M. P. v. NSK Steering Systems America, Inc. (May 22, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

M. P.	Opinion No. 14-07WC
v.	By: Phyllis Severance Phillips, Esq. Hearing Officer
NSK Steering Systems America, Inc.	For: Patricia Moulton Powden Commissioner
	State File Nos. U-10801 & M-10876

OPINION AND ORDER

Hearing held in Manchester, Vermont on November 21, 2006

APPEARANCES:

James Dingley, Esq. for Claimant
Jason Ferreira, Esq. for Defendant Royal & Sun Alliance
Frank Talbott, Esq. for Defendant Wausau Insurance Companies
Kaveh Shahi, Esq. for Defendant Sompo Insurance Company

ISSUES PRESENTED:

1. Whether Claimant's bilateral shoulder injuries are compensable; and

2. If so, which carrier is responsible for workers' compensation benefits.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Joint Medical Exhibit
Joint Exhibit II: First Report of Injury, November 13, 1998
Joint Exhibit III: Quick Fax Report, November 13, 1998
Joint Exhibit IV: First Report of Injury, October 15, 2003
Joint Exhibit V: Accident Report, October 15, 2003

Claimant's Exhibits:

Claimant's Exhibit 1: Deposition of William Ketterer, M.D., May 10, 2006
Claimant's Exhibit 2: Curriculum Vitae of William Ketterer, M.D.
Claimant's Exhibit 3: SOP Documents

Defendant's Exhibits:

Defendant's Exhibit A: Deposition of Todd Lefkoe, M.D., July 27, 2006
Defendant's Exhibit B: Curriculum Vitae of Todd Lefkoe, M.D.
Defendant's Exhibit C: Bonnie Latour, R.N., progress notes, 10/15/03-7/1/05

CLAIM:

Workers' compensation benefits under 21 V.S.A. §601 *et seq.*
Attorney's fees and costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. Claimant was born on September 10, 1938. At the time of the formal hearing she was 68 years old.

2. NSK Steering Systems of America, Inc., and its predecessor company, NASTECH, is a manufacturer of automotive steering parts.

3. Claimant began working on the assembly line at NSK in January 1994. Over the course of her employment there, spanning almost ten years, she performed production and line work on a variety of machines. Her job tasks required her to lift, carry, push, pull and manipulate steering column components. The extent of force and exertion required to do so varied from machine to machine, but all of the work involved repetitive movements of her shoulders, arms and hands.

4. Three different workers' compensation insurance carriers provided coverage for NSK during Claimant's employment tenure there. These were:

   (a) Wausau Insurance Companies, from April 8, 1994 through April 7, 2000;
   (b) Sompo Insurance Company, from April 8, 2000 through October 31, 2002;
   (c) Royal & Sun Alliance, from November 1, 2002 through October 31, 2003; and
   (d) Sompo Insurance Company, from November 1, 2003 through date of the formal hearing.

5. Claimant suffered a variety of injuries during the ten years of her employment at NSK, some work-related and some not. These included:

   (a) A November 1994 motor vehicle accident following which Claimant wore a cervical collar for a brief period of time;

   (b) A slip-and-fall at work on July 25, 1995 in which Claimant suffered a left elbow abrasion; in the course of being evaluated for that injury she also complained of right shoulder pain with overhead reaching;

   (c) An October 1995 motor vehicle accident in which Claimant injured her right shoulder;

(d) A right upper extremity injury in November 1998 causally related to Claimant's assembly work at NSK;

(e) A right shoulder injury in December 1998 causally related to an agility test Claimant was required to take in conjunction with her work at NSK;

(f) A slip-and-fall in the parking lot at work in May or June 2001 in which Claimant suffered a right shoulder injury; and

(g) A July 27, 2001 low back injury causally related to lifting boxes of parts at work.

