

Anita Anderson v. Access Design, Inc.

(October 26, 2009)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Anita Anderson

Opinion No. 41-09WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Access Design, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. Y-00107

**OPINION AND ORDER**

Hearing held in Montpelier on May 13, 2009

Record closed on June 15, 2009

**APPEARANCES:**

Craig Jarvis, Esq., for Claimant

Wesley Lawrence, Esq., for Defendant

**ISSUES PRESENTED:**

1. Is Claimant's left carpal tunnel syndrome causally related to her November 21, 2005 compensable work injury?
2. Is Defendant obligated under 21 V.S.A. §640 to pay for in-home nursing and/or home health aide services?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Deposition of Mary Hofreiter, M.D., May 6, 2009

Claimant's Exhibit 2: Deposition of Paul Bettinger, M.D., May 11, 2009

Claimant's Exhibit 3: Various journal articles

Defendant's Exhibit A: Mileage reimbursement logs

Defendant's Exhibit B: Invoices for various assistive devices

Defendant's Exhibit C: Deposition of Leon Ensalada, M.D., May 15, 2009

**CLAIM:**

Medical benefits pursuant to 21 V.S.A. §640

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, an employment agency, at Putney Paper Company, a paper manufacturer. On November 21, 2005 her right (dominant) hand was caught and crushed in a paper cutting machine. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.
4. As a result of the injury Claimant's right hand was amputated. Since the amputation she has undergone multiple surgeries, and has been fitted with multiple prostheses. Claimant has three prostheses currently. One is mechanical, two are electronic. All function somewhat differently and serve somewhat different purposes.
5. Claimant also has numerous assistive devices and adaptive tools to aid in her ability to function independently. These include various brushes, can and jar openers, kitchen tools and other utensils. Claimant operates most of these devices with her left hand rather than with her prosthesis.

### *Claimant's Left Hand Symptoms*

6. Claimant's prior medical history includes a non-work-related injury in July 2004 to her left forearm, caused by a deep laceration near the base of her wrist. The laceration was severe enough to damage her median nerve. As a result of this prior injury, the sensation in Claimant's left hand was significantly diminished. She had both pain and sensory deficits in her thumb and reduced sensation in her index finger. Her middle finger was completely numb.
7. Describing Claimant's left hand as "relatively insensate," the surgeon who presided over her right hand amputation suggested addressing these residual left hand symptoms by salvaging a portion of the right median nerve and grafting it onto the left. Claimant declined to undergo this procedure, apparently due to funding and insurance coverage considerations.
8. More than a year after her amputation, in December 2006 Claimant presented to Dr. Bettinger, an orthopedic hand surgeon, with complaints of left wrist pain. Claimant reported that she had had a soft tissue mass in the area of her 2004 laceration injury since it occurred, but that it recently had grown larger and become painful. Claimant also reported numbness and tingling in her left hand, thumb, index and long fingers, and in a portion of her ring finger. These symptoms as well Claimant reported having experienced ever since her 2004 laceration injury.

9. EMG testing conducted in February 2007 documented abnormal findings consistent with left carpal tunnel syndrome. An MRI scan established the soft tissue mass to be a ganglion cyst.
10. In March 2007 Claimant reported to Dr. Bettinger that the numbness and tingling in her left hand and fingers was now nearly constant. To provide at least partial relief from these symptoms Dr. Bettinger recommended surgery, which Claimant underwent in April 2007.
11. Dr. Bettinger's surgical findings included significant scarring about the median nerve underlying the traumatic scar in Claimant's wrist. From this he concluded that the laceration she suffered in 2004 had been deep enough to injure the median nerve itself. In fact, Dr. Bettinger noted that the laceration had resulted in a neuroma-in-continuity in Claimant's median nerve. A neuroma-in-continuity is the result of an injury that damages but does not entirely disrupt a nerve. The nerve partially heals, but becomes permanently scarred. In the case of the median nerve, the symptoms that follow can be quite similar to those associated with carpal tunnel syndrome. Both conditions can cause median neuropathy, which slows down nerve conduction and results in numbness, tingling, pain and weakness in the median nerve distribution of the hand and fingers.
12. With the discovery of the neuroma-in-continuity, Dr. Bettinger's surgery addressed three separate medical conditions and accomplished three distinct objectives. Dr. Bettinger released Claimant's left carpal tunnel, excised her ganglion cyst and removed the scar tissue from the swollen part of her median nerve.
13. In Dr. Bettinger's opinion, Claimant's left carpal tunnel syndrome was not caused in any way by her November 2005 work injury, but most likely was aggravated by it. According to Dr. Bettinger, once Claimant lost her right hand she was forced to use her left hand exclusively for all activities, including those that involve gripping, holding or pushing objects, as many activities of daily living do. This resulted in repetitive overuse, increased symptoms and decreased function.
14. As to the ganglion cyst and neuroma-in-continuity, Dr. Bettinger testified that while it was possible that these conditions as well were aggravated by overuse, he could not so conclude to the necessary degree of medical certainty.
15. In support of his causation opinion Dr. Bettinger referenced various studies reported in the medical literature. One such study posited that the act of making a fist or grasping an object firmly can increase the pressure within the carpal tunnel and decrease blood flow to the nerve. The stated purpose of that study, however, was not to pinpoint additional causes of carpal tunnel syndrome, but rather to identify effective non-surgical treatment recommendations.

