

Matthew Commo v. Stevens Gas Services, Inc.

(February 3, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Matthew Commo

Opinion No. 03-10WC

v.

By: Jane Dimotsis, Esq.
Sal Spinosa, Esq.
Hearing Officers

Stevens Gas Services, Inc.

For: Patricia Moulton Powden
Commissioner

State File Nos. W-7337 and Z-3648

OPINION AND ORDER

Hearing held in Montpelier on February 27, 2009 and June 17, 2009

Record closed on September 8, 2009

APPEARANCES:

Richard Goldsborough, Esq, for Claimant

Tammy Denton, Esq., for Defendant

ISSUES PRESENTED:

1. What is the appropriate permanent impairment rating for Claimant's April 13, 2005 low back injury?
2. What is the appropriate permanent impairment rating for Claimant's June 17, 2005 shoulder injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum Vitae*, Verne Backus, M.D.

Defendant's Exhibit A: *Curriculum Vitae*, John Johansson, D.O.

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

Claimant's Back Injury

3. On April 13, 2005 Claimant injured his lower back while making a fuel delivery. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.
4. Claimant's symptoms included right-sided low back and hip pain, with radiation down his right leg. Diagnostic imaging revealed disc herniations on the right at L4-5 and on the left at L5-S1. When his symptoms failed to abate with conservative treatment, in October 2005 Claimant underwent L4-5 disc surgery. Afterwards, he reported to Dr. Krag, his treating surgeon, that with the exception of some residual numbness in his toe, his right leg symptoms had completely resolved.

Claimant's Shoulder Injury

5. On June 17, 2005, after his April 13, 2005 back injury but before his October 2005 back surgery, Claimant fell down a flight of stairs while at work and injured his right shoulder. Claimant was diagnosed with a torn rotator cuff, which Dr. Slaughterbeck surgically repaired on October 24, 2005. Thereafter, Claimant underwent a course of physical therapy. By May 2006 Dr. Slaughterbeck reported that he had regained full range of motion in his shoulder. The March 2006 physical therapy discharge note reflected the same results.

Permanent Impairment Ratings – Spine

6. At Defendant's request, in September 2006 Dr. Johansson, an osteopathic physician, evaluated Claimant for the purpose of rating the extent of his permanent impairment relative to both the April 2005 low back injury and the June 2005 shoulder injury. In March 2007, upon referral of his attorney Claimant underwent a second permanency evaluation, this time with Dr. Backus, an occupational medicine specialist.
7. As to Claimant's low back injury, both doctors determined that Claimant had reached an end medical result as of September 5, 2006, the date of Dr. Johansson's examination. Using the *AMA Guides to the Evaluation of Permanent Impairment, 5th ed.* (the "AMA Guides"), both doctors concluded that Claimant fit within DRE Category 3, which provides an impairment range of ten to thirteen percent. According to the *AMA Guides*, to select the appropriate impairment rating within that range requires an analysis of how the injury has impacted one's activities of daily living.

8. Dr. Johansson placed Claimant at the low end of the range and therefore rated him with a 10% whole person impairment referable to his spine. In Dr. Johansson's opinion, it was inappropriate to assign any additional percentage attributable to the impact on Claimant's activities of daily living, as at least some of that impact was attributable instead to Claimant's June 2005 shoulder injury.
9. Dr. Backus disagreed. Unlike Dr. Johansson, he documented Claimant's responses on both a pain disability index and an impairment impact inventory. From that he concluded that the impact of Claimant's low back injury on his ability to perform activities of daily living merited a rating at the high end of the scale, or 13% whole person. Dr. Backus also noted that, to the extent that Claimant's shoulder injury also affected his activities of daily living, that impact was accounted for in the impairment rating for that injury. While he agreed that the impact of an injury on one's activities of daily living should not be counted twice, neither should it be ignored in the context of a rating for which the *AMA Guides* dictate that it be considered.

Permanent Impairment Ratings – Shoulder

10. Again, both doctors agree that Claimant reached an end medical result for his June 2005 shoulder injury as of September 5, 2006, the date of Dr. Johansson's examination. Both also agree that under the *AMA Guides*, the appropriate impairment rating for this injury depends on the extent of any residual deficit in Claimant's shoulder range of motion. They disagree as to how best to measure it.
11. According to Dr. Johansson's range of motion measurements, Claimant was left with a 2% whole person impairment referable to his shoulder injury. Dr. Johansson found corroboration for this rating in Claimant's medical records, specifically the reports from Dr. Slaughterbeck and the physical therapist indicating that by May 2006 Claimant had regained full range of motion in his shoulder.
12. Dr. Backus reached a different result. According to his measurements Claimant's shoulder range of motion was significantly more limited than what Dr. Johansson had reported. Dr. Backus' rating was higher, therefore – 6% whole person.
13. Dr. Backus attributed the difference between his rating and Dr. Johansson's to a variety of factors. Noting that the *AMA Guides* require that an impairment rating be based on active, not passive, range of motion, Dr. Backus questioned Dr. Johansson's reliance on both the March 2006 physical therapy report and Dr. Slaughterbeck's May 2006 report as corroboration for his findings. Those reports reflected passive, not active, range of motion findings. In addition, Dr. Backus noted that range of motion measurements that are taken shortly after active treatment has concluded, as both the physical therapist's and Dr. Slaughterbeck's measurements were, often do not reflect the true extent of a patient's permanent loss. With the passage of time, additional deficits may become evident.

14. For his part, Dr. Johansson acknowledged that the *AMA Guides* require that range of motion be measured actively, not passively. In his formal hearing testimony, Dr. Johansson clarified that he too took active range of motion measurements. Dr. Johansson expressed confidence in both his measurements and his methodology. He was skeptical that Claimant's range of motion could have decreased to the level that Dr. Backus reported.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
3. Applying the above test to the conflicting medical opinions offered in the current claims, I find Dr. Backus' permanency ratings to be the most persuasive. First, as to Claimant's low back injury, I find that Dr. Backus' report was indicative of a more careful and thorough examination. Most notably, consistent with *AMA Guides* protocol it included an impairment impact inventory from which it was easy to discern why Dr. Backus reached the rating that he did. In contrast, the basis for Dr. Johansson's rating is less apparent.
4. Similarly, as to Claimant's shoulder injury I find Dr. Backus' impairment rating to be better supported than Dr. Johansson's, and therefore more credible. Again, Dr. Johansson's report lacked sufficient detail from which to discern his measurement methodology. It is less persuasive as a result.
5. I conclude, therefore, that in accordance with Dr. Backus' impairment ratings Claimant sustained a 13% whole person impairment referable to his April 2005 low back injury, and a 6% whole person impairment referable to his June 2005 shoulder injury.
6. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits in accordance with a 13% whole person impairment referable to the spine, commencing on September 5, 2006, with credit for any amounts previously paid and with interest in accordance with 21 V.S.A. §664;
2. Permanent partial disability benefits in accordance with a 6% whole person impairment referable to the shoulder, commencing on September 5, 2006, with credit for any amounts previously paid and with interest in accordance with 21 V.S.A. §664; and
3. Costs and attorney fees in amounts to be established in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 3rd day of February 2010.

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.