

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Richard Deforge

Opinion No. 19-19WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Lark Inns, L.P.

For: Michael A. Harrington
Interim Commissioner

State File No. KK-51368

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Craig A. Jarvis, Esq., for Claimant
David A. Berman, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to permanent partial disability benefits based on a 20 percent whole person impairment as a matter of law, with no apportionment for his pre-existing respiratory condition?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts filed July 26, 2019

Claimant's Exhibit 1:	First Report of Injury (Form 1)
Claimant's Exhibit 2:	Agreement for Temporary Compensation (Form 32)
Claimant's Exhibit 3:	Email from Attorney Berman to the Department's specialist dated July 3, 2019
Claimant's Exhibit 4:	Medical records
Claimant's Exhibit 5:	Dr. Davignon's April 15, 2019 independent medical examination report
Claimant's Exhibit 6:	Dr. Backus' July 13, 2019 medical records review report

Defendant's Response to Statement of Undisputed Facts filed August 22, 2019

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

Claim History

1. On July 31, 2017, Claimant sought medical treatment following a workplace incident three days earlier during which he inhaled chlorine gas while maintaining a swimming pool. He reported lung irritation, eye irritation and shortness of breath. *Claimant's Exhibit 4 ("Medical Records") at 65.*
2. Defendant filed a First Report of Injury (Form 1) on August 1, 2017 for Claimant's reported respiratory injury, including difficulty breathing. *Claimant's Exhibit 1.*
3. Defendant entered into an Agreement for Temporary Compensation (Form 32) with Claimant to pay temporary total disability benefits at the rate of \$427.00 per week. The Department approved the Agreement on October 19, 2017. *Claimant's Exhibit 2.*
4. Defendant paid temporary total disability benefits from September 2 to September 11, 2017. *See Claimant's Exhibit 3.*

Claimant's Status as a Smoker and his Pre-Injury Respiratory Condition

5. Claimant is a 51-year-old man. *See Claimant's Exhibit 1.* His medical records describe him as a "heavy tobacco smoker," with a 34-year history of cigarette smoking. *See, e.g., Medical Records at 3, 76.* Claimant was still an active daily smoker in June 2016; he quit smoking around October 2016, about nine months before his workplace chlorine exposure. *See Medical Records at 8, 58.* However, he continues to vape nicotine products. *See, e.g., Medical Records at 47, 112.*
6. Claimant's medical records between March 2016 and June 2017 have no reference to chronic obstructive pulmonary disease (COPD) or emphysema, nor do they identify a pulmonary or respiratory condition as a current or past medical problem. *Medical Records at 1-64.* However, his medical record from August 2, 2017 notes that his 2010 and 2011 chest x-rays showed focal calcifications in the left upper lobe of his lung. Further, a chest x-ray from three days after his injury showed lung nodules in his right and left upper lobes. *Medical Records at 74.*
7. In May 2016 Claimant's medical record lists dyspnea (*i.e.*, labored breathing or shortness of breath) as a "pertinent negative" relevant to his high blood pressure treatment. *Medical Records at 1-2.* In August 2016 his medical record notes no shortness of breath. *Medical Records at 18.*
8. In January 2017 Claimant's provider wrote that his smoking was a risk factor for high blood pressure but noted dyspnea as a "pertinent negative" for that condition. *Medical Records at 33.* In February 2017, a respiratory system review was positive for a cough, but negative for chest tightness or shortness of breath. *Medical Records at 39.* In March 2017, Claimant's respiratory pattern was regular, and his breathing sounds were clear. *Medical Records at 47.*

Claimant's Respiratory Condition Following his Work Injury

9. After his July 28, 2017 work-related chlorine exposure, Claimant reported shortness of breath and had significant deficits on pulmonary examinations and pulmonary function tests. *See Medical Records at 66-188.*
10. A July 31, 2017 assessment of Claimant's respiratory efforts reported shallow and labored respirations, but no distress or nasal flaring. *Medical Records at 66.* On August 2, he had mild shortness of breath. *Medical Records at 71.* On August 3, he was positive for a dry productive cough and wheezing. *Medical Records at 75.* On August 7, he had shallow and labored respirations. *Medical Records at 82.* On August 14, he reported intermittent shortness of breath, with exertion exacerbating his symptoms; however, a pulmonary exam showed no labored breathing or signs of respiratory distress. *Medical Records at 85-86.*
11. A CT scan of Claimant's chest on August 22, 2017 revealed evidence of emphysema and chronic bronchitis. *Medical Records at 89.*
12. Spirometry is a method of assessing lung function by measuring how much air a person can exhale.¹ In August 2017, spirometric testing of Claimant's lungs showed an FEV1 of 2.76, an FVC of 4.96, and an FEV1/FVC ratio of 56. *Medical Records at 96.*
13. On August 28, 2017, internal medicine practitioner Benjamin Jorgensen, MD, wrote a plan to follow up on Claimant's possible chlorine inhalation injury in the setting of his smoking-related emphysema and COPD. *Medical Records at 97.* Pulmonary physician Benjamin Suratt, MD, agreed with his plan. *Id.* Dr. Suratt wrote:

