

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. K-17388
Mason Estabrook)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
)	For: Steve Janson
New England Precision)	Commissioner
& USF&G Insurance)	
)	Opinion No. 10-00WC

Case submitted on the record without a hearing
Record closed on November 19, 1999

APPEARANCES:

Joseph C. Galanes, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUE:

The degree of permanent impairment claimant suffered as a result of his work- related hernia.

Claimant Seeks:

1. Permanent Partial Disability Benefits under 21 V.S.A. §640.
2. Attorney fees and costs under 21 V.S.A. §678(a).
3. Legal Interest.

FINDINGS OF FACT:

1. On or about December 12, 1996, claimant was an employee of defendant, New England Precision, as Vermont workers' compensation law defines the term "employee."
2. Defendant, New England Precision, was an "employer" within the meaning of Vermont workers' compensation law.
3. USF&G provided defendant, New England Precision, workers' compensation insurance as of December 12, 1996.
4. Defendant Insurer does not dispute the fact that claimant suffered a work-related hernia. Defendant Insurer paid claimant temporary total disability and paid claimant's reasonable

and necessary medical charges incurred as a result of the work related injury. Defendant did not, however, investigate whether or not claimant suffered permanent impairment as a result of his work-related hernia.

5. Claimant's average weekly wage at the time of the injury was \$872.37 and his compensation rate was \$581.58.
6. All relevant facts in this case are undisputed. The claimant suffered a work injury in December of 1996. He was using a long steel bar to move a heavy piece of equipment that rested on a skid or wooden pallet. Claimant estimated that the equipment weighed between two and three thousand pounds. The skid collapsed and claimant was caught between the bar and a workbench. He immediately noticed the onset of abdominal pain and reported the injury.
7. Claimant suffered a left indirect inguinal hernia as a result of this work accident. He treated with his family physician, Dr. Kenneth Borie, and was later referred to a surgeon at Gifford Hospital, Dr. Leroy Hodges. On March 14, 1997, Dr. Hodges performed a left inguinal herniorrhaphy. Dr. Hodges used Prolene mesh to repair the herniation in claimant's abdominal wall.
8. Claimant seemed to recover well from the surgery and returned to his former position after a four to five week recovery period. However, almost two years later, claimant continued to have complaints of activity dependent daily pain. If he stands too long, he may have additional pain that results in a limp when he tries to walk. He limits his lifting to less than half his previous capacity.
9. On May 27, 1997, defendant's first insurance medical expert, Dr. George White, examined claimant. Dr. White noted that "[i]t has only been a couple of months since his surgery" and that claimant continued to experience pain as a result of the hernia. Although Dr. White speculated that claimant was not likely to suffer any permanent impairment, he did not state or imply that claimant had reached a medical end result.
10. Defendant USF&G apparently accepted Dr. White's tentative opinion as a finding of no impairment. It did not follow-up from there. It did not hire a physician to investigate claimant's degree of permanent impairment and it failed to notify claimant of his right to obtain a permanency rating of his own. Only after claimant retained counsel and obtained his own impairment rating of 10% did the defendant begin its own investigation into claimant's permanent impairment.
11. Claimant's treating physicians, Dr. Borie and Dr. Hodges, do not perform ratings in accordance with the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*. As a result, claimant sought an opinion from Dr. John Peterson.
12. After reviewing claimant's medical records and examining him on January 6, 1999, Dr. Peterson rated claimant's whole person permanent partial impairment at 10%. In his report, Dr. Peterson recorded the following medical findings: In December of 1996, claimant suffered from a work-related hernia. Dr. Leroy Hodges found an abdominal wall defect during surgery and repaired it using Prolene mesh. The claimant reported

significant pain post-operatively and remained out of work for four to five weeks, then returned to work at the same job. He now experiences pain on a daily basis which is activity dependent and that if he is up on his feet all day, he limps by the end of the day from the pain. Claimant has increased pain with coughing or sneezing but has not noticed any bulging in the area. Claimant has increased pain with heavy lifting and estimates that he tries to lift only half of what he had done previously. Claimant reported numbness in a triangular pattern from the incision down towards his scrotum.

