2005).

The "Arising Out Of" Component

4. The issues raised by the "arising out of" component in this claim relate to medical causation. Competent expert medical testimony is required to remove a determination on this issue from the realm of speculation and establish a sufficient causal link between injury and employment. *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 103 (1964). Here, each party presented its own expert testimony. Dr. Kiely concluded that Claimant's bilateral enthesopathy, though exacerbated by snow shoveling, was in fact caused by work-related overuse. Dr. Backus concluded that the shoveling alone caused Claimant's enthesopathy, and further that it would be speculative to assume that any underlying injury was work-related at all.

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 (September 17, 2003).

6. With particular reference to the third factor, I conclude here that Dr. Backus' opinion was the most credible. Considering the particular movements necessitated by Claimant's primary work activities, I am convinced by Dr. Backus' testimony that these would be an unlikely cause of the tendon damage in her hands, wrists and elbows. I find persuasive his conclusion that the upper extremity movements required by snow shoveling are a far more likely cause.

7. In contrast, Dr. Kiely's causation opinion is based on a series of assumptions – first, that Claimant's enthesopathy was caused primarily by her work activities, second, that it predated the snow shoveling incident, and third, that it prolonged her recovery. Yet none of these assumptions is sufficiently supported to move beyond mere speculation.

8. At best, the facts establish a temporal relationship between Claimant's work and her complaints of tired, achy hands, but this alone does not establish causation. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983); *Daignault v. State of Vermont, Economic Services Division*, Opinion No. 35-09WC (September 2, 2009). Indeed, Claimant's own testimony established a stronger temporal relationship between the snow shoveling incident and the alarming symptoms that almost immediately followed. It was these symptoms that prompted her to seek medical treatment, not her prior complaints.

9. Because the more credible medical evidence does not establish a causal connection, to the required degree of medical certainty, between Claimant's work activities and her bilateral enthesopathy, I conclude that she has failed to satisfy the "arising out of" prong of the compensability test.

The "In the Course Of" Component

10. Having been directed on remand to address both prongs of the compensability test, I next consider whether Claimant's enthesopathy occurred "in the course of" her employment. An injury occurs in the course of employment "when it occurs within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate, supra* at 98-99.

11. There is no dispute here but that Claimant's snow shoveling activities occurred at home, and were not related in any way to her job duties for Defendant. The requisite time, place and activity link is lacking, therefore. Her injury did not occur "in the course of" her employment.

Is Snow Shoveling a "Normal Activity of Daily Living"?

12. The final question to be addressed on remand is whether Claimant's snow shoveling activities constituted a "normal activity of daily living." This question would only have relevance were I to accept Dr. Kiely's opinion as to the cause of Claimant's hand pain – that it arose out of her employment for Defendant, but was exacerbated by her snow shoveling activities. I have concluded that the more credible medical evidence does not support this theory. It is instructive nevertheless to consider the circumstances under which a non-work-related activity will break the chain of causation back to what began as a work-related injury.

13. In addressing this issue, rather than questioning whether a particular non-work-related activity is "routine" or "normal," the better inquiry is to ask whether it is reasonable under the circumstances. *See* 1 Lex K. Larson, *Larson's Workers' Compensation* §10.05 at p. 10-11 (Matthew Bender, Rev. Ed.). An exacerbation triggered by an activity that is itself rash given what the injured worker knows or should know about his or her condition will break the work-related connection required for a finding of compensability. *Id.*, §10.06[3] and cases cited therein. An activity that is neither careless nor imprudent will not. *Correll v. Burlington Office Equipment*, Opinion No. 64-94WC (May 1, 1995).

14. I conclude from the evidence here that Claimant's snow shoveling activities were reasonable under the circumstances. Given what she knew about her condition at that point, which was simply that her hands became tired and achy at the end of her work week, I cannot say that her decision to help clear snow from her roof was rash or injudicious. Had she been suffering from a work-related injury at the time, this activity would not have broken the causal link back to her employment.

Summary

15. To summarize, I conclude from the more credible medical evidence that Claimant's bilateral upper extremity symptoms from February through mid-August 2008 most likely resulted from enthesopathy causally related to her snow shoveling activities. I further conclude that the evidence is insufficient to establish, to a reasonable degree of medical certainty, that Claimant suffered from any underlying condition causally related to her work for Defendant that likely prolonged her recovery from this snow shoveling-related injury. Notwithstanding that her snow shoveling activities were reasonable under the circumstances, because her injury did not arise out of her employment it is not compensable.

16. 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 15th day of November 2011.

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Anne M. Noonan
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.