S. C. v. Barre Supervisory Union School (July 9, 2007)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

S. C. Opinion No. 18-07WC

v. By: Rebecca L. Smith
Staff Attorney

Barre Supervisory Union School For: Patricia Moulton Powden
Commissioner

State File No. T-11595

**RULING ON DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR STAY OF FINAL DECISION AND CLAIMANT'S MOTION TO RECONSIDER REGARDING ATTORNEY'S FEES, COSTS, INTEREST AND IMPAIRMENT RATING**

The Defendant moves that the Department reconsider and modify, or in the alternative stay pending appeal, the final decision, Opinion No. 53-06WC, issued on January 2, 2007 after formal hearing in this workers' compensation matter. Specifically, the Defendant disputes the Department's finding of permanent partial impairment in Conclusion of Law 8, which states that Dr. Farrell's is the only permanency opinion on record. The Defendant asserts that Dr. Hebben's assessment of no permanent impairment is the correct one.

The Claimant requests several actions in her motion: 1) award of attorney's fees and costs on the basis that the Claimant partially prevailed at hearing, 2) clarification of the specific percentage of impairment awarded, 3) an award of interest on all outstanding benefits ordered, and 4) an order directing payment of the permanent partial disability benefits in a lump sum pursuant to §652.

The initial opinion denied permanent total disability and awarded permanent partial impairment as assessed by Dr. Farrell, who provided a rating in the form of a range of 26-32%. It did not address attorney's fees and costs or interest.

**Permanent Partial Impairment**

The Defendant argues that the Department erred in awarding permanent partial disability because that conclusion was not based on the facts found. Specifically, the Defendant disputes the statement in Conclusion of Law 8 that Dr. Farrell's was the only permanency rating advanced, noting that Dr. Hebben assessed no impairment associated with the work injury.

Dr. Hebben's opinion is founded on her conclusion that the Claimant suffered no psychiatric or cognitive injury as a result of the January 2003 accident. However, Dr. Hebben did find a somatoform disorder, which had not previously been diagnosed. Dr. Hebben describes that the mild head injury provided the Claimant with "a shelf to place [her preexisting psychological conditions] on." Further, Dr. Hebben questioned the diagnosis of concussion and post concussion syndrome, while it is well established by both the Claimant's treatment providers and by independent examiners hired by the Defendant that the Claimant experienced mild grade 1 concussion, followed by post concussion syndrome with persistent effects. Both Dr. Preis and the Claimant testified that a series of pre-injury conditions, essentially controlled and not significantly interfering with the Claimant's teaching career, markedly worsened subsequent to the injury. Dr. Preis describes the post-injury symptoms as becoming chronic rather than episodic.

Therefore, upon review and reconsideration, the original finding that the lingering effects of the work injury combined with the pre-existing conditions to produce disability are the most probable hypothesis. This conclusion is additionally supported by Dr. Peyser, who opined that "the incident may have spawned a psychological reaction which may be impacting the results of some of her testing," and recommended that the Claimant work with a vocational rehabilitation psychologist to "map out compensatory and recovery strategies along with pain management skills."

**Percentage of Impairment**

In June 2005, Dr. Farrell found a psychological impairment directly attributable to the work injury of 26-32 % based on the Colorado Department of Labor and Employment guidelines. The AMA Guides to the Evaluation of Permanent Impairment assess impairment due to mental and behavioral disorders, but do not assign numerical impairment ratings as they do for other injuries. The Department has recognized the Colorado system for the purpose of assigning an impairment percentage to mental disorders. See, e.g. *Bodell v. Webster Corporation*, Opinion No. 62-96WC (October 22, 1996), *Sargent v. Town of Randolph Fire Department*, Opinion No. 37-02WC (August 22, 2002). Close comparison of Dr. Farrell's findings with Table 13-8 of the *Guides* (Criteria for Rating Impairment due to Emotional or Behavioral Disorders) and the corresponding examples indicates correlation with high end Class 2 (moderate limitation of some activities of daily living, 15-29%) to low end Class 3 (severe limitation in performing most activities of daily living, 30-69%) impairment. Consequently, I find the Claimant's whole person impairment rating to be 30%.

