LaValley v. Northeast Cooperatives (08/18/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

James LaValley	)	State File No. M-10682
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Northeast Cooperatives	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 27R-03WC

APPEARANCES:

Thomas W. Costello, Esq., for the Claimant
William J. Blake, Esq. for EBI/RSA
Frank E. Talbott, Esq. for Wausau

RULING ON EBI/RSA MOTION FOR RECONSIDERATION

Attorney Fees

In its motion for reconsideration, defendant EBI/RSA makes three objections to the award of attorney fees, which was granted in the supplemental opinion on June 5, 2003. First, defendant argues that attorney fees should not be awarded on the portion of the cervical spine claim that was voluntarily paid by Wausau. Defendant asserts that the ulnar nerve claim was the only claim that required the assistance of counsel, because 57 weeks had already been paid on the cervical spine claim at the time of the initial decision, and the remainder of the dispute (the aggravation-recurrence issue) was a conflict between the two insurance companies.

Claimant prevailed because of his attorney's efforts, and is therefore entitled to attorney fees. Although no single factor is controlling in determining reasonable attorney fees, one factor is the contingency or certainty of the compensation. *Young v. Northern Terminals, Inc.*, 132 Vt. 125, 129 (1974). The voluntary payments made by Wausau were made without prejudice, and could therefore have been returned to Wausau in the event of a total denial. If Claimant had not been represented by counsel, he might have lost all benefits. While the aggravation-recurrence dispute was between the two insurance carriers, the possibility that the Department could have deemed the incident a flare-up and not an aggravation or recurrence, brought a risk of total loss upon the claimant. This risk was avoided by the efforts of Claimant's attorney.

An attorney fee award has been granted where Claimant prevailed due in part to the efforts of his attorney. *Dubuque v. Grand Union Company*, Op. No. 34-02WC (2002). Even if the attorney's efforts were not the only factor in the claimant's success, they were a factor, and are entitled to an award.

Second, defendant argues that Claimant is not a prevailing Claimant entitled to attorney fees, because the Department rejected Claimant's offset argument, and chose Dr. Thatcher's 31% rating over Dr. Ayres' 35% rating for permanent partial disability.

It is not necessary for Claimant to prevail on all claims in order to be a prevailing claimant entitled to an attorney fee award. *Hodgeman v. Jard*, 157 Vt. 461, 465 (1991). The question is whether Claimant substantially prevailed. Defendant argued that it was only responsible for 1%, but the Department awarded 13%. This constitutes a substantial victory.

Third, defendant argues that Claimant should only be awarded attorney fees on issues that were contested in the hearing, and since Claimant's attorney took no position on the overpayment issue, he should not be entitled an award on that issue. The extent to which issues were contested is one of seven factors to consider in determining amount of reasonable attorney fee award. 8 Larson's Workers' Compensation Law, § 133.03(3). However, this factor is far from dispositive.

Attorney fees are awarded if the compensability of the claim is contested. *Dubuque*. This rule does not delineate between which specific issues were contested and by whom, it merely requires that compensability have been contested. Compensability was clearly contested in this case. The overpayment issue in this case was raised at the hearing; Claimant prevailed on the issue, and is entitled to an attorney fee award on the issue. See *Williams v. Western Staff Services*, Op. No. 71S-98 WC (1998).

Attorney fee awards are a matter of discretion. 21 V.S.A. § 678(a). The court or agency awarding attorney fees enjoys a large measure of discretion in fixing the reasonable value of legal services, especially when the services were performed in that forum. *Young*, 132 Vt. at 130. The fee award granted in the supplemental decision represents a fair exercise of discretion and is therefore upheld.

Permanent Partial Impairment

In the supplemental opinion, the Department accepted Dr. Thatcher's impairment rating, because it was based on the AMA Guides 4th Edition. Dr. Thatcher found an impairment rating of 17% for cervical decompression, and 14% for cervical loss of motion. Dr. Thatcher then added these subtotals together to arrive at a total impairment rating of 31%.

