Joanna McNally v. State of VT, Dept. for Children and Families

STATE OF VERMONT
DEPARTMENT OF LABOR

Joanna McNally

v.

State of Vermont, Department
for Children and Families

Opinion No. 31-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. BB-57803

OPINION AND ORDER

Hearing held in Montpelier, Vermont on July 14, 2011
Record closed on August 12, 2011

APPEARANCES:

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

ISSUE PRESENTED:

Is Claimant entitled to temporary total disability benefits for the period from May 10, 2010 through August 9, 2010?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	First Report of Injury, 12/1/2009
Claimant's Exhibit 2:	Letter from Danielle Lewis, June 3, 2010
Claimant's Exhibit 3:	Workplace Safety Ergonomic Evaluation, 12/15/2009
Claimant's Exhibit 4:	Claim Questionnaire
Claimant's Exhibit 5:	Letter from Paul Madden, January 6, 2010
Claimant's Exhibit 6:	Request for Reasonable Accommodation, 1/12/10
Claimant's Exhibit 7:	Reasonable Accommodation Policy
Defendant's Exhibit A:	Physical therapy progress note, 8/6/10

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
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. Judicial notice also is taken of the medical records admitted into evidence at the formal hearing in *McNally v. State of Vermont, Department of PATH*, State File No. Z-4152.

3. Claimant began working as a Call Center Benefit Program Specialist in Defendant's Department for Children and Families in October 2009. Her duties included fielding telephone inquiries from benefit recipients, researching their cases and logging her activity, all electronically. The work required constant use of her computer mouse and keyboard for such functions as scrolling through multiple programs, typing and even answering the phone.

Claimant's December 2009 Work Injury

4. Shortly after starting at the call center, in late November or early December 2009 Claimant moved to a different office. She quickly realized that her new workstation was not ergonomically correct, as it required her to reach too far with her right arm for her computer mouse. As a result, Claimant began to experience burning pain in her right shoulder, arm, wrist and hand.

5. Claimant reported her symptoms to Defendant as work-related, alleging an injury date of December 1, 2009. In addition, she voiced her workstation concerns to her supervisor, who arranged for an ergonomic evaluation. At the evaluator's recommendation, Claimant's computer was outfitted with a tray so that she could position her mouse over the number keys, thus reducing the stress on her right arm.

6. Claimant was particularly attuned to her need for an ergonomically correct workstation given her prior medical history. In 2008, while employed by another department within state government, she had been diagnosed with bilateral enthesopathy, or tendon damage, in her wrist, carpus and elbow. Although Defendant disputed Claimant's claim that this condition was causally related to overuse from typing and data entry work,[1] it endeavored nonetheless to adjust her workstation correctly so as to enable her to manage her symptoms effectively.

[1] The Commissioner initially decided this claim in Defendant's favor, *McNally v. State of Vermont, Department of PATH*, Opinion No. 43-09WC (November 3, 2009). Claimant appealed to the Vermont Supreme Court, which reversed and remanded the case back to the Commissioner for further clarification. *McNally v. Department of PATH*, 2010 VT 99. A decision on remand has not yet been issued.

7. This time as well, after a brief period of reduced work hours, and once her workstation was modified to make it more ergonomically appropriate, Claimant was able to obtain reasonable relief of her symptoms. By mid-February 2010 she had resumed her regular work activities and schedule. Although she continued to complain of some right shoulder pain, by early March 2010 her primary care provider, Dr. Kiely, noted that her "more distal arm issues from work are quieter."

8. Defendant initially denied Claimant's claim for workers' compensation benefits on the grounds that her symptoms were not causally related to her work activities. Thereafter, at Defendant's request, in mid-March 2010 Claimant underwent an independent medical evaluation with Dr. Backus, an occupational medicine specialist. As Dr. Kiely had, Dr. Backus diagnosed Claimant with enthesopathy of the right wrist and carpus. As he described it, Claimant had a pre-existing propensity for this condition, which had been well controlled until her move to a new workstation caused a temporary exacerbation. In his opinion, therefore, Claimant's complaints were in fact work-related. I find this analysis persuasive.

9. In consideration of Dr. Backus' analysis, Defendant reversed its denial and accepted Claimant's claim for medical benefits causally related to her December 1, 2009 injury as compensable.

