

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

| | | |
|--------------------------------|---|------------------------|
| Susan Clay |) | State File No. M-24332 |
| |) | |
| v. |) | By: Margaret A. Mangan |
| |) | Hearing Officer |
| Precision Valley Communication |) | |
| |) | For: R. Tasha Wallis |
| |) | Commissioner |
| |) | |
| |) | Opinion No. 38-02WC |

Hearing held in Montpelier on March 5, 2002
Record closed on May 2, 2002

APPEARANCES:

John C. Mabie, Esq. for the Claimant
Keith J. Kasper, Esq. for the Defendant

ISSUES:

1. Did the Claimant suffer a personal injury by accident arising out of an in the course of her employment with Precision Valley Communication?
2. If so, for what period of time, if any, is Claimant entitled to temporary total disability benefits?

EXHIBITS:

| | |
|-------------------|-----------------|
| Joint Exhibit I: | Medical Records |
| Joint Exhibit Ia: | Medical Records |
| Joint Exhibit Ib: | Medical Records |

| | |
|------------------------|---|
| Claimant's Exhibit 1: | Transcript of deposition of Dr. Birch. |
| Claimant's Exhibit 2: | Transcript of deposition of Ruth Cody |
| Claimant's Exhibit 3: | Transcript of deposition of Dr. Tietz. |
| Claimant's Exhibit 4: | Transcript of deposition of Dr. Ayres |
| Claimant's Exhibit 5: | Social Security Administration |
| Claimant's Exhibit 7: | First Report of Injury (undated) |
| Claimant's Exhibit 8: | First Report of Injury dated June 2, 1999 |
| Claimant's Exhibit 9: | First Report of Injury dated June 8, 1999 (Claimant's copy) |
| Claimant's Exhibit 10: | Employee list |

Claimant's Exhibit 12: Interim Order dated December 12, 2000
Claimant's Exhibit 12A: Interim Order dated October 26, 2000
Claimant's Exhibit 14: Evaluation dated October 27, 1998
Claimant's Exhibit 15: Evaluation dated March 19, 1999
Claimant's Exhibit 16: Severance agreement
Claimant's Exhibit 17: Transcript of deposition of Matthew Alldredge

Defendant's Exhibit A: Precision Valley Invoices-6 pages
Defendant's Exhibit B: Precision Valley Invoices-6 pages
Defendant's Exhibit C: Curriculum vitae of James Grubman, Ph.D
Defendant's Exhibit D: Map

STIPULATION:

1. Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act from July 18, 1998 to June 8, 1999.
2. Defendant was the employer of Claimant within the meaning of the Vermont Workers' Compensation Act from July 18, 1998 to June 8, 1999.
3. Acadia Insurance was the workers' compensation insurance carrier for defendant at all times relevant to this action.
4. June 8, 1999 was the Claimant's last day of work with Defendant.
5. For the twelve weeks prior to June 8, 1999 Claimant's average weekly wage was \$464.50, which results in an initial compensation rate of \$309.68.

FINDINGS OF FACT:

1. Notice is taken of all official worker's compensation forms filed in this action. The exhibits are admitted into evidence.
2. Since Claimant completed high school in 1969, she has worked continuously in various jobs. Those jobs included bookkeeper, secretary, and administrative assistant. At the age of 35 she attended college and earned two Associate Degrees. Even while in school, Claimant worked 25 to 30 hours per week.
3. Claimant lives with her husband and daughter, both of whom are disabled. They moved to Vermont from Connecticut in 1997.
4. Claimant's first job in Vermont was at Black River High School where she was administrative assistant to the principal.

