

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 110

WCC No. 9508-7366

NICKY SHORTEN

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER ON APPEAL

Summary: Claimant appealed decision of DOL hearing examiner that claimant had not proved her alleged carpal tunnel syndrome was an occupational disease.

Held: Hearing examiner's decision was not clearly erroneous in view of the probative, reliable and substantial evidence in the record. The fact that claimant may have suffered from carpal tunnel syndrome does not prove that her syndrome was caused, in whole or in part, by occupational factors. She had a prior history of hand problems, her job involved less repetitive hand motion than she claimed, and the medical evidence did not establish a causal connection.

Topics:

Occupational Disease: Causation. From the fact that claimant may have suffered from carpal tunnel syndrome it does not follow that her syndrome was the consequence, in whole or in part, of occupational factors. She had a prior history of hand problems, her job involved less repetitive hand motion than she claimed, and the medical evidence did not establish a causal connection.

Occupational Disease: Proximate Cause. From the fact that claimant may have suffered from carpal tunnel syndrome it does not follow that her syndrome was the consequence, in whole or in part, of occupational factors. She had a prior history of hand problems, her job involved less repetitive hand motion than she claimed, and the medical evidence did not establish a causal connection.

Medical Conditions: Carpal Tunnel Syndrome. From the fact that claimant may have suffered from carpal tunnel syndrome it does not follow that her syndrome was

the consequence, in whole or in part, of occupational factors. A claimant must show that the CTS arose from or was aggravated by employment and that the last injurious exposure occurred as a result of the last employment. Here, claimant had a prior history of hand problems, her job involved less repetitive hand motion than she claimed, and the medical evidence did not establish a causal connection.

The appellant, Nicky Shorten (claimant), claims she suffers from occupationally related carpal tunnel syndrome (CTS). In Findings of Fact; Conclusions of Law; Final Order, issued August 8, 1995, the Department of Labor and Industry denied her claim. This appeal followed that decision.

Factual and Procedural Background

1. The Claim

After ten years of unemployment, on February 1, 1993, claimant took a job as a temporary receptionist for TOS & Associates (TOS). Claimant worked for TOS until May 28, 1993. Her duties during that time were described by the Department's hearing examiner as follows:

The claimant's work duties consisted of answering the telephone, greeting customers, photocopying tax information, photocopying and assembling tax returns, and preparing an average of two or three invoices a day, with a range from zero to five or seven. The claimant did minimal typing, and limited keyboard activities as few key strokes were required for simple invoices and small company payrolls. Limited keyboard entry was also required due to software programs performing much of the calculations. The claimant's typing skills were limited. TOS handled six or seven payrolls covering up to 23 employees for the largest client firm (Rose's Cantina). She also ran a ten-key calculator on a limited basis.

From February 1 through April 15 approximately 40% of the claimant's work was photocopying. . . . after April 16, the claimant had some additional tasks, such as filing, checking statements for a construction company and reading large check books. She occasionally ran errands like bank deposits. (Exs. 1-3, Testimony of N. Shorten and T. Swindle).

(Findings of Fact 3 and 4.)

Immediately following her termination of employment, claimant filed a written claim for compensation stating that "when using the calculator, computer, and typewriter [at work] my wrists and hands started hurting me, going numb, making it hard for me to control them." (Ex. 2.) The claim was submitted to the State Compensation Insurance Fund, which insured TOS. The State Fund denied liability under the Workers' Compensation Act but advised claimant's attorney that it was conducting an investigation into the possibility that she may suffer from an occupational disease.

2. Occupational Disease Medical Panel Examinations and Reports

On September 2, 1993, the State Fund denied liability for claimant's condition as an occupational disease but referred her claim to the Department of Labor and Industry. The Department then directed the claimant to an examination by Dr. Pius Baggenstos, who is a board certified neurosurgeon and a member of the Montana Occupational Disease Panel. The doctor examined claimant in November 1993, and concluded:

1. Mrs. Nicky Shorten is not suffering from an occupational disease.
2. This patient does not have typical carpal tunnel syndrome which is a compressive neuropathy at the carpal tunnel area.
3. It seems to me that this patient could have a peripheral neuropathy related to ischemic necrosis and demyelination secondary to rheumatoid arthritis and lupus erythematosus which was diagnosed by Dr. Elton Adams, rheumatologist, in Great Falls.

(Ex. 4.) In reaching his opinions Dr. Baggenstos reviewed all medical reports in the Department file.