6. Claimant did not treat extensively for any of the right shoulder injuries listed in Paragraph 5 above. Specifically:

(a) For the right shoulder pain associated with overhead reaching on July 25, 1995, Claimant treated at the Southwestern Vermont Medical Center Emergency Department. She was diagnosed with a right shoulder strain, prescribed Ibuprofen and referred to Dr. Michl, her primary care provider, for follow-up, but there is no record that she did so;

(b) For the right shoulder injury caused by the October 1995 motor vehicle accident, diagnosed as a shoulder contusion and possible rotator cuff tear, Claimant again treated at the Southwestern Vermont Medical Center Emergency Department. She was prescribed Ibuprofen, Flexeril and bed rest as needed;

(c) For the November 1998 right upper extremity injury causally related to her assembly work at NSK, Claimant treated with her primary care physician, Dr. Michl. Dr. Michl prescribed Advil for pain and modified-duty restrictions against heavy reaching and pressing. At a follow-up visit two weeks later, Dr. Michl reported significant improvement in Claimant's right shoulder, with minimal soreness and full range of motion. He released Claimant to full-duty work with no restrictions;

(d) For the December 1998 right shoulder injury caused by the agility test that NSK required of Claimant, she again treated with Dr. Michl. Dr. Michl diagnosed right shoulder and rotator cuff tendonitis. He administered an injection that produced significant improvement. Dr. Michl advised Claimant to follow up in one week if her symptoms did not continue to improve and he would refer her to physical therapy; there is no record that Claimant did so;

(e) For the fall in NSK's parking lot that occurred in May or June 2001, Claimant sought treatment with Dr. Michl in July 2001 for right upper extremity pain. As with the December 1998 injury, Dr. Michl diagnosed right shoulder and rotator cuff tendonitis. X-rays revealed calcific tendonitis and degenerative changes in the right AC joint. Dr. Michl recommended physical therapy, but Claimant did not pursue this treatment.

7. Claimant did not lose any time from work for any of the right shoulder injuries listed above. In fact, some of the injuries, including both the July 1995 complaint of shoulder pain with overhead reaching and the December 1998 agility test injury, she did not even report to NSK, notwithstanding that they clearly were work-related.

8. Interspersed with the medical appointments Claimant had related to her various right shoulder injuries over the course of her ten-year employment at NSK were numerous medical examinations for other reasons. Most of these were with Dr. Michl. Some concerned specific complaints or medical problems Claimant was experiencing, and some were routine annual general health evaluations. Aside from the treatments noted in Paragraph 6 above, Claimant did not complain of any right shoulder pain or symptoms at any of these other office visits. Thus, there were several significant gaps in treatment for any right shoulder symptoms. Specifically:

   (a) From October 1995 until November 1998, Claimant did not seek treatment for any right shoulder symptoms;

   (b) From December 1998 until July 2001, Claimant did not seek treatment for any right shoulder symptoms; during this time frame, she saw Dr. Michl three times – May 1999, November 2000 and March 2001;

   (c) From July 2001 until February 2004, Claimant did not seek treatment for any right shoulder symptoms; during this time frame, she saw Dr. Michl eighteen times, for both specific medical problems such as low back pain and for routine physical examinations.

9. The medical records do not reflect any complaints of left shoulder pain, injury or treatment at any time during the ten years of Claimant's employment at NSK.

10. Claimant testified that the repetitive work she performed at NSK caused her to suffer constant pain in both her right and left shoulders from at least 1998 on. She testified that Dr. Michl advised her numerous times to quit her job because the repetitive work was too hard for her. Claimant did not follow Dr. Michl's advice, however, nor did she ever file a formal injury report as to bilateral shoulder pain either with her supervisors or with the NSK plant nurse.[1]

11. Claimant stated that her reason for not reporting her constant, ongoing shoulder pain as a work-related injury was that she was afraid that if the claim were denied she would lose her job. Her wages at NSK were significantly higher than what she would have been able to make working for other local employers, and she had no other source of income. Fearful for her job, Claimant decided to work through the pain rather than report it.

[1] As noted above, Claimant did file an injury report for right upper extremity pain in November 1998, but according to the medical records that injury resolved quickly and Claimant did not follow through with any additional treatment recommendations.

12. Claimant testified that during the last two years of her employment she was assigned to work on the Toyota line. Claimant testified that her supervisor on this production line was aware of her shoulder pain and assigned her to work on a machine that required less overhead reaching and therefore was less stressful to her shoulders. When she worked at this assignment, her shoulder pain abated.

