Zielinski v. OMYA, Inc. (Apr. 29, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Constance Zielinski) File #: G-13610
) By: Barbara H. Alsop
v.) Hearing Officer
) For: Mary S. Hooper
OMYA, Inc.) Commissioner
)
) Opinion #: 24-96WC

Hearing held at Montpelier, Vermont, on March 28, 1996.
Record closed on April 11, 1996.

APPEARANCES

John J. Boylan, III, Esq., for the claimant
Rodney E. McPhee, Esq., for the defendant

ISSUE

1. Whether the claimant's torticollis is a compensable injury under the Workers' Compensation Act.

2. Whether the claimant is entitled to inclusion of other benefits in the calculation of her average weekly wage.

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642.

2. Permanent partial disability compensation pursuant to 21 V.S.A. §648.

3. Medical and hospital benefits pursuant to 21 V.S.A. §640.

4. Vocational rehabilitation pursuant to 21 V.S.A. §641(b).

5. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).

STIPULATIONS

1. At all relevant times, the claimant was an employee within the meaning of the Workers' Compensation Act.

2. At all relevant times, the defendant was an employer within the meaning of the Workers' Compensation Act.

3. The claimant's period of temporary total disability ended on August 3, 1995.

EXHIBITS

Joint Exhibit 1	*Medical records*
Joint Exhibit 2	*Nolan letter dated February 9, 1995*
Joint Exhibit 3	*COBRA letter dated February 22, 1995*
Joint Exhibit 4	*Life insurance conversion letter dated April 3, 1995*
Joint Exhibit 5	*Summary of benefits letter dated November 15, 1995*
Claimant's Exhibit I	*Deposition of Randy S. Moelter, D.C.*
Claimant's Exhibit II	*Condon letter dated October 24, 1994*
Defendant's Exhibit A	*Deposition of Dorothy E. Ford, M.D.*
For identification "a"	*Claimant's handwritten notes of dates of treatment and conversations*

FINDINGS OF FACT

1. The above stipulations are accepted as true and the exhibits, with the exception of "a" for identification, are admitted into evidence. Notice is taken of all forms filed in this matter with the Department.

2. The claimant received a two year degree, Associate in Arts and Executive Secretary, from Cape Cod Community College in 1974. Thereafter, she worked as a secretary through 1985, mainly for banks where about half of her work would involve typing.

3. Her first experience with computers was in 1985, when she worked for the Cape Cod Bank and Trust, where as much as 90% of her work was keyboarding. She then moved in October of 1985 to the Barnstable and Islands District Attorney's Office, where she was initially a secretary for a district court, spending about half of her time on a typewriter. She then became the head of the computer division for the office.

4. It was while she was working in the DA's office that she first experienced neck pain and pulling. Eventually, it reached the stage where her neck was locked 90 to the right, facing slightly downward. Initially,

she could straighten her head by pulling on her hair, but it became permanently locked at some point in 1986. She went to a general practitioner, and then on to neurologist. She was given muscle relaxers, and was recommended to have bed rest.

5. On her own, she contacted a chiropractor, Dr. Daniel Reida, who managed over a period of a few months to resolve her complaints. He diagnosed her problem as torticollis. After the resolution of her symptoms, the claimant returned to her position with the District Attorney's Office. The claimant and her husband continued to treat with Dr. Reida as part of their general health regimen.

6. The claimant and her family moved to Vermont in 1988. The claimant was unemployed for a period of time, caring for her infant daughter. In 1990, she obtained a few weeks of temporary employment through Kelly Services, and then in April of 1990, was employed by the defendant.

7. When the claimant moved to Vermont, she began to see Dr. Randy S. Moelter, a chiropractor, for maintenance. Her treatments with him consisted of manipulations of the spine, including the neck, for various discomforts that she experienced. All of the pains that she had treated up to the fall of 1993 were easily correctable. None of the conditions treated by Dr. Moelter was consistent with her prior history of torticollis.

8. The claimant's position at the defendant was a new position, secretary to the technical director and support staff. The claimant stayed in the same position throughout her employment at OMYA, but the position changed over the course of her tenure. The bulk of her work was keyboarding at a computer, preparing documents for her supervisor and his staff. By October of 1993, the claimant was doing the typing for 21 individuals, and was unable to keep up with the amount of work generated. People frequently lined up at her door to vie for her services. For some time prior to the fall of 1993, the claimant and her supervisor had begun to ask for assistance for her.

9. Also in the fall of 1993, the claimant's supervisor began to take an MBA course. The claimant was instructed to do all of his typing for this course, and to prepare this work before her regularly scheduled work. As a result, she experienced tension from her co-workers because of the priority being given to the school work.