5. On July 27, 1998 Claimant began working for the defendant-employer, Precision Valley, as an assistant to the project coordinator, Marcia Alldredge. Matthew Alldredge, Marcia's brother, was president of the company.
6. At first her work involved general office and administrative duties, including typing/keyboarding, preparing reports and invoices, and handling other administrative duties for Marcia and Matthew. Keyboarding totaled about an hour a day at first.
7. In November of 1998, Marcia Alldredge left Precision for another job. At about the same time, Precision Valley's receptionist, Kelly Stetner, took a leave. Neither Marcia nor Kelly, both experienced employees, was replaced.
8. Also in November of 1998 Claimant received a positive employment appraisal, including a recommendation for an increase in pay.
9. In Marcia's absence, Claimant was assigned more responsibilities including correspondence, reports, and other keyboarding and administrative functions. During the months the office was understaffed, from November 1998 through March 1999, Claimant's keyboarding responsibilities increased.
10. In January 1999 Claimant noticed pain in her hands and arms. In February she sought care at Ridgewood Associates where it was noted that she had work related carpal tunnel syndrome with bilateral repair two years earlier. On examination it was noted that she had a positive Phalen's test and tenderness at the elbow and forearm, but no atrophy.
11. A few weeks later, Claimant saw Dr. Muller at Connecticut Valley Orthopaedics, on referral. At that visit, Claimant reported that she was keyboarding most of her workday. Dr. Muller completed a form listing the diagnoses of cervical spondylosis, cervical radiculitis and carpal tunnel syndrome and specifying that her typing was to be limited to four hours per day.
12. Claimant testified that she keyboarded eight hours a day. Her employer and co-workers testified that it could not have been more than a few hours, but they could not have observed her long enough to have known her particular habits. It is likely that Claimant exaggerated the actual time and the employer minimized it. Reality probably falls between the two extremes. Regardless of the precise number of keyboarding hours per day, it is clear that keyboarding produced symptoms that prompted Claimant to seek medical care.
13. Claimant took Dr. Muller's note to Matthew Alldredge who assured her they would work around the restrictions. No workers' compensation claim was filed. Claimant believed that the symptoms related to an old work-related injury with her previous employer.

14. Claimant continued her work with no changes in responsibilities.
15. In early March 1999 Marcia Alldredge returned to Precision Valley and Kelly Stetner returned from her leave.
16. In April 1999, Precision Valley began to document problems with Claimant's work performance.
17. On occasion, Claimant dropped objects she was holding, once it was a cup of coffee, at another time, some files.
18. Claimant continued to treat with Ridgewood Associates and Dr. Mullen, who referred her to Dr. Donald Ayres, a neurologist.
19. Dr. Muller's notes from May of 1999 demonstrate that Claimant's diagnosis was a difficult one. At that point he suggested that she might have thoracic outlet syndrome, cervical neuropathy and/or cervical radiculitis.
20. Based on physical examination and history, Dr. Ayres diagnosed ulnar neuritis, with symptoms on the outside of the forearm and in the 4th and 5th fingers. Electrodiagnostic studies were normal.
21. On June 8, 1999 Claimant was fired for what she was told was substandard performance and asked to sign a severance agreement.
22. On June 10, 1999 a First Report of Injury was filed in this Department.
23. After her separation from Precision Valley, Claimant collected the full extent of her 26 weeks of unemployment. To qualify for that benefit, one must be "able to work, and [be] available for work..." 21 V.S.A. § 1343(a)(3).
24. Dr. Muller did not write an out of work note for the Claimant when he saw her in June 1999, but later opined that she was disabled from working at that time. In a subsequent report, he wrote that he had been treating her for a work related injury from February 1999 through December 1999.
25. At the employer's request, Joshua Yurfest, M.D. at the Center for Rehabilitation at the Berkshire Medical Center, evaluated the Claimant on August 9, 1999. Dr. Yurfest diagnosed: 1) status post carpal tunnel release surgery bilaterally; 2) tendonitis of the upper extremities; 3) carpal tunnel syndrome; 4) ulnar neuritis; and 5) cervical degenerative disc disease. To the question regarding the etiology of the diagnoses, he opined they could be the result of multiple processes, including work, farm chores and recreational activities.