13. Claimant testified that the reason she did not mention her shoulder pain during routine annual office visits with Dr. Michl was because the NSK plant nurse had strongly warned her against "commingling" medical appointments. Claimant understood this to mean that she would need to schedule a separate medical appointment with Dr. Michl for treatment of a work-related shoulder injury. This would have required her to take time off from work, which she did not want to do.

14. In addition to the injuries listed in Paragraph 5 above, Claimant suffered from carpal tunnel-like symptoms in both hands, causally related to her repetitive work at NSK. To alleviate these symptoms, Claimant wore bilateral wrist braces for many years. Ultimately, however, these symptoms, which included bilateral pain, weakness and numbness, disabled her from continuing with assembly work. Claimant was taken out of work for these symptoms in October 2003 and has not returned to work since.

15. Claimant treated for her carpal tunnel symptoms with William Ketterer, M.D., an orthopedic surgeon. Dr. Ketterer performed endoscopic carpal tunnel release surgery on Claimant's right wrist in January 2004 and on her left wrist in May 2004.

16. Claimant testified that she had been led to believe that the pain in her shoulders was related to her carpal tunnel syndrome, and that therefore once she underwent carpal tunnel surgeries her shoulder pain would resolve. The medical records do not reflect that a relationship between Claimant's carpal tunnel symptoms and her shoulder pain was ever considered.

17. Claimant testified that when her shoulder pain did not abate following her carpal tunnel surgeries she became more insistent with her medical providers that her shoulder pain be addressed. Thus, Dr. Michl reported in his June 8, 2004 office note that Claimant's carpal tunnel surgery had gone well but that her shoulders were "killing her." Dr. Michl listed "5 years of bilateral shoulder pain" in Claimant's problem list and remarked that Claimant "feels it's work related."

18. Bonnie LaTour, R.N., the occupational health nurse at NSK since May 2002, testified that the first time Claimant complained of or reported bilateral shoulder pain to her was in February 2004, some four months after Claimant's employment terminated. Ms. LaTour testified that since she began working at NSK she had occasion to observe Claimant at work at various times and never observed her to have difficulties due to shoulder pain. Ms. LaTour testified that had Claimant complained of work-related shoulder pain, Ms. LaTour would have completed an incident report and/or First Report of Injury and then would have referred Claimant to Dr. Timura, NSK's occupational medicine specialist, for evaluation. Ms. LaTour also would have considered modifications to Claimant's work station or job assignments had she reported any work-related shoulder symptoms.

19. On June 21, 2004 Claimant was seen for follow up on her left carpal tunnel by Janene Carol, a physician's assistant in Dr. Ketterer's office. Ms. Carol noted that Claimant "states that we have ignored her complaints of bilateral shoulder pain, which she also wishes evaluated today." Ms. Carol scheduled an appointment with Dr. Ketterer for further evaluation of Claimant's shoulder complaints.

20. Dr. Ketterer examined Claimant on June 25, 2004. He noted that Claimant reported a five- to six-year history of bilateral shoulder pain, causally related to repetitive abduction at work. Dr. Ketterer remarked that Claimant's symptoms "clinically are from rotator cuff impingement, and given her age and length of time with symptoms, probable rotator cuff tears as well. By history, these are work-related problems."

21. Interestingly, although Dr. Ketterer initially reported that Claimant ascribed her shoulder pain to the repetitive work she did at NSK, at a subsequent follow-up visit in June 2005 he reported that Claimant now recalled a specific incident at work, but could not remember the year or date. Claimant did not refer to any such specific incident in her formal hearing testimony, but rather maintained, consistent with Dr. Ketterer's earlier report, that years of repetitive stress caused her shoulder pain.

22. Ultimately, following MRI testing Dr. Ketterer diagnosed Claimant with bilateral shoulder impingement and rotator cuff tears complicated by cuff arthropathy.

23. As to the cause of Claimant's shoulder pain and specifically the rotator cuff tears evidenced by MRI, Dr. Ketterer testified as follows:

    (a) Rotator cuff tears are common in people aged 55 and over who are engaged in production line or assembly work, as the combination of age and repetitive trauma cause the shoulder tendon fibers to break;

    (b) From reviewing Claimant's MRI results, it is likely that her rotator cuff tears were not recent, and probably were at least two years old;

    (c) Based both on Claimant's self-report of the progression of her shoulder pain over the previous five years and on Dr. Ketterer's thirty years of experience seeing patients who are engaged in repetitive work, it is likely that Claimant's rotator cuff tears were caused by repetitive use at work.