10. In October of 1993, the claimant began to experience a sharp pain at the point where her neck and head meet. She described it as a sensation of someone sticking something into her neck. The pain was unlike anything else she had experienced since she moved to Vermont. She went to see Dr. Moelter, but was surprised when he was unable to resolve her condition.

11. The claimant, on the recommendation of a coworker's wife, went to see Dr. David H. Bahnson, an orthopaedist. He determined that her problem was in all likelihood musculoligamentous, and, as chiropractic had proved unavailing, he recommended physical therapy. After an unsuccessful period of physical therapy, he sent her on to Dr. Joseph E. Corbett, Jr., a neurological surgeon.

12. Dr. Corbett ordered an MRI which revealed some disc bulging at C5-6, but no herniation. In the absence of radiculopathy or nerve root encroachment, he did not recommend fusion although it was a possibility in the event that conservative treatment was not successful. Dr. Corbett gave her a referral for chiropractic treatment.

13. The claimant spoke with Brian Nolan, the health and safety manager for the employer, in an effort to obtain the chiropractic treatment recommended by Dr. Corbett. Because the health plan did not cover chiropractic, Mr. Nolan advised her to see an osteopath, and specifically recommended Harold H. Rosenzweig, D.O.

14. The claimant went to Dr. Rosenzweig on December 6, 1993. He found her to be a good historian, and determined that the claimant was suffering from a cervical strain secondary to a spinal imbalance and aggravated by her work position. He used myofascial release techniques and instructed her in a number of exercises. He also instructed her to stop using an inappropriate heel lift. Over the course of December, the claimant noted to him some improvement from his treatment, but, by the end of the month, was experiencing some pulling and soreness in the right side of her neck.

15. During the month of December, the claimant noticed that she was beginning to "list" to the right. Dr. Rosenzweig had given her a soft cervical collar, which was ineffective as her neck could still turn to the

right. During this period of time, she was also receiving some assistance at work, as Kelly Services had finally been brought in at her and her supervisor's request.

*16. The claimant took off the last week of December as she had some vacation
time that she needed to use up. By the middle of the week, she was experiencing symptoms similar to those she had suffered in 1985, including the pulling of her neck and its locking into one posture. She again consulted with Dr. Moelter who, on December 27, 1993, confirmed that she was
suffering from a torticollic spasm.*

*17. Dr. Moelter has testified that torticollis is a specific entity in which the lateral paracervical muscles are in a state of spasm or hypertonicity that draws the shoulder up and the head sideways, putting the cervical spine in a "C" shape. The primary muscle involved usually is the trapezius. Dr. Moelter also testified that there are three causes of torticollis, the most common of which in this geographical area is a postviral torticollis. The claimant did not have a postviral torticollis. The other two, idiopathic and post-traumatic, are less common. There is no direct cause of idiopathic torticollis. Dr. Moelter opined that the claimant was suffering from post-traumatic torticollis, secondary to the repetitious stress of her job. Based on his findings under the AMA Guides to the Evaluation of Permanent Impairment, Dr. Moelter determined that the claimant had a 5% whole person
impairment or a 9% impairment to the spine, based on the injury model and a
finding that the claimant's complaints fit more closely in the DRE (Diagnosis Related Estimates).*

18. The claimant was referred to Dr. Thomas N. Ward, a neurologist at Dartmouth Hitchcock Medical Center. He diagnosed her to have torticollis, which he believed was due to an idiopathic focal dystonia, a neurological condition. While he did not believe that the torticollis was caused by her work activities, he was clear that her work activities aggravate her condition. He has treated her since February of 1994 with botulinum toxin ("botox") injections, which paralyze the area where the nerve connects with the muscle.

13. As a result of these injections, the claimant experiences a period of improvement in the movement of her neck, although at an initial price of increased pain. As the botox wears off, her neck again stiffens and resumes its torticollic spasm, with attendant pain. At the time of the hearing, the claimant was in that stage after a botox injection where she has nearly normal range of motion and minimal pain attributable to her condition. The

period of time between injections may be anywhere from three to eight months.
For some significant part of that period, the claimant will be at least somewhat symptomatic.

14. With Dr. Ward's advice, the claimant returned to part time work at OMYA
in the spring of 1994. However, after a period of months, it became clear that she was unable to perform the work without a substantial increase in her
symptoms, and she was removed from work by Dr. Ward on June 27, 1994. The
claimant has not worked since that time.

15. The claimant applied for and was offered a job with the U.S. Attorney's Office in the summer of 1995. After careful consideration, she determined that she would not be able to perform the functions of that position without a substantial risk of an increase in her symptoms, and she declined the job. All of the claimant's work experience involves secretarial work.