Pursuant to section 39-72-602(b), MCA, the claimant requested and underwent a second examination by Dr. Dana Headapohl, Medical Director of the Occupational Health Department, St. Patrick Hospital in February 1994. Following examination, Dr. Headapohl responded to specific questions asked by the Department:

1. Is the claimant suffering from a disease that is the result of her employment (occupational disease)?

No, the claimant is currently not suffering from a disease that is the result of her employment. At the time of her employment by TOS & Associates she did have an exacerbation of symptoms but her current symptoms are totally unrelated.

(Ex. 5.)

The request for a second examination triggered the appointment of a third physician as panel chair. § 39-72-602(2)(b), MCA. At the request of the Department, Dr. William Shaw, who is board certified in occupational medicine, served as the chair. He reviewed the medical records of the claimant and discussed the case with Drs. Baggenstos and Headapohl. To a reasonable degree of medical certainty Dr. Shaw concluded:

- 1) Mrs. Shorten appears to suffer from a Raynaud's syndrome of unknown etiology. Her condition does not appear to be an occupational disease.

2) I do not believe the criteria for proximate causation can be met in accordance with section 39-72-408, MCA. Specifically, I cannot clearly determine any of the five criteria which are (sic) met in this case.

3) Patient does not appear to be suffering from a condition which would preclude her from performing her previous job activities.

4) Her condition does not appear to be such that she would be precluded from any and all type of work.

5) I do not believe there is an occupational component to this lady's condition.

(Ex. 10.) Dr. Shaw's report was made April 28, 1994.

3. Additional Medical Information

Medical records submitted to the hearing examiner showed that, notwithstanding claimant's testimony to the contrary, claimant began to complain of hand and wrist problems in 1991. Office notes of an examination of claimant on November 25, 1991, by Dr. Elton Adams, a rheumatologist, reflect the following history:

The patient states that about a year ago she had some pain in her right elbow and states that following this she had pain in multiple joints and muscles. The patient states that she's been hurting in multiple joints and muscles. She has stiffness lasting for hours. Heat does help. She also has noticed that she gets some **color changes in her hands** and feet when they turn blue and at times white. . . . She had seen Dr. Busey who told her she had fibromyalgia.

(Ex. 9.) The doctor diagnosed her condition as primarily fibromyalgia and Raynaud's syndrome⁽¹⁾ which is sometimes associated with fibromyalgia but may be associated with other connective tissue disorders. (*Id.*) On the August 28, 1992 visit, the doctor noted:

On exam today, she makes a complete fist with both hands. She does have some tenderness over her PIPs⁽²⁾ in both hands, but there is no definite synovitis⁽³⁾ She is slightly tender with lateral compression over the MTPs⁽⁴⁾, wrists.

(*Id.*) On October 23, 1992, Dr. Adams noted that claimant reported that she "still has aching in her hands and feet. . . ." On exam he found her wrists to be normal, but noted that she did have tenderness over several of her proximal interphalangeal joints. (*Id.*)

Shortly before her temporary employment ended, on May 12, 1993, claimant saw Dr. Jean Justad, an internist. At that time, claimant was complaining of bilateral wrist pain and told the doctor that it had been getting progressively worse since she took a job involving typing. (Ex. 7.) Dr. Justad noted probable carpal tunnel syndrome and recommended that she wear wrist splints.

Dr. Justad also referred claimant to Dr. Brooke Hunter, an orthopedic surgeon, who examined claimant on May 28, 1993. Dr. Hunter noted a "[l]ong history of bilateral wrist and hand numbness and tingling." (Ex. 6 at 2.) Following examination, he wrote:

I suspect shedoes [sic] have some median nerve pathology but there is certainly more going on than just that. She carries a diagnosis of fibromalagia [sic] and I wonder about the significance

(*Id.*) He recommended use of splints, prescribed anti-inflammatory medications, and ordered electrical diagnostic studies. (*Id.*)

Dr. Charles Anderson, a neurologist, did nerve conduction studies on June 7, 1993. The studies were normal. (Ex. 8.)

Claimant participated in an occupational therapy program from June 29, 1993 through September 9, 1993, a total of nine times. The occupational therapist noted that claimant did not follow through with her home program. The claimant advised the therapist that "I am not going to do anything that makes my wrists hurt." (Ex. 6 at 16.)

Claimant returned to Dr. Adams on November 29, 1993. At that time the claimant told him that her hands continued to turn blue and white when exposed to cold and that her hands and wrists hurt. Dr. Adams' impression was that she continued to suffer from "Arthralgias⁽⁵⁾, in part fibromyalgia. Raynaud's." (Ex. 9 at 6.)