24. Dr. Ketterer testified that in reaching his conclusions he did not review any medical records other than his own treatment notes. Specifically, he was unaware that the emergency room records relating to Claimant's October 1995 motor vehicle accident referenced a possible rotator cuff tear. Dr. Ketterer also acknowledged that it was "odd," though not "medically unlikely" that Claimant was able to continue working at a job involving repetitive shoulder motion for as long as she did without reporting symptoms or seeking treatment.

25. In September 2004 Claimant underwent an independent medical evaluation with Todd Lefkoe, M.D., a physiatrist. Dr. Lefkoe reported Claimant to be a "limited historian" who was able to give few details as to the timing and progression of her shoulder symptoms. In Dr. Lefkoe's opinion, such details are "critically important" to determining the causal relationship between a patient's symptoms and his or her work.

26. As part of his independent medical evaluation, Dr. Lefkoe reviewed all of Claimant's medical records and relevant medical history.

27. Dr. Lefkoe concurred with Dr. Ketterer's diagnosis of bilateral rotator cuff tears, but disagreed as to their causal relationship to Claimant's work. Dr. Lefkoe testified that given both the lack of a clear-cut mechanism of injury and the absence of any consistent strain of complaints and/or treatment over time, it was impossible to determine how the rotator cuff tears occurred, much less to relate them definitively to Claimant's work at NSK.

28. Both Dr. Ketterer and Dr. Lefkoe testified that events or conditions other than repetitive work can cause rotator cuff tears. Age can be a factor, even without repetitive stress, as can be a person's unique anatomy, specific trauma or simply normal wear and tear from activities of daily living.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. In addition to establishing the facts necessary to a finding of compensability, in order to maintain a claim for workers' compensation benefits a claimant must show that he or she has complied with the applicable statute of limitations. Vermont's workers' compensation statute includes two statutes of limitations – a six-month notice of claim, 21 V.S.A. §656(a), and a six-year statute of limitations, 21 V.S.A. §660(a)[2]; *Longe v. Boise Cascade*, 171 Vt. 214 (2000).

3. As to the first statute of limitations, the statute requires that notice of an injury be given to an employer "as soon as practicable after the injury occurred" and that a claim for compensation be made "within six months after the date of the injury." 21 V.S.A. §656(a). The statute further provides that the date of injury "shall be the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent." 21 V.S.A. §656(b); *Longe v. Boise Cascade*, 171 Vt. 214 (2000); *Hartman v. Ouellette Plumbing and Heating*, 146 Vt. 443 (1985). Last, the statute provides that "[w]ant or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer . . . had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice." 21 V.S.A. §660(a).

4. In the current case, Claimant testified that her repetitive work at NSK caused her to suffer constant shoulder pain from at least 1998 on. This is consistent with Dr. Michl's June 8, 2004 office note, in which he noted Claimant's complaint as "5 years of bilateral shoulder pain" and remarked that she "feels it's work related." Claimant further testified that Dr. Michl advised her many times over the years to quit her job because of the repetitive stress it required. Claimant opted not to quit her job because she enjoyed the higher wages it paid. She also opted not to inform her employer of the ongoing, constant nature of her shoulder pain, because she was afraid doing so would impact negatively upon her job. Ultimately, Claimant did report her bilateral shoulder pain to her employer as a work-related injury, but not until February 2004, some four months after she stopped working and years after the notice period required by 21 V.S.A. §656(a) had expired.

[2] Six years was the applicable statute of limitations at the time of Claimant's injury. The statute since has been amended to reduce the limitations period to three years.

5. Claimant did report one instance of right shoulder pain to her employer, in November 1998. According to the medical records, this injury resolved with minimal treatment, following which Claimant returned to work with no restrictions. There is no medical evidence that her symptoms continued and became constant, nor is there any evidence that this injury involved her left shoulder in any way. I cannot conclude, therefore, that this injury is so closely connected to Claimant's current complaints as to constitute the notice required by §656(a).

