

Susan Daignault v. SOV, Economic Services Division (September 2, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Susan Daignault

Opinion No. 35-09WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

State of Vermont,
Economic Services Division

For: Patricia Moulton Powden
Commissioner

State File Nos. Y-5638 and T-18733

OPINION AND ORDER

Hearing held in Montpelier on May 12, 2008

Record closed on June 27, 2008

APPEARANCES:

Kelly Massicotte, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUES PRESENTED:

1. Does Claimant suffer from work-related carpal tunnel syndrome?
2. If yes, is the proposed surgery reasonable and necessary?
3. May Defendant claim a credit against any workers' compensation benefits awarded for the amount it paid as a deposition fee in excess of the applicable fee schedule amount?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit A: *Curriculum vitae*, James Mogan, M.D.

Claimant's Exhibit B: Work Station/Work Place Assessment, July 17, 2003

Defendant's Exhibit 1: *Curriculum vitae*, William Boucher, M.D.

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney fees pursuant to 21 V.S.A. §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 been a State of Vermont employee for more than twenty years. Since 2002 she has worked in the Economic Services Division as a Benefits Program Specialist. She is responsible for determining whether applicants are eligible for food stamps, Medicaid and long-term care benefits. Thus, her job duties include processing both new applications and recertifications, conducting telephone interviews and analyzing verification information.
4. Functionally, Claimant estimates that she spends approximately 95% of her work day actively using her hands, whether it be inputting data on the computer via keyboard and/or mouse, printing out and folding letters, taking handwritten notes or filing. Her work is varied, however, and does not involve doing any one of these tasks for an entire day without stopping.

Claimant's Prior Medical History

5. Claimant has a prior medical history of thyroid cancer. Her thyroid was surgically removed in 1997. Since then she has been treated for hypothyroidism – low thyroid function – with synthetic thyroid replacement medications. Some of the symptoms of low thyroid function include fatigue, diffuse joint pain, weight gain and feeling cold. When Claimant's thyroid level gets out of sync with her medications, as has happened about once yearly since 2000, these symptoms become exacerbated. They tend to dissipate once the dosage levels are adjusted and her body has time to readjust.

Claimant's 2003 Injury Claim

6. In May 2003 Claimant complained that her right wrist and hand were swollen. She related her symptoms to the repetitive tasks she had to perform at work, such as filing, keyboarding, writing and stapling. Defendant filed a First Report of Injury and referred her to Dr. Backus for evaluation.
7. Dr. Backus diagnosed degenerative arthritis in Claimant's thumbs. Although he noted some signs of median nerve irritation in her right wrist, he did not believe these symptoms to be consistent with carpal tunnel syndrome, but rather thought that they more likely were referable to the inflamed tendons in her thumb.

8. Based on Claimant's report that her symptoms seemed to flare occasionally regardless of either work or home activity, Dr. Backus concluded that her condition was not work-related. Nevertheless, he recommended that Claimant's work station be assessed for possible ergonomic improvements. As a result of that assessment, various changes were suggested, including an articulating keyboard tray, a repositioned monitor and wide-grip pens. Claimant testified that only the last recommendation – that she use wide-grip pens to “reduce her current symptoms when taking extensive notes” – was ever implemented.
9. Claimant testified that after Dr. Backus' evaluation she treated her aching hands with over-the-counter medications and Ben-Gay. From 2005 to 2007 she underwent additional evaluations with Dr. Nielson, her primary care provider, Drs. Lau and Jones, both rheumatologists, Dr. Nathan, an endocrinologist, and Dr. Winokur, an orthopedist. During this time period, Claimant was complaining not just of bilateral hand pain but of more diffuse joint pains as well, including pain and swelling in her ankles, pain in her feet, achiness in her right knee and right shoulder pain.
10. No clear diagnosis for any of these complaints ever emerged. Of note, Dr. Nielson reported in April 2006 that Claimant had stiffness and pain bilaterally with wrist rotation, but did not report that she was experiencing numbness or tingling, the classic first sign of carpal tunnel syndrome. Both Tinel's and Phalen's tests were negative for the condition, furthermore. Also of note, Dr. Nathan concluded that at least as of August 2006 Claimant's symptoms were not related to any thyroid replacement or thyroid cancer issues.

