

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Brandy Clayton

Opinion No. 11-20WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

J.C. Penney Corporation

For: Michael A. Harrington
Commissioner

State File No. GG-61153

RULING ON CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

David L. Grayck, Esq., for Claimant
Wesley M. Lawrence, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's right foot plantar fasciitis a work-related injury for which she is entitled to workers' compensation benefits as a matter of law?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts filed December 3, 2019

Claimant's Exhibit 1: Vermont Supreme Court's Opinion and Order in *Clayton v. J.C. Penney Corp.*, 2017 VT 87, dated September 22, 2017
Claimant's Exhibit 2: Vermont Supreme Court's Entry Order in *Clayton v. J.C. Penney Corp.*, dated September 22, 2017
Claimant's Exhibit 3: Appellant's Motion for Reconsideration in *Clayton v. J.C. Penney Corp.*, filed October 5, 2017
Claimant's Exhibit 4: Vermont Supreme Court's Entry Order on Appellant's Motion for Reconsideration, dated October 17, 2017
Claimant's Exhibit 5: Vermont Supreme Court's Opinion and Order in *Clayton v. J.C. Penney Corp.*, 2017 VT 87, revised October 17, 2017
Claimant's Exhibit 6: Dr. McNamara's January 23, 2019 affidavit
Claimant's Exhibit 7: Dr. McNamara's October 4, 2019 affidavit
Claimant's Exhibit 8: Medical records

Defendant's Statement of Undisputed Material Facts and Response to Claimant's Statement of Undisputed Material Facts filed February 13, 2020

Defendant's Exhibit A: Dr. McNamara's November 20, 2007 medical record
Defendant's Exhibit B: Dr. Boucher's March 19, 2013 report

Defendant's Exhibit C: Dr. Smith's medical records from October 2013 through February 2014
Defendant's Exhibit D: Dr. Smith's December 2, 2013 medical record
Defendant's Exhibit E: Dr. Rudolf's January 11, 2020 report
Defendant's Exhibit F: Dr. White's June 16, 2014 report
Defendant's Exhibit 1: Dr. Rudolf's *Curriculum vitae*

FINDINGS OF FACT:

Taking judicial notice of all forms and correspondence in the Department's files on this matter and considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Claimant worked for Defendant as a hair stylist. Her job required her to stand on her feet during working hours.

Claims for Work-Related Left Foot and Right Foot Injuries

3. In February 2011, Claimant alleged a work-related left foot injury with an injury date of March 26, 2010. *First Report of Injury* (Form 1). Defendant accepted her claim as compensable and paid benefits accordingly. *See, e.g., Agreement for Temporary Total Disability Compensation* (Form 21), approved June 24, 2011. On September 24, 2014, the Department approved the parties' Modified Full and Final Form 16 Settlement Agreement with Addendum ("Settlement Agreement").
4. Six months later, in March 2015, Claimant alleged a work-related right foot injury with an injury date of March 10, 2015. *First Report of Injury* (Form 1). Defendant denied her claim on two grounds: first, that Claimant's injury was unrelated to her employment, and second, that her injury was preexisting. *Denial of Benefits* (Form 2), dated March 26, 2015. Defendant contends that, as a preexisting injury, Claimant's right foot claim is barred by the general release language of the Settlement Agreement.¹ Claimant appealed the denial on April 6, 2015.

The Parties' 2015-2016 Cross Motions for Summary Judgment

5. The parties filed cross motions for summary judgment on whether the Settlement Agreement barred Claimant from asserting a workers' compensation claim for her alleged March 10, 2015 right foot injury. On August 24, 2016, the Commissioner

¹ Defendant also contends that Claimant's right foot claim is barred by the statute of limitations. *See* Specialist's Referral to the Formal Hearing Docket dated June 22, 2015, at 1.

found that the Settlement Agreement’s general release language² violated public policy to the extent that it purported to release claims for injuries that might have arisen during Claimant’s employment from causes completely unrelated to her left foot injury. *Clayton v. J.C. Penney Corp.*, Opinion No. 13-16WC (August 24, 2016) (“*Clayton I*”). The Commissioner concluded:

As to whether Claimant’s pending claim for benefits on account of an alleged March 10, 2015 right foot injury is barred or not, I cannot yet say. I do not consider either of Dr. McNamara’s statements . . . conclusive on the question whether Claimant’s current complaints are causally related in any way to her previously settled left foot claim, or whether, to a reasonable degree of medical certainty, they are entirely separate and distinct. If the former, then her current claim is barred; if the latter, then it may proceed. In either event, genuine issues of material fact exist, sufficient to preclude summary judgment in either party’s favor.

