

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

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| Donna Perry |) | State File No. P-03905 and S-13081 |
| |) | |
| |) | By: Margaret A. Mangan |
| v. |) | Hearing Officer |
| |) | |
| Personnel Connection and |) | |
| Washington County Mental Health |) | For: Michael S. Bertrand |
| |) | Commissioner |
| |) | |
| |) | Opinion No. 19-03WC |

APPEARANCES:

Craig A. Jarvis, Esq., for the Claimant
Eric A. Johnson, Esq. for Personnel Connection
Andrew C. Boxer, Esq. for Washington County Mental Health, for the Defendant

ISSUES:

1. Did the Claimant's medical condition arise out of and in the course of her employment?
2. If this claim is compensable, is it due to an aggravation or recurrence?

CLAIM:

Claimant seeks temporary total disability benefits from May 6, 2002 and continuing until Claimant reaches medical end result or successfully returns to work, medical benefits, attorney fees and the costs of litigation.

EXHIBITS:

Joint I: Medical Records

Defense A: Berlin Police Department Report
Defense B: Incident report
Defense C: Transcript of deposition of Mark J. Bucksbaum, M.D.

FINDINGS OF FACT:

1. Claimant has lived and worked in Vermont since 1989. Between 1989 and 1997 she worked in a variety of jobs.
2. On June 23, 1997 she began working at Ethan Allen, through a Personnel Connection placement. Her job tasks included pounding metal bolts for the assembly of boxes and beds, for which she primarily used her left, dominant, hand, although she switched to her right arm on occasion. Within a few days of working at Ethan Allen, both hands began to swell, with the left worse than the right.
3. By July 7, 1997 Personnel Connection filed a First Report of Injury for left wrist swelling from hammering. State File No. L-03458.
4. When she consulted with Dr. Bram Starr on July 28, 1997, she reported bilateral pain, tingling and weakness in her hands. Dr. Starr diagnosed an overuse syndrome in both arms and referred her to physical therapy. Claimant determined that the therapy made her condition worse.
5. An EMG in November 1997 confirmed carpal tunnel syndrome and entrapment of the ulnar nerve at the elbow in a mild degree on the left. Claimant was then referred to Dr. Christian Bean, an orthopedic surgeon, who diagnosed a "complex work-related compression neuropathy [of the] left upper extremity." By February of 2003, Dr. Bean noted that Claimant probably had a pain syndrome.
6. Claimant next sought an opinion from Dr. James Mogan, who diagnosed cubital tunnel syndrome, recommended left ulnar surgery and performed that surgery on March 31, 1998.
7. In May 1998 Dr. Mogan diagnosed a minimal right ulnar dysfunction, but did not recommend surgery on that side.
8. In July 1998 Dr. Mogan determined that Claimant had reached medical end result. At that time Claimant reported some stiffness, but no pain.
9. Liberty Mutual accepted the compensability of upper extremity injuries diagnosed while she was working at Ethan Allen through Personnel Connection. Forms 22 and 21, approved by this Department, reflect agreements between Liberty Mutual and the Claimant for temporary total, medical and permanent partial benefits.

10. Next, Claimant went to work for Project Independence where she assisted elderly people in a variety of activities. Her right arm problem became worse.
11. On January 18, 2000 Dr. Mogan performed a right ulnar nerve transposition for what he had determined was aggravation of her condition in a job that involved lifting the elderly. She was released to full duty work on February 27, 2000.
12. A March 23, 2000 Rutland Regional Medical Center Rehabilitation note states that Claimant refused to provide any history that did not pertain to her elbows.
13. Kemper Insurance, Project Independence's workers' compensation insurance carrier, paid for the surgery. On June 19, 2000 Dr. Mogan placed her at medical end result for her right arm with a 6% whole person impairment.
14. In early 2000 Claimant began working for Washington County Mental Health (WCMH), where she drove patients to appointments, set up their homes and helped them in various activities.
15. From late 2000 to May of 2001, Claimant helped her daughter with a costume business. Claimant did some bookkeeping, checked orders and repaired costumes.
16. On January 22, 2002, Claimant was driving a patient of WCMH from an appointment as a part of her regular job duties. While stopped at a traffic light another car hit her from behind. The rear bumper was scraped. Claimant hit her left elbow on the door of the car.
17. Claimant then took the client home, filed a police report and went to the Central Vermont Hospital. Her shoulder was sore at the site of shoulder strap. At the emergency department visit, she reported only left shoulder pain and specifically denied back, neck or extremity pain. She was treated and released. Subsequent x-rays were negative.
18. Claimant returned to work the next day and did not miss time from work for three months.
19. At an April 2002 visit to her chiropractor, Rob Borowski, D.C, Claimant reported left shoulder and neck pain. Dr. Borowske diagnosed possible reflex sympathetic dystrophy and took her out of work on May 13, 2002.
20. Claimant has not worked since May 6, 2002.
21. On a referral Claimant next saw Dr. Milhorat, a neurologist on May 13, 2002, who diagnosed reflex sympathetic dystrophy.