Former smoker with evidence of emphysema on CT and recent chlorine exposure by report, now with moderate obstructive lung disease without [bronchodilator] response and no previous [pulmonary function testing] to determine pre-exposure baseline. At this point i[t] may be impossible to determine the relationship between his symptoms and possible chlorine exposure, but we will monitor for worsening and treat with [long-acting beta-agonists] for both post-exposure [reactive airways dysfunction] and smoking-related COPD.

Id. at 101.

14. In September 2017 physician assistant Oliver Barkley reported the pulmonologist's determination that Claimant has COPD and emphysema. However, he could not rule

¹ Forced Vital Capacity (FVC) is a measure of the largest amount of air a person can forcefully exhale. Forced Expiratory Volume 1 (FEV1) is a measure of how much air a person can exhale in one second. The FEV1/FVC ratio is an indication of lung function; the ratio indicating normal lung function varies depending on a person's age, gender and height. *See generally* Mayo Clinic, Spirometry, <https://www.mayoclinic.org/tests-procedures/spirometry/about/pac-20385201>.

out an acute lung injury as well because he was unable to compare Claimant's current lung functioning with any prior pulmonary function tests. *Medical Records at 103.*

15. In October 2017 spirometry showed moderate airflow limitations, with an FEV1 of 2.77, an FVC of 4.59, and an FEV1/FVC ratio of 60. *Medical Records at 114.* Claimant reported to pulmonary fellow Glenda Euceda, MD, that his breathing status was "almost back to baseline" or "80 to 90 percent of baseline," but he still had fatigue and shortness of breath on exertion. *Medical Records at 112, 114.* Dr. Euceda wrote a plan to address Claimant's chlorine inhalation injury and moderate COPD. *Id.*
16. On November 22, 2017, physician assistant Jared Leavitt released Claimant from care, noting that he was at maximum medical improvement for his chlorine inhalation injury. *Medical Records at 118.* Mr. Leavitt also noted that Claimant has COPD not directly related to his work injury. *Id.; see also Medical Records at 180.*
17. In April 2018 spirometry showed an FEV1 of 2.45, an FVC of 4.00, and an FEV1/FVC ratio of 61. At that time Dr. Euceda wrote a plan to address Claimant's "irritant-induced asthma" due to chlorine inhalation and moderate COPD. *Medical Records at 143-44.* Spirometry in December 2018 showed an FEV1 of 2.54, an FVC of 4.13, and an FEV1/FVC ratio of 61.² *Medical Records at 185.*

Expert Medical Opinions

18. On April 15, 2019, occupational medicine physician Philip Davignon, MD, performed an independent medical examination of Claimant at his attorney's request. Dr. Davignon found that Claimant was at maximum medical improvement for his chlorine inhalation injury and assessed a 20 percent whole person impairment based on Table 5-12³ of the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)* ("*AMA Guides*"). *Claimant's Exhibit 5, at 5.* With regard to Claimant's pre-existing condition, Dr. Davignon reported that he "has a previous 2-pack a day smoking history but quit in 2016 and was vaping. He was otherwise fully active prior to the injury of record." *Id.*
19. On July 13, 2019, occupational medicine physician Verne Backus, MD, reviewed Claimant's medical records at Defendant's request. He concluded that Claimant was at maximum medical improvement for his acute inhalation exposure to chlorine and that a 20 percent permanent impairment rating using Table 5-12 of the *AMA Guides* was a reasonable assessment of permanency. *See Claimant's Exhibit 6, at 7.*

² Defendant denied this statement of undisputed fact, "as it does not appear these figures are represented on [Claimant's Exhibit 4 at] 185." *Defendant's Response* ¶ 28. I located the figures there and accordingly have included this statement in the Findings of Fact. *See Medical Records at 185.*

³ Table 5-12 compares a patient's actual FVC and FEV1 measurements with his or her predicted measurements based on his or her gender, age and height. Accordingly, Claimant's Statement of Undisputed Facts specifies that he is 51 years old and 187.5 centimeters tall. *See Claimant's Exhibit 1; Medical Records at 96.*

20. Dr. Backus wrote in his report:

Ana [sic] analysis [of apportionment] is a bit problematic without pre-injury records indicating what any of these pulmonary numbers were and they probably do not exist. Nevertheless, one cannot ignore the statement by the pulmonary attending [physician] which was that one cannot determine whether these changes are related to his injury.