16. Dr. Bettinger acknowledged that he had no specific knowledge as to what adaptive equipment Claimant had received since her amputation, what activities she was able to perform with her prosthesis, or exactly how frequently she gripped objects with her left hand and with how much force. Nor had he reviewed the medical records relating to Claimant's amputation surgery, and therefore was not aware that she already was reporting significantly decreased sensation in her left hand even at that time. Dr. Bettinger also acknowledged that carpal tunnel syndrome is very common in women of Claimant's age, and that it is a condition that can worsen over time. Last, Dr. Bettinger acknowledged the role that Claimant's 2004 laceration injury probably played in the development of her median nerve symptoms. In his opinion, to a reasonable degree of medical certainty, both injuries contributed together.
17. Since Dr. Bettinger's surgery the function in Claimant's left hand has improved, even though her symptoms have not abated entirely. She still complains of numbness in the fingertips of her index and middle fingers. Her grip strength has improved and she is better able to hold a coffee cup or pick up a dinner plate, but she still has difficulty holding a razor so that she can shave her legs. As documented by an EMG performed in February 2009, the nerve conduction across Claimant's carpal tunnel has normalized. Based on that test result, Dr. Bettinger has concluded that any residual symptoms Claimant is continuing to experience in her left hand most likely are related to the permanent effects of the 2004 laceration injury and resulting neuroma-in-continuity.
18. Two other medical experts have expressed opinions as to the relationship, if any, between Claimant's right hand amputation and her left carpal tunnel syndrome. Dr. Gennaro, an expert retained by Claimant to perform an independent medical evaluation, concluded that Claimant's left upper extremity had been "negatively impacted" by the loss of her right hand, and that consequently there was a causal relationship between her work injury and her diminished left hand function. In that respect, therefore, Dr. Gennaro's opinion was consistent with Dr. Bettinger's.
19. In contrast, Dr. Ensalada, the independent medical evaluator retained by Defendant, concluded that no causal relationship between Claimant's left carpal tunnel syndrome and her work injury could be established to the required degree of medical certainty. In reaching this conclusion, Dr. Ensalada noted that Claimant's 2004 laceration injury left her with "severe and unusual" sensory deficits of a type that are not commonly found in the context of a repetitive stress injury rather than a traumatic one. Because the laceration injury reasonably would be expected to produce the same symptoms – pain, weakness and decreased sensation in the hand, thumb and fingers – as those typically associated with carpal tunnel syndrome, it is impossible to parse out which injury is now responsible for Claimant's diminished left hand function. If anything, the fact that Claimant reported on her first visit to Dr. Bettinger that her left hand symptoms had remained unchanged since her laceration injury suggested to Dr. Ensalada that the loss of her right hand had not aggravated or altered the status of her left hand in any respect.

20. Dr. Ensalada noted as well that even using just her left hand exclusively the activities of daily living in which Claimant engages are neither highly repetitive nor high force. According to him, these are the only scientifically proven activity-related risk factors for the development or aggravation of carpal tunnel syndrome. In fact, Dr. Ensalada testified that he was unaware of any medical research or reported studies establishing a correlation between activities of daily living and carpal tunnel syndrome. With that in mind, in Dr. Ensalada's opinion even if Claimant performs all daily tasks just with her left hand this cannot be identified with any degree of certainty as having either caused or aggravated her carpal tunnel syndrome.