16. The claimant was seen by Dr. Dorothy Ford, a board certified physiatrist hired by the insurer for its examination of the claimant. Dr. Ford prepared a report and also testified by deposition in this case. She indicated that the claimant's condition was consistent with the diagnosis of focal dystonia, and denied that the claimant had any restriction in her range of motion at the time of her examination on February 17, 1995. Dr. Ford analogized the claimant's condition with that of one suffering from amyotrophic lateral sclerosis (Lou Gehrig's disease), where the underlying illness prevents the sufferer from performing his or her job, rather than being caused by the job. Dr. Ford indicated that torticollis was not rated by the AMA Guides and that there was therefore no permanency attributable to the claimant's injury.

17. The claimant was paid by OMYA through September of 1994. Thereafter,
she received a payment for unused vacation time, and a further payment of severance through February 28, 1995. She received disability payments for a
period of time, at least until the summer of 1995, and also received workers' compensation benefits pursuant to an order of the Department of Labor and Industry after October of 1994.

18. The primary issue in this matter is the correlation, if any, of the claimant's work with the torticollis. The evidence on this issue comes from a series of medical providers and can be summarized as follows. At one end of the spectrum is Dr. Dorothy Ford, who opines that the claimant is suffering from a focal dystonia, which is a disease of the central nervous

system, and is therefore not related to her work. At the other end of the spectrum is Dr. Moelter who opines that the claimant is suffering from post-traumatic torticollis which was directly caused by the repetitive activity of her work. In the intermediate ground are Drs. Ward, Jenkyn and Welch, whose opinions will be assessed seriatim.

19. Dr. Ward, as a treating physician, came to the conclusion, as did Dr. Ford, that the claimant was suffering from idiopathic torticollis, or a focal dystonia. He stated that "...most of the time we cannot find out why the patient has this problem. My evaluation of her did not reveal an underlying condition that I could detect." He went on to say that "I cannot say with medical certainty that her work caused this condition, however, I am quite prepared to say that the activities at work are likely to aggravate her condition."

20. The claimant had been referred by Dr. Ward to Dr. Lawrence R. Jenkyn, board certified in psychiatry and neurology, for a permanency evaluation. Dr. Jenkyn opined that "this patient with recurrent spasmodic torticollis had that condition aggravated by her work activities as a word-processor and data
keyboard entry person in her place of employment. There is no certain way to
describe the cause and effect relationship between the onset of torticollis and such work activity, however, there is little doubt that constant craning of the neck in one position will aggravate this condition in my view." Dr. Jenkyn was unwilling to perform a permanency evaluation because of his belief
that the claimant was not at an end medical result because of the carpal tunnel syndrome he believed she had developed during her return to work in the summer of 1994.

21. Finally, the claimant was seen by Dr. David G. Welch for an examination at the request of the long term disability insurer for the employer. Dr. Welch opined that the diagnosis of dystonia was a misnomer and that the claimant was actually suffering from a myofascial pain syndrome or fibromyalgia. He attributed her condition to work-related activities and associated stress, and indicated that he believed that his opinion was confirmed by the efficacy of the botox injections.

22. The claimant also argues that she is entitled to a different calculation of her average weekly wage. Based on this allegation, she has introduced evidence of various other benefits which she received. There is no dispute as to the accuracy of the following figures: $3,059.55 in profit sharing and retirement contributions in 1993, $466.21 in monthly health insurance benefits, and $857.69 in annual life insurance benefits.

23. The claimant was represented in this proceeding initially by an attorney not the attorney of record in this case. With a fee agreement for a contingency fee of 33 %, he has submitted evidence of spending 33.25 hours in his representation of the claimant, with expenses of $162.87. Her trial attorney also had a fee agreement for a contingency fee of 33 %, having spent 102.25 hours in his representation of the claimant with expenses in the amount of $2,180.17. In light of the complex nature of this claim and the fact that it is a claim of first impression, these amounts are reasonable.

CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant 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). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961).

2. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979). 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 from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. In this case, the expert opinions span quite a range. What is clear is that the claimant's condition is not one easily definable or attributable. While Dr. Moelter and Dr. Welch clearly assert that the condition was caused by the claimant's employment, Dr. Jenkyn and Dr. Ward claim that an underlying condition was aggravated by the work the claimant performed. Only Dr. Ford finds no relationship between the condition and the work, except that the condition prevents the claimant from doing her work.

