STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

KIMBER LEE TAYLOR	)	State File No. B-7978
	)	
	)	By: Christopher McVeigh
v.	)	Hearing Officer
	)	
NATIONAL HANGER	)	For: Barbara G. Ripley
	)	Commissioner
	)	
	)	Opinion No. 7-93WC

APPEARANCES:

Sam W. Mason, Esq. Claimant
William A O'Rourke, III, Esq. for the Defendant

WITNESSES FOR THE CLAIMANT:

Kimber Lee Taylor

WITNESSES FOR THE DEFENDANT:

Michele Pickard
Bernard Graney (appearing by telephone)

ISSUES:

1. Whether the claimant's current condition arose out of and in the course of her employment at National Hanger.

2. Whether the claimant's current condition is a result of her employment at National Hanger or whether it resulted from an aggravation caused by her work at Mark Sports.

3. If it is determined that the claimant's current condition is not related to her employment with National Hanger, what degree of permanent partial impairment has the claimant suffered?

CLAIMS:

1. Temporary total disability benefits from August 30, 1989, through February 2, 1990, and May 26, 1990, through September 13, 1990.

2. Temporary partial disability benefits from February 2, 1990, through May 26, 1990.

3. Medical benefits.

4. Permanent partial disability benefits.

5. Attorney's fees.

EXHIBITS:

The parties jointly admitted the following exhibits:

Joint Exhibit 1, medical records of Edd Lyon, M.D., dated 12/28/88; 1/13/89; and 1/18/89.

Joint Exhibit 2, medical records of Thomas M. Snyder, M.D., letter dated 10/26/88; nerve conduction study dated 10/26/88.

Joint Exhibit 3, medical records of Harris Snoparski, D.C., letter dated 12/21/88; note dated 12/21/88; letter dated 3/31/89; letter dated 5/5/89.

Joint Exhibit 4, medical records of Robert S. Block, M.D., office notes dated 1/17/89, 2/28/89, 11/28/89, 1/10/90, 4/4/90; report dated 2/20/89; progress notes for 3/14/89, 4/12/89, 5/16/89, 6/6/89, 7/11/93, 10/10/89; letter dated August 17, 1989; note dated 12/1/89; and letter dated 4/27/92.

Joint Exhibit 5, D. Haseman, M.D., 12/6/90 radiology report.

Joint Exhibit 6, William F. Ketterer, M.D.'s office notes dated 4/23/90, 5/31/90, and 9/13/90 letter re: permanent partial impairment.

Joint Exhibit 7, Forst E. Brown, M.D., 12/6/90 letter; 12/6/90 office note; 9/15/92 letter.

Joint Exhibit 8, physical therapist Jeffrey J. Videtto, 4/6/89, evaluation.

Joint Exhibit 9, Southwest Vermont Medical Center operative report dated 2/20/89.

Joint Exhibit 10, Marcy E. Jones, D.C., office notes dated 1/30/89, 11/16/90, 12/13/90, 2/22/91 and 8/24/92; letter dated 2/22/91.

Joint Exhibit 11, Attorney Mason's letters dated 12/20/90, 2/17/92, 4/10/92; 4/27/92, 5/26/92, and 5/7/92.

The following defendant's exhibits were also admitted:

Defendant's Exhibit No. 1, Kimber Lee Taylor's deposition dated March 4, 1993.

Defendant's Exhibit B, 4/10/92 payroll/hour document for Ms. Taylor while employed at Mark Sports, Inc.

Defendant's Exhibit C, Ms. Pickard's 9/15/89 letter.

Defendant's Exhibit D, Ms. Pickard's 9/28/89 letter.

Defendant's Exhibit E, Marcy E. Jones, D.C., 11/16/90 re-evaluation of Ms. Taylor.

Defendant's Exhibit F, Ms. Pickard's telephone log of 8/23/89.

Defendant's Exhibit G, Ms. Pickard's telephone log dated 9/15/89.

Defendant's Exhibit H, Ms. Pickard's telephone log dated 9/27/89.

FINDINGS OF FACT

1. Claimant, Kimber Lee Taylor, worked for National Hanger, located in Bennington, Vermont, for approximately three years when in September 1988, she suffered a work-related carpal tunnel injury to her right wrist.

