Gideon Langdell v. G. W. Savage Corp. (June 24, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Gideon Langdell

v.

G.W. Savage Corp.

Opinion No. 19-09WC

By: Jane Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-07750

OPINION AND ORDER

Hearing held in Montpelier on April 11, 2008
Record closed on May 21, 2008

APPEARANCES:

Michael Green, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUES PRESENTED:

1. What, if any, permanent partial disability benefits is Claimant entitled to receive as a consequence of his November 22, 2004 work-related injury?

2. Is Defendant responsible for the medical expenses Claimant incurred between March 19, 2006 and November 17, 2006?

3. Is Claimant entitled to mileage reimbursement for his travel to and from medical appointments?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae,* Verne Backus, M.D.

Defendant's Exhibit A: Affidavit of Bill Savage, April 2, 2008
Defendant's Exhibit B: *Curriculum vitae*, Craig Mikio Uejo, M.D.

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640
Mileage reimbursement pursuant to Workers' Compensation Rule 12.2100
Interest pursuant to 21 V.S.A. §664
Costs and attorney's fees pursuant to 21 V.S.A. §678

JOINT STATEMENT OF UNCONTESTED FACTS:

1. On November 22, 2004 Claimant was employed by Defendant as a mason. He injured his back when the mason tender lost his footing and left Claimant holding a 100-pound object.

2. On June 13, 2005 Dr. Nancy Binter performed an L4-5 laminotomy and discectomy. In a letter dated November 29, 2005 Dr. Binter stated that Claimant had reached an end medical result. She rated him for permanency at "DRE Category III an 11% whole person disability according to the AMA 5th Edition Impairment Guide."

3. Defendant's workers' compensation insurance carrier filed a Form 27 on December 12, 2005, which the Department approved on December 20, 2005.

4. The Department notified Claimant that the Form 27 was determined to be supported and that he had the right to contest the decision.

5. Defendant subsequently paid Claimant all of the benefits due in accordance with Dr. Binter's 11% whole person rating, which amounted to 60.5 weeks at his weekly compensation rate of $494.37.

6. Claimant retained Dr. Verne Backus to do a permanency evaluation. Dr. Backus concluded that Claimant had a 29% whole person impairment.

7. Defendant retained Brigham & Associates to perform an impairment rating review, which was prepared by Craig Uejo, M.D. That evaluation concluded that Claimant's current impairment is 29% whole person. In Dr. Uejo's opinion, 7% is attributable to the November 22, 2004 injury.

8. The Department has provided the parties with all records relating to Claimant's previous workers' compensation claims.

9. Claimant had a previous spine fusion following a work place injury in approximately 1978. The Department has no files pertaining to this claim. There is no evidence that Claimant received a permanency award for this injury.

10. On July 3, 1991 while employed by Conklin Construction, Claimant injured his back. The workers' compensation claim bearing State File No. E-01756 resulted in a Form 22 settlement for a 17% spine impairment.

11. This was a compromise between the 13% whole person rating assessed by Dr. Carol Talley and an 8% whole person impairment assessed by Dr. John Peterson. The 17% spine rating is equivalent to 10.5% whole person.

12. In his evaluation, performed under the Third Edition of the *AMA Guides*, Dr. Peterson concluded that Claimant's impairment was 11% whole person. He was aware of the earlier spine fusion surgery related to Claimant's 1978 work injury and deducted 3% for that. Dr. Peterson explained:

> I feel that it would be appropriate to deduct 3% of the whole person based on his previous fusion. This would leave an impairment of 8% of the whole person, which can be converted to 14% of the spine. It does not appear that Dr. Talley took this fusion into consideration when she gave her permanent partial impairment rating.

13. Claimant, therefore, has received benefits equal to a 21.5% whole person rating – 11% based on Dr. Binter's evaluation and 10.5% from the settlement of his earlier claim. This is 7.5% less than his current 29% rating from all injuries.

14. Defendant has claimed that Claimant is not entitled to medical benefits following an intervening event referenced in a handwritten medical report, dated March 22, 2006, which states that Claimant suffered an exacerbation of his back pain on 3/19/06 when he attempted to stop his truck from rolling back after the brake did not hold.

15. No medical bills have been paid since that date, in accordance with the Department's October 24, 2006 determination that the truck incident was a "significant intervening event that likely broke the causal connection" between Claimant's November 2004 work injury and his current condition.

