

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Paul Phillips

Opinion No. 05-14WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Orange North Supervisory Union

For: Anne M. Noonan
Commissioner

State File No. CC-57109

OPINION AND ORDER

Hearing held in Montpelier, Vermont on December 4, 2013

Record closed on January 6, 2014

APPEARANCES:

Heidi Groff, Esq., for Claimant

Justin Sluka, Esq., for Defendant

ISSUE PRESENTED:

What is the appropriate permanent impairment rating referable to Claimant's January 13, 2011 cervical injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, George White, Jr., M.D.

Claimant's Exhibit 2: *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), p. 392

Claimant's Exhibit 3: *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), p. 393

Claimant's Exhibit 4: Department of Labor Forms 1, 24, 10/10s and 25

Claimant's Exhibit 5: Department of Labor Form 27, February 6, 2013

Defendant's Exhibit A: *Curriculum vitae*, Nancy Binter, M.D.

Defendant's Exhibit B: *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), Chapter 15, pp. 373-431

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. Judicial notice also is taken of relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)* (hereinafter the "AMA Guides").

Claimant's Work Injury and Subsequent Medical Course

3. Claimant worked for Defendant as a second shift janitor. His duties included vacuuming, mopping and waxing the school floors. In addition, he gathered all of the trash from the various rooms and carried the bags outside for disposal.
4. On January 13, 2011 Claimant was vacuuming the staff room when the power cord became entangled around a chair. He bent down to release the cord when a noise from behind startled him. He turned his head sharply to the left and felt a stabbing pain in his neck and shoulders.
5. Claimant saw Dr. Williams, his primary care physician, the next day. Dr. Williams diagnosed Claimant with a left trapezius strain. He recommended treatment with heat and a reduced work schedule for two weeks. Claimant was completely out of work for one week, until January 20, 2011. Then he returned to work part-time (four to five hours per day) with restrictions.
6. Claimant did not improve, so Dr. Williams referred him to physical therapy. He attended and participated, but did not enjoy much progress or relief.
7. Dr. Williams next referred Claimant to Dr. Aros, an orthopedic surgeon. Upon examination Dr. Aros noted that he was tender over his trapezius and also that he had diffuse muscle atrophy with left scapular winging. Dr. Aros diagnosed Claimant with cervical muscle pain and ordered an x-ray. The x-ray revealed mild left foraminal narrowing at C4-5 and some osteophytes.
8. For the next seven months Claimant did not enjoy any relief from his trapezius and neck pain. Due to his prolonged symptoms and concern that he might be suffering from a more serious condition, in July 2011 Defendant referred him for an independent medical examination with Dr. McLellan, an occupational medicine specialist. Dr. McLellan diagnosed Claimant with persistent left neck, trapezius and scapular pain. He determined that Claimant was not yet at end medical result, and that he was able to work full time with restrictions.

9. In December 2011 Claimant underwent nerve conduction studies. The results showed mild carpal tunnel syndrome and mild ulnar nerve entrapment of the left upper extremity. Comparing these results to Claimant's cervical spine x-ray, Dr. Krantz, a neurologist, believed his condition to be consistent with a left C5 radiculopathy. A subsequent MRI showed diffuse annular bulging of the C4-5 disc on the left side, causing a moderate narrowing of the left C4-5 neural foramen.
10. Claimant again tried physical therapy and an epidural injection, but neither treatment provided him any significant pain relief. He continued to work four or five hours per day with a 20 pound lifting restriction.

Permanent Impairment Ratings Referable to Claimant's Cervical Condition

11. Claimant underwent two independent medical examinations – one with Dr. White, at his own attorney's referral, and one with Dr. Binter, at Defendant's request. Both experts placed him at end medical result and then evaluated him for any permanent impairment referable to his cervical condition. To do so, both used the Diagnosis-Related Estimates (DRE) methodology suggested by the *AMA Guides*. Under this methodology, an individual is assigned to the correct impairment category based on symptoms, signs and appropriate diagnostic test results, as follows:
 - Category I – the individual has subjective complaints, but no significant clinical findings or documentable neurologic impairment; 0 percent impairment;
 - Category II – the individual may have significant muscle guarding (voluntarily limited motion due to muscular pain) or spasms observed at the time of examination, asymmetric loss of range of motion or radicular complaints, such as pain or weakness in a nerve root distribution, but with no objective verification by electrodiagnostic findings; 5-8 percent impairment;
 - Category III – there are both significant signs of radiculopathy and objective electrodiagnostic verification; 15-18 percent impairment.