4. By definition, an aggravation is an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2(I), Workers' Compensation and Occupational Disease Rules. The word "condition" does not, as Dr. Ford appears to conclude, rule out the acceleration or exacerbation of an illness. Nor are the cases cited by the

defendant apposite in this case. He refers to two earlier decisions by the Commissioner, Milizia v. University of Vermont, (March 7, 1983), and Phillips v. Ethan Allen, Opinion No. 6-86WC. In each case, there was a previous underlying condition and the ruling involved a consideration of the claimant's failure to adduce evidence that her condition was connected to her
work by more than a possibility. That is not the case here. Here four of five doctors find a correlation between the claimant's work and her symptoms,
two by direct causation and two by aggravation.

5. A prior condition that has been made symptomatic by work was found to be
compensable in Clark v. U.S. Quarried Slate Products, Opinion No. 8-95WC, where a claimant with prior treatment for a congenital back problem suffered an increase in symptoms after an incident at work. So, similarly in this case, the claimant, who had not had torticollic symptoms for a period of eight years, began to experience them again when confronted with a markedly
increased work load in stressful circumstances.

6. I find that the claimant has established that the more probable hypothesis in this case is that her renewed and more serious symptoms of torticollis in 1993 arose out of and in the course of her employment with the defendant in this case. This is not to say that the torticollis was necessarily caused by her work, only that it was aggravated by the working conditions after a long period of remission. The claimant reached an end medical result on August 3, 1995, and has been evaluated for permanency by
Dr. Ford and Dr. Moelter. Dr. Ford found no permanency because torticollis is not specifically referenced in the AMA Guides and because the claimant had
normal range of motion at the time of her examination of the claimant. Dr. Moelter found a permanency based on the diagnosis related estimate of 9% impairment to the spine.

7. The AMA Guides to the Evaluation of Permanent Impairment provide for the
evaluation of injuries to the spine either by an estimate tied to the diagnosis or by a measurement in the change in the claimant's range of motion, with modifiers based on estimates involving sensation, weakness, and
conditions of the musculoskeletal, nervous or other organ systems. This case
causes peculiar difficulties in determining the measure of the claimant's permanency because of the periodic nature of her limitations in range of

motion. Additionally, the speculation inherent in the question of a possible second remission of her condition belies the difficulty is assigning a specific number for her impairment. Nonetheless, it is clear that the claimant's work has caused an impairment of her spine, and it would be unfair
to deny her recovery simply because her range of motion was normal when Dr.
Ford saw her. Dr. Moelter's evaluation is found to be more credible in light of the unusual circumstances of this case, and the claimant is to be awarded benefits for a 9% permanent partial impairment to her spine.

8. The claimant's arguments about calculation of her average weekly wage, while interesting, are unsupported by the evidence in this case. While there is no doubt that the claimant received a number of benefits as compensation for her work with the employer, there is no evidence from which I can find that those benefits were received in the 12 weeks prior to her injury. 21 V.S.A. §650 states "Average weekly wages shall be computed in such manner as
is best calculated to give average weekly earnings of the worker during the twelve weeks preceding his injury...." Just as bonuses are only included in the calculation if they were received in the 12 weeks prior to the injury, claims for profit sharing and retirement contributions also must be appraised in terms of their date of receipt, at least as a threshold requirement for consideration. I need not determine now if such benefits are in fact earnings for the purpose of the statute, given that there is no evidence as to the date these sums were credited to the claimant's benefit.

9. With regard to health and life insurance premiums, this issue has already been addressed in a decision by the Commissioner. See Antilla v. Edlund Co., Inc., Opinion No. 7-90. The claimant has produced no countervailing authority to justify review and revision of that previously declared policy, and hence cannot prevail in her claim here.

10. The claimant having prevailed is entitled to an award of her costs as a matter of law and her attorneys' fees as a matter of discretion. Costs in the amount of $2,343.04 are awarded. Both attorneys who represented the claimant in this matter had contingency fee agreements with the claimant, which are by rule limited to 20% or $3,000.00. However, because of the novel
issues raised in this case and the diverse medical opinions, a large number of hours were spent in representing the claimant. A limitation on the award of attorneys' fees to the sum of $3,000.00, as would be required were fees to
be awarded based on a contingency fee agreement, is inappropriate. Therefore, fees to the two attorneys will be awarded at the rate of $35.00 an hour, for an award of $4,742.50.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, Zurich-American, or in the event of its default OMYA, Inc., is ordered to:

1. Pay temporary total disability benefits to the claimant through August 3, 1995, consistent with this opinion;

2. Pay permanent partial disability benefits to the claimant for 29.7 weeks, representing a 9% permanent partial impairment to the spine;

3. Pay such medical benefits as are due and payable in accordance with this
decision; and

4. Pay attorneys' fees in the amount of $4,742.50 and costs in the amount of $2,343.04.

DATED at Montpelier, Vermont, this 29th day of April 1996.

____

Mary S. Hooper
Commissioner