6. In September 2016, Defendant appealed *Clayton I* to the Vermont Supreme Court on the following Certified Question: “As a matter of law, does the parties’ September 24, 2014 approved settlement agreement bar Claimant from asserting a claim for workers’ compensation benefits on account of her alleged March 10, 2015 work-related right foot injury?”

Vermont Supreme Court’s Decision and Entry Orders

7. On September 22, 2017, the Vermont Supreme Court issued *Clayton v. J.C. Penney Corp.*, 2017 VT 87 (“*Clayton II*”). The Court held that the Commissioner did not have the authority to invalidate the general release language in the Settlement Agreement on public policy grounds. *Id.* at ¶ 13. The Court reversed the Commissioner’s decision and remanded the case for a hearing to determine whether claimant’s left foot and right foot injuries were causally related. *Clayton II*; see also Supreme Court Entry Order dated September 22, 2017.
8. On October 17, 2017, in response to Defendant’s motion for reconsideration,³ the Court modified footnote 3 of *Clayton II*. As modified, footnote 3 provides as follows:

² The Settlement Agreement provides that it is “**INTENDED TO BE A GENERAL RELEASE OF ALL CLAIMS OF THE EMPLOYEE AGAINST THE EMPLOYER AND THE INSURANCE CARRIER ARISING FROM EMPLOYEE’S EMPLOYMENT WITH EMPLOYER.**” See Settlement Agreement, Form 16, at 1 (emphasis in original). It further provides that Claimant is releasing Defendant from “any and all” workers’ compensation claims causally related not only to her alleged March 26, 2010 injury, but also to “any other date.” *Id.*, Addendum, at 1. The Settlement Agreement also covers Claimant’s left foot injury “and any and all sequelae.” Settlement Agreement, Form 16, at 1.

³ Defendant’s motion informed the Court that *Clayton II* contained an inaccuracy at footnote 3. The footnote stated that Defendant had limited its argument concerning the scope of the release to whether Claimant could bring a claim for injuries that pre-dated the March 2010 injury. Defendant’s motion clarified that it had limited its argument to whether Claimant could bring a claim for injuries that pre-dated the September 24, 2014 Settlement Agreement, not the March 2010 injury. *Defendant’s Motion for Reconsideration*, at 1.

The Commissioner's decision indicates that she interpreted the general release language in the parties' settlement agreement to relieve employer of the obligation to provide workers' compensation coverage not just for claims that may have existed before or at the time of claimant's March 2010 injury, but also claims that may have arisen from injury occurring after March 2010. ***On appeal, employer limits its argument to whether claimant may bring a claim for injuries that claimant knew of, or should have known of, on the date of the September 24, 2014 settlement.*** Thus, we need not address whether claims arising after March 2010, which are not sequelae of claimant's left-foot injury, may be brought despite the agreement's release language.

See Supreme Court Entry Order dated October 17, 2017 (emphasis added).

Claimant's Motion for Partial Summary Judgment

9. On remand, Claimant has filed a Motion for Partial Summary Judgment seeking a determination that her right foot claim is compensable as a matter of law. In support of her motion, she submitted two affidavits from podiatrist Kevin McNamara, stating that her left foot and right foot injuries are not causally related to each other and that her right foot injury arose after the September 24, 2014 Settlement Agreement. Claimant contends that her right foot claim therefore is not barred by the Settlement Agreement *and* is compensable as a matter of law.
10. Defendant contends that there are genuine issues of material fact as to whether Claimant's left foot and right foot injuries are causally related and as to whether her right foot claim arose after the Settlement Agreement. Further, even if these facts were undisputed, Defendant contends that Claimant is still not entitled to summary judgment because there has been no determination that her right foot claim is a compensable work-related injury.

Opinions of Podiatrist Kevin McNamara, DPM

11. Kevin McNamara, DPM, is one of Claimant's treating podiatrists. *Claimant's Exhibit 6, Dr. McNamara's January 23, 2019 Affidavit* ("Dr. McNamara's First Affidavit"), ¶ 6; *Claimant's Exhibit 7, Dr. McNamara's October 4, 2019 Affidavit* ("Dr. McNamara's Second Affidavit"), ¶ 6. Claimant presented to Dr. McNamara on March 9, 2015 for evaluation and treatment of right foot pain. Notably, Dr. McNamara did not treat Claimant between May 2012 and February 2015; podiatrist Paul Smith, DPM, treated her during that time.
12. Dr. McNamara graduated from the Temple University School of Podiatric Medicine. He completed a residency at Frankford Hospital in Philadelphia and a fellowship with the American Academy of Podiatric Sports Medicine. Dr. McNamara is board certified with the American Board of Foot and Ankle Surgery.

