STATE OF VERMONT
DEPARTMENT OF LABOR

Casey Arman

v.

Vermont Mutual Insurance Company

Opinion No. 02-24WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. MM-50689

OPINION AND ORDER

APPEARANCES:

Craig A. Jarvis, Esq., for Claimant
Jennifer L. Meagher, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant's ulnar nerve subluxations arise out of and in the course of his employment?

2. If so, to what benefits is he entitled?[1]

EXHIBITS:

Joint Medical Exhibit ("JME")

Claimant's Exhibit 1: Certificate of Dependency and Concurrent Employment (Form 10)

Defendant's Exhibit A: *Curriculum Vitae* of Philip J. Davignon, MD, MS
Defendant's Exhibit B: (excluded)
Defendant's Exhibit C: (excluded)

FINDINGS OF FACT:

1. Claimant is a 50-year-old man who has worked as an insurance adjuster for Vermont Mutual Insurance Company for approximately nine years.

2. In his role with Defendant, Claimant spends most of his time either on his computer or on the telephone. Before the onset of the Covid-19 pandemic, he worked exclusively in an office at Defendant's premises. As of July 2021, he worked exclusively at his home. Currently, he works about half of the time at home and half of the time at Defendant's

[1]Additionally, Claimant has preserved the issue of the proper computation of his average weekly wage, which the Department decided in a prior interlocutory ruling on cross-motions for partial summary judgment. *See Arman v. Vermont Mutual Insurance*, Opinion No. 03-23WC (February 7, 2023).

office. His workload decreased sharply at the beginning of the Covid-19 pandemic. As of the date of formal hearing, Claimant's workload had not returned to its pre-pandemic level.

3. Claimant uses a sit-stand workstation at his office and uses two workstations at home, each of which allows a different physical position while keyboarding. For work-related telephone calls, he uses a hands-free headset.

4. Beginning in or around 2017, he began experiencing bilateral upper extremity pain. In August of that year, he presented to his primary care provider, Jeffrey Haddock, MD, with bilateral shoulder pain radiating into his forearm muscles following a home improvement project. Dr. Haddock prescribed prednisone. (JME 1).

5. Approximately one year later, Claimant returned to Dr. Haddock with complaints of spasms from his elbow to his neck, for which Dr. Haddock again prescribed prednisone and referred Clamiant to physical therapy. (JME 5-6).

6. On July 22, 2019, Claimant again visited Dr. Haddock, who diagnosed him with bilateral wrist and hand inflammation with some degree of neuropathic and radicular symptoms, for which he recommended wrist splints. (JME 17-20).

7. Sometime in 2019, Claimant began experiencing progressive muscle and joint pain that moves around his body with no clear explanation. He has consulted multiple rheumatologists about this condition. Specifically, he experiences fatigue from dealing with this pain and attributes some foggy thought processes to this condition. (*See, e.g.,* JME 21-27; 65-76; 83-86; 104-105). At least one rheumatologist has expressed a suspicion of fibromyalgia as the condition underlying these symptoms. (JME 104). Claimant does not attribute this more generalized pain to his work activities.

8. Despite his pain, Claimant has remained physically active and spends considerable time bicycling; he has both a gravel bike and a mountain bike. Claimant was questioned at some length concerning his cycling activities, and he credibly testified that cycling does not aggravate his symptoms.[2] Importantly, no medical expert testified that his cycling contributed to or aggravated the ulnar subluxation condition or any related neuropathies that form the basis of this claim.

9. One night in early July 2021, Claimant experienced an elbow muscle spasm that prompted him to seek medical care. He presented to the University of Vermont Medical Center Urgent Care with complaints of bilateral wrist and elbow pain, spasms, numbness, tingling, and increased clumsiness. (JME 35). His provider suspected carpal tunnel syndrome and advised him to continue using a wrist brace. The provider also told Claimant to advise his employer of his worsening condition and referred Claimant for an orthopedic evaluation. (*Id.*).

[2] He has discussed with his medical providers whether he should continue cycling given his symptoms, and at least one has advised that he could continue as long as cycling did not worsen his symptoms.

