

D. T. v. IBM

(January 8, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. T.

Opinion No. 38-07WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

IBM

For: Patricia Moulton Powden
Commissioner

State File No. W-53206

OPINION AND ORDER

Hearing held in Montpelier on September 4, 2007

Record closed October 8, 2007

APPEARANCES:

Joseph Paul O'Hara, Esq. for Claimant

Craig Matanle, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's right carpal tunnel syndrome is work-related and if so, to what benefits is she entitled?

EXHIBITS:

Claimant's Exhibits:

Claimant's Exhibit 1:	Medical records
Claimant's Exhibit 2:	Payroll information
Claimant's Exhibit 3:	Correspondence from Liberty Mutual
Claimant's Exhibit 4:	Listing of payments made by Claimant for medical care and surgery
Claimant's Exhibit 5:	IBM Global Well-Being Services job restrictions
Claimant's Exhibit 6:	MVP/Healthcare recoveries
Claimant's Exhibit 7:	Dr. McLean bill for Independent Medical Examination
Claimant's Exhibit 8:	FAHC bills
Claimant's Exhibit 9:	Verne Backus, M.D. Independent Medical Evaluation Report, 1/25/05 and Supplemental Report, 6/10/05
Claimant's Exhibit 10:	Letter from Med-Eval, Inc. to Dr. Verne Backus, 12/28/04

Defendant's Exhibits:

Defendant's Exhibit A: *Curriculum Vitae*, Verne Backus, M.D., M.P.H.

CLAIM:

1. Medical and hospital benefits under 21 V.S.A. §640(a)
2. Permanent partial disability benefits under 21 V.S.A. §648
3. Attorney's fees and costs under 21 V.S.A. §678

RULING ON CLAIMANT'S MOTION TO STRIKE DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:

By Motion dated October 16, 2007 Claimant sought to strike Defendant's proposed findings of fact and conclusions of law on the grounds that they had not been filed in a timely manner. The parties' proposed findings and conclusions were to have been postmarked by October 8, 2007. That date was a federal holiday, however, with no U.S. Mail service available. Defendant's proposed findings and conclusions were dated October 8, 2007, postmarked October 9, 2007 and received by the Department on October 10, 2007.

Proposed findings of fact and conclusions of law that are submitted by the attorneys in a workers' compensation claim are not evidence. *Loyer v. Visiting Nurse Association*, Opinion No. 22R-99WC (July 8, 1999). Where there is no prejudice to the opposition, and where the delay in filing proposed findings is so minimal as to be clearly of no import whatsoever, there is no reason to impose sanctions. *See Loyer, id.* Claimant's Motion to Strike is DENIED.

FINDINGS OF FACT:

1. Judicial notice is taken of all forms in the Department's file in this matter.
2. Claimant was at all relevant times an employee as defined under Vermont's Workers' Compensation Act.
3. Defendant was at all relevant times an employer as defined under Vermont's Workers' Compensation Act.
4. Claimant was employed by Defendant for 27 years, from 1978 until her retirement in 2005.
5. For the first eleven years of her employment, Claimant performed quality assurance work in Defendant's manufacturing plant. For the next 4 or 5 years after that, she worked in the "maskhouse," where she manufactured and inspected the glass pieces used to fabricate silicon wafers.
6. In 1994 Claimant transferred out of manufacturing and began working in data processing. Her job duties involved receiving and entering data into computer programs. This data entry process consisted of approximately 90% mouse work and keyboarding and 10% writing. Claimant typically worked at least an 8-hour shift daily, and in addition averaged 8 to 10 hours of overtime weekly.