AMA Guides §15.3 at pp. 381, 383 and Box 15-1, §15.6a at p. 392, Table 15-5.

(a) *Dr. Binter*

12. Dr. Binter is a board certified neurosurgeon. She has been performing independent medical examinations since her retirement from private practice in early 2011. While in active practice, she performed approximately 4,000 surgeries, one-third of which involved the cervical spine. For any of her surgical patients who were involved with the workers' compensation system, she performed an impairment rating. Dr. Binter is now certified as an independent medical examiner, having attended a several-day seminar to achieve that designation.

13. Dr. Binter examined Claimant in June 2012 and updated her report after a records review in November 2012. She reviewed all of the pertinent medical records, as well as Claimant's cervical MRI.
14. Dr. Binter diagnosed Claimant with a chronic left trapezius strain causally related to his work injury. In her opinion, Claimant did not suffer any permanent impairment as a result of this injury. Dr. Binter based her opinion on the observations she made of Claimant during her examination, including:
 - No muscle guarding;
 - No significant neurological impairment; and
 - No loss of range of motion or any other indicator of impairment.
15. Based on these findings, Dr. Binter determined that Claimant had reached an end medical result for his work injury, and placed him in DRE Cervical Category I, with a zero percent impairment referable to his cervical spine.
16. In arriving at this result, Dr. Binter was mindful of Claimant's intermittent complaints of tingling and numbness across his left trapezius, halfway down his left upper arm and at times into his left hand and fingers. However, in her opinion, these complaints did not constitute objective evidence of cervical radiculopathy referable to the C5 nerve root, because they did not appear in the appropriate dermatomal distribution. For that reason, Dr. Binter concluded that Claimant did not merit an impairment rating under Cervical Category II.
17. Dr. Binter also concluded that Claimant was fit and strong, and that his symptoms should have resolved in a matter of weeks or months. She found no objective evidence to justify restricting his work to only five hours per day. Rather, in her opinion, Claimant could return to work full time, albeit with overhead lifting restrictions.
18. With Dr. Binter's opinion as support, with the Department's approval Defendant discontinued Claimant's temporary partial disability benefits effective February 15, 2013 on the grounds that he had reached an end medical result.

(b) Dr. White

19. Dr. White is board certified in occupational medicine. As part of his residency training, he began performing permanency ratings using the *AMA Guides* in 1989 and has done them ever since. He regularly attends training in the *AMA Guides*, especially when a new edition is published. He has performed thousands of impairment ratings under the fifth edition, the currently mandated version in Vermont. Dr. White performed an independent medical examination, and reviewed all pertinent records, in March 2013.

20. Dr. White placed Claimant in DRE Cervical Category II, with a five percent permanent impairment referable to his 2012 work injury. He based his rating on two significant findings. First, according to his observation, Claimant exhibited pain and voluntary muscle guarding when he turned his neck to the left and when he extended his neck backwards away from his chest. Second, Claimant complained of intermittent radicular symptoms in the “shawl” area of his neck and left shoulder. This is the nerve root distribution of the C5 dermatome. As corroboration for this finding, Dr. White noted that the radiologist who interpreted Claimant’s cervical MRI reported annular bulging at C5, with narrowing of the C4-5 channel where the nerve exits.
21. Dr. White agreed that Claimant’s complaints were subjective, and had not been objectively verified by electrodiagnostic studies, such as an EMG. However, he credibly explained that Claimant still qualified for an impairment rating under Cervical Category II because for inclusion, only one criterion needed to be met – either muscle guarding, asymmetric loss of motion *or* radicular complaints. Having observed muscle guarding during his examination, Dr. White thus determined that it was appropriate to rate Claimant’s impairment under Category II.
22. Dr. White acknowledged that Dr. Binter had not observed any muscle guarding during her examination of Claimant. However, it is possible for two examiners to observe different signs on different days. Dr. White credibly reported that when he conducted his examination, Claimant’s muscle guarding was very obvious. Otherwise, he would have measured Claimant’s range of motion with an inclinometer. As it was, in Dr. White’s assessment the muscle guarding “was not a close call.” I find this testimony credible.

Claimant’s Compensation Rate

23. At the time of his work injury, Claimant’s average weekly wage was \$555.07, which entitled him to the minimum compensation rate, \$373.00 weekly. As of February 15, 2013, when his temporary partial disability benefits were discontinued, the minimum compensation rate was \$382.00 weekly.