26. After receiving an extension in which to evaluate the compensability of the claim, Acadia sent the Claimant notice of a denial on August 17, 1999. The reason given for the denial, based on a report from Dr. Yurfest, was that the condition was a recurrence of an old work-related injury.
27. In September of 1999, according to Ruth Cody, a physician's assistant at Ridgewood Associates, Claimant could have worked in a modified duty job without repetitive motion. In all likelihood, in the absence of contemporaneous records to the contrary, that statement would have been true for the preceding three months as well.
28. In a November 1999 note, Ms. Cody stated that Claimant should only be performing light duty work. In December of that year, Ms. Cody answered "no" to the question whether Claimant could return to modified duty. At that point, Claimant's unemployment benefits were coming to a close.
29. In December 2, 1999 Dr. Muller stated his belief that Claimant had bilateral cubital tunnel syndrome and thoracic outlet syndrome, suggesting a progression of her symptoms along the ulnar nerve from the hands and forearms to the elbow and perhaps higher.
30. In January 2000 Dr. Muller retroactively extrapolated an out of work condition from June of the previous year. That conclusion had to have been based on the history provided him by the Claimant, as contemporaneous records do not support the conclusion.
31. Although symptoms associated with ulnar neuritis are expected to improve when one stops the offending activity, this Claimant's condition did not improve when she stopped keyboarding.
32. In the winter of 2000, Claimant began to exhibit signs of depression.
33. On June 13, 2000 Claimant reported to Dr. Ayres that her symptoms had progressively worsened, yet she had no muscle weakness or atrophy. The ENMG performed a few weeks later revealed no abnormalities.
34. Dr. Rowland also evaluated this Claimant for the defense. Following his examination on July 25, 2000, he noted illogical results from a pinwheel test and lack of atrophy, signs which suggest volitional weakness. He was not able to diagnose precisely the Claimant's condition but opined that it could not be an overuse syndrome because symptoms did not resolve with cessation of the offending activity.
35. Claimant reached a medical end result for her hand and arm symptoms by July 11, 2000. She has no ratable permanency.

36. On August 23, 2000 Ms. Cody diagnosed the Claimant with “left trapezius muscle strain,” acknowledging that her pain had moved to the shoulder and upper back.
37. In September 2000 Dr. Harbaugh saw the Claimant on referral for a neurosurgical consultation. He noted that the Claimant had “multiple” symptoms in the upper extremities and that the etiology seemed unclear. He could determine “no specific structure or location within the nervous system which could account for the patients constellation of symptoms.”
38. Dr. Judy Tietz, a psychiatrist, and Dr. Jeremy Birch, a psychologist, have both opined that Claimant has depression caused by a work-related injury at Precision Valley. They also opine that the loss of her work and loss of the ability to work are the principal and primary causes of Claimant’s significant depression. In Dr. Tietz’s opinion, Claimant’s condition is not likely to improve as long as she is not working.
39. In September 2000 when Dr. Ayres again saw the Claimant he wrote:
- Since last evaluation she has been seen by orthopedics and Dr. Harbaugh. No explanation for her pain is forthcoming at this point. Since last evaluation she has also seen Dr. Rowland for an IME. His opinions are essentially the same....At this point, I do not believe that there is any explanation for her persistent pain, especially of an incapacitating nature, related to the patient’s previous work activity....[F]urther medical care for these complaints is best interpreted as not related to work activity.
40. By October of 2000 Ms. Cody was identifying Claimant’s condition as myofascial pain. She opined that as of October 24, 2000, Claimant no longer had ulnar neuritis.
41. On November 10, 2000 on a referral from Ms. Cody, Claimant saw Dr. Bannerjee who determined that Claimant’s condition was “suggestive of myofascial pain...associated with sleep disturbance and depression.”
42. At the request of the defendant, Dr. Bucksbaum evaluated the Claimant and concluded that Claimant suffers from fibromyalgia. He noted that she suffers from depression, a pain syndrome in her hands and arms, insomnia, anxiety and other mental health factors.

43. Next, the defendant obtained an opinion from Dr. Grubman, a psychologist, who relied on Dr. Bucksbaum's diagnosis and determined that Claimant's pain syndrome is not work-related.