7. In 1998 Claimant moved to a different data entry position. In this position Claimant did mouse work and keyboarding approximately 80% of the time. As with her previous job, Claimant typically worked a standard 8-hour shift with substantial overtime as well.
8. In 2000 Claimant transferred again, this time to a software support position. As with her prior positions, her job duties consisted of data processing, but with more mouse work and less keyboarding than previously. Claimant worked in this position until her retirement in 2005.
9. In December 2003 Claimant began to experience tingling and numbness in the first three fingers of her right hand. On January 19, 2004 Claimant sought treatment for these symptoms with Claudia Berger, M.D. Dr. Berger has been Claimant's primary care physician for more than fifteen years.
10. Dr. Berger diagnosed right carpal tunnel syndrome and prescribed a wrist splint as treatment. Claimant testified that she wore the wrist splint at all times over the next several months, both at work and at home, except for when she was sleeping.
11. Claimant testified that with the wrist splint her symptoms improved somewhat, at least for a time. By September 2004, however, they had worsened again and Claimant was experiencing significantly increased pain. Claimant had a very heavy workload in September; she was working overtime at her own job and filling in for a co-employee as well.
12. Claimant returned to Dr. Berger on September 27, 2004. Dr. Berger reiterated her diagnosis of right carpal tunnel syndrome. In light of Claimant's worsening symptoms, Dr. Berger referred her for an orthopedic evaluation and EMG studies. In the meantime, Dr. Berger advised Claimant not to perform any work using her right hand.
13. As to the causal relationship of Claimant's carpal tunnel syndrome to her work at IBM, Dr. Berger stated: "[I] believe that [Claimant's] right wrist symptoms are related to activities using her right hand at work. There was no specific work injury but I believe the requirements of her job at work led to her carpal tunnel symptoms."
14. Claimant underwent EMG studies in October 2004, which documented mild right carpal tunnel syndrome and possibly a mild right C5-6 radiculopathy as well.
15. At Dr. Berger's referral, Philip Trabulsy, M.D., an orthopedist, evaluated Claimant in mid-October 2004. Dr. Trabulsy reported that Claimant complained of numbness, tingling, burning and aching in her right hand, with occasional radiation into her forearm and elbow. Claimant also complained of a significant amount of neck and upper back pain. Dr. Trabulsy also noted that Claimant had been under work restrictions against using her right hand for the past few weeks, and in that time she had begun to experience numbness and tingling in her left hand. Last, Dr. Trabulsy noted cervical tenderness at C5, C6 and C7 and diminished cervical range of motion.

16. At Dr. Trabulsy's referral Claimant underwent physical therapy for her neck and upper back symptoms, which resulted in some improvement. She also had a cervical MRI, which showed neuroforaminal narrowing at C5-6, right greater than left.
17. Dr. Trabulsy's ultimate diagnosis was (a) possible cervical radiculopathy; (b) right carpal tunnel syndrome; and (c) right dorsal wrist ganglion. As to causal relationship to work, Dr. Trabulsy stated: "[I]t is my opinion that the patient's carpal tunnel is related to repetitive strain and overuse from her keyboard work while working at IBM. Although she does have some degenerative cervical disc disease and a dorsal wrist ganglion, I believe that her hand symptoms are most consistent with carpal tunnel and are work-related."
18. Claimant testified that her workstation was reviewed for possible ergonomic changes at various times during her tenure at IBM and was found to be laid out appropriately. After September 2004 Claimant experimented with 5 different mouse styles in the hopes that one of them would alleviate her wrist symptoms, but to no avail.
19. Claimant retired from IBM in January 2005; however, she continued to work there as a contract employee for 5 months thereafter while she trained her replacement.
20. On January 20, 2006 Claimant underwent a right endoscopic carpal tunnel release performed by Michel Benoit, M.D., an orthopedic surgeon. Claimant testified that following surgery the pain, tingling and numbness she had experienced in her right hand and fingers completely resolved. Her only residual symptom is some deficit in grip strength.
21. As to causal relationship, Dr. Benoit stated that "it seems clear to me that [Claimant's] symptoms . . . were work-related. She was doing a lot of work on keyboard at IBM, which has most likely been the cause of her symptoms."
22. All of Claimant's treating physicians, therefore – Drs. Berger, Trabulsy and Benoit – have opined that Claimant suffered from right carpal tunnel syndrome causally related to her work at IBM.
23. In contrast, Defendant's medical expert, Verne Backus, M.D. concurs in the diagnosis of right carpal tunnel syndrome, but disagrees that the condition was either caused or aggravated by Claimant's work.
24. Dr. Backus is board-certified in occupational medicine. The focus of his practice is diagnosing and treating occupational illnesses and injuries. At Defendant's request, Dr. Backus conducted an independent medical evaluation of Claimant on January 25, 2005.
25. Dr. Backus' diagnosis was (a) multisegment, multilevel degenerative spine disease with cervical radiculopathy; (b) right carpal tunnel syndrome; and (c) right wrist ganglion cyst. In his opinion, none of these conditions were caused by Claimant's work at IBM.