10. Approximately three weeks later, Claimant presented to Dr. Haddock with complaints that the pain in his wrists was flaring. Dr. Haddock noted that Claimant's symptoms had improved after taking a four-day weekend, but then had worsened over the course of the week. On physical examination, Dr. Haddock noted tenderness at Claimant's elbow medial epicondylar. He diagnosed Claimant with multiple conditions, including carpal tunnel syndrome and medial epicondylitis, and referred him to physical therapy. (JME 44-45). Dr. Haddock also issued Claimant a work restriction at that time, stating that he was unable to engage in work-related use of his lower arms for approximately one month, and that when he could resume normal work, he would need to use a split keyboard to improve his ergonomics. (JME 46).

11. Defendant did not accommodate Dr. Haddock's restriction against Claimant's use of his lower arms. Claimant therefore sought workers' compensation coverage for his urgent care visit and requested temporary disability benefits due to his inability to work. Defendant denied liability, eventually supplementing the record with the opinion of occupational medicine physician Philip Davignon, M.D., who performed an independent medical evaluation ("IME") of Claimant on September 28, 2021. (*See* Denials of Workers' Compensation Benefits filed on August 11, 2021 and October 6, 2021). Dr. Davignon found that Claimant had a history of bilateral upper extremity pain of undetermined causal origin, and he could not attribute Claimant's symptoms to work to a reasonable degree of medical certainty. (JME 77 *et seq.*). *See also* discussion *infra*, Findings of Facts Nos. 24-30.

12. Claimant credibly testified that after Dr. Haddock took him out of work, his left arm symptoms continued to worsen, but that his right arm improved somewhat.

13. On December 13, 2021, orthopedic surgeon Seth Frenzen, M.D., diagnosed Claimant with cubital tunnel syndrome in both upper extremities. Dr. Frenzen noted subluxations, or slight dislocations, of both of Claimant's ulnar nerves. (JME 99-100). This was the first instance in the medical record of any medical provider noting ulnar subluxations, despite at least two other providers looking for the condition previously. (*E.g.,* JME 56-58; 90).

14. Despite Defendant's denial of responsibility for Claimant's ulnar nerve condition, he underwent a left[3] ulnar nerve transposition surgery with hand surgeon Denise Durant, M.D. on February 11, 2022. (JME 109 *et seq.*).

15. Dr. Durant confirmed intraoperatively that Claimant's ulnar nerve ran posterior to his epicondyle. (JME 109). She attributed Claimant's forearm pain, the pain around his elbow, and the paresthesias in his fingers to the subluxation of his ulnar nerve; she also expressed concern about his pain level, which she suspected may have been related to fibromyalgia. (JME 107). She did not offer any causal opinion as to the origin of the subluxation, though she subsequently issued a letter addressed "to whom it may concern" on April 12, 2022, relating Claimant's ulnar nerve pathologies to his computer work:

[3] At least as of March 2023, when Clamiant underwent an IME with George White, M.D., he had not pursued surgery on his right upper extremity, noting that he was waiting to see how the left side went first. (JME 141).

> Mr. Arman has significantly subluxing ulnar nerves in his bilateral elbows. Given this, prolonged elbow flexion, such as with computer work and with holding a telephone,[4] it is my medical opinion that there is more likely than not a causal relationship between his work and his ulnar nerve pathology symptoms.

(JME 127).

16. Dr. Durant did not testify at the formal hearing and did not provide any more detailed reasoning underlying her medical conclusion above.

17. Claimant credibly testified that after recovering from Dr. Durant's surgery, his elbow is much better but is not 100 percent improved. He attempted to return to work with Defendant in July 2022, but he felt that he needed more time to recover, so he took additional time off, at least part of which was covered by a long-term disability insurance policy. Defendant rehired him full time in December 2022, and he now performs the same duties and works substantially the same number of hours per week as he did in July 2021. He still experiences some soreness in his elbows, his left more than his right, especially when his work volume increases, but he has not had a serious relapse of symptoms since his return to work.