*Claimant's In-Home Nursing and Home Health Services*

21. After her right hand amputation, Claimant was followed by Dr. Hofreiter, her primary care provider, for both this and other general health issues. Not surprisingly, Claimant's work injury proved to be traumatic in all respects, both physically and psychologically. She continues to suffer from symptoms of post-traumatic stress disorder, mood dysregulation and depression. Claimant regularly treats with both a psychiatrist and a mental health counselor as to these conditions.
22. In the context of her role as Claimant's primary care physician, Dr. Hofreiter advocated for Claimant to receive various in-home services – a visiting nurse, a home health aide and a personal care attendant.
23. The nurse visits Claimant's home every other week. She checks Claimant's vital signs and monitors her mental status. She also helps Claimant manage the many medications she is prescribed, by arranging them in a pill box and checking to make sure they are taken as scheduled.
24. The home health aide visits Claimant weekly. She helps Claimant wash those parts of her body that she cannot reach with her left hand, assists her with shaving her legs and armpits, cares for her feet and changes her earrings.
25. The personal care attendant comes to Claimant's home for twelve hours each week. She cooks, cleans, does household chores and assists with paperwork.<sup>1</sup>
26. Dr. Hofreiter testified that in addition to performing the specific tasks outlined above, the visiting nurse and home health aide also provide Claimant with another vehicle for communicating her medical concerns back to her treating providers. Maintaining continuity of care is important, particularly given Claimant's mental health issues and emotional lability.

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<sup>1</sup> Claimant acknowledges that the services of a personal care attendant do not constitute "medical services or supplies," and therefore are not covered under Vermont's Workers' Compensation Act. *See Brunet v. Brunet*, Opinion No. 9-07WC (February 23, 2007), and cases cited therein. She is not requesting that Defendant bear the cost of this service, therefore, but she is seeking coverage for both the visiting nurse and the home health aide services.

27. Claimant testified that she is capable of performing many of the tasks for which she receives in-home assistance, albeit not as efficiently or as well. She is fully capable of dispensing her own medications, for example. She bathes and dresses herself daily, and with the proper adaptive equipment she can clip her nails and care for her feet. She drives independently to medical appointments, visits a gym regularly and attends to errands. She has demonstrated on numerous occasions her ability to advocate on her own behalf to her medical providers, including contacting them appropriately at a time when she believed her mental status required immediate attention.
28. Drs. Gennaro and Ensalada both believe that the visiting nurse and home health aide services Claimant receives are not medically necessary under the circumstances of this case. Claimant has no medical condition that requires in-home monitoring of her vital signs, and according to Dr. Ensalada monitoring her mental status and checking her pill box only on a biweekly basis is both ineffective and unnecessary. As for the home health aide services, Dr. Ensalada testified that with the proper adaptive equipment Claimant is fully capable of accomplishing these tasks herself. Indeed, to the extent that having an aide do them for her encourages dependence rather than independence, in Dr. Ensalada's opinion they are counterproductive.

#### 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).

#### Compensability of Carpal Tunnel Syndrome

3. Certainly, as both Dr. Bettinger and Dr. Ensalada acknowledge, the medical evidence establishes that Claimant suffered from two distinct injuries to her left median nerve, both of which likely contributed to her symptoms of left hand pain, diminished sensation and weakness. It is Claimant's burden to show, however, that because her right hand was amputated she overused her left hand to such an extent that one or both of those preexisting injuries or conditions was aggravated. Of this I am unconvinced.