Dr. Adams saw claimant on January 26, 1994. At that time he noted that "[w]ith Phalen's, she develops numbness in her fingers, median nerve distribution." (*Id.* at 10.) His diagnostic impression on that date was "Arthralgias; Raynaud's probable carpal tunnel." He recommended the use of splints for her wrists. Dr. Adams has offered no opinion regarding any causal connection between the claimant's employment and her probable carpal tunnel condition.

On her own the claimant thereafter sought treatment from Dr. Stephen Powell, M.D., and orthopedic surgeon in Missoula, Montana. Dr. Powell examined claimant on March 7, 1994. Based on history and physical findings Dr. Powell's impression was "typical of carpal tunnel syndrome." (Ex. B-1.) The nerve conduction studies done by Dr. Powell were negative, but the claimant reported a continuation of the symptoms. On April 4, 1994, Dr. Powell performed bilateral carpal tunnel surgery on claimant. Claimant had good recovery and subjectively reports improvement of her symptoms. On August 18, 1994, Dr. Powell released her to full activity. (Unmarked Ex. B-7.)⁽⁶⁾

Based on the history provided by claimant of her symptoms. Dr. Powell observed, "This **sounds** as though it was work induced initially and that her symptoms are better since she stopped working." (Ex. B-1; emphasis added.) The only other reference made by Dr. Powell to the claimant's work activity was on June 23, 1994, when he noted:

She does not want to return to her job in secretarial work, part of which is due to the fact that her attorney told her that she should not do this until the question of whether or not this is work related is settled.

(Ex. B1.) While Dr. Powell indicated that claimant's condition "sounds as though it was work induced initially", the words "sound as though" fall short of a medical opinion on a more probable than not basis. Dr. Powell's records do not indicate that he reviewed the medical records of Dr. Adams, Dr. Justad, Dr. Hunter, Dr. Baggenstos, Dr. Anderson, Dr. Headapohl or Dr. Shaw, although he mentions claimant did report to him that she had been seen by the first five doctors, at least post-employment, and that Dr. Adams had diagnosed "Raynaud's phenomenon" and was 'watching her for Lupis [sic]." (Ex. B-1.) Dr. Powell's records also do not indicate that he was aware that claimant had experienced hand symptoms prior to her employment. According to his notes:

She **started** having trouble she said when she was working at a tax office doing a lot of ten key with her right hand and turning pages with her left hand with both hands developing pain and aching in the wrists and volar forearms with tingling starting shortly after that and this **started** in about March 1993. [Emphasis added.]

(Ex. B-1.)

4. Department Proceedings and Decision

On May 20, 1994, the Department issued a preliminary determination finding that the claim for occupational disease benefits should be denied. (Ex. 17.) On May 24, 1994, claimant requested a hearing.

A hearing was held on November 22, 1994. Claimant, claimant's husband, and Tom Swindle testified. Neither party called medical witnesses to testify. The medical part of the case was submitted entirely on medical records and reports.

On August 10, 1995, the hearing examiner issued his findings and conclusions determining that claimant is not entitled to benefits under the Occupational Disease Act. The hearing examiner rejected claimant's testimony that her employment at TOS involved forty-plus hours a week of continual data entry. (Conclusion of Law 4.) He also specifically rejected testimony by claimant and her husband that she had not experienced difficulties with her hands and wrists prior to going to work for TOS. Ultimately, he concluded that claimant had failed to prove that "her apparent CTS was directly tied to her work, followed as a natural incident of work, was fairly traced to her limited work, or could not have come from some other cause, and could only have come from work exposure." (Conclusion of law 4; underlining in the original.) He pointed out that the panel physicians, who specifically addressed the occupational disease question, "uniformly concluded that the claimant does not suffer from an occupational disease nor does she meet the criteria for entitlement." (*Id.*; underlining in the original.) He further relied on evidence showing that 1)

the claimant had suffered from problems with her hands and wrists since 1991 (despite her testimony to the contrary) and that 2) her work was very light work and did not require extensive keyboarding or operation of a ten key calculator. Finally, he was unpersuaded by Dr. Powell's comment, which he characterized as 'surmise', concerning a possible relationship of her condition to her work since it was based on claimant recitation of her history, which left out her earlier onset of hand symptoms, and did not address the specific elements necessary to establish an occupational disease.