10. As noted above, by the time of Dr. Backus' March 2010 evaluation Claimant's workstation already had been modified so as to make it more ergonomically appropriate, and as a result her wrist and hand symptoms had resolved back to their pre-December 2009 baseline. With that in mind, Dr. Backus determined that Claimant had reached an end medical result for her December 1, 2009 work injury. Nevertheless, he stressed the importance of maximizing the ergonomic design of Claimant's workstation in order to prevent further work-related exacerbations.

Claimant's May 2010 Disability

11. Unfortunately, in early April 2010 Claimant moved to yet another workstation, one with a computer mouse that was ill-positioned for her ergonomically. Once again, Claimant's enthesopathy symptoms flared, specifically, swelling in her right hand and pain radiating up her arms and into her shoulders. As she had in the past, Claimant requested that her supervisor arrange an ergonomic assessment. This time, for reasons that are not clear from the record, the supervisor failed to do so.

12. By early May 2010 Claimant's symptoms had worsened to the point where they interfered with her ability to do her job. When she learned that the ergonomic assessment she had been anticipating had not even been requested, she decided she could no longer remain at work. Thereafter, Claimant sought and was granted FMLA leave, effective May 10, 2010.

13. Dr. Kiely supported Claimant's request for FMLA leave, in the hopes that a combination of time away from her job duties and physical therapy would help her symptoms abate. This did not occur, however. Instead, in his August 9, 2010 evaluation Dr. Kiely noted that Claimant was complaining of more generalized pain and was increasingly sensitive to palpation, not just in her arms but throughout her body. A more focused clinical examination revealed that she was suffering from fibromyalgia.

14. Fibromyalgia is a syndrome characterized by chronic pain and hypersensitivity throughout the body. Its cause is not well understood. Patients with fibromyalgia tend to perceive tissues as being more painful than what otherwise would be expected based solely on the trauma to which they have been exposed.

15. Fibromyalgia and enthesopathy are not mutually exclusive diagnoses. Because people who suffer from fibromyalgia have a heightened perception of soft tissue pain, it may take longer for them to recover from an inflammatory condition such as tendinitis or enthesopathy than it would for a person who does not suffer from the more generalized pain syndrome.

Expert Opinions as to Causation

16. Both Dr. Kiely and Dr. Backus agree that from December 2009 until mid-March 2010 Claimant's right wrist and hand symptoms likely were caused primarily by work-related enthesopathy. Where the experts diverge is as to the cause of her condition thereafter.

17. According to Dr. Kiely, Claimant's complaints in May 2010 most likely were attributable to her work activities. At least one of the symptoms she reported at that point – swelling in her right hand – was consistent with enthesopathy, but would not have been indicative of fibromyalgia. By the time of Dr. Kiely's August 9, 2010 evaluation, however, Claimant's soft tissue pain still had failed to abate despite extended time away from work. In addition, she was exhibiting signs of more generalized pain and sensitivity. From these facts Dr. Kiely concluded that Claimant's symptoms likely now were being driven by fibromyalgia, not by work-related enthesopathy. Any further improvement would come from treating the former condition, not the latter. With that in mind, Dr. Kiely determined that Claimant had reached an end medical result for her work-related injury.

18. Dr. Backus disagreed with this analysis. As noted above, he first evaluated Claimant in mid-March 2010. At that time, he concluded that as a result of working at an ergonomically inappropriate workstation Claimant's enthesopathy had been temporarily exacerbated. It was on the basis of this opinion that Defendant accepted Claimant's December 2009 injury as compensable.

19. Dr. Backus re-evaluated Claimant in December 2010. At that point, he differentiated between the symptoms she had reported in December 2009, which he recalled as being focused primarily in her right wrist and hand, and those that she reported in April 2010 and thereafter, which seemed to emanate from her shoulder. Although he continued to attribute the earlier symptoms to work-related enthesopathy, the latter symptoms he now attributed solely to fibromyalgia, a condition that was neither caused nor aggravated by work.

20. Contrary to Dr. Backus' assertion, I find that the medical records do document varying complaints of hand, wrist, arm, shoulder and/or shoulder girdle pain, both at the time of Claimant's December 2009 injury, which Dr. Backus ascribed to work-related enthesopathy, and at the time of her May 2010 injury, which he ascribed to non-work-related fibromyalgia.