2. The claimant originally treated with Edd Lyon, M.D., of Bennington, Vermont, who subsequently referred her to Thomas M. Snyder, M.D., for examination. Dr. Snyder performed nerve conduction tests and diagnosed the claimant as suffering from an occupationally related carpal tunnel syndrome.

3. Initially, the claimant underwent a conservative treatment regimen which included injection therapy, wrist splinting, and anti-inflammatory medication to treat her carpal tunnel syndrome.

4. When these conservative therapies failed to substantially improve her condition, Robert S. Block, M.D., of Bennington, Vermont, performed a surgical carpal tunnel decompression on her right wrist on February 20, 1989.

5. After her carpal tunnel surgery, the claimant continued treating with Dr. Block with several post surgical follow-up visits.

6. On July 11, 1989, Dr. Block noted that the claimant's grip strength was "slowly improving," but that she still had some incisional tenderness, and that there was "still some occasional pain up into the thumb, otherwise doing well at the forearm, elbow and upper arm."

7. On July 11, 1989, Dr. Block released the claimant for light-duty work but prohibited her return to any work involving gripping or heavy-lifting work. In his June 6, 1989, office notes, Dr. Block stated his concern about the claimant returning "to repetitive parts-type work."

8. In an August 17, 1989, letter to Ruth Woodward, CIGNA's claim representative, Dr. Block stated that the claimant could return to light duty work by the end of August but cautioned against work involving repetitive heavy gripping or lifting work.

9. On August 29, 1989, Michele Pickard, National Hanger's Director of Operations, wrote to the claimant to offer her the choice of several light-duty jobs, including an office-work job. Ms. Pickard also spoke with the claimant by telephone concerning these employment options. Ms. Pickard established no specific time deadline for the claimant to respond to this offer, and the claimant failed to respond before September 15, 1989.

10. On September 15, 1989, Ms. Pickard sent the claimant another certified letter, again offering her several options of light-duty work.

11. On September 27, 1989, the claimant called Ms. Pickard concerning the light-duty job offers; she did not want the

office work, but Ms. Pickard again gave her the option of working on the third floor which involved work requiring wrist motions but not repetitive ones, or working on the mold floor. Ms. Pickard followed up this telephone conversation with a September 28, 1989, letter to the claimant.

12. After September 28, 1989, the claimant never responded to National Hanger's offer of light-duty work, and I find that she unreasonably refused to accept any of these offers of light-duty work, or discuss or explore other potential jobs at National Hanger.

13. The claimant testified that National Hanger only offered her work on the crimping machine, work she performed prior to her carpal tunnel syndrome and which Dr. Block prohibited. I find that her testimony on this point is not persuasive, particularly since Ms. Pickard had offered her a choice of light-duty jobs, and the claimant failed to respond to any of these offers.

14. Although the claimant disputed whether she could actually perform office work because of a failed attempt at office work in September 1988, that experience occurred just after her carpal tunnel injury and before her February 1989, carpal tunnel release surgery. Furthermore, the office work at National Hanger was lighter than the work she subsequently performed at Mark Sports Inc. I'm not unmindful of the inherent inconsistency in the defendant's argument that office work was appropriate for this claimant, while at the same time arguing in the alternative, that the claimant's work with Mark Sports, Inc., doing work which the defendant argues is of a lighter capacity than the work she would have done in the office at National Hanger, aggravated her condition.

15. Even after her release for light-duty work, the claimant visited Dr. Block for continuing symptomology related to her carpal tunnel surgery. On October 10, 1989, Dr. Block noted the claimant's historical symptoms as "some new clicking on flexion extension localized primarily to the long finger" and "some recurrent pain when she tries to type or do prolonged finger work." As treatment, Dr. Block injected the canal with Xylocaine and Celestone and recommended that the claimant resume using her wrist brace for heavier activity.

16. On November 28, 1989, Dr. Block saw the claimant again for "persisting painful snapping in the wrist" and diagnosed the condition as mild instability of the wrist. He recommended an Ortho-Mold wrist brace and injected her wrist for symptomatic management.

17. Dr. Block treated the claimant again on January 10, 1990, noting continuing pain throughout the right wrist. Although he found some "very mild flexor tendinitis," Dr. Block noted that the claimant could perform light-duty work.

