

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. J.)	Opinion No. 48-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
)	
Bourbeau International)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. S-18166

Submitted on written record
Pretrial conference held on November 15, 2004
Record closed on July 5, 2005

APPEARANCES:

Chris McVeigh, Esq., for the Claimant
Keith Kasper, Esq., for the Defendant

ISSUE:

What is the extent of claimant’s permanent impairment?

EXHIBITS:

1. Medical Records
2. Department of Labor Forms
3. Randy Jones Preservation Deposition
4. Dr. Glen Neale, M.D. Preservation Deposition
5. Dr. Christopher Brigham, M.D. Preservation Deposition
6. Dr. Verne Backus, M.D. Preservation Deposition
7. February 8, 2005 settlement letter

FINDINGS OF FACT:

1. Claimant is a 49 year-old male, who was injured on October 17, 2001 while working for Bourbeau International dismantling staging. Claimant’s injury resulted from a part of the staging falling and striking him on his right elbow.
2. Claimant’s right elbow injury is an undisputed compensable work-related injury.
3. At the time of the injury, claimant had an Average Weekly Wage of \$645.07.

4. On February 18, 2003, Dr. Glenn Neale, M.D., claimant's treating physician for the orthopedic injury, performed surgery on claimant's right elbow.
5. Claimant returned to work on March 27, 2003.
6. Dr. Verne Backus, M.D., performed an Independent Medical Exam (IME) on September 11, 2003. Dr. Backus concluded from his IME that claimant reached Medical End and had a 1% whole person impairment resulting from his work-related injury.
7. In a report dated March 8, 2004, Dr. Neale stated that claimant had a 7% whole person impairment resulting from his work-related injury.
8. On February 8, 2005, defendant made an offer of judgment to claimant for 4% whole person impairment.
9. Claimant's billable attorney hours prior to February 8, 2005 were 38.20, and after February 8, 2005, they were 23.80. Claimant's necessary costs prior to February 8, 2005 were \$184.36, and after February 8, 2005 were \$806.91.

Medical Expert Opinions

10. Dr. Backus is Board Certified in Occupational Medicine and a Board Certified IME. Dr. Backus performs numerous impairment ratings every year.
11. Dr. Backus originally examined claimant early on in his treatment for the work-related injury, as well as at the request of defendant. At the request of the defendant, Dr. Backus then performed an IME to determine the impairment of the claimant.
12. Dr. Backus concluded that claimant had a 1% whole person impairment based on his elbow extension contracture of 5 degrees. Dr. Backus used Figure 16-34 of the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition (the AMA Guides), to determine the 5-degree elbow contracture is a 1% impairment. Dr. Backus found tenderness at the elbow surgical site, but noted there was no distal nerve paresthesia. He also noted that tenderness at the surgical site alone is not a ratable impairment. Dr. Backus found that claimant could fully pronate and supinate, as he measured pronation to 90 degrees. Dr. Backus did not document the number of measurements for pronation and supination as required by the AMA Guides. He measured claimant's strength to be 5/5, but still found slight weakness. Dr. Backus stated that, pursuant to the AMA Guides, weakness was not a ratable impairment when pain or loss of motion will impact the strength findings. Dr. Backus also found that claimant's sensory systems were normal.
13. Dr. Neale is claimant's treating surgeon and a Board Certified orthopedic surgeon. He began treating claimant in July of 2002 and examined him on January 26, 2004 to determine the extent of his permanent partial impairment.