22. A May 31, 2002 EEG study performed at Central Vermont Hospital was normal. In his report of that study, Dr. John Milhorat reported the history of reflex sympathetic dystrophy and recent syncopal episodes with no etiology.
23. Claimant describes skin on her left hand that is cracking, nails of the index finger and thumb that are curving, problems with the regulation of body temperature, swelling of the left hand and changes in the left hand and foot. These symptoms all can be found in reflex sympathetic dystrophy.
24. Claimant acknowledges that she had neck pain and headaches long before the motor vehicle accident at issue here, but attributes those symptoms to high blood pressure that is now under control. This incredible theory is not supported with medical evidence.
25. Claimant's symptoms include headaches, neck pains, tender points, dizziness, lightheadedness, shoulder pain, back pain, stiffness, joint pain, fatigue, gastrointestinal disorders, sleeplessness and restless legs.

Past History

26. For approximately 15 years, from about 1974 until 1989, Claimant worked off and on for a factory in New York on an assembly line placing electronic parts into boxes. The job required repetitive motions with her upper extremities for up to eight hours per day.
27. In 1992 Claimant sought medical attention for persistent headache, mostly in the back and neck. On examination at that time, Dr. Jewett at Green Mountain Family Practice, noted trigger points with spasms. He diagnosed "fibromyositis."
28. Also in 1992 Claimant sought medical attention for ongoing pain in her hip and back.
29. In 1993 Claimant sought care at Gifford Emergency Department at least twice, once for pain radiating to her shoulders and back with an examination that revealed tenderness in those areas. At the second visit, she complained of intolerable pain that made her wince when touched.
30. In 1994 Claimant was seen for complaints of back pain, sore neck and headache.
31. Four days before she complained of a work-related injury at the Personnel Connection she was seen for left shoulder tenderness.
32. A 1997 Community Health Plan record notes Claimant's report of a three-year history of numbness and tingling in both hands and forearms. At a deposition, Claimant testified that she never had numbness and tingling in her hands before working at Ethan Allen.

Expert Medical Opinions

33. John Milhorat is a neurologist with 30 years experience. He has treated the Claimant since March 13, 2002.
34. Dr. Milhorat opined that the Claimant suffers from Reflex Sympathic Dystrophy (RSD), with symptoms of allodynia (exquisite sensitivity to touch) in the left arm, swelling of the hand, joint stiffness and loss of range of motion, trophic changes including hair loss and changes in the fingernails, and an action tremor. In the Claimant's case, the symptoms are just developing and are likely to get worse. He does not believe that the Claimant could sustain employment in her current state, especially since she is left hand dominant.
35. Dr. Milhorat opined that it is possible Claimant had RSD as early as 1997 and that it was possible that the motor vehicle accident caused it, although he could not rule out work at the costume shop or another event in her daily life. He could not offer an opinion about her condition before 2002 to a reasonable degree of medical certainty.
36. Dr. Michael Kenosh performed an examination of the Claimant for the Travelers. He is an expert in the area of physical medicine and rehabilitation. He opined that the Claimant suffered a cervical strain with a left radicular syndrome relating to the motor vehicle accident on January 22, 2002, a strain that had reached medical end result at the time he saw her in September of that year. He also opined that she has a somatoform pain disorder that predates and is unrelated to the motor vehicle accident. He attributes the pain disorder to a maladaptive coping style, psychosocial factors, legal issues and what he called "medicalization." In further support of his theory, he noted that she has had a number of other medical problems with minimal or no objective findings. He ruled out RSD as a diagnosis in this case because she lacked the objective physical signs to support the diagnosis.
37. Dr. Kenosh does not believe the Claimant's motor vehicle accident exacerbated or aggravated any other pre-existing problems, including prior upper extremity ulnar neuropathy symptoms. Although he did not document it, Dr. Kenosh has acknowledged that Claimant had a tremor in her left arm when he examined her.
38. Dr. Mark Bucksbaum examined the Claimant on August 26, 2002 at the request of Liberty Mutual. In his opinion she suffers from fibromyalgia, which predates the motor vehicle accident and is unrelated to work, and a chronic pain syndrome developed as a result of the motor vehicle accident for which she has reached medical end result with a 3% whole person impairment rating.