21. Dr. Backus did not discuss, in either his December 2010 independent medical evaluation report or in his formal hearing testimony, the causal relationship, if any, between Claimant's move to another ergonomically inappropriate workstation in April 2010 and her worsened symptoms thereafter. As he had in the context of his March 2010 evaluation, he acknowledged in his testimony that were Claimant required to work in a setting that was not ergonomically correct for her, this could cause her enthesopathy to flare. With that in mind, Dr. Backus' failure to address Claimant's move to yet another incorrect workstation between the time of his first evaluation in March and his second one in December is confusing.

Claimant's Non-Work-Related Activities

22. In addition to asserting that Claimant's disability after May 10, 2010 was due to her fibromyalgia rather than her work, Defendant also points to various non-work-related activities as likely intervening events. This assertion comes from a single physical therapy notation, dated April 5, 2010: "Very sore today. Putting roof on house and busy weekend with Easter."

23. At the formal hearing, Claimant clarified that it was her husband and son who did the roofing work referenced in the physical therapist's note. Claimant's participation was limited to occasionally picking up small scraps of wood or discarded nails and serving refreshments. Claimant's son fully corroborated this testimony, and I find it credible in all respects.

24. Claimant also acknowledged that scrubbing the Easter dinner pots and pans caused her pain to spike for about a week thereafter. I find this testimony credible as well.

25. Neither Dr. Backus nor Dr. Kiely established any credible connection, to the required degree of medical certainty, between Claimant's non-work-related activities in early April 2010 and her disability after May 10, 2010.

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 (September 17, 2003).

3. With specific reference to the first and third factors, I conclude here that Dr. Kiely's opinion is the most credible. As the treating physician, he had occasion to see and examine Claimant on a much more regular basis than Dr. Backus did. Notably, Dr. Kiely evaluated Claimant in early May 2010, when her right shoulder, arm, wrist and hand symptoms were flaring again, and then monthly through early August 2010, when he determined that her pain syndrome had become more generalized and that her ongoing symptoms were now due to fibromyalgia, not enthesopathy.

4. In contrast, Dr. Backus only examined Claimant twice – once in March 2010, *before* her move to another ergonomically incorrect workstation, and then not again until December 2010, many months *after* she had stopped working. Dr. Backus had no opportunity to evaluate Claimant's condition during the crucial period at issue here, therefore, whereas Dr. Kiely did.

5. Beyond that, I am hard pressed to understand the basis for Dr. Backus' opinion that work at an ergonomically inappropriate workstation likely caused Claimant's enthesopathy to flare in December 2009, but not in May 2010. Given that Dr. Backus himself had acknowledged the risk that Claimant's symptoms might recur were she required to work in a less than optimal ergonomic setting, his conclusion in this regard is perplexing.

6. Dr. Kiely's opinion is more easily understood. It reasonably differentiates between the point at which Claimant's symptoms were attributable primarily to her enthesopathy and the point at which her fibromyalgia began to predominate. In this respect, Dr. Kiely's opinion is clearer, more thorough and better supported by the facts than Dr. Backus' is.

7. On the basis of Dr. Kiely's opinion, I conclude that as a consequence of her work-related enthesopathy Claimant was disabled from working for the period from May 10, 2010 through August 9, 2010. Claimant is entitled to temporary total disability benefits covering that period. Having reached an end medical result for her work injury on the latter date, her disability thereafter was no longer work-related, and her entitlement to temporary disability benefits therefore terminated.

8. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $645.71 and attorney fees totaling $12,613.50. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.

9. As for attorney fees, these lie within the Commissioner's discretion. Defendant argues that no fees should be awarded for any work performed prior to July 29, 2010, the date when Claimant's attorney formally entered his appearance on her behalf before the Department. Defendant does not cite to any legal authority in support of its position. Having reviewed the specific billing entries, I find that they are sufficiently related to the claim at issue here to be recoverable. I therefore award Claimant her attorney fees as presented, with no reduction for work performed prior to July 29, 2010.

ORDER:

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

1. Temporary total disability benefits for the period from May 10, 2010 through August 9, 2010 in accordance with 21 V.S.A. §642;

2. Interest on the above amounts calculated in accordance with 21 V.S.A. §664; and

3. Costs totaling $645.71 and attorney fees totaling $12,613.50 in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 12th day of October 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.