13. When Dr. Peterson examined the claimant he noted a 5-centimeter diagonal scar over the left lower abdomen which was tender to palpation. There was noticeable tenderness to palpation at the left inguinal canal and the tenderness increased during Valsalva maneuver. Dr. Peterson did not notice an obvious bulge or protrusion upon examination.
14. Based on his review of the relevant medical records, Dr. Peterson determined that claimant had an abdominal wall defect which was found at surgery. He further found, based on his history and physical examination, that claimant had frequent discomfort which interferes with his normal activities despite the fact that he had been able to continue in his regular job. He needed to limit his lifting to less than 50% his pre-injury levels and experienced increased pain, resulting in limping if he was on his feet for too long.
15. Following his history and examination, Dr. Peterson determined the degree of permanent impairment claimant suffered as a result of his hernia. Dr. Peterson applied Table 7 on page 247 of the *Guides*. Specifically he noted that an abdominal defect had been found at surgery, that he had been able to do his job despite frequent discomfort that interferes with normal activities. Dr. Peterson opined that claimant met all the criteria for a class 1 impairment and the baseline criteria for a class 2 impairment. Because the claimant had improved from his pre-surgical state and did not have a persistent defect, Dr. Peterson rated him claimant at the lower level of class 2 which has a range from 10% to 19% of the whole person.
16. After receiving Dr. Peterson's evaluation, USF&G hired Dr. Christopher Brigham to review the records and render an opinion on permanency. Dr. Brigham is an occupational medicine physician who has actively worked on the *AMA Guides* and its Newsletter. Dr. Brigham did not meet with or examine the claimant.
17. Dr. Brigham determined that claimant has no permanent partial impairment. In Dr. Brigham's opinion, to have a ratable condition for any class of hernia under Table 7 in the *AMA Guides*, there must be a palpable defect in the supporting structures of the abdominal wall. In support of that opinion, he referenced the examples offered in the *Guides* under the section entitled Hernias of the Abdominal Wall in the text accompanying Table 7. Because the claimant has no palpable defect, Dr. Brigham concluded that he has no ratable impairment. Dr. Brigham further opined that Dr. Peterson and the other physicians who rated this claimant with a permanent partial impairment rated his pain, which under the *Guides* is not a sufficient basis for a rating. According to Dr. Brigham's interpretation of the *AMA Guides*, an individual with a surgically repaired hernia will never have a ratable impairment no matter how significant the residual signs and symptoms, unless there is a palpable defect.

18. Dr. George M. Smith and Dr. G. Theodore Davis reviewed claimant's medical records at the request of claimant and rendered an opinion on permanency as well. Their opinion is the same as Dr. Peterson's, 10% whole person impairment. They took, however, a slightly different approach in applying Table 7.
19. Dr. George M. Smith was an editor of several editions of the *AMA Guides*, including the 4th edition. Like Dr. Brigham, his work with the *Guides* enhances his qualifications to render an opinion in this case. Doctors Smith and Davis started from the premise that an impairment is the loss of, loss of use of, or derangement of a body part, function or system. (Citing *AMA Guides* Glossary). And impairment is best understood as a residual observable or otherwise identifiable abnormality following an injury or illness. When an individual does not recover completely from an accident or injury and is left with one or more observable or otherwise identifiable residual abnormalities, that individual has an impairment.
20. Smith and Davis go on to point out that whether an impairment has a rating greater than zero depends on (1) the impact of the residual abnormalities on the individual's activities of daily living as those activities are listed in the *Guides*, and (2) on the degree to which an individual's capacity to carry out daily activities such as those listed on page 317 is diminished. Dr. Smith and Dr. Davis agreed with Dr. Peterson's finding that claimant continues to suffer with residual signs and symptoms two years following his surgically repaired hernia. Therefore, he has an impairment. That impairment is a derangement in the area of his left groin identified by a surgical finding of hernia, postoperative tenderness on examination, and concomitant symptoms in the area of the tenderness made worse by activities of daily living.
21. Turning to Table 7, Dr. Smith and Dr. Davis provide an alternative approach. They assert that the claimant has a 10% whole person impairment because he has frequent discomfort, precluding heavy lifting, but not hampering normal activity. It is their contention that the grammatical structure of the *AMA Guides* Table 7 does not require a finding of a palpable defect at the time of the examination. Rather, it merely requires documented history of a hernia together with residual signs and symptoms meeting the criteria in the 3rd paragraph of Class 2 -- Table 7. Their approach is consistent with the letter and spirit of the *AMA Guides* and Vermont's workers' compensation scheme and consistent with prior Vermont precedent. Furthermore, it complies with the decades old Vermont practice of assigning a permanency rating to all hernias.

CONCLUSIONS OF LAW:

1. There is no dispute in this case that the claimant suffered a compensable work injury. Likewise there is no dispute as to the medical facts. Claimant continues to suffer frequent discomfort, precluding heavy lifting, but not hampering normal activity and the discomfort is causally attributable to his work-related injury.
2. The issue for decision, based on the undisputed medical evidence, is the degree of permanent impairment claimant suffered as a result of his work-related hernia.