39. In support of his diagnosis of chronic pain, Dr. Bucksbaum noted that her perceived pain and disability interfere with life at every level. This perceived pain is out of proportion to the clinical examination findings. It is a behavioral phenomenon with a perception of significant pain and disability that continues after the source of the pain either resolved or came to some reasonable resolution. Dr. Bucksbaum observed that it is not clear from the records that Claimant's physical findings changed after the accident, although her pain and perceived disability did. Yet the records demonstrate that she had a decade long history of multifocal pain. On top of that preexisting pain, the car accident superimposed an additional pain syndrome. He opined that the dizziness and neck pain Claimant complained of are old issues for the Claimant that are resurfacing.
40. In Dr. Bucksbaum's opinion, Claimant is at a medical end result for her work-related chronic pain.

Attorney fees and Costs

41. Claimant submitted a copy of her contingency fee agreement with her attorney, evidence of 118.2 hours worked on this case and total costs and expenses of \$3,320.15.

CONCLUSIONS OF LAW:

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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. If this claim were deemed compensable, the Personnel Connection would be the employer responsible for benefits associated with Claimant's injuries if she suffered a recurrence, that is if the work for Washington County Mental Health merely caused a return of symptoms following temporary remission, *Workers' Compensation Rule 14.9242*, and did not causally contribute to her disability. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem.) (1997). On the other hand, Washington County Mental Health would be responsible for the entire disability if Claimant's work there caused a new injury or aggravated, accelerated, or combined with a preexisting impairment to produce a disability greater than what would have resulted from earlier injury alone. *Id.*; Rule 2.110.

4. The vast weight of the evidence indicates that the Claimant had a longstanding pain disorder that has led to different diagnoses. The injury diagnosed, surgically treated and which resulted in a permanent partial disability award while she was at Personnel Connection had resolved prior to her work at Washington County Mental Health. There simply is no persuasive evidence to warrant assigning liability to the Personnel Connection.
5. While working at Washington County Mental Health, Claimant clearly had a work-related motor vehicle accident. However, the accident was minor and she continued to work. It was several months before she had complaints of neck pain and other pain complaints that led Dr. Milhorat to diagnose RSD. While that diagnosis may be the correct one, his opinion regarding its connection to her work does not rise to the necessary standard of probability and even if it did, would have to be rejected because of the Claimant's long history of pain complaints and her inherently unreliable recollection of that history.
6. Doctors Bucksbaum and Kenosh both rely on the history of pain complaints in concluding that her pain disorder is longstanding.
7. Any injury Claimant suffered at Washington County Mental Health was a new and limited one. I would have to ignore her history and the crucial facts showing a minor motor vehicle impact and no time lost from work for three months to conclude that the pain complaints that have increased since that time date back to the motor vehicle accident. In fact, it would be impermissible speculation to conclude that Claimant's current pain complaints are due to her work at either the Personnel Connection or Washington County Mental Health.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, this claim based on Claimant's pain complaints is DENIED.

Dated at Montpelier, Vermont this 18th day of March 2003.




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.