18. Dr. Block saw the claimant again on April 4, 1990, noting the claimant's historical account of "pain in the wrist if she does push/pull or lifting." He also noted her employment with Mark Sports, Inc., stating "she's back at work doing telemarketing and packing orders, and this continues to bother her right wrist." Dr. Block diagnosed the claimant as suffering from scapholunate ligament strain at the right wrist and referred her to Dr. Ketterer for a second opinion on this diagnosis and the wrist pain.

19. As Dr. Block's treatment notes demonstrate, the claimant had continuing wrist problems prior to her employment with Mark Sports, Inc., an employment which she actually commenced in February 1990.

20. On April 23, 1990, William Ketterer, M.D., examined the claimant concerning her right wrist problem and diagnosed her condition as "persistent right wrist pain related to disassociation at the scapholunate internal." On a follow-up visit on May 31, 1990, Dr. Ketterer discussed some treatment options with the claimant but she declined additional treatment then because "she [did] not feel that she had severe enough symptoms to warrant intervention."

21. Apparently in response to an inquiry by Randal Pesut, CIGNA's representative, Dr. Ketterer rated the claimant at a six percent permanent partial impairment for mild impairment of the radial scaphoid on September 13. 1990.

22. After seeing Dr. Ketterer, the claimant saw Marcy Jones, D.C., on November 16, 1990, who noted, in part, that she continued to have pain in her wrist and finger numbness and that "she had tried to return to work but this dramatically increased her symptoms so she quit the job on her own. Evidently it involved a lot of writing and she was unable to

do this without increased symptoms." The job Dr. Jones referred to was her employment with Mark Sports, Inc.

23. Because of the possible need for surgical intervention on the wrist, Dr. Jones referred the claimant to Forst Brown, M.D. of the Dartmouth Hitchcock Medical Center for evaluation. Dr. Jones also performed a permanency rating and, assuming no further surgical or other care, concluded that she suffered a 15 percent permanent partial impairment to her upper right extremity.

24. Dr. Brown examined the claimant on December 6, 1990, and noted complaints of wrist pain, a clicking in the wrist, and pain radiating up the arm and into the shoulder and neck region. He diagnosed her as suffering from scapholunate disassociation and ordered an arthrogram before considering reconstructive surgery. The arthrogram proved negative for triangular cartilage injury or mid-carpal compartment communication.

25. In response to a letter from Randal Pesut, Dr. Brown wrote on September 15, 1992, that the claimant's symptoms had remained the same as in December 1990; that his diagnosis was still scapholunate ligament weakness; that the claimant was not at a medical end result in September 1990, because her condition had continued and surgery could improve it; that daily living activities worsened her condition because of the strain it put on the wrist area; that the "symptoms and physical findings are probably related to her original injury of September 26, 1988, aggravated by the work she did in January 1990"; that the claimant could not perform light-duty work; and that the recommended course of treatment included either a limited wrist fusion or ligament reconstruction in the scapholunate joint area.

26. In December 1989, the claimant, through her own efforts, secured a job with Mark Sports, Inc. She actually started working at Mark Sports, Inc. in February 1990, and worked there through May 25, 1990.

27. At Mark Sports, Inc., the claimant worked for Mr. Bernard Graney. She initially worked in the production department but subsequently worked directly for Mr. Graney preparing data for shipping merchandise. The tools of her job included rubber bands, a calculator, staples, writing utensils, and paper.

28. The claimant was a good employee at Mark Sports, Inc., receiving a pay increase within her first month. She only worked part time at Mark Sports because only part-time work was available. While at Mark Sports, the claimant worked approximately 20 hours per week, but for the last three weeks in April this weekly average climbed to approximately 32 hours per week. Subsequently, the claimant de facto quit Mark Sports by simply failing to show up for work after May 25, 1990.

29. The claimant never complained of wrist pain to Mr. Graney during her Mark Sports employment nor had she complained about her ability to perform her work duties there. After she left Mark Sports, the claimant subsequently told Mr. Graney that she quit because her husband did not want her working all the hours that she did.

CONCLUSIONS OF LAW

1. In a workers' compensation action the claimant has the burden of establishing all facts essential to the rights asserted, including the character and extent of the injury and disability. Goodwin v. Fairbanks, Morse and Company, 123 Vt. 161 (1962); McKane v. Hill Quarry Company, 100 Vt. 54 (1946).