26. Dr. Backus testified that contrary to what has become popular belief, both among medical providers and lay people, recent studies have established that there is no causal relationship between carpal tunnel syndrome and keyboarding. Rather, carpal tunnel syndrome is believed to be a fairly common disorder, particularly among middle-aged females. Significantly, its incidence in that population is the same among those who type as it is among those who do not, an indication that typing alone is not a causative factor.
27. According to Dr. Backus, the only work-related risk factors for carpal tunnel syndrome, as documented in the most current medical literature, involve repetitive forceful gripping, sustained awkward wrist postures and/or cold vibration, such as occurs while using a chain saw outside in the winter. However, Dr. Backus cited no studies or literature either in his report or in his testimony.
28. Dr. Backus found none of the risk factors in the Claimant's work in studies which he failed to cite. He noted that the wrist typically is maintained in a neutral position while keyboarding or using a mouse and also that it is the fingers and thumb that move repetitively in the course of these activities, not the wrist. Dr. Backus also observed that Claimant's workstation was reported to be ergonomically appropriate (although he could not know if this were true throughout her entire career), with no indication of any sustained awkward wrist postures. Last, Dr. Backus noted that while Claimant's use of a wrist splint for many months while at work may have put her at risk for musculoskeletal pain in her forearm, it would not have caused or aggravated her carpal tunnel syndrome, as the splint itself would have maintained her wrist in a neutral position.
29. Dr. Backus testified that given Claimant's age, gender and anatomical makeup, it was likely that she would have developed carpal tunnel syndrome even if she had not done keyboarding and computer work at IBM. He stated that Claimant's prior medical history, which included surgeries for trigger fingers, indicated a tendency towards swelling in her tendons and nerves, another risk factor for carpal tunnel syndrome. With these individual characteristics in mind, in Dr. Backus' opinion, although admittedly Claimant's work aggravated her symptoms, it neither caused nor aggravated the underlying condition.
30. On August 3, 2006 Charles McLean, M.D. examined Claimant for the purpose of rating the extent of her permanent impairment. Dr. McLean determined that Claimant had reached end medical result, with a 3% whole person impairment referable to her right carpal tunnel syndrome.
31. Claimant's gross wages for the twelve weeks prior to January 19, 2004, the date when she first sought treatment for her right wrist symptoms, totaled \$15,441.59, which yields an average weekly wage of \$1,286.80 and a compensation rate of \$857.90.

32. Defendant has not paid any of the medical bills associated with treatment of Claimant's right carpal tunnel syndrome. Claimant introduced evidence establishing that she has paid a total of \$1,600.00 towards these expenses herself. In addition, her group health insurance carrier has paid some expenses, for which it is seeking reimbursement in the event Claimant's condition is determined to be work-related and compensable. Notwithstanding these payments, there is an additional balance due to Fletcher Allen Health Care for medical expenses associated with Claimant's right carpal tunnel syndrome, the exact amount of which is difficult to determine from the evidence produced. Last, there is a \$450.00 balance owed to Dr. McLean for his August 3, 2006 impairment rating.
33. Claimant's attorney has submitted an itemized statement of attorney's fees representing 68.7 hours of legal services rendered, and an itemized statement of expenses totaling \$213.14.

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. At issue in the current claim is whether Claimant's right carpal tunnel syndrome is causally related to her keyboarding and mouse work at IBM. All of Claimant's treating physicians have issued opinions in support of a causal relationship. In contrast, only Defendant's medical expert testified that no such causal relationship reasonably could be established given the facts of this case.
3. 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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).