16. Dr. Backus states as follows:

> There was no specific injury on that date. I do not see this as an aggravating even[t] for his low back. In an attempt to take a few steps or even try to run towards his truck in an emergency is what would be considered, in my opinion, a normal activity and not an injury. It is therefore my opinion a reflection that his ongoing back pain was not aggravated at that point in time. If it was temporarily worsened, it would have been a recurrence or just a continuance.

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of the Joint Statement of Uncontested Facts recorded above, and of relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"), 5th ed.*

Expert Medical Opinions as to Apportionment of Claimant's Permanent Impairment

3. As the parties have stipulated, Claimant has suffered three separate work-related low back injuries, each of which resulted in some permanent impairment to his spine. The first injury occurred in or about 1978. Claimant underwent a spinal fusion as a consequence of this injury. There is no evidence that he received any permanent partial disability benefits thereafter.

4. Claimant suffered a second work-related low back injury in 1991. In 1992 the Department approved an Agreement for Permanent Partial Disability Compensation (Form 22) that both he and his employer had executed. By the terms of that agreement, Claimant received compensation for a 10.5% whole person permanent impairment, representing a compromise between Dr. Talley's 13% rating and Dr. Peterson's 8% rating. Both doctors calculated their ratings in accordance with the 3rd edition of the *AMA Guides*, the version that was in effect at the time. In calculating his rating, however, Dr. Peterson apportioned away the 3% impairment he attributed to Claimant's earlier injury and 1978 spinal fusion, specifically subtracting that amount from what he determined to be a total impairment of 11%. Dr. Talley did not do so. By compromising the two ratings, therefore, the permanency benefits Claimant received in 1992 included at least some compensation for the 1978 injury as well, although admittedly not all that might have been rated and paid separately.

5. The focus of the current claim centers on Claimant's November 2004 work injury. As a consequence of that injury, Dr. Binter rated him with an 11% whole person permanent impairment, and Claimant received permanent partial disability benefits in accordance with that rating. Dr. Binter made no attempt to apportion any part of Claimant's permanent impairment to either of his previous injuries.

6. Both Claimant's expert, Dr. Backus, and Defendant's expert, Dr. Uejo, agree that Dr. Binter's rating was incorrect and that the proper rating for Claimant's current impairment, before apportionment, is 29% whole person. The experts differ, however, as to how much of that impairment relates to Claimant's November 2004 injury and how much relates back to his 1978 and 1991 injuries.

7. The 5th edition of the *AMA Guides* provides some direction to physicians faced with apportionment issues. Generally, the *AMA Guides* suggest that a subtraction method be utilized – calculate the claimant's total current impairment rating, then subtract the rating referable to his or her prior impairment; the remainder is the impairment specifically attributable to the current injury. *AMA Guides (5th ed.)*, §§1.6b and 2.5h. In situations where a prior injury either was not rated or was rated according to an earlier version of the *AMA Guides*, the physician is directed to take the necessary steps to allow for both injuries to be rated via the same edition, *id.* In all cases, however, the *AMA Guides* specifically defer to each state's "customized methods for calculating apportionment," *id.* at §1.6b, and mandate that the physician's apportionment determination "should follow any state guidelines," *id.* at §2.5h.

8. Dr. Backus' apportionment calculation utilized a straightforward subtraction approach – he subtracted the 10.5% whole person impairment for which Claimant was paid after his 1991 injury from the 29% whole person impairment he rated currently, and attributed the remaining 18.5% whole person impairment to the November 2004 injury. Claimant having already received compensation for the November 2004 injury in accordance with Dr. Binter's 11% whole person rating, the remainder due him under Dr. Backus' approach would be 7.5%.

9. Dr. Uejo utilized a different approach. Mindful of the fact that the impairment referable to Claimant's 1991 injury had been rated in accordance with the 3rd edition of the *AMA Guides*, Dr. Uejo began his apportionment analysis by recalculating that impairment according to the 5th edition of the *Guides* instead. Using the 5th edition's methodology, he rated Claimant with a 22% whole person impairment causally related to the 1991 injury. Subtracting that from the 29% impairment that both he and Dr. Backus had rated for Claimant's current condition, Dr. Uejo concluded that Claimant had suffered only a 7% impairment as a result of the November 2004 injury alone. Given that Claimant already has been compensated for an 11% impairment in accordance with Dr. Binter's rating, under Dr. Uejo's analysis no further permanency benefits would be due. To the contrary, according to Dr. Uejo's apportionment methodology, Claimant has been overpaid.

