VERMONT DEPARTMENT OF LABOR AND INDUSTRY

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| Linda Kane Andrew | ) | File #: F-2673 |
| | ) | |
| | ) | By: J. Stephen Monahan<br>General Counsel |
| v. | ) | |
| | ) | For: Barbara G. Ripley<br>Commissioner |
| Johnson Controls | ) | |
| | ) | Opinion # 3-93WC |

APPEARANCES

Phyllis Severance, for the claimant
Glen Yates, for the defendant

ISSUES

1. Did the claimant's neck injury arise out of and in the course of her employment with Johnson Controls?

2. If the answer to the first question is yes, but the claimant left her employment at Johnson Controls for reasons unrelated to her neck injury is she nonetheless entitled to temporary total disability compensation?

2. Is claimant currently temporarily totally disabled from working?

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from August 4, 1992 to the present.

2. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. During October, 1991:

   a. The claimant, Linda Kane Andrew, was employed by the defendant, Johnson Controls of Bennington, Vermont, as a Customer Service Coordinator.

   b. The defendant was an employer within the meaning of the Workers' Compensation Act.

c. The claimant began to experience neck pain at work which she attributed to the extensive telephone work her job required. She subsequently was diagnosed as having a neck injury. Defendant has accepted this as a work related personal injury.

d. The claimant's injury arose out of and in the course of employment with the defendant.

e. Defendant Johnson Controls is self-insured for the purposes of workers' compensation. The Kemper Insurance Company administered defendant's workers' compensation self insurance program at all times relevant to this claim.

f. The claimant's average weekly wage for the twelve weeks preceding the accident was $340.12, resulting in a weekly compensation rate of $226.75 (plus $10.00 for each dependent).

g. The claimant has two dependents under the age of 21, identified as:

i) Laura E. Kane, DOB - 7/31/86
ii) Alexis M. Kane, DOB - 9/5/89

h. The claimant was 30 years of age at the time of the incident. The claimant's current mailing address is 939 Gage Street, Bennington, Vermont, 05201.

2. On August 10, 1992, the defendant filed a first report of injury.

3. On October 7, 1992, the defendant through its workers' compensation program administrator, notified the claimant that it was denying her claim for temporary total disability compensation because it believed she had left work for reasons unrelated to her neck injury, and was not entitled to temporary total disability compensation because she had no income.

4. On October 21, 1992, the claimant filed a Notice and Application for Hearing.

5. There are no objections to the amount or reasonableness of the surgical, medical and nursing services and supplies, including hospital services or supplies which claimant has received in the course of treating her neck injury.

6. There are no objections to the qualifications of the following expert witnesses or to their testifying by telephone or through deposition.

a) Daniel Robbins, M.D., of Orthopaedic and Hand Surgery, P.C., an orthopaedist.

b) David King, M.D., of Shaftsbury Medical Associates, Inc.,

c) John Chard, M.D., of Orthopaedic Associates of Brattleboro, Inc., an orthopaedic surgeon.

7. Judicial notice may be taken of the following documents in the Department's file:

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| Form | 1 : | Employer's First Report of Injury |
| Form | 25 : | Wage Statement |
| Form | 10 : | Certificate of Dependency |
| Form | 6 : | Notice and Application for Hearing |

8. The following documents are offered into evidence without objection:

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| Joint Exhibit 1: | Raymond C. Foster, D.C. Workers' Compensation Initial Medical Report 12/29/92 (3 pages). |
| Joint Exhibit 2: | Keith R. Edwards, M.D., Office visit 12/21/92; Office revisit and Nerve Conduction Studies 1/12/93 (5 pages). |
| Joint Exhibit 3: | Daniel S. Robbins, M.D., Office Progress 2/16/93; 1/12/93; Office Progress 12/15/92; Office Progress 11/17/92; Office Progress 10/27/92; Letter - To Whom It May Concern 10/19/92; Letter - To Whom It May Concern 10/14/92; Office Consultation 9/29/92 (2 pages); |
| Joint Exhibit 4: | Hand written progress note 8/4/92. |
| Joint Exhibit 5: | David E. King, M.D., Letter - To Whom It May Concern 10/22/92. |
| Joint Exhibit 6: | Raymond L. Horwitz, M.D., MRI of the cervical spine 9/8/92. |
| Joint Exhibit 7: | Edwin D. Harrington, M.D., Office note, 8/31/92; Workmen's Compensation Physician's or Surgeon's First Report 9/15/92; Note, 9/3/92. |
| Joint Exhibit 8: | John T. Chard, M.D., independent medical examination report dated 2/23/93 (6 pages). |

FINDINGS

1. Stipulations numbered 1 - 6 are true and the exhibits listed in stipulations number 7 and 8 are admitted into evidence.