**Attorney's Fees and Costs**

By oversight, the initial opinion neglected to address attorney's fees and costs. The Claimant has submitted an accounting of $19,719.00 in fees and $6,826.34 in costs.

The Claimant sought to establish work-related permanent total disability, or, in the alternative, work-related permanent partial disability; the Defendant disputed any permanent disability attributed to the work injury. Awarding of attorney's fees is discretionary pursuant to 21 V.S.A. §678. The Claimant has prevailed in part, and is thereby entitled to of a portion of the fees and costs sought. An award in the amount of 50% of the fees sought, or $9,859.50, is appropriate to the degree of the Claimant's success, in consideration of the extent to which the necessary preparations for the alternative positions overlapped.

Necessary costs are mandatory when a claimant prevails. Having prevailed in part, the Claimant is entitled to an award of costs, however the costs sought in this matter far exceed the norm for claims of this type. Payments to one individual alone, Dr. Paul R. Solomon, exceed four thousand dollars. Dr. Solomon's role in preparing the case is not clear, and without further elaboration cannot be deemed necessary. Accordingly, $2,776.34 in costs is awarded.

**Interest**

Pursuant to 21 V.S.A. §664, an award shall include the date on which the Defendant's obligation to pay compensation began, and shall include interest at the statutory rate computed from that date. Defendant's obligation to pay temporary partial disability compensation began at the termination of the period of temporary total disability, which the parties have stipulated occurred on April 26, 2005. Interest on the benefits due shall be paid from that date.

**Lump Sum**

The Claimant requests an order requiring that the permanent partial disability benefits be paid in a lump sum in accordance with 21 V.S.A. §652 in order to protect her Social Security benefits from offset. Section 652 was amended in May 2006 to require that, in the absence of a claimant's request to the contrary, any order for a lump sum payment of permanent partial disability benefits shall include a provision accounting for excludable expenses and prorating the remainder of the lump sum payment in the manner set forth by the Social Security Administration in order to protect the claimant's entitlement to Social Security Benefits. The Department relies upon party counsel to provide such an accounting for review and approval, and cannot approve lump sum payment in its absence.

**Stay**

To prevail on its request for stay of the award of permanent partial disability benefits, the Defendant must demonstrate 1) that it is likely to succeed on the merits of the appeal; 2) that it would suffer irreparable harm if the stay were not granted,; 3) that a stay would not substantially harm the other party; and 4) that the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc*. 148 Vt. 634, 635 (1987).

The Defendant argues that it will likely prevail on appeal because the Department's conclusions were not based upon the facts as presented at hearing. Specifically, the Defendant notes that Conclusion of Law 8 conflicts with the facts found in Finding 38. The Defendant's arguments regarding the other three stay factors are similarly based. Those concerns are addressed above in the discussion regarding the reconsideration of the award of permanent partial disability benefits. The defendant has failed to sufficiently demonstrate that another forum, after interpreting all submitted evidence, would reach a different conclusion. See, e.g. *Carter v. Portland Glass*, Opinion No.8RS-98WC (April 3, 1998 and Feb. 6, 1998). Without this essential prong of the four-part test under *In re Insurance Services Offices, Inc.*, the Defendant's arguments regarding the other three prongs are diminished, and lead to the conclusions that the required factors are not demonstrated. Accordingly, the motion for a stay must be denied.

**ORDER:**

Therefore, based upon the forgoing:

1. The award of permanent partial disability is upheld after reconsideration;
2. PPD shall be at the rate of 30% whole person disability;
3. Interest is awarded as though the PPD payments had commenced on April 26, 2005;
4. Claimant is awarded attorney's fees and costs in the amount of $10,625.00;
5. Claimant's request for a lump sum payment of benefits is denied.

Dated at Montpelier, Vermont this 9th day of July 2007.

_____

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.