Claimant seeks to increase this permanency rating from 31% to 33%, based on an alleged error that Dr. Thatcher made in his calculation and which was explained in a supplemental deposition. In his May 14, 2003 deposition, Dr. Thatcher stated that he failed to account for the claimant's sixth surgery in his 17% cervical decompression rating. He opined that under the *AMA Guides*, an additional 2% should be added for this surgery, which brings the subtotal for cervical decompression to 19%.

EBI/RSA challenges Dr. Thatcher's revised opinion and offers argument based on the *Guides* for why the maximum rating should be 30%. Further, EBI/RSA notes that at Dr. Thatcher's deposition Claimant's counsel maintained that the permanency issue was closed.

The record on the permanency issue was closed at the time the supplemental opinion was issued on June 5, 2003. Evidence and new arguments for why that determination should change will not be considered at this juncture.

ORDER:

Accordingly, EBI/RSA's motion for reconsideration is hereby DENIED.

Dated at Montpelier, Vermont this 18th day of August 2003.

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Michael S. Bertrand
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.

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Northeast Cooperatives	)	For: Michael S. Bertrand
	)	Commissioner
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	)	Opinion No 21-03WC

SUPPLEMENTAL OPINION

APPEARANCES:

Thomas W. Costello, Esq., for the Claimant
William J. Blake, Esq. for EBI/Royal & SunAlliance and Northeast Cooperatives, Inc.
Frank Talbott, Esq. for Wausau and Northeast Cooperatives, Inc.

ISSUES:

1. What permanency benefits are due Claimant?

2. What attorney fees are due Claimant?

BACKGROUND:

1. The questions at issue arise from a previous department decision, Opinion No 26-02WC dated June 18, 2002, where the question on permanency was deferred. In that opinion, this Department held that the Claimant suffered an aggravation and ordered EBI/Royal (RSA), the more recent insurer, to reimburse Wausau for benefits paid since 1999 and to assume coverage for Claimant's ulnar neuropathy.

2. It is now necessary to decide the appropriate ratings due for both the ulnar neuropathy and the spinal injury as well as fees due the Claimant’s attorney.

Back Injuries

3. Claimant James LaValley incurred several work-related injuries, two of which resulted in permanent partial disability awards.

4. State File No. W-24047 includes a March 10, 1987 Form 22 Agreement for Permanent Partial Disability Compensation for 52.8 weeks based on 16% of the spine. That rating followed surgery on the cervical spine. State File No. C-9462 includes a July 24, 1990 Form 22 to a 15% loss of use of the right side of his neck which was converted to 49.5 weeks. Thus Claimant has received 102.3 weeks of permanency benefits.

Expert Opinions

5. Dr. Donald Ayres performed an independent medical examination on December 15, 2000. Dr. Ayres is a neurologist who practices with Upper Valley Neurology and Neurosurgery, a practice with Dr. Saunders and Dr. Harbaugh, two neurosurgeons who operated on Claimant. Dr. Ayres based his impairment rating on the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*, 5th Edition and his clinical experience, concluding that the final rating of 35% for the back was appropriate. That rating is based on sections 15.6, DRE: Cervical Spine and 15.7, Corticospinal Tract Damage. Using Table 15.5, he determined that the Claimant was best categorized as DRE Category 4 due to loss of motion integrity with an impairment range of 25 to 28%. Given this Claimant's deficit, he chose the high end of that range, 28%. Next, he added 10% because of two other dysfunctions, 5% each, as outlined Table 15-6. Using the combined values chart, the combined value is 33%. Finally, he concluded that a final 35% rating is appropriate. How he arrived at the additional 2% is unclear.