2. During the hearing, Defendant's Exhibit A, a drawing of claimant's work area by the claimant, Defendant's Exhibit B, a photograph of the claimant's work area, and Defendant's Exhibit C, Dr. Raskin's records, were admitted into evidence. Claimant's exhibit I, statement of attorney fees, was also admitted.

3. Claimant was employed by Johnson Controls from May, 1990 until July 17, 1992 as a Customer Service Representative. Her duties included taking orders, coordinating with the trucking department, handling phone inquiries and performing computer work.

4. Her duties involved a considerable amount of phone work, and she spent much of her time cradling the phone against her shoulder while she typed orders into the computer.

5. In July, 1991, the claimant began experiencing neck and shoulder pain, which was related to her extensive use of the telephone in the manner described in finding four.

6. In October, 1991, the claimant sought treatment for this problem with Dr. Raymond Foster, a chiropractor. He diagnosed the claimant's problem as "vertebrogenic radiculitis" and treated her by manipulating her neck and upper back. He also recommended that she use a telephone shoulder rest or headset at work rather than cradling the phone against her shoulder.

7. Claimant did not file a workers' compensation claim at that time. Her supervisor was aware of claimant's visit to the chiropractor, and knew that claimant's phone work was causing or aggravating claimant's neck and shoulder pain. Her supervisor also knew that the chiropractor had recommended a headset or telephone shoulder rest to alleviate the pain. A shoulder rest and a headset were provided to the claimant. The supervisor did not file a First Report of Injury or report claimant's condition to her superiors or the plant nurse at this time.

8. The shoulder rest did not abate the claimant's neck and shoulder pain. The claimant did not regularly use the headset initially provided, because she had difficulty hearing the callers. Johnson Controls offered her a new headset, or a speaker phone, but claimant declined both.

9. Throughout this period, claimant continued to work for defendant, and did not miss any time because of her symptoms. She did not consult with any other physicians, or undergo further chiropractic treatment for her neck and shoulder pain. Instead claimant testified that she treated her symptoms by taking four to eight aspirins a day, routinely getting "handfuls" from the plant nurse.

10. In early 1992, Johnson Controls instituted a "cross-training" program under which claimant and her co-employees were trained to

handle both Sears brand and "private label" products order requests. Claimant's supervisor was in charge of the cross-training program.

11. Claimant was openly hostile to the concept of cross-training, and vocally opposed its implementation. She even attempted to have co-employees "boycott" the cross-training efforts. Her opposition was not in anyway related to her neck pain.

12. In early July, 1992, claimant received a negative job performance evaluation from her supervisor. The negative evaluation was based on claimant's reluctance to cross-train and not because of her neck or shoulder pain.

13. Claimant was angry and disappointed with the negative evaluation and gave two weeks notice of her intent to resign effective July 17, 1992. Claimant's resignation was in no way related to her neck and shoulder pain. Indeed at the time she resigned, claimant was working forty to forty-two hours per week and believed she was performing her job in an acceptable and satisfactory manner.

14. Claimant saw the company nurse just prior to her last day of work, based on the advice given to her by Bob Andrew, the chief union steward at defendant's plant. (Claimant married Bob Andrew on July 17, 1992, her last day of work.) The nurse arranged for the claimant to be seen by David King, a family practitioner who is in a medical practice with the defendant's company doctor, Arthur Faris, M.D. Claimant also filed a statement concerning her neck and shoulder pain, and its relation to her work on July 16, 1992.

15. Claimant saw Dr. King on August 4, 1992. Dr. King took claimant's history, performed a physical exam, and checked her range of motion, reflexes and strength. Dr. King believed claimant was suffering from an inflammatory muscle disorder and prescribed Naprosyn, an anti-inflammatory medication. In his opinion claimant had a work capacity at that time but she should refrain from cradling the phone between her neck and shoulder.

16. Claimant informed the company nurse that the Naprosyn was not helping and the nurse scheduled an appointment with Edward Harrington, M.D., an orthopedist. Dr. Harrington took claimant's history, checked her range of motion, took X-rays and ordered an MRI of the cervical spine. Based on claimant's statements that she was unable to work, Dr. Harrington pronounced her totally disabled "for her usual work." He did not address whether there were other types of work which she could perform. Dr. Harrington referred claimant for further visits with his medical partner, Daniel Robbins, M.D.

17. Dr. Robbins first saw claimant on September 29, 1992. Based on his examination, her history, and the MRI and X-rays which had been taken, he diagnosed claimant as suffering from a possible C5-6 disc herniation and C7 radiculopathy. He recommended a treatment plan which included a Medrol dose pack to decrease swelling, and a cervical epidural steroid injection to decrease nerve irritation. If these treatments were not successful, then Dr. Robbins would consider surgery (a disc excision and fusion), even though surgery would not relieve claimant of all of her pain.