Medical History

44. Claimant was first presented with arm pain in 1992 when she was diagnosed with tendonitis in her right arm.
45. Claimant's job at Hamilton Standard in Connecticut involved keyboard work, six hours per day as reflected in a physical therapy note dated October 19, 1993. In 1996 she had surgery there for carpal tunnel syndrome.
46. The 1996 surgery for carpal tunnel surgery was performed for symptoms, as there was "no electrical evidence of carpal tunnel syndrome or of compromise of other peripheral nerve segment studies" according to a February 1995 note from Dr. Cerza.
47. Beginning in 1997 Claimant worked at Black River High School as an administrative assistant for a year and a half.
48. A 1997 physical therapy note states that Claimant resigned her job due to "hand/arm pain ...inability to do job.... pain." Yet, to physicians she saw after she left Precision Valley, she reported that that her symptoms had resolved after the carpal tunnel surgery.
49. At her job at Black River High School, Claimant did keyboarding work. In fact, she told Dr. Ayres that the job aggravated her symptoms.
50. In February 1999 Claimant's family acquired beef cattle. Because her husband was out of town several days a week, Claimant let the cattle in and out of the barn, fed them and provided them with water. Her husband and daughter cleaned out the barn.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence 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. 367 (1984).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. A claimant is totally disabled for work under 21 V.S.A. § 642, while she is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume his or her former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, *Roller v. Warren*, 98 Vt 514 (1925); *Coburn v. Frank Dodge & Sons*, 165 Vt. 415 (1996) (Claimant entitled to temporary disability compensation until reaching medical end result or successfully returning to work). It is only when earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded. See, *Moody v. Humphrey*, 127 Vt. 52, 57 (1968); *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962); *Sivret v. Knight*, 118 Vt. 343 (1954).
4. The credible evidence, including contemporaneous medical records, factual testimony and medical opinion, convinces me that Claimant developed ulnar neuritis due to the keyboarding work she did at Precision Valley. Her keyboarding work increased when two employees left. She sought medical care for the symptoms and reported the nature of her work. Physical examination revealed tenderness along the distribution of the ulnar nerve, as compared with the radial nerve involved with her prior injury. That Claimant's farm chores and hobbies may have played some role does not negate the causal link to work, because "employment need not be the primary cause, but need only contribute to the injury." 1 Larson's Workers' Compensation Law, Chapter 4, "Scope" at 4-1.
5. However, for two reasons, and despite the testimony of Dr. Muller and Ms. Cody, I cannot find that the neuritis disabled her. First, at no time before June 1999 was Claimant advised not to work because of the neuritis. In fact, she worked full-time until her employment ended. Second, she represented that she was willing and able to work when she filed a claim for unemployment benefits. Standing alone, particularly with extenuating circumstances, these reasons might not always bar a claimant from receiving disability benefits, but in combination in this case, they convince me that the Claimant was capable of working in June 1999.
6. After several months out of work, Claimant developed depression that her care providers attribute to her not working. As noted above, however, she was not disabled in June 1999 and could have been working. She acknowledged as much when she applied for unemployment benefits. There is ample evidence---years of work experience and two associates degrees---demonstrating that Claimant was capable of obtaining another job and no evidence showing that she made that effort.

7. Furthermore, Claimant's not working at Precision Valley was due to a managerial decision to end her employment. If that decision is the reason for her depression, it is not compensable in this forum if it was a bona fide employment decision. See, *Bluto v. Compass Group/Canteen Vending*, Opinion No. 11-02WC (Feb. 25, 2002) (Stress from bona fide personnel actions, such as transfers or disciplinary actions, is not compensable.) "The [workers compensation] statute did not intend to provide redress to every employee unhappy with the business decisions a company must necessarily make, including decisions to hire, fire, reorganize, or reduce and reallocate its work force." *Mazut v. General Electric Co.*, Opinion No. 3-89WC (Oct. 26, 1990).
8. Finally, it is clear that the Claimant now has a pain condition. Dr. Bucksbaum labels it fibromyalgia. Ms. Cody and Dr. Banarjee called it myofascial pain. Regardless of the label, it has caused the Claimant considerable distress and to date has been refractory to treatment. Its etiology has eluded discovery and cannot, on the record before me, be attributed to her work at Precision Valley.

ORDER:

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, Precision Valley is ORDERED to pay for medical treatment for treatment of the ulnar neuritis.

All other claims are DENIED.

Dated at Montpelier, Vermont this 28th day of August 2002.

R. Tasha Wallis
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.