3. Deciding this issue requires revisiting Table 7 on page 247 of the *AMA Guides* and prior precedent on this issue. In *Knapp-Bowen v. Equinox Terrace*, Opinion No. 4-98WC (Jan. 19, 1998), this Department determined that a hernia is a defect, even if it has been surgically repaired. Under that reasoning, a claimant could have a permanency rating from 0-30% depending on the degree of protrusion, discomfort or limitation in activities. The defendant in this case is asking the Department to reevaluate that interpretation in light of Dr. Brigham's opinion in this case.

4. A class 1 hernia-related impairment correlates with a 0-9% impairment of the whole person which is defined in Table 7 as:

Palpable defect in supporting structures of abdominal wall;

and

Slight protrusion at site of defect with increased abdominal pressure;
readily reducible;

or

Occasional mild discomfort at site of defect, but not precluding normal activity.

A class 2 hernia-related impairment in Table 7 is rated from 10% to 19% and defined as:

Palpable defect in supporting structures of abdominal wall;

and

Frequent or persistent protrusion at site of defect with increased abdominal pressure; manually reducible;

or

Frequent discomfort, precluding heavy lifting, but not hampering heavy lifting.

5. In this case, the claimant continues to experience frequent discomfort, precluding heavy lifting but not hampering normal activity.

6. One issue for decision is whether the table should be interpreted as A + (B or C) or (A+B) or C. Dr. Smith favors the (A+B) or C interpretation. He acknowledges that the table itself does not explain how the three criteria are related by the conjunctions between them. But he opines that it makes more sense to consider the first two criteria together, i.e., palpable defect in supporting structures of the abdominal wall and frequent or persistent protrusion at site of defect with increased abdominal pressure. The third criterion would then be considered alone, i.e., frequent discomfort, precluding heavy lifting, but not hampering normal activity. He explains that "it is clearly possible for discomfort to occur without a palpable defect and whereas it may be possible that a defect in the abdominal wall is not associated with a protrusion, a frequent or persistent protrusion at the site of the defect would hardly be expected to occur in the absence of a palpable defect."

7. Dr. Brigham favors the A+ (B or C) interpretation. First, he maintains that one must have a palpable defect in the abdominal wall in order to have a ratable impairment, hence the "A" alone. Next, he believes that once it is determined that one has a palpable

impairment, the next level of inquiry is whether the claimant has a protrusion at the site of the defect (B) or frequent discomfort (C). To consider C (frequent discomfort) alone, in Dr. Brigham's opinion, would mean assigning a substantial impairment to subjective complaints, without objective findings, an approach that would be inconsistent with other approaches in the *Guides*.

8. Doctors Davis and Smith argue that the first two criteria in Table 7 may be taken together and the third criteria may stand alone. They agree with Dr. Peterson that claimant suffered a 10% whole person impairment as a result of his work-related hernia. That opinion is based on the premise that an individual who has suffered a medically documented hernia to the abdomen wall meets the criteria for a Class 2 impairment if he experiences frequent discomfort, precluding heavy lifting, but not hampering normal activity. Dr. Davis's and Dr. Smith's approach is consistent with this Department's prior precedent, with the letter and spirit of the *AMA Guides* and the remedial goals of the workers' compensation scheme.
9. They recognize that the claimant has suffered a "permanent" "impairment" as those terms are defined by the *AMA Guides* and then set out to apply Table 7 in a way that reflects the goals of the *Guides* as a whole. In *Knapp-Bowen*, this Department held that if a claimant suffered a medically documented hernia, the threshold criterion for all classes of hernia impairment is met. Applying *Knapp Bowen* to the facts of this case, the medical evidence unequivocally and undisputedly demonstrates that claimant suffered a work-related hernia. Under *Knapp-Bowen*, he has met the threshold criterion for all classes of hernia impairments. If, upon physical examination claimant has resulting frequent discomfort, precluding heavy lifting but not hampering normal activity, his permanent impairment must result in at least a Class 2 impairment according to Table 7 of the *AMA Guides*.
10. Accordingly, I conclude that the claimant suffered a 10% whole person impairment as a result of his work-related hernia.

