Silver v. Rutland Area Visiting Nurse Associates (June 23, 2003)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Irene Silver	)	State File No. P-18132
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Rutland Area Visiting	)	For: Michael S. Bertrand
Nurse Associates	)	Commissioner
	)	
	)	Opinion No. 28-03WC

Hearing held in Montpelier on January 7, 2003
Record closed on February 19, 2003

APPEARANCES:

Kerry G. Spradlin, Esq., for the Claimant
Jeffrey W. Spencer, Esq., for the Defendant

ISSUES:

1. Did Claimant's bilateral carpal tunnel syndrome arise out of and in the course of her employment with Rutland Area Visiting Nurse Associates?

2. Is Claimant entitled to temporary total disability benefits? If so, for what period of time is that entitlement?

CLAIM:

1. Temporary total disability benefits from July 13, 1999 to May 29, 2001 pursuant to 21 V.S.A. § 642.

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

3. The issue of permanency benefits is deferred.

EXHIBITS:

Joint Exhibit I: Medical Records
Joint Exhibit II: Medical Records Index

Claimant's Exhibit 1:	Transcript of deposition of Dr. Mark Bucksbaum
Claimant's Exhibit 2:	Curriculum vitae of Dr. Bucksbaum
Claimant's Exhibit 3:	Dr. Bucksbaum's correspondence/second opinion
Defendant's Exhibit A:	Letter from Dr. Kenosh dated 10/24/04

FINDINGS OF FACT:

1. From July 16, 1991 until July 13, 1999 Claimant was an employee and the Rutland Area Visiting Nurse Associates (RAVNA), her employer as those terms are defined by the Workers' Compensation Act. Claimant worked as a nursing assistant.

2. In September of 1995, Claimant complained to her primary care physician, Dr. Heidi Rasmussen, of general body aches, including pain in her shoulders, wrists and fingers.

3. Claimant's work history included work installing swimming pools, carpentry work, and sewing thousands of pieces of clothing in rapid succession. The carpentry and sewing work ended before she began her job at RAVNA, although she continued to work in the swimming pool business.

4. As a nursing assistant at RAVNA, Claimant worked with clients in their homes, performing household chores, bathing, grooming, helping with walking, and transferring four to six clients a day. After hours she "moonlighted" by working privately with RAVNA clients in their homes.

5. Claimant was in contact with her supervisor, Ann Pollack, on average of once each work day, by telephone or in person.

6. Claimant injured her ankle in the course of her employment in January of 1998. She reported the injury, a claim was filed and she received benefits.

7. On November 9, 1998 Claimant was placed on light duty work in the office at RAVNA doing paper work to take stress off her ankle. She set her own schedule and pace. Her tasks included filing and placing stickers on newly opened files. She also covered phones and made up bags of supplies for nurses.

8. Claimant reported to Ann Pollack for assignments, but never mentioned any problems with her hands or wrists. She discussed freely her husband's swimming pool business and the pride she took with the mermaid she painted on one pool.

9. On June 19, 1999 Claimant was placed at medical end result for her ankle injury. Both she and the insurer obtained permanency ratings. No mention is made in the reports that followed of any wrist or hand symptoms.

10. Because her light duty restrictions were never lifted, in July 1999 Claimant was terminated from her job at RAVNA due to her inability to perform the essential functions of a licensed nursing assistant.

11. When Claimant saw Dr. Kenosh on August 26, 1999 for continued treatment for her ankle, she did not mention any upper extremity problems. However, ten days later she reported a one-year history of hand pain to Dr. Rasmussen, who referred her back to Dr. Kenosh for treatment of her hand problems.

12. On a questionnaire, Claimant reported that her hand pain was worse in the morning, that drawing and painting activities had to be curtailed and that since 1998 her activities in the pool construction business had been restricted to supervision. Dr. Kenosh's diagnosis of carpal tunnel syndrome was confirmed electrodiagnostically. In response to her specific question, he opined that the problem was not work-related.

13. In January 2000 Claimant sought another opinion from Dr. Mark Bucksbaum. She reported to him that problems with her hand began in the RAVNA office when she was putting stickers on files.

14. Dr. Bucksbaum opined that Claimant's carpal tunnel syndrome is clearly work-related given her history and objective clinical findings.

15. On May 9, 2000 Claimant filed a Form 5 Notice of Injury and Claim for Compensation on which she specified that the dates of injury were from November 1998 to July 1999. Workers' Risk, insurer for RAVNA, denied the claim.

16. In May 2001 Claimant had surgical treatment for carpal tunnel syndrome on her right hand and in October of that year, surgery on the left hand. Dr. Bucksbaum has diagnosed a 6% whole person impairment for the bilateral carpal tunnel syndrome.

17. On her application for hearing, Claimant identified March of 1995 at the date of injury.

18. Claimant submitted various receipts reflecting costs incurred and a copy of her attorney's time record reflecting 27.50 hours worked on this claim.

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. As in similar cases,

> This case highlights the difficulty of the claimant sustaining …[the] burden of proof when the alleged work injury was unwitnessed, did not arise from specific trauma, and was unreported for a period of time. In such instances, the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, and explore any inconsistencies and hidden or not-so-hidden motivations.

Fanger v. Village Inn Opinion No. 5-95WC (1995)

4. In this case, Claimant clearly has carpal tunnel syndrome for which surgery was necessary. She worked for RAVNA for several years doing work that involved her hands, which raises a suggestion that work was the causative agent.

5. However, the evidence as a whole does not support such a conclusion. Claimant knows how to report a work related injury, yet said nothing to anyone at RAVNA about hand problems. The office work she did while on light duty could not have been as repetitive as she now claims when one considers the facts that the tasks were varied and she was able to pace herself. Furthermore, her August 1999 report to Dr. Kenosh that drawing and painting activities had to be curtailed together with her continued work with the swimming pool business are facts that considerably undercut her theory of causation. When the record as a whole is considered, Claimant is unable to meet her burden of proof.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 23rd day of June 2003.

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Michael S. Bertrand
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.