13. In Dr. McNamara's opinion, Claimant's right foot injury is unrelated to her prior left foot injury. *Dr. McNamara's First Affidavit*, ¶ 7. Dr. McNamara also offered his opinion that Claimant's right foot injury arose after September 24, 2014. In his opinion, her right foot injury arose in early 2015. *Dr. McNamara's First Affidavit*, ¶ 7; *Dr. McNamara's Second Affidavit*, ¶ 7. In reaching these opinions, Dr. McNamara reviewed Claimant's medical records, including an office note of her visit to Dr. Smith on October 24, 2013. *Dr. McNamara's Second Affidavit*, ¶ 8.
14. Dr. McNamara possesses the necessary training, experience and professional knowledge to assert a medical opinion as to the nature of Claimant's foot injuries. He offered his opinions here to a reasonable degree of medical certainty. *Dr. McNamara's Second Affidavit*, ¶ 13.

Opinion of Orthopedic Surgeon Leonard Rudolf, MD

15. Leonard Rudolf, MD, is an orthopedic surgeon. Dr. Rudolf reviewed Claimant's medical records from 2005 through 2015 and issued a report on January 11, 2020. In his report, Dr. Rudolf identified certain medical records that document Claimant's right foot plantar fasciitis prior to September 24, 2014.⁴ *Defendant's Exhibit E*.
16. In Dr. Rudolf's opinion, to a reasonable degree of medical certainty, Claimant has right foot plantar fasciitis for which she had evaluation and treatment both prior to 2014 and continuing after that date. *Defendant's Exhibit E*.

Contested Material Facts

The parties' submissions reflect genuine disputes concerning the following factual statements that Claimant asserted in support of her motion:

17. Claimant's right foot injury is unrelated to her prior left foot injury. *Claimant's December 3, 2019 Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶¶ 25, 28; *Dr. McNamara's First Affidavit*, ¶ 7. Defendant disputes this assertion, citing Claimant's medical records. *Defendant's February 13, 2020 Response to Claimant's Statement* ("Defendant's Response"), ¶¶ 25, 28. See *Claimant's Exhibit 8*, at 164 (Dr. McNamara's March 9, 2015 office note stating that Claimant's right foot bothered her when she was compensating for her left foot fasciitis). Accordingly, I find that there is a genuine issue of material fact as to whether Claimant's right foot injury is related to her prior left foot injury.
18. Claimant's right foot injury arose after September 24, 2014; it arose in early 2015. *Claimant's Statement*, ¶¶ 26, 28; *Dr. McNamara's First Affidavit*, ¶ 7; *Dr.*

⁴ For example, Dr. Rudolf identified Dr. McNamara's November 20, 2007 medical record noting that Claimant presented with right heel pain of six months' duration. The record further noted that Claimant's job as a hairdresser required her to stand on concrete floors and that her symptoms were consistent with right foot plantar fasciitis. *Defendant's Exhibit E; Claimant's Exhibit 8*, at 32-35.

McNamara's Second Affidavit, ¶ 7. Defendant disputes these assertions, citing Claimant's medical records and Dr. Rudolf's report. *Defendant's Response*, ¶¶ 26, 28. *See Defendant's Exhibit A* (Dr. McNamara's November 20, 2007 record noting right heel pain and history of standing on concrete floors as a hairdresser); *Defendant's Exhibit B* (Dr. Boucher's March 19, 2013 report noting treatment for right foot plantar fasciitis); *Defendant's Exhibit C* (Dr. Smith's October 24, 2013 record noting right foot plantar fasciitis and how it might relate to her occupation); *Defendant's Exhibit D* (Dr. Smith's December 2, 2013 record discussing right foot plantar fasciitis and its relationship to her occupation); *Defendant's Exhibit E* (Dr. Rudolf's January 11, 2020 report identifying right foot plantar fasciitis for which Claimant received treatment prior to and after 2014); *Defendant's Exhibit F*, at 8 (Dr. White's June 16, 2014 report noting current problems with Claimant's right foot). Accordingly, I find that there are genuine issues of material fact as to whether Claimant's right foot injury arose after September 24, 2014 and whether it arose in early 2015.