4. I find Dr. Bettinger's opinion deficient for two reasons. First, it fails to account for the left hand symptoms Claimant had been experiencing since her 2004 laceration injury, as documented in medical records he admittedly did not review. These symptoms had developed well before any overuse related to her right hand amputation could have occurred, and according to Dr. Bettinger's own report they had remained unchanged for more than a year thereafter.
5. Second, Dr. Bettinger acknowledged that Claimant's age and gender alone put her at higher risk to develop carpal tunnel syndrome. More significantly, he admitted that he was not aware of the specific activities for which Claimant now uses her left hand as opposed to her prosthesis, and the extent to which any of them are either repetitive or high force. It may well be that the activities of daily living for which Claimant used her left hand exacerbated the symptoms of what even Dr. Bettinger acknowledges was a preexisting carpal tunnel syndrome. It does not necessarily follow, however, that those activities either caused or aggravated the underlying condition itself, as is required for a finding of compensability. *Stannard v. Stannard*, 2003 VT 52.
6. Furthermore, I find credible Dr. Ensalada's assertion that to separate out the extent to which Claimant's left hand pain, diminished sensation and weakness were caused by her carpal tunnel syndrome as opposed to her 2004 laceration injury would be impossible. Given that Claimant's left hand already was "relatively insensate" at the time of her amputation, and also that whatever lingering symptoms she still has have been attributed to the laceration injury rather than to the carpal tunnel syndrome, it is conceivable that all of the symptoms she experienced in the interim were caused by the sequellae of her laceration injury, and none at all by the carpal tunnel syndrome. There simply is no way to know, and it would be inappropriate to assume.
7. I conclude, therefore, that Claimant has failed to sustain her burden of proof as to the causal relationship of her carpal tunnel syndrome to her compensable work injury.

Coverage for In-Home Nursing and Home Health Care Services

8. Under 21 V.S.A. §640(a), an employer is required to furnish "reasonable surgical, medical and nursing services and supplies to an injured employee." In keeping with the liberal construction to be given Vermont's workers' compensation law, *see St. Paul Fire & Marine Insurance Co. v. Surdam*, 156 Vt. 585, 590 (1991), the Vermont Supreme Court has broadly interpreted the term "nursing services." Depending on the circumstances it can include not only skilled nursing care such as that delivered by a registered nurse, but also home health care assistance with such tasks as bathing or dressing. *Close v. Superior Excavating Co.*, 166 Vt. 318 (1997); *see generally* 5 *Larson's Workers' Compensation Law* §94.03[4] and cases cited therein.
9. Regardless of what services are deemed to fit under the "nursing services" umbrella, however, they still must be reasonably necessary in order to be compensable. In determining whether they are, the decisive factor is what is shown by competent expert evidence to be medically necessary. *Garcia v. Alpine Glen Farm*, Opinion No. 17-09WC (June 3, 2009); *Brunet v. Brunet*, Opinion No. 09-07WC (February 23, 2007). This may be quite different from what the claimant finds desirous or helpful. *Id.*

10. Notwithstanding Dr. Hofreiter's status as Claimant's treating physician, I cannot accept her opinion as to the medical necessity for Claimant's in-home skilled nursing care. Dr. Hofreiter admitted that Claimant has no medical condition that would necessitate in-home monitoring of her vital signs, can handle her own medications safely and is fully capable of calling for emergency services in the event she requires them, for either a physical or an emotional issue. In fact, Dr. Hofreiter acknowledged that the most significant benefit to be derived by the nurse's attendance is to help maintain the continuity of Claimant's care by providing another vehicle for communicating her status back to her treating physicians. But again, Claimant has aptly demonstrated her ability to communicate on her own behalf. I cannot accept this factor alone as sufficient to justify the need for skilled nursing care.
11. I reach the same conclusion as to the medical necessity for Claimant's home health aide care, but with one important qualification. As even Dr. Bettinger admitted, it is likely that Claimant could accomplish most, if not all, of the tasks currently performed by her home health aide if she had a properly functioning prosthesis and the proper adaptive equipment. To the extent that she lacks these, there is no question that Defendant is obligated to provide them. Claimant suffered a significant loss as a result of her work injury. Her life changed dramatically and she is understandably frustrated by the challenges she now faces. Defendant should be working with her to minimize those frustrations, not add to them. Claimant deserves not to be short-changed on these matters.
12. I conclude, therefore, that the in-home nursing and home health care services for which Claimant seeks coverage are not reasonably necessary, and therefore are not compensable under 21 V.S.A. §640(a).
13. As Claimant has not prevailed on either of her claims, she is not entitled to an award of costs or attorney fees under 21 V.S.A. §678.



**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to her left carpal tunnel syndrome is **DENIED**.

Claimant's claim for workers' compensation medical benefits to cover her in-home nursing and home health care services is **DENIED**.

**DATED** at Montpelier, Vermont this 26<sup>th</sup> day of October 2009.

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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.