2. The claimant must establish by sufficient, competent evidence the character and the extent of the injury as well as the causal connection between the injury and medical treatment for the injury, and the employment. Id.

3. When the claimant's injury is an obscure one so that a layperson could have no well-grounded opinion as to its causation or duration, expert medical testimony is the sole means of laying the foundation for an award. Jackson v. True Temper Corporation, 151 Vt. 592, 596 (1989); Egbert v. The Book Press, 144 Vt. 367 (1984); Lapan v. Verno's Inc., 137 Vt. 393 (1979).

4. There must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incident complained of was the cause of the injury and the inference from the facts proven must be at the least the more probable hypothesis. Jackson v. True Temper Corporation, supra; Egbert v. The Book Press, supra; Burton v. Holman and Martin Lumber Company, 112 Vt. 17, 19 (1941).

5. A claimant is entitled to temporary total disability compensation when she or he is totally disabled from work, and temporary total disability compensation terminates when the claimant reaches a medical end result or successfully returns to work. Merrill v. Town of Ludlow, 147 Vt. 186 (1974); Orvis v. Hutchins, 123 Vt. 18 (1962).

I. TEMPORARY TOTAL DISABILITY BENEFITS

1. The claimant seeks temporary total disability benefits from August 30, 1989, when Dr. Block released her for light-duty work, through February 2, 1990, when she commenced work at Mark Sports.

2. Temporary total disability benefits are awarded when a claimant is totally disabled from work. In his July 17, 1989, and January 10, 1990, notes, and his August 17, 1989, letter, Dr. Block states that the claimant was able to perform light-duty work; therefore, she was not temporarily totally disabled entitling her to temporary total disability benefits.

3. Even when released for light-duty work, a claimant may be entitled to continuing temporary total disability benefits if she is unable to secure employment, despite a good-faith effort. See Dejnak v. The Book Press, Opinion No. 116-81 WC; Dailey v. S.G. Phillips Corp., Opinion No. 5-82 WC; Gee v. City of Burlington, 120 Vt. 472 (1958). The claimant has the burden of proving her good-faith effort to secure suitable, available employment. See Coleman v. United Parcel Service, 155 Vt. 646 (1990); Gee v. City of Burlington, supra.

4. Although the claimant was released for light-duty work in August 1989, she refused National Hanger's offer of light duty positions without a reasonable explanation, particularly since the positions offered met the restrictions Dr. Block placed on her return to work. In addition, other than the position at Marks Sports for which she was hired, the claimant did not meet her burden of demonstrating a good-faith effort to seek available employment. For these reasons, the claimant's claim for temporary total disability benefits from August 30, 1989, through February 2, 1990, is denied.

5. The claimant also seeks temporary total disability benefits for May 26, 1990, when she left Mark Sports, through

September 13, 1990, when Dr. Ketterer rated her with a 6 percent permanent partial impairment.

6. The claimant has offered no medical evidence demonstrating that she was temporarily totally disabled during this period of time, nor has she provided any evidence of any good-faith efforts to secure suitable, available employment during this period of time. For these reasons, the claimant's claim for temporary total disability benefits from May 26, 1990, through September 13, 1990, is denied.

II. TEMPORARY PARTIAL DISABILITY BENEFITS

1. The claimant also makes claim for temporary partial disability benefits for the time she worked at Mark Sports, where she worked part time for approximately 20 hours per week.

2. A claimant is entitled to temporary partial disability payments when she's released for work but, because of her work injury, can return only part time or can only return to a position paying a lower average weekly wage than she had prior to her injury. See 21 V.S.A. § 646. Orvis v. Hutchins, 123 Vt. 18 (1962); Roller v. Warren, 98 Vt. 514 (1925).

3. When releasing her for light-duty work, Dr. Block placed no restrictions upon the claimant working a full-time position, he merely restricted her to light-duty work, which National Hanger offered her at full time.

4. Instead of accepting any of the positions National Hanger offered, the claimant unilaterally and voluntarily sought the position with Mark Sports, which only offered part-time work. Under these circumstances, the claimant's work injury and subsequent work restriction did not force her to accept the part-time position Mark Sports offered. She voluntarily and unilaterally chose to do so. Since the claimant has not met her burden of proof on this issue, her claim for temporary partial disability benefits is denied.