19. Claimant presented to Dr. McNamara on March 9, 2015 for evaluation and treatment of right foot pain; although she had a history of right foot pain in 2007 and 2013, those prior incidents resolved. *Claimant's Statement*, ¶ 30; *Dr. McNamara's Second Affidavit*, ¶ 10. Defendant disputes this assertion. *Defendant's Response*, ¶ 30. *See, e.g., Defendant's Exhibit F*, at 8 (Dr. White's June 16, 2014 report of ongoing problems with Claimant's right foot). Accordingly, I find that there is a genuine issue of material fact as to whether Claimant's right foot pain had resolved prior to March 9, 2015.
20. Claimant's 2015 episode of right foot plantar fasciitis corresponded with an increased work demand that occurred in the early months of 2015. *Claimant's Statement*, ¶ 31; *Dr. McNamara's Second Affidavit*, ¶ 11. Defendant contends that Claimant has not supported this statement with admissible evidence of any increased work demand. *Defendant's Response*, ¶ 31. I agree. Accordingly, I find that there is a genuine issue of material fact as to whether Claimant's episode of right foot plantar fasciitis in March 2015 corresponded with an increased work demand.
21. To a reasonable degree of medical certainty, Claimant's right foot injury is unrelated to her prior left foot injury; her right foot injury arose after 2014; and her right foot injury was not reasonably discoverable or apparent prior to early 2015. *Claimant's Statement*, ¶ 34; *Dr. McNamara's Second Affidavit*, ¶ 13. Defendant disputes these assertions, citing Claimant's medical records. *Defendant's Response*, ¶ 34. *See Finding of Fact Nos. 17-19 supra*. Accordingly, I find that there are genuine issues of material fact whether Claimant's right foot injury is related to her prior left foot injury; whether her right foot injury arose after 2014; and whether her right foot injury was reasonably discoverable and apparent prior to early 2015.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. In March 2015, Claimant filed a claim for right foot plantar fasciitis. Defendant denied her claim as unrelated to her employment and as preexisting and therefore barred by the parties' Settlement Agreement. *See* Finding of Fact No. 4 *supra*.
2. Claimant now seeks summary judgment in her favor that her right foot plantar fasciitis is compensable. She must therefore establish, as a matter of law, that her right foot condition is causally related to her employment *and* that her claim is not barred by the Settlement Agreement.
3. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The party opposing the motion is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
4. Claimant contends that Defendant has not created a genuine issue of material fact because it did not submit Dr. Rudolf's opinion by affidavit. However, neither the Vermont Rules of Civil Procedure nor the Workers' Compensation Rules require that evidence supporting allegations made in opposition to summary judgment be in affidavit form. *See* V.R.Civ.P. 56(c)(2) and Workers' Compensation Rule 17.0000. In determining whether there is a genuine issue as to any material fact, the Department will accept as true "the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits *or other evidentiary material*." *Gauthier v. Green Mountain, Inc.*, 2015 VT 108, ¶ 14 (emphasis added).
5. In keeping with the informal nature of workers' compensation proceedings, the Department routinely admits independent medical examination reports and record reviews into evidence. *See* Workers' Compensation Rule 17.1100; 21 V.S.A. §§ 602, 604; *see also* Rule 17.1800 (hearsay admissible as set forth in the rule). Further, the Department routinely relies on medical records at formal hearings and in the summary judgment context. *See* Workers' Compensation Rule 17.1600.
6. Accordingly, I conclude that Defendant has supported its allegations opposing summary judgment by sufficient evidentiary material to create the genuine issues of material fact identified in Finding of Fact Nos. 17-21 *supra*.