4. In this claim, the key factors differentiating Claimant's medical experts from Defendant's are the first, third and fifth. The first factor – the existence of a patient-provider relationship – weighs in favor of Claimant's experts, as all were treating physicians. They took into account the type and extent of Claimant's repetitive activities and length of time she had been doing the specific hand activities. Presumably, Claimant gave the same verbal description to Defendant's medical expert, Dr. Backus.
5. The weight given to a treating provider's expert opinion, furthermore, must be balanced against his or her qualifications, training and experience – the fifth factor cited above. I find that Dr. Backus' specific expertise in occupational medicine could have made his opinion on the issue of causal relationship more credible than any of Claimant's treating physicians. However, he failed to cite any of the recent studies he referred to and did not refer to any in his report. Claimant's physicians, who all found her work caused carpal tunnel, were not present to refute any general information regarding recent studies that were referred to in Dr. Backus's testimony. The Defendant did not have notice that such evidence would be presented. Dr. Backus basically stated that all middle-age women are at risk for carpal tunnel no matter what they do for employment. However, this does not explain why one person would get carpal tunnel and one would not. It also does not take into account the large amount of middle-aged women who up until recently were the more likely persons to do keyboarding and/or typing in their employment.
6. The third factor cited above – the clarity, thoroughness and objective support underlying each expert's opinion – I find could also have weighed more heavily in Defendant's favor in this claim. However, her treating physicians, all experienced doctors, were very clear that they all believed Claimant's work caused her carpal tunnel syndrome, and no other causes could be cited except Dr. Backus's untitled studies allegedly stating that due to her age and other factors she might be predisposed to such a condition. Thus, Claimant's own work-related risk factors were far more likely causes. The extent of years that Claimant did almost all mouse work and typing exclusively in excess of eight hours per day is strong evidence in her favor that the condition was work related. Also, persuasive is the fact that when she stopped using her right hand and arm and began using her left hand and arm she began to experience symptoms in the left arm of carpal tunnel. In addition, her overall carpal tunnel condition worsened in September of 2004 when her workload increased significantly due to helping to fill in for a co-worker. This case can be distinguished from *B.T. v. C & S Wholesale Groceries*, Opinion No. 68-05WC where the Claimant did have carpal tunnel but was found not credible regarding her prior medical history. It can also be easily distinguished from *Hall v. Burger King (Sawtooth, Inc.)*, Opinion No. 24-01WC where the Claimant had only worked for several months for her employer. Further, in the *Hall* case the Department acknowledged that it has historically viewed carpal tunnel as a gradual onset illness by workers who perform repetitive motions with their hands.

7. Claimant argues that even if she was pre-disposed to develop carpal tunnel syndrome by virtue of her gender, age and anatomical makeup, under Vermont's workers' compensation law she still is entitled to recover because her job duties accelerated or aggravated her condition. This is a true statement of the law, *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989). It is also clear that the employer takes the employee as they find them. In this case, the Claimant worked for the Defendant for 27 years. If this were looked at as an aggravation claim the treating physicians' opinions would all remain that Claimant's carpal tunnel was caused by her work and aggravated by it. Claimant's medical experts cannot rebut studies that were not produced either in writing or testimony. Claimant worked for the same company for 27 years doing keyboarding and mouse work. The evidence establishes, therefore, that Claimant's work caused her carpal tunnel condition, not just accelerated or aggravated the underlying symptoms. There were no symptoms prior to her work history at Defendant's employment and no other cause is cited. This is a sufficient basis for a finding of compensability. See, *Stannard v. Stannard*, 175 Vt. 549 (2003).
8. I find, therefore, that Claimant has met her burden of proof on the issue of causation. She has established her work activities caused her carpal tunnel syndrome. Therefore, her claim is compensable.
9. However, had Dr. Backus testified as to the studies he relied on, produced them as evidence or given notice that such studies would be the basis for his testimony and such evidence was not refuted, this case could have resolved differently.

ORDER:

Claimant's claim for workers' compensation benefits related to her right carpal tunnel syndrome is Granted. The Claim should be adjusted as follows:

1. Claimant is entitled to medical benefits from the date she became disabled until she voluntarily left her employment and for her surgery for carpal tunnel syndrome. This includes the reimbursements requested.
2. Permanent Partial Disability is awarded to the Claimant in the amount of 3% whole person under the AMA Guides.
3. Attorney's fees in the amount of 68.7 hours and costs of \$213.14, both found reasonable and necessary under the prevailing rules.

DATED at Montpelier, Vermont this 8th day of January 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.