III. RECURRENCE VERSUS AGGRAVATION

1. The claimant seeks additional medical treatment for her right wrist, claiming that her current condition arose out of and in the course of her employment at National Hanger. The defendant first contends that any causal connection between

the claimant's employment at National Hanger and her current medical condition has been broken by the following factors:

a. The four-month gap between the claimant's refusal to accept work at National Hanger and her employment with Mark Sports; and

b. The significant gap in medical treatment following her decision not to resume work at National Hanger and treatment for her current condition.

2. In the alternative, the defendant argues that the claimant's employment at Mark Sports aggravated her condition, thus causing a new injury for workers' compensation purposes for which Mark Sports, not National Hanger, is responsible.

3. The Department has recently developed working definitions for the terms "recurrence" and "aggravation." See Jaquish v. Bechtel Construction Company, Opinion No. 30-92WC (December 29, 1992). A "recurrence" is a continuation of a previous work-related injury which has not resolved or become stable. An "aggravation," on the other hand, is the destabilization of a condition which had become stable, although not necessarily completely symptom free. Factors analyzed in determining whether a second injury is a recurrence or an aggravation are whether the claimant had been actively treating medically, the extent of that treatment, the proximity in time of that treatment to the second injury, and whether the claimant has successfully returned to work.

4. Whether a subsequent injury is a recurrence or an aggravation is a medical issue requiring expert medical evidence for resolution. Jackson v. True Temper, 151 Vt. 592 (1989). If deemed a recurrence, the employer/carrier responsible for the original injury is responsible for the recurrence as well. See Jaquish supra. If the second injury is deemed an aggravation, or a new injury, the employer/carrier on the risk at the time of the aggravation is responsible for benefits. Id. Based on the pertinent medical records, I find that the claimant's wrist problem is a recurrent one related to her employment at National Hanger, rather than a result of an aggravation caused by her employment at Mark Sports.

5. Well before her employment at Mark Sports, which commenced in February 1990, the claimant had complained of wrist pain to Dr. Block. In an October 10, 1989, visit, Dr. Block noted that the claimant "had some new clicking on flexion extension localized primarily to her long finger." He also noted "some recurrent pain when she tries to type or do prolonged finger work." To remedy this problem, Dr. Block "injected the canal with Xylocaine and Celestone" and advised the claimant to start using her wrist brace again.

6. In a November 28, 1989, visit he noted "persisting painful snapping in the wrist despite anti-inflammatories and her exercise program." Dr. Block diagnosed this condition as "mild instability of the wrist with secondary tendinitis."

7. Dr. Block also examined the claimant for this problem on January 10, 1990, before she actually started work at Mark Sports, and on April 4, 1990, when she was working for Mark Sports. In his April 4, 1990, notes, Dr. Block stated that the claimant was "still tender in the scapholunate interval" and diagnosed her condition as "scapholunate ligament sprain at the right wrist." While Dr. Block raised the possibility of surgery, he referred the claimant to Dr. Ketterer for a second opinion on the surgical option.

8. Dr. Ketterer examined the claimant on April 23, 1990, and noted from the claimant's history that she developed right wrist symptoms while working for National Hanger which forced her to stop work. He further noted that the claimant "has had a carpal tunnel relief which did relieve the carpal tunnel syndrome, but has persistent wrist pain." Dr. Ketterer noted that even the claimant's writing and light-lifting duties at Marks Sports caused wrist symptoms. His x-ray findings noted a widening of the scapholunate interval. Dr. Ketterer diagnosed the claimant as suffering from "persistent wrist pain related to disassociation at the scapholunate interval."

9. On May 31, 1990, Dr. Ketterer followed up with the claimant noting that a steroid injection did not change the pain symptoms in her wrist. Although he discussed medical options, including surgery, the claimant declined any further treatment at that time because "she [did] not feel she has severe enough symptoms to warrant intervention." Subsequently, Dr. Ketterer rendered a 6 percent permanent impairment rating because of a mild impairment of the radial scaphoid angle.