The March 2006 Truck Incident

10. On March 19, 2006 Claimant drove his pickup truck to a friend's house. Claimant parked the truck in his friend's driveway, set the emergency brake and exited. Moments later his friend exclaimed that the truck was rolling down the hill. Claimant turned and began running after the truck. After running only a short distance, he realized that he would not be able to catch the truck and stopped. The truck continued down the hill and crashed into a tree.

11. At the time of this incident, Claimant already had been complaining of ongoing low back pain, radiating pain, burning and numbness into his legs and gait instability. Claimant was troubled by these symptoms and felt dissatisfied with Dr. Binter's determination that she had nothing more to offer him. He had discussed with his wife whether he should seek a second opinion, and they had agreed that he should do so.

12. To that end, Claimant reported his ongoing symptoms to Dr. Towle, his primary care provider, in December 2005 and again in January 2006. In order to better evaluate his current condition, Dr. Towle scheduled Claimant for an MRI, which he underwent in February 2006, some weeks before the March 2006 truck incident.

13. The February 2006 MRI revealed multi-level degenerative disc disease and evidence of focal arachnoiditis at L4-5, the site of his earlier surgeries. Arachnoiditis is an inflammation of the membranes surrounding the central nervous system, including the spine. As the membranes become more inflamed, they may cause the tissue to impinge on the nerves, which causes pain. Arachnoiditis is a known complication from spinal surgery.

14. As a follow-up to his February 2006 MRI, at the time of the March 2006 truck incident Claimant already was scheduled to see Dr. Penar, a neurosurgeon, to discuss possible surgical treatment for his ongoing symptoms. This evaluation occurred in April 2006. Dr. Penar determined that Claimant's symptoms were unlikely to be correctable surgically. Instead, he referred Claimant for epidural steroid injections.

15. Three days after the March 2006 truck incident, on March 22, 2006 Claimant returned to Dr. Towle. Dr. Towle's office note stated that Claimant presented with "exac[rebated] back pain" that had begun when "he tried to stop his truck from rolling back after he got out of it."

16. Claimant testified credibly that Dr. Towle's office note was erroneous, and that he did not in any way attempt to stop or hold back his truck from rolling. As noted above, Claimant stated that after the truck began to roll down the hill, he tried to run after it but quickly realized that he would not be able to reach it in time. Claimant testified that after running for only a short distance the combination of his unstable gait and low back pain prevented him from continuing.

17. Claimant also testified credibly that the March 2006 truck incident did not cause any appreciable increase in his low back pain. As noted above, he had been experiencing ongoing symptoms for some time before that event and these continued to the same extent afterwards.

18. Dr. Backus testified that based on Claimant's description of the event, the March 2006 truck incident caused merely a minor experience of symptoms and did not result in any specific new injury. He noted that Claimant already had taken steps to obtain a second opinion from Dr. Penar to determine what, if any, treatment might be reasonable for his ongoing symptoms. With that in mind, Dr. Backus concluded that the medical treatment Claimant received from March 2006 until November 2006 was causally related to the November 2004 work injury, not to any intervening injury or condition related to the March 2006 event.

19. As of the date of his November 17, 2006 permanent impairment evaluation, Dr. Backus determined that Claimant had reached an end medical result for the November 2004 work injury.

20. Dr. Uejo concurred with Dr. Backus' conclusion that the March 2006 truck incident did not cause any specific new injury. Unlike Dr. Backus, however, Dr. Uejo posited that the truck event caused Claimant's symptoms to flare up temporarily. In Dr. Uejo's opinion, therefore, the medical treatment Claimant received from March 22, 2006 until Dr. Backus' end medical result date in November 2006 was causally related to the truck incident, not to his prior work injury. Dr. Uejo admitted that in forming this opinion he was not specifically aware that Claimant already had scheduled a second opinion with Dr. Penar prior to the truck incident, in preparation for which he already had undergone an MRI in February 2006.

Mileage Reimbursement

21. Claimant's work for Defendant required him to travel to job sites throughout the state. Sometimes Claimant commuted directly to a job site from his home in Johnson, Vermont, and sometimes he traveled first to Defendant's main office before heading out. Sometimes he used Defendant's dump truck to travel, particularly if he needed to transport bricks or staging. Other times he used his own pick-up truck. In either event, Defendant provided Claimant with a gas credit card with which to purchase gas, whether for the company-owned dump truck or for Claimant's personal pick-up.