Standard of Review on Appeal

Section 39-72-612(2), MCA, provides for a direct appeal to the Workers' Compensation Court from the DLI's final order in an occupational disease case. The section further provides:

. . . The judge may overrule the department only on the basis that the department's determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). The Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1 (1992). Conclusions of law, however, must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601 (1990).

Discussion

Section 39-72-408, MCA, sets out the criteria which must be met in order to determine that a disease is proximately caused by employment.

39-72-408. Proximate causation. Occupational diseases shall be deemed to arise out of the employment only if:

- (1) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;

- (2) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
- (3) the disease can be fairly traced to the employment as the proximate cause;
- (4) the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment;
- (5) the disease is incidental to the character of the business and not independent of the relation of employer and employee.

Section 39-72-706, MCA, governs cases where the claimant's disease is due to a combination of occupational and non-occupational factors:

Aggravation. (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

Under these sections, the fact that a claimant suffers from carpal tunnel syndrome is not sufficient to impose liability on an insurer. A claimant must also show that her CTS arises from or was aggravated by her employment and that the last injurious exposure occurred at the place of her employment.

The critical facts found by the hearing examiner are supported in the record. While Drs. Powell, Justad and Adams all indicate that claimant suffered from "probable" carpal tunnel syndrome, none of these doctors provided medical opinions addressing the statutory criteria for causation. On the other hand, the medical panel members concluded that her medical condition was not occupationally related.

Claimant's assertions that the conclusions of the panel were "all speculation" and that the panel physicians were "hired guns" of the State Fund are without merit. As this Court wrote in *Katella v. Plum Creek Timber Co.*, WCC No. 9501-7214, Decision and Judgment on Appeal, June 30, 1995 at 9, 10:

The medical panel procedure established by the Occupational Disease Act is calculated to provide specialized, impartial medical opinion regarding occupational disease claims. Section 39-72-601(1), MCA (1993), requires the Department to "develop a list of physicians to serve on the occupational disease medical panel." Medical panel members must be board certified or board eligible in a specialty area. *Id.* Neither the claimant nor the insurer designate the panel member who is to examine the claimant: the Department does. §§ 39-72-601(2) and -602(2)(a), MCA

(1993). The panel physician designated by the Department must specialize in the area of medicine which is "appropriate to the claimant's condition." § 39-72-601(1), MCA (1993). If either the claimant or insurer is dissatisfied with the opinion of the first examining physician, then the Department is required to appoint a second physician to examine claimant. § 39-72-602(b), MCA (1993). That appointment triggers a further review by a three member panel of physicians, who must then submit a final, joint report as to whether the claimant is suffering from an occupational disease. *Id.* The panel report is then deemed "prima facie evidence as to the matters contained in the report." § 39-72-609, MCA (1993).

The claimant argues that because the carpal tunnel surgery has helped her symptoms it therefore must be work related. From the fact that claimant may have suffered from carpal tunnel syndrome it does not follow that her syndrome was the consequence, in whole or in part, of occupational forces. She had a prior history of hand problems, which she denied when she testified and which she did not fully disclose to Dr. Powell. Her job involved far less of the repetitive hand motion typically associated with carpal tunnel than she claimed. The medical evidence did not establish a casual connection.

The decision of the hearing examiner was not clearly erroneous in view of the probative reliable and substantial evidence on the whole record.

ORDER

The August 8, 1995 Findings of Fact; Conclusions of Law; Final Order of the Department of Labor and Industry are **affirmed**.

DATED in Helena, Montana, this 22nd day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. John C. Doubek

Ms. Susan C. Witte

Ms. Christine L Noland

Mr. Brian McCullough - Notified

Date Submitted: November 1, 1995

1. Raynaud's p., intermittent bilateral attacks of ischemia of the fingers or toes and sometimes of the ears or nose, marked by severe pallor, and often accompanied by paresthesia and pain; it is brought on characteristically by cold or emotional stimuli and relieved by heat, and is due to an underling disease or anatomical abnormality. When the condition is idiopathic or primary it is termed *Raynaud's disease*. DORLAND'S MEDICAL DICTIONARY, 27th Edition at 491.

2. Proximal interphalangeal joint. The Merck Manual, 15th ED. at 1234.
3. Inflammation of a synovial membrane which is the membrane of joint cavities, tendon sheaths, etc. WEBSTER'S New World Dictionary at 1444.
4. Metacarpophalangeal joints. The Merck Manual, 15th ED at 1444.
5. Pain in a joint. Dorland's Medical Dictionary, 27th Edition at 147.
6. Exhibit B-7 is the page following Exhibit B-6 but no exhibit number appears on B-7.