10. The claimant subsequently was examined by Dr. Forst Brown on December 6, 1990 who noted complaints of wrist pain "with an obvious clicking sensation with movement," and "pain radiating up the arm and into the shoulder and neck regions." He diagnosed the claimant as suffering from scapholunate disassociation.

11. From January 1989, when she first started treating with Dr. Block, through April 4, 1990, when she saw Dr. Block for the last time, the claimant has consistently treated for wrist pain associated with her original work-injury at National Hanger. The defendant relies heavily upon the gaps in medical treatment to argue that there is no causal connection between the claimant's work at National Hanger and her current wrist condition. The medical reports and notes, including Dr. Block's, Dr. Ketterer's, Dr. Jones's, and Dr. Brown's belie that position. The records also demonstrate the claimant's complaint of wrist pain long before her employment at Mark Sports. In fact, the very diagnosis Dr. Block, Dr. Ketterer, Dr. Brown render, scapholunate disassociation, is based on the claimant's continuing symptoms of wrist pain and clicking. The plaintiff treated periodically for this condition, and no traumatic event or other adverse-employment condition occurred after her initial injury at National Hanger which accounts for these symptoms. Compare Downs v. Weyerhauser, Opinion No. 35-92 WC (April 13, 1993) (arthroscopic knee surgery and temporary total disability related to knee injury occurring three years before where no intervening event occurred); Liberty v. Lebel and Raines Sprinkler, Inc., et al., Opinion No. 34-92 WC (April 9, 1993) (same).

Attempting to classify the claimant's current problem as an aggravation, the defendant also relies upon Dr. Brown's December 6, 1990, exam in which, it argues, he first notes the shoulder to arm pain. Prior to this time, however the claimant had complained of pain in her wrist, forearm, and upper arm. See Dr. Snyder's October 26, 1988, note; Dr. Jones's January 30, 1989, note; and Dr. Block's January 10, 1990, note. That the symptoms may have increased to include shoulder pain as well is not enough to classify the claimant's current condition as an aggravation, particularly since the defendant points to no specific event or conditions persuasively responsible for the alleged aggravation.

12. Next, the defendant contends that the claimant's work at Mark Sports caused her current condition. The medical records belie this contention, as does the testimony. Even Ms. Pickard, the defendant's witness, felt the work at Mark Sports as described by Mr. Graney, was fairly light duty, lighter in fact than the office work National Hanger has offered. Simply no evidence of any incident or undue strain at Mark Sports exists. Although the claimant's symptoms may have increased because of her Mark Sports work, the medical records demonstrate that her condition had not stabilized as the claimant still treated with Dr. Block who had injected her right wrist as recently as November 1989, "for symptomatic management."

13. Finally, the defendant relies upon Dr. Brown's statement in his September 15, 1992, letter that the claimant's "symptoms and physical findings are probably related to her original injury of September 26, 1988 aggravated by the work she did in January 1990." Under the Department's case law, the term "aggravation" carries a specific legal definition. It is unclear in what context Dr. Brown uses the term "aggravated" but it is one often used by medical care providers to mean recurrence. Compare Kelly v. Porter Medical Center, Opinion No. 21-84WC, dated March 15, 1985. This bare statement, without more, is too slender a reed upon which to conclude that the claimant's current condition resulted from an aggravation, particularly in light of the other evidence which supports the finding of recurrence.

14. Therefore, I conclude that the claimant's current wrist condition is a recurrent one and is related to her employment at National Hanger. Therefore, she is entitled to medical treatment for this condition.

IV. PERMANENT PARTIAL DISABILITY BENEFITS

Since the claimant is entitled to additional medical treatment for her current wrist condition, no ruling on the permanent partial disability issue shall be rendered now.

Therefore, it is ordered that:

1. The claimant's claim for temporary total disability benefits from August 30, 1989, through February 2, 1990, and from May 26, 1990, through September 13, 1990, is denied;

2. The claimant's claim for temporary partial disability benefits from February 2, 1990, through May 26, 1990, is denied;

3. The claimant's claim for medical benefits for treatment of her current right wrist condition is granted; and

4. Finally, because of the claimant's failure to adequately present this matter to the Department, I am exercising my discretion to deny any claim for attorney's fees.

DATED this 6th day of July, 1993 at Montpelier, Vermont.

Barbara G. Ripley
Commissioner