22. No evidence was presented as to what Claimant's average commuting distance was, taking into account that he sometimes commuted directly from home to a job site rather than traveling first to Defendant's main office. Defendant's policy was to compensate employees for travel time only for distances exceeding 35 miles each way.

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. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test 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. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

Apportionment of Permanent Impairment

3. Vermont's workers' compensation statute requires apportionment in cases where a prior impairment has been both rated and paid. 21 V.S.A. §648(d). Absent those specific circumstances, the Commissioner retains discretion whether to apportion or not. *See Murray v. Home Depot USA, Inc.*, Opinion No. 41-08WC (October 20, 2008).

4. Clearly here, at the time of his November 2004 injury Claimant had suffered prior impairments that had been both rated and paid. The parties agree, therefore, that some apportionment is mandatory under the statute. The question before me now is how best to apportion – whether simply to rely on the compromise rating pursuant to which Claimant was paid in 1992, as Dr. Backus suggests, or whether to recalculate the extent of his 1992 impairment in accordance with the most current edition of the *AMA Guides*, as Dr. Uejo did.

5. The *AMA Guides* seem to favor Dr. Uejo's approach, particularly where, as here, the prior impairment rating was calculated according to an earlier edition. But the *Guides* also direct physicians to defer to each state's "customized method" for determining how best to apportion. In Vermont, in order for mandatory apportionment to be triggered the statute requires that a prior impairment be not simply rated, but also paid as well. It is reasonable to infer that the statutory reference to payment requires that the apportionment calculation be based on the rating that actually was paid, not the one that might have resulted had a more recent edition of the *Guides* been available at the time. To rule otherwise would open up all prior impairment ratings to retrospective analysis and recalculation. This would undermine the binding nature of prior approved compensation agreements and the finality of permanency awards.

6. I conclude, therefore, that the most appropriate method for apportioning Claimant's total current impairment is to subtract the 10.5% whole person impairment that was rated and paid in 1992 from his current 29% impairment. The remaining 18.5% is the impairment attributable to Claimant's November 2004 injury. Of that, 11% already has been paid, leaving a balance due of 7.5%.

Medical Benefits from March 2006 until November 2006

7. Defendant asserts that Claimant's medical treatment from March until November 2006 was necessitated by the March 2006 truck incident rather than the original compensable injury. The record is clear, however, that Claimant already had taken steps to seek further evaluation and treatment for his ongoing symptoms prior to that event. I am convinced that the truck incident in no way precipitated Claimant's need for ongoing medical treatment from March until November 2006. Defendant remains responsible for the medical expenses he incurred during that period.

Mileage Reimbursement for Travel to and from Medical Appointments

8. Last, Defendant argues that Claimant is not entitled to mileage reimbursement for travel to and from his medical appointments. *Workers' Compensation Rule* 12.2100 provides that a claimant is entitled to reimbursement only for mileage that is "beyond the distance normally traveled to the workplace." Here, Claimant sometimes commuted directly from home to a work site, and therefore did not have a "normal" travel distance upon which to base a mileage reimbursement calculation.

9. There was evidence, however, that Defendant's policy is to use 35 miles each way as the basis for calculating its employees' entitlement to compensation for their travel time. It is reasonable under the circumstances to use the same distance as a basis for calculating Claimant's entitlement to mileage reimbursement. In accordance with *Workers' Compensation Rule* 12.2100, Defendant is obligated to reimburse Claimant for travel to and from medical appointments that were more than 35 miles away from his home.

10. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $2,183.35 and attorney's fees totaling $5,103.00 (56.7 hours at the mandated rate of $90.00 per hour). An award of costs to a prevailing claimant is mandatory under the statute. As Claimant has prevailed, these are awarded.

11. As for attorney's fees, these lie within the Commissioner's discretion. I find that they are appropriate here, and therefore these are awarded as well.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits in accordance with a 7.5% whole person impairment rating referable to the spine;

2. Medical benefits covering treatment for Claimant's low back injury from March 2006 until November 2006;

3. Mileage reimbursement in accordance with Conclusion of Law No. 10 above;

4. Interest on the above amounts in accordance with 21 V.S.A. §664; and

5. Costs totaling $2,183.35 and attorney's fees totaling $5,103.00.

DATED at Montpelier, Vermont this 24th day of June 2009.

_____
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.