CONCLUSIONS OF LAW:

1. The issue raised by this claim concerns Claimant’s entitlement to permanency benefits for his work-related cervical injury. Claimant seeks benefits in accordance with Dr. White’s five percent whole person impairment rating. Defendant instead argues that benefits should be denied in accordance with Dr. Binter’s zero percent rating. Claimant bears the burden of proof on this issue. *King v. Snide*, 144 Vt. 395, 399 (1984).
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. With particular reliance on the third and fifth factors, I conclude here that Dr. White's opinion is the most persuasive. Dr. White has been performing impairment ratings using the *AMA Guides* for more than 20 years, since 1989. His level of confidence as to whether Claimant did or did not exhibit muscle guarding during his examination was credible, as was his explanation regarding why Claimant may not have exhibited similar signs during Dr. Binter's examination. Dr. White also credibly attributed the shawl distribution of Claimant's radicular complaints as corresponding to the C5 dermatome, which provided an additional basis for placing him in Cervical Category II. Dr. White therefore had two bases for rating Claimant in Category II rather than Category I. I accept his analysis as convincing.
4. While Dr. Binter's credentials as a neurosurgeon are impressive, she has far less experience than Dr. White as to rating impairment under the *AMA Guides*. In addition, while she agreed that Claimant exhibited radicular symptoms in a shawl distribution, she failed to specifically address whether they corresponded to the C5 dermatome or not. For these reasons, I conclude that her opinion is less persuasive.
5. I conclude that Claimant has sustained his burden of proving that he suffered a five percent whole person impairment referable to his cervical spine as a consequence of his January 2011 compensable work injury.

Claimant's Compensation Rate

6. Pursuant to 21 V.S.A. §648(a), "at the termination of total disability, the employer shall pay to the injured employee 66-2/3 percent of the average weekly wage . . . subject to the maximum and minimum compensation rates." As Claimant's total disability here terminated on January 20, 2011, this is the date on which his entitlement to permanent partial disability benefits accrued. *Laumann v. State of Vermont*, 2004 VT 60.
7. Per *Laumann*, permanency benefits are payable at the initial rate of \$373.00 weekly, which was Claimant's compensation rate at the time his temporary total disability benefits terminated. A five percent impairment rating entitles him to a total of 27.5 weeks of benefits, 21 V.S.A. §648 and Workers' Compensation Rule 11.2300. As these weeks extended beyond July 1, 2011 he was entitled to a cost of living adjustment, 21 V.S.A. §650(d); thus, his compensation rate for the remaining weeks due was \$382.00.

8. Claimant also is due interest, computed from “the date on which the employer’s obligation to pay compensation under this chapter began.” 21 V.S.A. §664. As just discussed, under *Laumann*, for the purposes of calculating the appropriate compensation rate the right to permanency is deemed to accrue at the termination of total disability. Where, as here, total disability terminates before the claimant reaches an end medical result, it would be both unfair and illogical to apply the same rule to calculating interest, however. The purpose of interest is to compensate a claimant for the time value of money in situations where the employer has failed to make payment when due. But an employer cannot be faulted for failing to pay benefits on account of a permanent impairment that may or may not exist, and until the claimant reaches an end medical result, this fact cannot be determined. *See, e.g., Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009) (holding that, for statute of limitations purposes, cause of action for permanency benefits cannot accrue until the claimant reaches end medical result); *see also, Hill v. CV Oil Co.*, Opinion No. 15A-09WC (August 7, 2009) (interest on permanency runs from date of end medical result).
9. I conclude that Defendant’s obligation to pay interest thus began on February 15, 2013, the date upon which it terminated Claimant’s indemnity benefits on end medical result grounds.
10. 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 submitted an itemized claim for costs totaling \$929.95 and attorney fees based on a contingent fee of 20 percent of the recovery, not to exceed \$9,000.00, in accordance with Workers’ Compensation Rule 10.1220. His costs are awarded, as these are mandatory under the statute.
11. An award of attorney fees is discretionary under the statute. I find that the contingent fee requested is appropriate and therefore these are awarded as well.

ORDER:

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

1. Permanent partial disability benefits pursuant to 21 V.S.A. §648, calculated in accordance with a five percent impairment referable to the cervical spine at an initial compensation rate of \$373.00 and updated as of July 1, 2011 to \$382.00;
2. Interest on the above amounts beginning on February 15, 2013 pursuant to 21 V.S.A. §664;
3. Costs in the amount of \$929.95; and
4. Attorney fees totaling 20 percent of the total award, or \$9000.00, whichever is less.

DATED at Montpelier, Vermont this 21st day of March 2014.

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.