6. Claimant testified with great emotion as to how stressful certain work assignments were to her shoulders and how other assignments caused less stress and therefore less shoulder pain. When she described her job duties to her physician, he advised her that the repetitive stress was problematic and recommended that she quit her job. I can only conclude from this evidence that Claimant knew her constant, ongoing shoulder pain was work-related for years before she finally reported it to NSK, and that therefore she has failed to meet the notice requirements of 21 V.S.A. §656(a). Her claim for benefits fails unless she can prove either that NSK had knowledge of the "accident" that gave rise to her injury or that it was not prejudiced by the delay in reporting it.

7. It is easier to ascertain whether an employer had knowledge of the "accident" giving rise to a workers' compensation claim when the injury at issue was caused traumatically rather than as a result of cumulative trauma or repetitive stress, as is the case here. Claimant did testify that at least one of her supervisors was aware of her shoulder pain and assigned her to work at machines that caused less repetitive shoulder stress. The evidence does not reflect whether the supervisor understood Claimant's shoulder pain to have been caused by work as opposed to other non-work-related causes. Nor does the evidence reflect exactly when these alternative assignments occurred and for how long they lasted. As such, the evidence is insufficient to constitute "knowledge" on NSK's part of a repetitive micro-trauma type "accident" so as to bring Claimant under the protection of 21 V.S.A. §660.

8. Can Claimant establish that NSK was not prejudiced by her delay in reporting her bilateral shoulder injury? In this context, lack of prejudice is demonstrated in two ways: first, by showing that the employer was not hampered in making its factual investigation and preparing its case, and second, by showing that the claimant's injury was not aggravated by reason of the employer's inability to provide early medical diagnosis and treatment. *Lowell v. Rutland Area Visiting Nurse Association,* Opinion No. 42-99WC (Oct. 12, 1999), citing 7 *Larson, Workers' Compensation Law,* §78.32(c).

9. I find that the delay was prejudicial. First, given the lack of documentation of any ongoing complaints of bilateral shoulder pain in Claimant's medical records, NSK's ability to investigate the timing, extent and progression of Claimant's symptoms has been severely hampered. Second, it is reasonable to assume that Claimant's injury was aggravated by her unilateral decision to continue working despite both her ongoing pain and her doctor's recommendation that she stop. *See Holmes v. James Gold, D.D.S.*, Opinion No. 31-00WC (Oct. 2, 2000) (no employer prejudice found where employee did not give notice of cumulative trauma injury, but incorporated the workplace modifications suggested by her doctor on her own initiative). Third, as Ms. LaTour testified, it is likely that had Claimant reported her injury, NSK would have modified her work station or assigned her to different job duties so as to minimize any ongoing stress and promote prompt healing.

10. Vermont's Workers' Compensation Act provides a statutory scheme for balancing the interests of both injured workers and employers. By holding employers responsible for work-related injuries regardless of fault, it encourages them to provide and maintain a safe work environment so that the risk of injury is minimized. *See Gerrish v. Savard*, 169 Vt. 468, 473 (1999). But the statute places responsibilities upon employees as well. An injured worker is obligated to report injuries promptly so that the employer can respond appropriately, by correcting the unsafe condition that gave rise to the injury and taking the necessary steps to minimize the risk of aggravation or re-injury. As sections 656 and 660 provide, when the injured worker fails to do so, and when the failure causes prejudice to the employer, the employee must bear responsibility for the consequences, not the employer.

11. I find, therefore, that Claimant failed to give notice of her injury within the time frame mandated by 21 V.S.A. §656(a), that the employer had no knowledge of the accident giving rise to her injury and that the lack of notice was prejudicial. Her claim for workers' compensation benefits, therefore, must fail.

12. Having determined that Claimant's claim fails for lack of timely notice, I need not address the question whether Claimant sufficiently established the causal relationship between her injury and her work at NSK and if she did, which insurance carrier is liable.

ORDER:

1. Claimant's claim for workers' compensation benefits associated with her bilateral rotator cuff tears is DENIED;

2. Because Claimant has not prevailed, she is not entitled to an award of attorney's fees or costs under 21 V.S.A. §678.

DATED at Montpelier, Vermont this _____ day of May 2007.

_____
Patricia Moulton Powden
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.