18. In Dr. Robbins opinion claimant was totally disabled from working due to her neck injury. This opinion was evidently based on claimant's statements to him, and not based on any determination of her functional capacity. None of claimant's physicians discuss or offer an opinion as to why claimant was able to work in July, 1992, but totally disabled from working in September and October of 1992, even though by claimant's own account her condition was not much different in terms of the degree of pain she was experiencing.

19. Dr. King, by letter dated October 22, 1992, changed his opinion as to the claimant's ability to work, indicating that it was now his opinion that she was totally disabled from working. This new opinion was not based on any examination by him, but was instead solicited by the claimant's husband, who provided Dr. King with Dr. Robbins notes and an MRI report.

20. The epidural injections prescribed by Dr. Robbins provided claimant with no relief, and Dr. Robbins referred her to Keith Edwards, M.D., a neurologist, for nerve conduction studies, and verification of C6 radiculopathy. Dr. Edwards examined claimant, performed nerve conduction studies, and confirmed that claimant had a C6 radiculopathy and musculoskeletal pain due to a "nerve root stretch injury from postural and overuse situation". He recommended Trazadone and use of an "aqua jogger".

21. Claimant returned to Dr. Robbins, who had a CAT scan/myelogram performed. It showed anterior impingement of bony spur/discal changes at the C5-6 level.

22. By February, 1993 claimant was exercising four to five times a week at the Winning Image, a health club, to decrease her pain. She used the treadmill, bike, stair climber, and the Polaris weight machines. The latter weight lifting machines were used by her to perform arm presses (lift weight up), butterfly press (works chest muscles), arm pull downs (pulling down), a rowing machine, arm curls, abdominal weight machine, low back weight machine, and various leg weight machines.

23. Dr. Robbins was unaware of the full extent of the claimant's exercise routine. He testified that he had told claimant to use light weights and to avoid over head weight machines like presses

and arm pull downs. He was not aware that claimant was in fact performing those exercises.

24. All physicians who have examined claimant are of the opinion that her phone activity aggravated a pre-existing condition and led to her neck and shoulder pain, and I so find.

25. All of the physician's who have examined claimant agree that she has not reached a medical end result. Defendant's expert, Dr. Chard, believes claimant could benefit from a pain management clinic, and has a light duty work capacity. Claimant's expert, Dr. Robbins, does not believe that a pain management clinic would help and advocates surgery, which he believes would alleviate somewhere between 25% and 80% of her neck pain symptoms.

26. Claimant voluntarily removed herself from the labor market for reasons wholly unrelated to her injury when she quit on July 17, 1992. At that time she was working a forty hour week and treating her symptoms with aspirin. She sought no medical treatment until she quit working for the defendant.

27. Claimant testified that she applied for one job in August, but was not hired after the prospective employer learned she was wearing a neck brace. Neither she nor her physicians have been able to adequately explain why she was able to work before July 17, 1992, but not after.

28. Defendant did take appropriate steps to accommodate claimant and address her neck pain complaints by offering her a telephone headset and or speaker phone. Other items at her work station were also adjustable and could have been changed to lessen any aggravation of her neck. Claimant chose not to utilize the headset and other accommodations offered to lessen her pain.

29. Claimant has not had a functional capacity evaluation performed to determine what if any work capacity she might have.

30. Although the claimant did not seek any treatment for her neck and shoulder pain complaints between October, 1991 and July 17, 1992, she did see her family physician several times for other medical complaints. None of her family physician's medical records indicate that claimant ever even discussed neck and shoulder pain with this physician although she did discuss low back pain and urinary tract complaints.

31. Although claimant's physician's have opined that claimant is totally disabled from work, I find it difficult to accept that premise because:

a. She was working under essentially the same conditions when she quit her job for reasons unrelated to her injury;

b. The physicians opinions are largely based on claimant's subjective complaints and not on any functional capacity evaluation;
c. I can not accept that a person who follows an extensive exercise regime four to five times a week, including exercises in contravention of her physician's recommendations, does not have even a light duty work capacity;
d. Claimant is a bright, educated individual with a variety of skills - she is a college graduate with a B.S. in business who has worked as a bookkeeper, and for a mortgage company prior to working for the defendant.

**CONCLUSIONS**

1. In workers' compensation cases, the claimant has the burden of establishing all the facts necessary to support the claim. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161 (1962). The claimant must establish by sufficient competent evidence the nature and extent of the injury. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1949). In this case it was incumbent on the claimant to prove that she had an injury which arose out of and in the course of her employment, and that the injury, rather then some other factor, rendered her temporarily totally disabled.