Expert Medical Testimony

George White, MD

18. George White, MD, is a board-certified occupational medicine physician who, at Claimant's attorney's request, performed an IME of Claimant on March 24, 2023, approximately six weeks after Dr. Durant had performed the surgery discussed above. (JME 140 *et seq.*).

19. Dr. White testified that Claimant had ulnar neuropathy in both arms related to ulnar nerve subluxation. In his opinion, Claimant's subluxations were pre-existing anatomical conditions that did not originate from his employment, but the symptoms that Claimant experienced from his subluxations were aggravated by ergonomic issues with his computer workstation.

20. In explaining the mechanism of Claimant's subluxation, Dr. White explained that the ulnar nerve usually sits in a groove in the cubital canal, with soft tissue covering it to keep it in place. Claimant's ulnar nerve tends to pop out of its usual groove, and the surgery he underwent moved the nerve back into place. In his IME report, he noted that when a patient has ulnar nerve subluxations, elbow flexion and extension movements "can cause an irritation of the nerve itself." (JME 147). He considered it "likely that these motions occur in the workplace, talking on the phone, using the computer, and the like." (*Id.*).

[4] Claimant actually used a headset for his work-related telephone calls.

21. Dr. White noted that when Dr. Frenzen examined Claimant as a part of his orthopedic examination, he found that Claimant would experience subluxation when he flexed his elbow approximately 85 degrees. Dr. White understands that the normal flexion range for computer work is approximately 90 to 110 degrees. Thus, the degree of flexion necessary to cause Claimant's ulnar nerve to induce subluxation was less than the typical flexion associated with computer work.

22. The primary basis for Dr. White's opinion that Claimant's work aggravated his symptoms was that multiple reports from Claimant's providers noted that when he was working, his symptoms worsened and when he stopped working, his symptoms improved. (JME 147). Despite some arguable counterexamples to this correlation, *e.g.,* Findings of Fact Nos. 12 and 17, *supra*, this observation is generally well-supported by Clamiant's medical records, which reflect symptoms decreasing with time away from work and increasing during periods of greater work. (*E.g.*, JME 44-46, 56). That said, the essence of Dr. White's causation opinion is that the intensity of Claimant's symptoms correlates with his work volume. He has not identified any specific medical diagnosis that Claimant would not have had but for his work. Nor has he convincingly identified any objective worsening of what was in Dr. White's opinion a pre-existing condition.

23. Dr. White found that by the time he saw Claimant, Claimant had reached end medical result. Accordingly, he assessed Claimant's whole person impairment under the *AMA Guides* as three percent. He also testified that, in his opinion, Claimant's medical treatments to date have been reasonable and necessary.

Philip Davignon, MD

24. Philip Davignon, M.D., is a preventive and occupational medicine physician who, at Defendant's request, performed an IME of Claimant in September 2021, before Claimant underwent the surgery described above. (JME 77). He also performed a records review after that surgery in May 2023. (JME 151 *et seq.*).

25. At the time of his IME, Dr. Davignon was unable to pinpoint a specific location that was causing Claimant's discomfort; he could only assess him with bilateral upper extremity pain of uncertain etiology. He noted that Claimant had a full range of motion in his neck and both upper extremities but had diminished sensation on his ulnar nerve on the left side; however, he had normal two-point discrimination in all digits. He could not say to a reasonable degree of medical certainty that Claimant's symptoms were causally related to his work.

26. Based on his review of postsurgical medical records, Dr. Davignon updated his diagnosis to reflect bilateral cubital tunnel syndrome. However, he was still unable to offer a conclusion regarding causation.[5]

27. He also noted that there was no diagnosis of subluxation in Claimant's medical records until Dr. Frenzen saw him in December 2021, after Claimant had already been out of

[5] He credibly noted that it might have been helpful to see Claimant in order to form such an opinion.

work for five months. Dr. Davignon could not rule out that something non-work-related happened during that time that would have contributed to that condition.

28. Dr. Davignon also noted that he did not observe subluxation or cubital tunnel syndrome in 2021 when he physically examined Claimant. Accordingly, he declined to opine to a reasonable degree of medical certainty that Claimant's work activities caused or objectively worsened his condition.