Claimant's 2007 Injury Claim

11. In June 2007 Claimant filed another workers' compensation claim, again alleging work-related bilateral hand pain. By this point, she testified, she was experiencing numbness, tingling and pain in both hands. At times she would awaken at night because her hands were bothering her. Claimant testified that she felt that working “non-stop” all day made her symptoms worse.
12. This time, Claimant treated with Dr. Mogan, a board-certified hand surgeon. EMG testing documented mild carpal tunnel syndrome bilaterally, and Dr. Mogan determined that both her subjective report and her physical examination (positive Tinel's and Phalen's tests bilaterally) were indicative of the condition. When a steroid injection failed to produce any relief of symptoms, Dr. Mogan recommended surgery.
13. Defendant denied the compensability of Claimant's condition on the grounds that it was neither caused nor aggravated by her work. It also has denied responsibility for the surgery recommended by Dr. Mogan. As of the date of the formal hearing, Claimant had not undergone the surgery, but was continuing to work full-time without restrictions nonetheless.

Expert Medical Opinions

14. Dr. Mogan testified on Claimant's behalf as to the work-relatedness of her condition and the reasonable necessity of surgery as the most appropriate treatment. Dr. Boucher testified on Defendant's behalf to the opposite conclusion. Despite their opposing views, both doctors agreed on the following salient points:
- Carpal tunnel syndrome is a condition that results from the compression of the median nerve in the hand. The compression causes specific symptoms – numbness, tingling and pain – in the areas innervated by the median nerve – the thumb, index and long fingers, and occasionally half of the ring finger as well. These symptoms often occur at night.
 - The most prevalent cause of carpal tunnel syndrome is idiopathic, meaning that no specific reason for the nerves or tendons that pass through the carpal tunnel to have become swollen or inflamed can be identified. Age and obesity are risk factors, as are systemic diseases such as diabetes. Hypothyroidism also has been associated with carpal tunnel syndrome, as evidenced by the increased incidence of the condition in the population of people who suffer from low thyroid function.
 - As for work-related risk factors, the medical literature currently supports a connection between carpal tunnel syndrome and work that requires both repetition and forceful gripping – a machinist working with small hand tools throughout the day, for example. According to the medical literature, there is no proven relationship or association between carpal tunnel syndrome and work that involves repetition alone, with no element of forceful gripping.
15. Dr. Mogan testified that Claimant suffers from bilateral carpal tunnel, which in his opinion was not caused by her work but has been aggravated by it. Dr. Mogan did not speculate as to what might have caused Claimant to develop the condition initially. As to his opinion that work aggravated it, he referred only to Claimant's subjective report that her symptoms were worse at the end of her work day.
16. Dr. Mogan admitted that aside from the most general understanding of Claimant's job – that it was administrative in nature and that it involved "repetitious" typing, filing and writing – he knew nothing about the specifics, for example, the extent of each of these activities during Claimant's work day or the layout of her work station. In fact, Dr. Mogan acknowledged that he spent less than a minute discussing Claimant's job with her. He testified that his primary concern is to treat his patients' symptoms, not to discern their forensic cause. Thus, Dr. Mogan conceded that he had "no idea" what it was about Claimant's work that made her symptoms worse, only that it did so.

