Jeffrey Marshall v. State of Vermont, Vermont State Hospital (March 25, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Jeffrey Marshall	Opinion No. 01R-11WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
State of Vermont, Vermont State Hospital	For: Anne M. Noonan Commissioner
	State File No. S-22038

RULING ON CLAIMANT'S MOTION TO AMEND

The Commissioner previously decided this claim on January 25, 2011. In her opinion, she rejected Claimant's claim for additional permanent partial disability and/or medical benefits causally related to his June 2002 compensable work injury.

Claimant now seeks reconsideration because of "significant errors" in the Commissioner's decision. Essentially, Claimant argues that various findings of fact are unsubstantiated by the evidence adduced at formal hearing and that therefore the Commissioner's conclusions must fail.

Claimant asserts that the Commissioner misstated the evidence by finding that in the opinion of Defendant's medical expert, Dr. Boucher, "[M]ore likely than not the June 2002 injury is no longer contributing significantly to Claimant's ongoing complaints." *Marshall v. State of Vermont*, Opinion No. 01-11WC (January 25, 2011) at Finding of Fact No. 36.

The basis for this finding was Dr. Boucher's March 8, 2010 independent medical evaluation report. On page 9 (Joint Medical Exhibit at p. 272), in the section labeled, "Causation," the report states:

> [The June 6, 2002] incident was a simple lumbosacral strain, not resulting in any change in radiculopathy or new structural injury. Given the examinee's very significant prior history including three low back surgeries, I must state that more likely than not, the June 6, 2002 incident does not continue to significantly contribute to the examinee's low back complaints.

It is true that Dr. Boucher gave somewhat conflicting testimony in his deposition, primarily in the context of explaining the basis for his permanent impairment rating. Nothing compels the fact-finder to accept that testimony as a more credible statement of the doctor's opinion than what he wrote in his report, however. Indeed, one might argue that the opinions stated in a written report are likely to be more thoughtfully considered and expressed than those that are elicited upon cross-examination in a deposition. With that in mind, I conclude that there

is ample support in the record for Finding of Fact No. 36, and therefore I see no basis for amending or reconsidering it.

Claimant next argues that there is no support for the Commissioner's determination that his L4-5 disc herniation is responsible for his current condition. Yet in his July 16, 2008 report (Joint Medical Exhibit at p. 256) Claimant's own medical expert, Dr. Banerjee, stated:

> His previous disc herniations were at L5-S1 level on the left side, and his current problem is related to right L4-5 disc herniation resulting from work injury in June 2002.

The Commissioner rejected Dr. Banerjee's conclusion that the L4-5 disc herniation *resulted from the June 2002 work injury*, and on those grounds determined that Claimant had failed to sustain his burden of proving a causal connection between his current condition and his compensable injury. *Marshall, supra* at Conclusion of Law No. 6. The facts adequately support this conclusion and therefore there is no basis for amending or reconsidering them.

Last, Claimant argues that there was no basis for the Commissioner to have upheld the validity of the 2004 permanency agreement. Claimant asserts that because both Dr. Boucher and Dr. Banerjee testified that Dr. Cyr's permanent impairment rating was calculated incorrectly, (a) it must necessarily be so; and (b) the Form 22 must be invalidated on mutual mistake of fact grounds.

Neither of these assertions is correct. I am not compelled, first of all, to accept either Dr. Boucher's or Dr. Banerjee's expert opinions as correct, even if their testimony was undisputed. *Goode v. State*, 150 Vt. 651, 652 (1988) (mem.), citing *Shortle v. Central Vermont Public Service Corp.*, 134 Vt. 486, 489 (1976). To the contrary, I remain convinced that considering both the medical record and the relevant portions of the *AMA Guides*, there was sufficient evidence from which to find that Dr. Cyr's rating may well have been appropriate at the time that it was rendered.

As stated in my earlier opinion, furthermore, even if Dr. Cyr's interpretation of the *Guides* was incorrect, the result was a mistaken opinion, not a mistaken fact. Were I to rule otherwise, no permanency agreement would ever be safe from reappraisal by experts retained even years after the fact. The result would be impractical and unfair to injured workers and employers alike.

I conclude that there is no basis for amending or reconsidering the findings or conclusions stated in my earlier opinion. Claimant's Motion to Amend is **DENIED**.

DATED at Montpelier, Vermont this 25th day of March 2011.

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Anne M. Noonan
Commissioner