2. Claimant met her burden of establishing that her neck and shoulder pain arose out of and in the course of her employment with the defendant. Therefore the defendant, or its workers' compensation carrier are obligated to pay all reasonable and necessary medical bills associated with treatment and diagnosis of her injury.

3. The workers' compensation act contemplates that an injured worker will promptly return to work on recovery from a work related injury, and even if partially disabled or incapacitated as a result of the injury, the worker has an obligation to seek work within the limitations of the physical disability suffered. The law requires a partially disabled worker to make a reasonably diligent search for suitable employment. Cf., Abby Johnson v. State of Minnesota, Department of Veterans Affairs, 400 N.W. 2d 729 (Minn. 1987); McGraw v. Industrial Commission of Ohio, 564 N.E.2d 695 (1990). See generally, 2 LARSON, The Law of Workmen's Compensation, § 57.64(b).

4. The general rule is that a claimant who voluntarily quits their job for reasons having nothing to do with the injury, is **not** entitled to temporary total disability compensation. Pearl v. Builders Iron Foundry, 73 R.I. 304, 55 A.2d 282 (1947); Powers v. District of Columbia Dept. of Employment Serv., 566 A.2d 1068 (1989); Coon v. Rycenga Homes, 146 Mich. App. 262, 379 N.W. 2d 480 (1985). The rationale behind this rule is that a worker who

voluntarily removes him or herself from the work force for reasons unrelated to a work injury no longer incurs a loss of earnings.

5. There are some exceptions to this general rule, in part because its result seems overly harsh in some instances. Thus courts in other states have held that the "suspension of entitlement to wage loss benefits will be lifted once it has become demonstrable that the employee's work-related disability is the cause of the employee's inability to find or hold new employment." Abby Johnson v. State of Minnesota, Department of Veterans Affairs, 400 N.W. 2d 729 (Minn. 1987); An employee again becomes eligible for compensation when he or she begins a diligent search for employment. Id.

6. Thus a claimant who voluntarily removes him or herself from the work force for reasons not related to a work injury has the burden of demonstrating a) a work injury; b) a reasonably diligent attempt to return to the work force; c) the inability to return to the work force, or a return at a reduced wage is related to his or her work injury and not other factors in order to be entitled to temporary total or temporary partial disability compensation.

7. In this case claimant has not met her burden of demonstrating that she has made a reasonably diligent effort to return to the work force. Applying for only one position is not sufficient, and her testimony tended to be ambiguous and evasive when asked whether she would be willing to return to her former position, despite the defendant's demonstrated willingness to alter her work station to make it more comfortable.

8. Of course, the law does not require a claimant to engage in a futile work search, See e.g., Forman v. Springfield Hospital, Op. No. 1-88 WC (opinion of the commissioner). In this case claimant has not established that reasonably diligent work search would be futile. Although her physicians have offered opinions that claimant is totally disabled, none has actually evaluated her functional capacity. Instead a review of their opinions demonstrates that they are based on what the claimant has told them about her capacity. Claimant's self serving statement is not entitled to greater weight simply because a physician repeats it in a medical report. This is especially true where no physician could explain why claimant was able to work before quitting, and able to engage in an extensive four to five times a week weight lifting regime.

9. The fact that a claimant with a work injury voluntarily removes him or herself from employment does not relieve the defendant from all of its responsibilities under the workers' compensation act. It is still obligated to pay for all reasonably necessary medical treatment. When a claimant reaches a medical end result, if it is determined that the injury has caused some degree of permanent disablement, defendant would be responsible for

providing permanency compensation. See, Electronic Association, Inc. v. Heisinger, 266 A. 2d 601, 604 (1970); Seymour's Case, 381 N.E. 2d 1121, 1123 (Mass. App. 1978). Finally if, prior to reaching medical end result the claimant engages in a reasonably diligent work search, or obtains a job with a lesser remuneration, the claimant may reapply for temporary total or partial disability compensation.

10. Claimant in this case has not reached a medical end result and may require neck surgery. Defendant is responsible for reasonably necessary medical care and any permanency related to the neck and shoulder injury.

**ORDER**

Therefore based on the foregoing findings and conclusions:

1. Claimant's claim for temporary total disability compensation and attorney fees is **DENIED.**

2. Defendant shall promptly pay all for all of the reasonable and necessary medical care and treatment required by the claimant for treatment of her work injury.

3. Once claimant is determined to have reached medical end result, defendant shall provide for any permanent partial disability related to her work injury.

Dated at Montpelier, Vermont, this 13th day of June, 1993.

Barbara G. Ripley
Commissioner