29. Dr. Davignon clarified that Claimant in fact had an ulnar subluxation at the time of his surgery, that the surgery he underwent confirmed that condition, improving his symptoms thereafter. He also confirmed that several providers had recorded popping sensations in Claimant's elbow before Dr. Frenzen's diagnosis, which Dr. Davignon testified was suggestive of subluxation, but not dispositive.

30. Dr. Davignon also noted in his supplemental records review report that if Claimant's diagnosis of fibromyalgia is correct, this would contribute to his symptoms. (JME 156).

CONCLUSIONS OF LAW:

1. Claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the 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 the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, *supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Under Vermont's Workers' Compensation Act, a workplace injury based on cumulative trauma is compensable if it "accelerates the progression of a pre-existing condition, or disrupts its stability such that an individual's ability to work and function is disabled[.]" *S. B. v. Homebound Mortgage*, Opinion No. 29-07WC (November 6, 2007). Thus, the standard for causation in such cases is "whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred." *Stannard v. Stannard Co., Inc.*, 2003 VT 52, ¶ 11 (cits. & punct. omitted). Importantly, "[m]ere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement." *Id.* (upholding trial court's finding that plumber's work did not aggravate and accelerate the progression of his osteoarthritic knees and thus did not constitute an aggravation or new injury); *see also Goodwin-Abare v. State of Vermont Agency of Human Services*, Opinion No. 41-11WC (December 14, 2011) ("Nor is it enough that Claimant's job aggravated her symptoms. To be compensable, there must be proof that her work either caused or accelerated the underlying condition itself.") (concluding that a temporal relationship between claimant's work activities and the symptoms from cubital tunnel syndrome and carpal tunnel syndrome were insufficient to sustain her burden to prove causation).

3. When presented with competing expert testimony, the Commissioner has often used a five factor analysis to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *See Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003). 11. Because a claimant bears the burden of proof on issues of causation, "in the final analysis it is [his] expert's credibility that matters most. More to the point, merely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered." *Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014).

4. The traditional *Geiger* analysis is most useful when assessing diametrically opposed expert opinions of the form "I assert" versus "I deny." In this case, however, Dr. White's opinion is that Claimant's work activities aggravated his pre-existing condition, while Dr. Davignon's opinion is essentially that he was not able to form an opinion to a reasonable degree of medical certainty as to the cause of Claimant's condition. Thus, this case presents the non-diametric dichotomy of "I assert" versus "I am not so sure," making the *Geiger* factors an imperfect match for the evidence presented. This makes the persuasiveness of Dr. White's opinion centrally important.

5. Dr. White is a well-credentialed and experienced occupational medicine physician who testified well within the scope of his expertise. There is no significant basis on which to criticize his examination of the relevant medical records or his physical examination. However, his central opinion is that Claimant's workplace activities worsened his ***symptoms*** of a pre-existing condition. This opinion is based primarily on temporal relationships between Claimant's symptoms waxing with increased work volume and waning with time away from work.

6. Most importantly, the essential subject of Dr. White's opinion relates to the intensity of Claimant's symptoms, not the origin or progression of his ulnar subluxation or its related neuropathies themselves, *i.e.*, the underlying conditions giving rise to those symptoms. Nothing in his analysis persuades me that Claimant's workplace computer usage "either caused or accelerated" the ulnar nerve subluxation that Dr. White believes to have been pre-existing. *Cf. Goodwin-Abare*, *supra.* While I find Dr. White's opinion that Claimant's work temporally corresponded to an increase in symptoms to be credible and well-supported, I cannot conclude that this satisfies the legal causation standard set forth above. *See* Conclusion of Law No. 2, *supra*.

7. Having determined that Claimant's expert's opinion is not sufficient to establish the compensability of the ulnar nerve condition, I need not assess the persuasiveness of Dr. Davignon's testimony on this point. Likewise, I need not assess the compensability of Claimant's claims for specific medical or indemnity benefits in dispute.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for benefits relating to his ulnar nerve subluxation is **DENIED**.

DATED at Montpelier, Vermont this 19 of February 2024.

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Michael A. Harrington
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.