14. Dr. Neale concluded that, pursuant to the AMA Guides, claimant had a 7% whole person impairment based on claimant's limits in pronation, limits in supination, dyesthesia, weakness, and elbow instability. Dr. Neale based his conclusions on physical findings and his familiarity with claimant as his treating orthopedic surgeon.
15. Among the physical findings, Dr. Neale found that claimant had -8 degrees of extension, 140 degrees of flexion, 70 degrees of pronation, and 70 degrees of supination. He awarded 1% for each, which added up to a 4% upper extremity impairment for claimant. Dr. Neale found numbness along the ulnar nerve and he had some mild tenderness at the distal radial ulnar joint, which was subluxable, but easily reduceable. Dr. Neale noted that the subluxation of the distal radial ulnar joint was subtle and consistent with the mechanism of injury. Dr. Neale gave a 2% upper extremity impairment for the mild dyesthesias and a 4% upper extremity impairment for the instability. Dr. Neale also found motor weakness in terms of flexion, pronation, and supination. Dr. Neale gave a 1% impairment for the weakness. Dr. Neale combines these ratings to find a 11% upper extremity impairment, which pursuant to Table 16-3 of the AMA Guides, equates to a 7% whole person impairment.
16. On January 11, 2005, Dr. Christopher Brigham, M.D., performed a record and permanency review at the defendant's request. He is Board Certified in occupational medicine and has an extensive background in the AMA Guides.
17. Dr. Brigham agreed with the findings of Dr. Backus and concurred that claimant has a 1% whole person impairment. The purpose of Dr. Brigham's review was to provide a critique of the doctors' permanency impairment evaluations. Dr. Brigham did not perform a physical evaluation of claimant. Dr. Brigham criticized Dr. Neale for failing to record measurements on range of motion, checking upper extremities bilaterally, and specifying how he conducted the sensory exam. Dr. Brigham knew Dr. Backus through several AMA Guides trainings he taught, and had reviewed some of Dr. Backus' impairment evaluations in the past.
18. Both Dr. Backus and Dr. Brigham opined that an impairment rating for strength was inappropriate here, as Section 16.8 of the AMA Guides does not allow for strength impairments if there are other compounding problems like pain or decreased range of motion. Both doctors also opine that pursuant to Section 16.7 of the AMA Guides, combining the impairment from the subluxation of the distal radial ulnar joint and the range of motion determination would be duplicative.
19. Dr. Backus, Dr. Neale, and Dr. Brigham all opined that physical changes between impairment ratings could be an explanation for two different ratings.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). A party who bears the burden of proof cannot meet that burden without providing such evidence, and possibility, suspicion or surmise are insufficient to carry that burden. *Miller v. Cerosimo Lumber Co.*, Opinion No. 55-96WC (Oct. 5, 1996). Claimant bears the burden of proving that Dr. Neale's impairment rating is the most accurate.
2. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the Claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Opinion No. WC 20-97 (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997).
3. Dr. Neale's finding of numbness along the ulnar nerve is most convincing based on his history of treatment with the claimant. Dr. Neale performed the surgery on claimant, and provided the most treatment for claimant's right elbow injury. In most cases, the amount of care provided by a physician to the claimant should not garner the same amount of weight in permanency cases as in causation. The AMA Guides was published "in response to a public need for a standardized, objective approach to evaluating medical impairment." AMA Guides, at p. 1. The AMA Guides provides specific procedures, so that any doctor who performs an examination should be able to use the objective tests and reproduce the same results. However, Dr. Neale's position as the claimant's treating surgeon does play a role because he was able to pick up on subtle differences while performing tests along the ulnar nerve. This is consistent with claimant's elbow injury and Dr. Neale's experience treating the claimant put him in the better position to focus on the dysesthesias.
4. The Commissioner accepts Dr. Neale's finding of subluxation of the distal radial ulnar joint. Dr. Neale is a Board Certified orthopedic surgeon and is the most qualified to pick up on subtle orthopedic deformities. Dr. Neale's experience places him in a better position to determine if a subluxation of the distal radial ulnar joint was present. I will also rely on Dr. Neale's experience to conclude that the subluxation of the distal radial ulnar joint is a direct result of the elbow injury.

5. The 1% upper extremity impairment given by Dr. Neale for weakness is not appropriate pursuant to the AMA Guides. “Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated.” AMA Guides, p. 508. Dr. Brigham and Dr. Backus agreed that strength was an inappropriate measurement to be taken in the presence of decreased motion and pain. Dr. Neale also concluded that a deformity existed, so under these circumstances, the highly subjective test to determine weakness interferes with claimant’s strength measurement and should not be included in the final impairment rating.
6. Finally, the Commissioner will not make a determination regarding the impairment rating for decrease in range of motion. Neither Dr. Neale, nor Dr. Backus properly recorded three test results, as Dr. Brigham noted is typical, and Dr. Neale did not record whether both extremities were compared, as should have been pursuant to Section 16.4 of the AMA Guides. Regardless, whether the Commissioner were to accept Dr. Neale’s 4% impairment for decrease in range of motion or Dr. Backus’ 1% impairment for decrease in range of motion, it would be duplicative and inappropriate to combine with the finding of 4% for joint instability. As noted by Dr. Brigham and Dr. Backus, Section 16.7 of the AMA Guides states that combining the impairment from the subluxation of the distal radial ulnar joint and the decrease range of motion would be duplicative. “The impairment values due to these findings cannot be combined, and only the finding with the highest impairment value is rated.” AMA Guides, at. 499. Therefore, the 4% upper extremity impairment is the greatest value and the only one counted in the impairment rating.
7. The claimant’s whole person impairment is 4%. Utilizing the above findings of the 2% upper extremity impairment for the numbness along the ulnar nerve, and the 4% upper extremity impairment for subluxation of the distal radial ulnar joint, the Commissioner finds a 6% upper extremity impairment. Pursuant to Table 16-3 of the AMA Guides, the 6% upper extremity impairment equates to a 4% whole person impairment.

8. The Workers' Compensation Act provides for a discretionary award of reasonable attorney fees and mandatory award of necessary costs. 21 V.S.A. § 678(a); see also Rule 10. The Commissioner has discretion when awarding attorney fees. Pursuant to 21 V.S.A. § 678(a), the Commissioner is authorized to award reasonable attorney's fees to *prevailing* claimants in workers' compensation cases. See also WC Rule 10.1000. In this case, claimant did not prevail in its claim for 7% whole person disability, and rejected defendant's February 8, 2005 settlement offer. An award of attorney fees to the claimant would set the unfavorable precedent of encouraging litigation after a reasonable settlement offer is presented. The facts of this case suggest that a settlement for 4% in February of 2005 would have been the appropriate course of action by the claimant, and at that time, pursuant to WC Rules 10.1300, the claimant would not have been awarded attorney fees. Under the discretion of the Commissioner, the claimant's request for attorney fees is denied. However, pursuant to 21 V.S.A. § 678(a), necessary costs are not discretionary and are awarded as a matter of law. Necessary costs are awarded to claimant for the period prior to the February 8, 2005 settlement offer, or \$184.36.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, defendant is ordered to utilize a 4% whole person permanent impairment when determining claimant's benefits, and ordered to reimburse claimant's necessary expenses of \$184.36. Attorney fees are denied.

Dated at Montpelier, Vermont this 9th day of August 2005.

Patricia A. McDonald
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.