

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

)	State File No. M-24220
)	
Beverly Lent)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Experian)	Commissioner
)	
)	Opinion No. 16-01WC

Hearing Held in Rutland on January 23, 2001
Record Closed on February 5, 2001

APPEARANCES:

Beverly Lent, pro se
John W. Valente, Esq. for the employer

EXHIBITS:

- I: October 11, 1999 report of Mark J. Bucksbaum, M.D.
- II: July 5, 2000 report of George C. Fjeld, M. D.

ISSUES:

What degree of permanency did the claimant incur as a result of her work-related injury?

FINDINGS OF FACT:

1. In the course of her employment with Experian and as a result of a lifting incident, the claimant injured her back on May 27, 1999. Afterwards she treated with physicians in Rutland, Brandon and Burlington.
2. The claimant has had persistent back pain since the incident. She cannot do those things she did before the accident. For example, the pain keeps her from sitting or driving for extended periods. Even putting on a sock is difficult because she needs to lift her foot with her hands rather than bend over.
3. Claimant lives with her husband in Brandon. Distance, family responsibilities and her unwillingness to sit in classes kept her from participating in the Spine Institute Program in Burlington.
4. In October 1999 at the request of the employer, Mark Bucksbaum, M.D. evaluated the

claimant. He diagnosed her condition as lumbar strain with persistent muscle spasm and guarding.

5. At the time of Dr. Bucksbaum's evaluation, the claimant had no objective signs of radiculopathy, although she had a high level of perceived pain. Her gait was normal. Range of motion in her lumbar spine was slightly decreased, although the range of motion in her hips, knees and ankles was normal. Sensation in her legs was intact. Straight leg test was normal. She had tenderness with spasm and guarding at the right iliocostalis muscle.
6. Noting that she had been unsuccessful with therapy, Dr. Bucksbaum placed her at a medical end result with a 5% whole person permanent partial impairment, based on DRE Lumbosacral category II from the AMA Guides to Permanent Impairment, 4th edition.
7. The workers' compensation insurance carrier paid the claimant permanency benefits based on Dr. Bucksbaum's 5% rating. In fact, on January 3, 2000 the claimant signed a Form 22 agreement to that effect but wrote on the back of the form that she "did not agree with this decision." The 5% rating translated to 27.5 weeks at her compensation rate of \$253 per week.¹
8. On July 5, 2000 George Fjeld, M.D. determined that the claimant had at least a 10% impairment in terms of functional capacity based on conversation with her, seeing her move about and reviewing her record.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963).
2. Although temporary benefits under the Workers' Compensation Act are awarded on the basis of an injured worker's incapacity for work, "permanent disability benefits are calculated solely on the basis of physical impairment. " *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).
3. Under 21 V.S.A. § 648(b) "Any determination of the existence of degree of permanent partial impairment shall be made only in accordance with the whole person determination set out in the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment."
4. In general the impairment ratings provided in the *Guides* "make allowance for the pain that may accompany the impairing condition." *AMA Guides* at 2/9.

¹ Although the claimant's initial compensation rate was \$242.00 based on the average weekly wage at the time of her May 1999 injury, the July 1, 1999 update increased the rate to \$253.00 for purposes of the PPD calculation.

5. DRE Category II in the *AMA Guides* is described as a Minor Impairment. Persons with injuries placed in this category have a history of muscle guarding and non-uniform loss of range of motion. There is no objective sign of neurologic impairment. *AMA Guides at 3/106*. The impairment for a Category II is 5% whole person. Id.
6. DRE Category III carries 15% impairment. People in this category have ongoing minor neurologic impairment of the lower extremity, documented through examination of reflexes and findings of atrophy on one side. Id.
7. The results of the claimant's physical examination support the 5% rating assessed by Dr. Bucksbaum. This claimant has the muscle guarding specified in the *Guides* and some loss of range of motion. However, she does not have the signs of diminished reflexes, or loss of muscle or other objective signs that would justify a higher rating.
8. I found nothing in the record to reconcile Dr. Fjeld's 10% rating with the *Guides*.

ORDER:

Based the Foregoing Findings of Fact and Conclusions of Law, the employer is responsible for permanent partial impairment benefits based on a 5% whole person rating, which has already been made. No additional permanent partial benefits are due.

Dated at Montpelier, Vermont this 25th day of June 2001.

R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.