

Violet Ploof v. Heritage Motors

(March 25, 2011)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Violet Ploof

Opinion No. 06-11WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Heritage Motors

For: Anne M. Noonan  
Commissioner

State File Nos. S-21982 and U-10296

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS:**

Richard Goldsborough, Esq., for Claimant  
John Valente, Esq., for Defendant

**ISSUE PRESENTED:**

Did the Workers' Compensation Specialist err as a matter of law by issuing an order that Defendant pay permanency benefits in accordance with Dr. Fenton's impairment rating as opposed to Dr. Kirkpatrick's rating?

**FINDINGS OF FACT:**

The following facts are undisputed:

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. On June 10, 2002 Claimant injured her right shoulder and lower back in a work-related incident.
3. Between October 2003 and December 2005 Claimant underwent numerous independent medical evaluations. Ultimately the parties were able to resolve the issues relating to Claimant's right shoulder injury. They could not agree, however, as to (a) whether Claimant's ongoing low back complaints were causally related to her work injury; and (b) if so, whether spinal fusion surgery was a reasonable and necessary treatment.
4. Both of these issues were determined in Claimant's favor following a formal hearing in 2007. *V.P. v. Heritage Ford*, Opinion No. 26-07WC (September 28, 2007). Defendant was ordered to pay workers' compensation benefits associated with the proposed fusion surgery, "including payment of medical bills and both temporary and/or permanent

disability benefits, as proven following the procedure.” *Id.* On appeal, the Chittenden Superior Court affirmed following a jury trial in June 2008.

5. Claimant underwent lumbar spinal fusion surgery in January 2009. Thereafter, she underwent two independent medical evaluations for the purpose of determining the extent of her permanent impairment. The first was with Dr. Kirkpatrick in January 2010, the second with Dr. Fenton in July 2010.
6. There are two versions of Dr. Kirkpatrick’s report, both dated January 8, 2010. In one report, Dr. Kirkpatrick calculates the impairment referable to Claimant’s lumbar spine at 28% whole person. In the amended version of the same report, he calculates the impairment at 25% whole person. In both versions, Dr. Kirkpatrick referenced the *AMA Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> ed.)*, and used DRE Lumbar Category V as the basis for his rating. Impairment ratings in that category can range from 25% to 28% whole person.
7. Dr. Fenton also used DRE Lumbar Category V as the basis for his lumbar spine impairment rating, which he determined to be 28% whole person. The 3% difference between this rating and Dr. Kirkpatrick’s 25% rating is what drives the parties’ current dispute.
8. In his report, Dr. Fenton explained the rationale for his rating as follows:

[Claimant] clearly meets the criteria for the higher end of a DRE Lumbar Category V . . . of 28% whole person due to her persistent radiculopathy, status post single level fusion, and continued pain and [activities of daily living] limitations.
9. In an October 2010 letter to Defendant’s attorney, Dr. Kirkpatrick acknowledged that he had placed Claimant at the lower end of the Category V impairment scale, whereas Dr. Fenton had placed her at the higher end. Dr. Kirkpatrick explained his reasoning as follows:

The claimant by criteria met Lumbar Category V by virtue of motion segment alteration and radiculopathy. . . . On a functional level, the claimant has been able to function with activities of daily living without difficulty, and has had a very good result with the degree of surgery that she has had with no clear evidence of continued defined radiculopathy, except for the symptoms that she described.

It is my opinion, therefore, that she fits the lower end of the DRE Lumbar Category of 25% whole person impairment, not 28% as ascribed by Dr. Fenton. This claimant has had a good result within that category.
10. In August 2010 Claimant filed a Notice and Application for Hearing with the Department in which he claimed entitlement to permanency benefits in accordance with Dr. Fenton’s 28% impairment rating.

11. In December 2010 the Department's Workers' Compensation Specialist ordered Defendant to pay permanency benefits in accordance with Dr. Fenton's rating. As support for her order, the Specialist noted that medical records both prior to and following Dr. Kirkpatrick's evaluation documented ongoing complaints of low back pain, radiculopathy and limitations in Claimant's activities of daily living. Finding these records to be more consistent with Dr. Fenton's observations than with Dr. Kirkpatrick's, the Specialist concluded that Dr. Fenton's rating was the more credible one.

## **DISCUSSION:**

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).
2. Defendant seeks a determination that the Workers' Compensation Specialist exceeded her authority by issuing an interim order to pay permanency benefits in accordance with Dr. Fenton's impairment rating. It asserts that in choosing that rating over Dr. Kirkpatrick's, the Specialist improperly ignored the credibility issues surrounding Claimant's subjective reports of pain and limitations as to daily living activities, which Dr. Kirkpatrick found to be less significant than what Dr. Fenton had concluded. As a matter of law, Defendant argues, such credibility issues preclude the Commissioner, or her designee, from ordering that benefits be paid until the parties have had an opportunity to present evidence in the context of a formal hearing.
3. The Commissioner's power to issue an interim order in advance of a formal hearing derives from both statute, 21 V.S.A. §662(b), and rule, Workers' Compensation Rule 6.1400. The standard of review is whether the evidence produced does or does not "reasonably support" a denial of compensation. *Id.*
4. Particularly with respect to claims for compensation related to the extent of an injured worker's permanent impairment, Workers' Compensation Rule 14.4000 requires that if the dispute in a particular claim involves permanent partial disability ratings which differ by 10 percent or less, "the rating shall be determined by the commissioner." By virtue of 21 V.S.A. §601(20), the Commissioner's authority extends to his or her designee, including a Workers' Compensation Specialist. Nothing in the rule precludes the Specialist from making that determination in the context of the Department's informal dispute resolution process.

5. It is true, as Defendant asserts, that as a general rule it is good practice not to issue an interim order where questions as to a witness' credibility are central to the dispute. Typically such disputes are best dealt with in the context of a formal hearing, where the witness' demeanor can be evaluated and the truth of his or her assertions judged more effectively than is possible in the context of the Department's informal dispute resolution process.
6. Neither the statute nor the rule absolutely prohibits an interim order from issuing in any case in which a witness' credibility is questioned, however. Where other evidence exists from which the truthfulness of his or her statements reasonably can be inferred, an interim order still might be appropriate.
7. In issuing her interim order here, the Specialist determined that Dr. Fenton's impairment rating was more credible than Dr. Kirkpatrick's in part because it was based on findings as to Claimant's pain and functional limitations that were substantiated by other medical records as well. This was a proper analysis for her to undertake. If Defendant objects to the result, its remedy is to litigate the issue at formal hearing. *Haggart v. General Dynamics*, Opinion No. 11-00WC (May 16, 2000). In the meantime, however, I see no basis for concluding that the Specialist's determination was erroneous as a matter of law.

**ORDER:**

Defendant's Motion for Summary Judgment is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 25<sup>th</sup> day of March 2011.

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Anne M. Noonan  
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.