Interest

11. Claimant asserts that defendant failed to investigate diligently this worker's claim as required by Rule 3 of the Vermont Workers' Compensation rules and demands interest on the permanent partial disability award.
12. The Commissioner has the inherent authority to enforce against a worker's compensation defendant its obligation to adjust a workers' compensation claim expeditiously and efficiently and to pay the benefits in a reasonably prompt fashion. *Blaine v. St. Johnsbury Trucking*, Opinion No.19-91WC (Oct. 10, 1991). "The power to penalize those who fail to adjust claims expeditiously and efficiently by awarding interest is an appropriate exercise of this authority." *Id.*
13. In August of 1997, defendant solicited a report from Dr. George White. It is obvious from the face of Dr. White's report that he did not believe claimant had reached a medical end point at the time of his independent medical examination. Defendant did not follow up with Dr. White and did not advise claimant of his right to obtain his own

permanency assessment. Only after receiving Dr. Peterson's evaluation did USF&G hire a physician to support its position that claimant did not have any permanent impairment as Dr. White speculated two years before.

14. Rule 3 of the Department of Labor and Industry's rules provides: "The employer shall, upon receiving notice of an injury, promptly investigate and determine whether or not compensation is due. If the employer determines that an injury is compensable, it shall enter into a compensation agreement (Forms 21, 22, 23, 24)."
15. Defendant had an affirmative obligation under Rule 3 to investigate whether or not claimant suffered any permanent impairment as a result of his work-related injury. *Heaney v. Southwestern Vermont Medical Ctr.*, Opinion No. 22-96WC (April 29, 1996). It failed to carry out its regulatory obligation until confronted with a report from claimant's expert physician two years later.
16. As in the *Berno* case, USF&G failed to pay any permanency, failed to advise the claimant of his entitlement to permanency, and failed to request any report reflecting a permanency evaluation. *Berno v. Stripping Unlimited, Inc. and Farm Family Mutual Insurance*, Opinion No. 07-98WC (Feb. 6, 1998).
17. Claimant is entitled to an award of interest at the statutory rate of 12% starting 30 days after the date he reached a medical end result and running to the date of payment. *See Berno*. We will assume for the purposes of this interest award that claimant reached medical end point one year following his surgery, that is March 14, 1998. Claimant is therefore entitled to interest at the statutory rate from April 14, 1998 to the date of payment.

ATTORNEY'S FEES AND COSTS:

1. Pursuant to 21 V.S.A. § 678, claimant's entitlement to reasonable and necessary costs is a matter of law; his right to attorney's fees is a matter of discretion. *Morrisseau v. Legac*, 123 Vt. 70 (1962). Claimant is awarded costs in the amount of \$1,231.31.
2. The claimant, having prevailed in this case because of his attorney's efforts, is awarded attorneys' fees at the new regulatory rate of \$60 per hour with a cap of \$6,000 in contingent fee cases. *See Lowell v. Rutland Area Visiting Nurses Assoc.*, Opinion No. 42-99WC (Oct. 12, 1999). This is consistent with the Department's own rules. Department of Labor and Industry's Rule 35 (a) specifically provides: "Procedures under these rules not affecting the substantive rights of a party, shall apply to pending and future claims and cases." If the amendment to Rule 10 created a new, substantive right to receive attorney's fees one could persuasively argue that a substantive change had occurred. Such a change would alter the so-called "American Rule" - each party to litigation paying their own attorney's fees and provide the Claimant with new rights and remedies. *See Fleury v. Kessel/Duff Const.*, 156 Vt. 406 (1991). However, when the rule change merely alters the rate of compensation it cannot be said that a substantive change to the law has occurred. The Rule 10 amendment changing the rate of attorney's fees (effective 9/13/99) was a procedural amendment. It did not create a new substantive

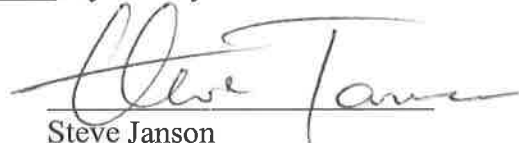
right, it merely changed the rate at which a claimant may be entitled to compensation for his attorney's fees. Changing the rate of attorney's fees does not affect the substantive rights of any party. Claimant is entitled to an award of 20% not to exceed \$6,000.

3. Furthermore, relying on the strength of Dr. Brigham's opinion, the defendant chose to ignore this Department's precedent in *Knapp-Bowen* which held that a hernia resulted in permanent partial impairment. Although the employer certainly can argue in good faith that such precedent should be overruled, its choice to ignore it provides further justification for an award of interest and fees.

WHEREFORE, it is hereby ordered that defendants pay claimant:

1. Permanent partial disability benefits based on a 10% whole person impairment;
2. Interest at the statutory rate from April 14, 1998 to the date of payment;
3. Costs of litigation totaling \$1,231.31; and
4. Attorney's fees equaling 20% of the award not to exceed \$6,000.

Dated at Montpelier, Vermont, this 16th day of May 2000.


Steve Janson
Commissioner