Claimant's Exhibit 6, at 8.

21. Based on the treating pulmonary physician's statement and the records as a whole, Dr. Backus could not state to a reasonable degree of medical certainty that Claimant has any permanent impairment from his chlorine inhalation injury. Thus, he apportioned all of Claimant's impairment to his tobacco-related COPD and none to his chlorine exposure injury. *See Claimant's Exhibit 6, at 7-8.*

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). When the motion is considered, 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, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
2. Claimant seeks a summary judgment determination that he is entitled to permanent partial disability benefits based on a 20 percent whole person impairment rating, without apportioning any part of that impairment to his pre-existing respiratory condition. He contends that his impairment cannot be apportioned because his lung function was not measured prior to his work-related injury and therefore there are no accurate and comparable data upon which to base an apportionment analysis.
3. Defendant relies on Dr. Backus' apportionment analysis to establish that, in fact, Claimant's permanent impairment can be apportioned. On this basis, it contends that a genuine issue of material fact precludes summary judgment.

Apportionment of Permanent Impairment

4. The Workers' Compensation Act provides for the payment of permanent partial disability benefits to an employee who has any permanent partial disability resulting from his or her work injury. 21 V.S.A. § 648. The statute requires apportionment of permanent impairment between the work injury and any pre-existing condition in

cases where the prior impairment has been both rated and paid. 21 V.S.A. § 648(d). Absent those specific circumstances, however, the Commissioner retains discretion whether to apportion or not. *Kapusta v. Dep't of Health/Risk Management*, 2009 VT 81; *Murray v. Home Depot USA, Inc.*, Opinion No. 41-08WC (October 20, 2008).

5. In order to apportion an impairment between a work-related injury and a pre-existing impairment, there must be a sufficient basis upon which to perform the apportionment. The *AMA Guides* provide for calculating the most recent impairment rating and then calculating and deducting the prior impairment rating; the remaining impairment rating would then be attributed or apportioned to the current injury. *AMA Guides*, § 1.6b, at 12. Such an approach requires accurate and comparable data for both impairments. *Id.*; see also *Vitagliano v. Kaiser Permanente*, Opinion No. 39-03WC (September 8, 2003) (apportionment not permitted without pre-injury data upon which to base an apportionment analysis); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (August 4, 1997) (apportionment available when “valid evidence” of a defined pre-existing injury exists). However, there are circumstances that allow for rating a pre-existing impairment without having comparable data from before and after the work injury. See, e.g., *Belville v. RHC, Inc.*, Opinion No. 29-09WC (July 29, 2009) (pre-existing spinal impairment rated by using the *AMA Guides*' diagnosis-related estimate (DRE) method).
6. Here, Claimant contends that his pre-existing smoking-related lung condition cannot be rated because he never underwent any lung function testing prior to his work injury. Accordingly, he contends that there is no basis for apportionment. However, Claimant's argument ignores the obvious fact that Dr. Backus has, in fact, apportioned his permanent impairment between his pre-existing lung condition and his work-related injury. Although Dr. Backus noted that apportionment was a “bit problematic” without prior lung function testing, he nevertheless was able to provide an apportionment to a reasonable degree of medical certainty. *Claimant's Exhibit 6, at 8.*
7. Dr. Backus diagnosed Claimant with pre-existing tobacco-related COPD and acute inhalation exposure to chlorine. Based on the medical records, he could not find to a reasonable degree of medical certainty that chlorine exposure caused any significant aggravation of Claimant's pre-existing COPD beyond a temporary flare. Accordingly, Dr. Backus was able to apportion all of Claimant's permanent impairment to his pre-existing condition without having to rely on comparable data from before and after the work injury. *Claimant's Exhibit 6, at 8.*
8. A factual dispute between the parties is thus established as to the apportionment of Claimant's permanent impairment. Resolving that dispute will require me to consider both the facts underlying each doctor's opinion and the reasoning each used to arrive at his conclusions. Consideration of these factors will require an evidentiary hearing.
9. The sole purpose of summary judgment review is to determine whether a genuine issue of material fact exists. If such an issue does exist, the case cannot be adjudicated in the summary judgment context. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). Here, there is a genuine issue of material fact as to whether

Claimant's permanent impairment can be apportioned. Accordingly, he is not entitled to summary judgment.

ORDER:

For the foregoing reasons, Claimant's Motion for Summary Judgment is hereby **DENIED**.

| **DATED** at Montpelier, Vermont this 23 day of October 2019.

Michael A. Harrington
Interim Commissioner