6. On December 20, 2000 at the request of Wausau, Dr. Jon Thatcher performed an independent medical examination and impairment rating. Dr. Thatcher rated the claimant under *Guides*, 4th edition, with a 31% whole person impairment, of which he attributed 1% to the 1999 incident. He based his impairment on Table 75, section IV D which assigns a 10% rating of an impairment to the whole person for cervical decompression with residual symptoms, section IV E, 1 and 2, which adds an additional 2% for two other levels and an additional 5% for subsequent surgeries for a subtotal of 17%. Next, because of loss of cervical spine motion, he assigned an additional 14% based on Tables 76, 77 and 78, for a total of 31%, of which he attributed 1% to the 1999 incident.

7. Although the 2001 5th edition to the *Guides* was available to physicians in December 2000, it was not generally used at that time. Consequently, this Department did not begin to apply the 5th edition until January 2001. With this bright line well established, we accept Dr. Thatcher's opinion that Claimant has a 31% permanency because it was performed in December 2000 and based on the 4th edition.

Apportionment

8. At issue now is whether Claimant is due additional permanency for his back injuries, and if so, how much. RSA argues that the only permanency due is 1%.

9. RSA initially calculated an offset as follows: it converted the previous paid ratings of 16% and 15 % of the cervical spine to 10% and 9 % whole person impairment respectively, which under the *Guides* combined values chart total 18% whole person impairment. It then subtracted the 18% already paid from the 31% rating of Dr. Thatcher for a total due of 13% whole person or 71.5 weeks (13% x 550 weeks) WC Rule 11.2300. Because Wausau had already paid 57 weeks, RSA reimbursed Wausau and paid the Claimant for an additional 14.5 weeks (71.5-57 weeks).

10. At this point, RSA argues that it overpaid Wausau who failed to consider apportionment when it paid permanency on the back. The argument is based on 21 V.S.A. § 648 (d), which provides that impairment rates "shall be reduced by any previously determined permanent impairment for which compensation has been paid" and *Aker v. ALIIC, Op*. No., 53-98WC (1998), which adds to § 648 in holding that in those cases where one has a prior impairment for which one had not received payment, a rating "may be reduced if valid evidence of a defined pre-existing injury exists."

11. It is undisputed that the prior paid ratings must be subtracted from the total impairment Claimant now has. But RSA contends that such a calculation does not go far enough. Based on Dr. Thatcher's conclusion that the most recent (1999) incident added only 1% to the Claimant's total permanency, a conclusion that necessarily subtracted all prior impairment—paid and unpaid—RSA seeks reimbursement for payments in excess of 1% and a credit toward future permanency for overpayment.

12. Dr. Thatcher's rating cannot serve as a basis to subtract from the total any percentages greater than those already paid. Under *Aker* and the cases cited therein, a reduction for a prior rating is discretionary and can be granted only if there is valid evidence of the pre-existing condition. Crucial to that determination is an individually calculated permanency rating for each of the prior conditions the defense seeks to subtract from the total. See *Guides*, § 1.6b. Without that information, a reduction is not permitted. Furthermore, the cumulative effect of the Claimant's work related injuries justify a denial of apportionment for the unpaid previous injuries.

13. Therefore, Claimant is entitled to 13% impairment as RSA originally calculated.

Ulnar neuropathy

14. In an analysis of the Claimant's upper extremity motor and sensory deficits using the 5th edition of the *Guides*, Dr. Ayres assessed the Claimant's upper extremity impairment as 9% whole person (15% impairment of the upper extremity). That assessment remains unchallenged.

15. As the responsible carrier, RSA is hereby ordered to pay Claimant a permanency award based on Dr. Ayres upper extremity impairment assessment.

Attorney Fees

16. Pursuant to 21 V.S.A. § 678(a) and Rule 10, as a Claimant who prevailed due to the efforts of his attorney, James LaValley is entitled to reasonable attorney fees, in this case, based on 20 % of the two permanency ratings awarded.

ORDER:

THEREFORE, RSA is responsible for:

Permanent partial disability benefits based on:

- 13% whole person impairment for the spine injury;
- 9% whole person impairment for the upper extremity injury

Attorney fees based on 20% of the total.

Dated at Montpelier, Vermont this 5th day of June 2003.

_____

Michael S. Bertrand
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.