17. Dr. Mogan also acknowledged that Claimant's job likely does not involve the type of repetitive forceful gripping that has been proven to be associated with carpal tunnel syndrome. Although he agreed that the medical literature no longer supports any association between repetition alone and carpal tunnel syndrome, in his own clinical practice he has observed that patients who are both predisposed to develop the condition and who work in repetitive jobs are more likely to develop carpal tunnel syndrome than those who are predisposed but do not work in repetitive jobs.
18. Dr. Boucher disagreed both with Dr. Mogan's diagnosis and with his opinion as to causal relationship. According to Dr. Boucher, Claimant's symptoms are indicative not of carpal tunnel syndrome, but of a more diffuse neuropathy most likely involving the median nerve. For the following reasons, Dr. Boucher believes this neuropathy is causally related to Claimant's hypothyroidism, not her work:
- Claimant's work is only intermittently repetitive, and does not involve any forceful gripping;
 - Claimant's symptoms are bilateral and symmetric, which more likely indicates a systemically caused neuropathy rather than one related to activity;
 - Claimant's lack of response to Dr. Mogan's steroid injection is indicative of a primary problem involving the median nerve itself rather than some activity-related tendon inflammation; and
 - Claimant's particular complaints, which included not only bilateral hand and wrist numbness and pain, but also diffuse neck, right shoulder and lower extremity joint pains, are all compatible with active hypothyroidism and are better explained by that condition than by a diagnosis of carpal tunnel syndrome.
19. Dr. Boucher also disagreed with Dr. Mogan's treatment recommendation. According to Dr. Boucher, patients who suffer from carpal tunnel syndrome secondary to hypothyroidism tend not to improve with surgery. At a minimum, therefore, Dr. Boucher would recommend waiting until Claimant's thyroid function has tested normal for at least three months and then, if her hand symptoms have not improved, conducting repeat EMG testing prior to considering surgery.

Dr. Mogan's Deposition Fee

20. On April 9, 2008 Claimant's counsel notified Defendant's counsel that Dr. Mogan would be available to be deposed on April 21, 2008. Claimant's counsel also forwarded a copy of Dr. Mogan's fee schedule, which indicated an hourly fee of \$400 for deposition testimony.

21. Defendant took Dr. Mogan's deposition as scheduled and later paid the \$400 fee in full. At some later date, Defendant challenged the fee on the grounds that the maximum allowable fee for such services under Workers' Compensation Rule 40.111 was \$300. Defendant now seeks a credit of \$100 against any benefits it is determined to owe Claimant.

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 appreciate Dr. Mogan's candor in acknowledging that his job is to treat his patient's symptoms, not to discern their forensic cause. This is, unfortunately, evidenced by his opinion as to causation, which is based principally on one factor – the temporal relationship between Claimant's work and her symptoms – and little if anything else. And while a temporal relationship *combined with other factors* may be sufficient to show causation, *Hatin v. Our Lady of Providence*, Opinion No. 21-03WC (April 29, 2003), a temporal relationship alone is too shaky a base upon which to rest an award. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983); *Bockus v. Datatrac Information Services*, Opinion No. 14-05WC (February 8, 2005).
4. Here, the other factors relevant to causation work against a finding of work-relatedness rather than in favor of it. Most notably, Claimant's work did not include the forceful gripping component that both experts agree has been proven to be the key to establishing an association between carpal tunnel syndrome and repetitive work. With that in mind, to posit that Claimant's condition was aggravated by her work activities rather than by the other risk factors with which she presented, including her hypothyroidism, is too speculative for me to accept.

5. I conclude, therefore, that Claimant has failed to sustain her burden of proving that her work for Defendant either caused or aggravated her carpal tunnel syndrome. It follows, therefore, that she is not entitled to workers' compensation benefits related to Dr. Mogan's proposed surgery.
6. As for Defendant's claim that it is entitled to a credit for the amount it paid Dr. Mogan in excess of the maximum charge allowed by Workers' Compensation Rule 40.111, there being no benefits owed there is nothing from which to take a credit. That said, common sense dictates that it is far easier to avoid responsibility for an unwarranted charge *before* one pays the bill, not after.

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 2nd day of September 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.