J. M. v. Vencor/Starr Farm Nursing Center (February 12, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

J. M.

v.

Vencor/Starr Farm Nursing Center

Opinion No. 09-04WC

By: Margaret A. Mangan Hearing Officer

For: Michael S. Bertrand Commissioner

State File No. P-12794

Hearing Held in Montpelier on October 17, 2003
Record Closed on December 2, 2003

APPEARANCES:

Paula J. Kane, Esq., for the Claimant
John W. Valente, Esq., for the Defendant Vencor Corporation/Starr Farm Nursing Center/Constitution State Service Company

ISSUE:

Did Janet Martin's work as a licensed nursing assistant cause or aggravate her foot condition?

EXHIBITS:

Joint I: *Medical Records*

Claimant's 1: *Summary of hours worked*

FINDINGS OF FACT:

1. *At all times relevant to this action, claimant Janet Martin was an employee and defendant Vencor/Starr Farm Nursing Home her employer within the meaning of the Workers' Compensation Act.*

2. *Claimant has worked as a nurse's aide since 1983 and as a licensed nursing assistant (LNA) since 1995, the year the state began such certification.*

3. *In October of 1997 claimant sought medical care for a muscle mass on the ball of her right foot that Samuel Eppley, M.D. treated with an injection.*

4. *Before starting a job at Starr Farm, where she worked from May of 1998 to January of 2000, claimant filled out a pre-employment health questionnaire on May 19, 1998. To the question whether she had any foot problems, she answered "no," believing that the question pertained only to active problems.*

5. *In March of 1999, claimant saw Dr. Chi Chi Lau with complaints that her foot pain had increased over the previous two years.*

6. *Starr Farm is a large, one floor structure; with cement floors covered with a carpet thin enough to allow the easy passage of wheelchairs and carts. The nursing center has 150 beds on three units, with 50 beds on each unit.*

7. *At first claimant worked eight-hour days, but when staffing decreased, her hours increased, making forty-eight to more than fifty hour weeks common. After about a month into her job, claimant noticed that her foot was throbbing. She then saw Dr. Eppley.*

8. *Her foot condition worsened. She received injections to reduce inflammation and pain. At work she wore a foot apparatus. A co-worker noticed that she was not walking normally and appeared to be in pain. In January of 2000, she told her primary care physician that she had persistent problems with her feet, particularly the left.*

9. *When claimant left the job at Starr she intended to "get fixed and go back."*

10. *When claimant visited Stephan LaPointe, D.P.M./Ph,D, a foot surgeon, in January of 2000, she told him that her foot pain had begun in 1997 and got worse in May of 1998. At that time, she had contractures in toes on both feet and the dislocation of a toe on the left foot.*

11. *Dr. LaPointe diagnosed hammertoe and did surgery in September 2000.*

12. *In December of 2000, claimant saw another podiatrist, David Groening, D.P.M., for a second postoperative opinion.*

13. *Over the next couple of years, claimant had five surgical procedures on her feet by Doctors LaPointe and Groening.*

14. *In February of 2001, Dr. LaPointe noted that claimant was beginning to have symptoms in the ball of her left foot.*

15. *After she left Starr Farm, claimant had jobs at two other nursing homes and worked as the owner of a convenience store. On wood surfaces and on rubber mats, she still had pain in her feet.*

Expert Medical opinions

16. *Robert M. Zelazo, M.D., is an internist who has treated the claimant since 1976 and who has referred her to an orthopedist when she complained of foot problems.*

17. *Dr. Zelazo testified on behalf of the claimant, opining that prolonged standing on a concrete surface would aggravate the claimant's foot problems by causing inflammation. Dr. Zelazo agreed that claimant's weight could have caused the condition that in turn was made worse by the hard surface. However, he would have expected her condition to have improved when she stopped working, but it did not.*

18. *In an opinion written to claimant's counsel after a meeting in July of 2001, Dr. LaPointe stated that the more claimant walked, the more she would have aggravated her condition, that she had trained herself to ignore the pain.*

19. *Hyman Glick, M.D., an orthopedic surgeon who specializes in foot and ankle surgery, evaluated this case for the defense. After reviewing all of claimant's medical records, he opined that her foot deformities had nothing to do with her work and that she would have had pain regardless of the surface she was working on. Any walking, he explained, would increase pain and may or may not worsen the underlying condition. If he were treating a patient with hammertoe who was complaining of pain when on hard surfaces, he would tell that patient not to work on a hard floor.*

20. *Dr. Glick attributed the worsening of claimant's hammertoe to its natural progression, not to her work. Although he could not identify a cause of the neuroma, he noted that overload could contribute to it.*

21. *Working 45 to more than 50 hours a week, in Dr. Glick's opinion, would make the deformities more painful and could push the bones around. And excessive weight also leads to foot trouble.*

DISCUSSION:

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. *It is black-letter law that an employer takes each employee as is and is thus responsible under our workers' compensation law for an accident or trauma which disables one person but which might not disable another. Morrill v. Bianchi, 107 Vt. 80 (1935); Taft v. Blue Mountain Union School, Opinion No. 10-99WC (1999).*

4. *The persuasive medical evidence convinces me that claimant's work did not cause her complicated foot conditions, but did aggravate those conditions. Doctors Zelazo and LaPointe support the claimant's position that the standing and walking at work worsened the claimant's condition. Even the testimony from the defense expert, Dr. Glick, supports this conclusion when he conceded that being on her feet worsened her pain, may have worsened the underlying condition and could have moved the bones. All agreed that they would advise her not to work on hard surfaces given her symptoms.*

5. *Therefore, this case differs from Stannard v. Stannard Co., Inc. 2003 VT 52, ¶ 13, where the Court rejected the argument that claimant had aggravated his condition on a record showing that the claimant's condition had gotten as bad as it was going to get, necessitating surgery, before the final carrier assumed coverage for the employer. In this case, claimant was symptom free before she began her work at Starr Farm. Staffing needs necessitated her working 50 hours in a week, with most of that time on her feet. Even if the floor surfaces had not been concrete, one with her foot condition and her weight risked aggravation of her foot deformities because of the long work hours. That work caused a downward spiral in her condition that involved both feet and necessitated more medical and surgical treatment.*

CONCLUSION OF LAW:

6. *Therefore, claimant has met her burden of proving that that it is more probable than not that her work aggravated her condition, See Burton 112 Vt. 17, and she is entitled to benefits.*

ORDER:

Based on the foregoing findings of fact and conclusion of law, defendant is ORDERED to adjust this claim.

Dated at Montpelier, Vermont this 12th day of February 2004.

_____

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.