Pauline Kearney v. Addison-Rutland Supervisory Union (June 24, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Pauline Kearney	Opinion No. 21-09WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Addison-Rutland Supervisory Union	For: Patricia Moulton Powden Commissioner
	State File No. W-57184

OPINION AND ORDER

Hearing held in Montpelier on March 30, 2009
Record closed on April 13, 2009

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUE PRESENTED:

What is the extent of the permanent partial impairment causally related to Claimant's January 3, 2005 work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae,* Robert McLellan, M.D.

Defendant's Exhibit A: *Curriculum vitae,* George White, Jr., M.D., M.S., CIME

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648
Interest pursuant to 21 V.S.A. §664
Costs and attorney's fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

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. 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 relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment, 5th ed.* (the *"AMA Guides"*).

3. Claimant suffered a low back injury in January 2005. Following a formal hearing, the Commissioner determined that the injury was causally related to her work for Defendant and therefore compensable. *Kearney v. Addison-Rutland Supervisory Union*, Opinion No. 20-07WC (August 2, 2007).

4. Claimant had a prior history of non-work-related low back pain, diagnosed as lumbar spinal stenosis, in 1996. Her symptoms at that time were right-sided low back and buttock pain radiating to her right groin and knee. As treatment for this degenerative condition, in December 1996 Claimant underwent an L4-5 laminectomy. After surgery her symptoms resolved completely and she had no residual functional limitations. Because the condition was not work-related, she neither sought nor received any workers' compensation benefits referable to it.

5. Claimant's January 2005 work injury was to the L-5 nerve root. It caused predominantly left-sided symptoms, including low back and left leg pain. Claimant's treating physicians theorized that the pre-existing degenerative condition in Claimant's lumbar spine, for which she underwent surgery in 1996, caused her to be more vulnerable to pinching a nerve in that same spinal region, which is likely what happened as a result of her work activities in January 2005. In finding Claimant's 2005 injury to be compensable, the Commissioner specifically accepted this explanation as to the mechanism of that injury.

6. Claimant reached an end medical result for the January 2005 injury in November 2007. Her low back pain has subsided, but she is left with residual weakness in her left leg and loss of sensation in her left calf, foot and great toe. As a result of these residual symptoms Claimant has become limited in a number of functional activities she used to enjoy. She walks with a shorter gait and uses an ankle brace when walking outdoors.

7. Two independent medical evaluators have rated the extent of Claimant's permanent impairment – Dr. McLellan on Claimant's behalf and Dr. White at Defendant's request. Both used the same methodology, referred to in Chapter 15 of the *AMA Guides* as the "range of motion" method. That analysis comprises three components:

- A percentage impairment based solely on the applicable diagnosis;
- A percentage impairment attributable to restricted range of motion, if any; and
- A percentage impairment attributable to neurologic deficits, if any.

The three components are then combined to determine the patient's total impairment.

8. Doctors McLellan and White essentially agree as to the impairment attributable to the second and third factors listed above. Both found no restricted range of motion, and therefore no ratable impairment for the second component. As to the third component, both found neurologic deficits attributable to the January 2005 work injury, which Dr. McLellan rated at 4% whole person and Dr. White at 5%.

9. As to the first component, both doctors agree that Claimant's 1996 diagnosis of lumbar spinal stenosis, with subsequent surgery and residual symptoms, yields a ratable impairment of 10% whole person. Where they disagree is as to whether or not to apportion away that component because it was pre-existing. Dr. McLellan testified that because he was not asked to apportion, he included the 10% diagnosis-related impairment in his final rating – 14% whole person. Dr. White did not do so, such that his final impairment rating was the 5% referred to in Paragraph 8 above.

10. 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* §§1.6b and 2.5h (generally); §15.2a (as applied to spine impairments). 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, and "jurisdiction practices," *id*. at §15.2a.

11. To date, Defendant has not paid any permanency benefits to Claimant. Through its attorney, Defendant has asserted that it offered to pay benefits in accordance with Dr. White's 5% rating without requiring Claimant to execute a Form 22 Agreement to that effect, but that Claimant declined the offer and therefore no payments were made. Neither party presented any evidence on this issue.

CONCLUSIONS OF LAW:

1. This claim presents primarily a legal issue as to the extent of Claimant's permanent partial impairment, not a factual or medical one. Both medical experts admitted that their opinions differ only as to whether it is proper to include the permanency specifically referable to Claimant's pre-existing condition in her final impairment rating, as Dr. McLellan did, or to apportion it away, as Dr. White did. As even the *Guides* themselves acknowledge, this is a decision best left to lawyers, not doctors.

2. 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. *Murray v. Home Depot USA, Inc.*, Opinion No. 41-08WC (October 20, 2008); *Kapusta v. State of Vermont Department of Health*, Opinion No. 36-08WC (September 4, 2008). Both of these opinions lend instructive guidance here.

3. At the time of his work injury, the claimant in *Murray* had evidence of pre-existing degenerative disc disease in his lumbar spine, admittedly a "somewhat benign condition" that had neither disabled him from working nor required medical treatment. The work injury aggravated and accelerated the disease. The Commissioner declined to apportion away the permanency attributable to the pre-existing condition. Instead, she awarded permanency benefits based on the total impairment rated for both that condition and the work injury. In doing so, the Commissioner concluded that the claimant's permanency award should fully reflect the fact that a condition that had not been disabling before became so as a result of the work injury.

4. The Commissioner also declined to apportion the claimant's permanency benefits in *Kapusta*. The claimant there injured her hip in a slip-and-fall at work only months after having undergone non-work-related hip replacement surgery. She had recovered well from that surgery, but following the work injury was left with significant functional limitations. The Commissioner concluded that the two injuries were directly related, that the claimant's impairment from her prior injury had exacerbated her work injury and that therefore it would be inappropriate to apportion.

5. Unlike the claimant in *Murray*, here Claimant did treat surgically for her pre-existing spine disease in 1996, but she recovered fully and had no lingering symptoms. Like the claimant in *Murray*, her condition appeared to be "benign." Unfortunately, however, as was the case in *Kapusta*, the pre-existing condition caused Claimant to be more vulnerable to injury from the work activities in which she engaged in January 2005. Now, the combination of that increased vulnerability and those work activities have resulted in residual symptoms, functional limitations and permanent partial disability.

6. Given its remedial purpose, Vermont's workers' compensation statute must be "construed broadly to further its purpose of making employees injured on the job whole." *Hodgeman v. Jard Co.*, 157 Vt. 461, 464 (1991). To allow apportionment in this claim would defeat that purpose.

7. I conclude, therefore, that because Dr. McLellan did not apportion away the ratable impairment referable to Claimant's pre-existing condition, his 14% whole person impairment rating yields the more appropriate result. Claimant is owed permanency benefits in accordance with that rating.

8. As for interest, arguably Defendant should have paid permanency benefits in accordance with the 5% impairment rating that Dr. White issued in November 2007, as that amount at least was undisputed by the parties. *Workers' Compensation Rule 3.1200*. Apparently Defendant offered to do so and apparently Claimant declined its offer. Rule 3.1200 gives the Commissioner discretion whether to award interest under these circumstances. Given the parties' failure to introduce any evidence on the issue, I decline to exercise that discretion here. Pursuant to 21 V.S.A. §664, I find that Claimant is entitled to interest on her award, but only from the date of this decision.

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 Dr. McLellan's 14% whole person impairment rating;

2. Interest on the above amount computed from the date of this decision; and

3. Costs and attorney fees in an amount to be determined based on Claimant's timely submission.

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

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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.