Causal Relationship Between Claimant's Right Foot Injury and her Employment

7. Claimant has the burden of establishing that her right foot injury arose out of and in the course of her employment. 21 V.S.A. § 618; *King v. Snide*, 144 Vt. 395, 399 (1984) (claimant's burden to establish all facts essential to the rights asserted). Thus, she must establish by sufficient credible evidence the character and extent of her injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and her employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984).
8. As the cause of Claimant's right foot plantar fasciitis is not readily apparent, she must prove her allegation by expert testimony. *See Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979) (where the cause of an injured worker's medical condition is not readily apparent, expert testimony is the sole means of establishing a causal connection between the employment and the injury).
9. Dr. McNamara did not offer an opinion that Claimant's right foot plantar fasciitis is work-related, but he did state that her condition "corresponded with" an increased work demand in early 2015. *Dr. McNamara's Second Affidavit*, ¶ 11. However, Dr. McNamara has no personal knowledge of Claimant's work demands. *See Finding of Fact No. 20 supra*. Further, a temporal relationship alone is insufficient to establish causation, particularly as a matter of law. *See, e.g., Griffin v. Eden Park Nursing Home*, Opinion No. 52-05WC (September 8, 2005), citing *Norse v. Melsur Corp.*, 143 Vt. 241 (1983) (temporal relationship is an insufficient basis to support causation); *Goodwin-Abare v. State of Vermont, Agency of Human Services*, Opinion No. 41-11WC (December 14, 2011) (same).
10. I therefore conclude that Claimant has failed to establish a work-related right foot injury as a matter of law.

Effect of the Parties' Settlement Agreement on Claimant's Right Foot Claim

11. If Claimant's right foot injury is causally related to her left foot injury, then it is barred by the Settlement Agreement as a sequela of her left foot injury. *See Finding of Fact No. 5 supra*, footnote 2; *Clayton I*, Conclusion of Law No. 15, *rev'd on other grounds by Clayton II*. Even if Claimant's right foot and left foot injuries are not causally related, her right foot injury claim would nevertheless be barred by the Settlement Agreement's general release language if that injury arose before the settlement's effective date. *See Finding of Fact No. 5 supra*, footnote 2; *Clayton II* (upholding the Settlement Agreement's general release language).

Causal Relationship Between Claimant's Left Foot and Right Foot Injuries

12. Claimant relies on Dr. McNamara's affidavits to establish that her right foot injury is not causally related to her left foot injury. Nevertheless, a genuine issue of material fact exists as to the causal relationship between Claimant's left foot and right foot injuries. *Finding of Fact No. 17 supra*. Further, I am not required to find an expert

opinion persuasive, even if there is no countervailing opinion. *See, e.g., Meau v. The Howard Center, Inc.*, Opinion No. 01-14WC (January 24, 2014).

13. I therefore conclude that there is a genuine issue of material fact as to whether Claimant's right foot plantar fasciitis claim is barred by the parties' Settlement Agreement as a sequela of her left foot injury.

Status of Claimant's Right Foot Injury Prior to the Settlement Agreement

14. The Settlement Agreement provides that it is a "general release of all claims" against Defendant arising from Claimant's employment. It further provides that Claimant releases Defendant from "any and all" workers' compensation claims causally related to her employment on any date. Finding of Fact No. 5 *supra*, footnote 2. In *Clayton II*, the Court allowed this broad general release language to stand. Thus, if Claimant's work-related right foot injury arose prior to September 24, 2014, her claim would be barred by the Settlement Agreement.
15. Claimant relies on Dr. McNamara's affidavit to establish that her right foot plantar fasciitis arose after the parties' Settlement Agreement. Dr. McNamara wrote that her right foot incidents from 2007 and 2013 had resolved and that her March 2015 right foot condition arose in early 2015. *Dr. McNamara's Second Affidavit*, ¶ 10. Nevertheless, there is a genuine issue of material fact as to whether Claimant's current right foot plantar fasciitis condition arose before or after the effective date of the Settlement Agreement. *See* Finding of Fact Nos. 18-19 *supra*.
16. I therefore conclude that there is a genuine issue of material fact as to whether Claimant's right foot plantar fasciitis claim is barred by the Settlement Agreement's general release language.

Conclusion

17. Claimant has failed to establish that her right foot plantar fasciitis arose out of and in the course of her employment as a matter of law. Conclusion of Law Nos. 8-10 *supra*. She has also failed to establish that her left foot and right foot conditions are unrelated as a matter of law. Conclusion of Law Nos. 12-13 *supra*. Finally, Claimant has failed to establish as a matter of law that her right foot claim arose after September 24, 2014. Conclusion of Law Nos. 14-16 *supra*. Determination of all these issues will require the presentation of evidence at a formal hearing.
18. Claimant is accordingly not entitled to summary judgment in her favor that her right foot plantar fasciitis is a work-related injury for which she is entitled to workers' compensation benefits.

ORDER:

Claimant's Motion for Partial Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont, this 17th day of June 2020.

Michael A. Harrington
Commissioner