STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Kathleen Belleau	)	State File No: L-01354
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Western Staff Services	)	
	)	For: R. Tasha Wallis
and	)	Commissioner
	)	
The Burlington Free Press	)	Opinion No. 13R-00WC

RULING ON THE DEFENDANT, WESTERN STAFF SERVICES' MOTION TO RECONSIDER

Defendant, Western Staff Service ("WSS"), through its attorney, Andrew C. Boxer, Esq., moves the Commissioner to reconsider the May 3, 2000 ruling of summary judgment in favor of the claimant, Kathleen Belleau.

In seeking reconsideration, WSS challenges the decision granting the claimant a 5% whole person rating for her shoulder injury in addition to the 9% paid in 1997 for her hands. WSS asserts that there are genuine material facts in dispute regarding the expert medical testimony, specifically, that Dr. Hetman, Dr. Fenton, and Dr. Bucksbaum had different diagnoses as to the cause of the claimant's symptoms. This motion by WSS is based in part on Dr. Fenton's letter dated June 12, 2000. Because that letter was produced after the decision was rendered, it cannot now be considered in evidence.

At the outset, it should be noted that this Department's power to reconsider a decision is a necessary incident to the Commissioner's power to decide and is implicit within the Workers' Compensation Act. *See generally*, Am. Jur. 2D *Administrative Law* § 523 (1962). "[P]articular administrative agencies have been held to have the power to reopen and reconsider previous final decisions under a remedial statute which does not deny [reconsideration] where the existence accords with the liberal construction given such statutes to accomplish their protective purpose under statutory authority to issue rules of procedure, in light of practical interpretation by the agency …" *Id*. at 333 (footnotes omitted). Motions for reconsideration of workers' compensation decisions have been a long-standing practice in this jurisdiction and are in the best interest of judicial economy.

Claimant asserts that summary judgment was proper, the post decision commentary by Dr. Fenton should be disregarded, no dispute of genuine material fact exists, and that claimant is entitled to judgment as a matter of law. Mainly, the claimant argues that Dr. Hetman evaluated and rated claimant's wrist and hands, whereas, Dr. Fenton and Dr. Bucksbaum rated and evaluated a separate and distinct region of claimant's upper extremity, her neck and shoulders. Therefore, the claimant argues that the different ratings are not disputed facts, but different ratings for different injuries. Claimant opines that the 9% disability rating given by Dr. Hetman does not include the cervical and thoracic impairments. Claimant further states that there is no

dispute as to the impairment of these latter regions since both Dr. Fenton and Dr. Bucksbaum evaluated the permanency at 5% for these.

In 1997 this claimant has been compensated for Dr. Hetman's diagnosis of a loss of right wrist extension, left thumb joint crepitation and entrapment of the median nerve in the right wrist at a 9% whole body disability assessment. Since then, Doctors Fenton and Bucksbaum have both diagnosed the claimant with 5% whole body disability for her neck and shoulder problems. Dr. Bucksbaum diagnosed the neck and shoulder problem as thoracic outlet syndrome, a diagnosis that he maintains is separate from the problem for which the claimant had been compensated in 1997. Although Dr. Fenton agrees that the claimant has a 5% permanent partial impairment, he based that determination on his diagnosis of a pain syndrome that may include the area for which compensation had been paid.

This Department erred in not assigning greater importance to the differing diagnoses for the claimant's shoulder and upper arm problems. Because those diagnoses create questions of fact on the issue of apportionment, it was an error to have granted summary judgment.

Accordingly, that ORDER is vacated and the issue of apportionment must go to hearing.

Dated at Montpelier, Vermont, this 17th day of August 2000.

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R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-1354
Kathleen Belleau	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Steve Janson
Western Staff Services and	)	Commissioner
The Burlington Free Press	)	
	)	Opinion No. 13SJ-00WC

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

Claimant, Kathleen Belleau, by and through her attorney, Susan J. Flynn, Esq., of Affolter, Gannon & Flynn, Ltd., moves for judgment as a matter of law on the issue of her permanent partial disability rating. Western Staff Services (WSS), represented by Andrew Boxer, Esq., of Kiel & Ellis, filed a memorandum in opposition to the claimant's motion. The Burlington Free Press, represented by Robert Cain, Esq., of Paul, Frank & Collins, Inc. joins in the opposition to claimant's motion.

At issue is whether claimant's current permanency rating should be apportioned and, if not, whether claimant is entitled as a matter of law to payment based on a 5% whole person rating in addition to the 9% paid in 1997. In support of her motion, claimant submitted medical records from Dr. Susan Hetman, Dr. Jonathan Fenton and Dr. Mark Bucksbaum, as well as a segment of Dr. Bucksbaum's deposition.

Those records reveal the following **FINDINGS OF FACT**, which are limited to this motion:

1. In the fall of 1996 claimant developed a cumulative trauma injury to her wrist and hands while she was working for the Burlington Free Press. After examining the claimant on May 13, 1997, Dr. Susan Hetman rated her permanency at 9%, which the Burlington Free Press paid.

2. In Dr. Hetman's note following a March 27, 1997 history and physical examination are the observations that claimant had wrist pain, numbness and tingling, as well as left thumb pain. She also recorded claimant's complaint of decreased grip strength. On examination, Dr. Hetman noted that claimant exhibited "full range of motion of her shoulders and elbows of her bilateral upper extremities." She documented positive findings with claimant's right wrist extension, left thumb joint instability, and carpal tunnel tests (Phalen's and Tinel's) on the right. Dr. Hetman explained that her permanency rating was based on loss of right wrist extension, left thumb joint crepitation,

3. On or about May 19, 1997 the claimant was working for Western Staff Services when she experienced another incident that she described as a flare-up, with symptoms that did not dissipate as the symptoms after the earlier incident had. After the incident at Western Staff Services, Dr. Jonathan Fenton assigned a 5% rating to her neck and shoulder problems.

4. In a September 2, 1998 letter to the insurance carrier's representative, Dr. Fenton concluded that an additional 5% impairment for the neck was not "appropriate." He specifically stated that he did not rate the factors Dr. Hetman had rated. His only findings were "some myofascial pain at the cervicothoracic junction which were persistent both before CMM and after." He did not explain how he reached his conclusion that claimant's current symptoms dated back to an earlier time.

5. On February 1, 2000, Dr. Mark Bucksbaum evaluated the claimant, diagnosed thoracic outlet syndrome, and assessed a 5% whole person impairment for that syndrome. He unequivocally stated that "there is no apportionment between the thoracic outlet syndrome and her initial rating based upon bilateral and wrist injuries." In the deposition that followed his initial evaluation, Dr. Bucksbaum testified that it is "unreasonable to consider apportionment for separate and distinct parts of the body." He therefore concluded that it is not appropriate in this case to subtract the previously paid permanency from claimant's current rating because "we're dealing with hand and wrist versus neck, and it's not overlapping zones. They do not get apportioned."

CONCLUSIONS OF LAW:

1. Summary judgment is appropriate only where, taking the allegations of the nonmoving party as true, it is evident that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. V.R.C.P. 56; *Granger v. Town of Woodford*, 167 Vt. 610, 611 (1998) (mem.). In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22 (1996).

2. According to the claimant, the current 5% rating for her shoulder is in addition to the earlier 9% rating because the two ratings apply to separate areas of the body. She argues that the AMA Guides and applicable statutory provisions are clear on when apportionment is appropriate. Under 21 V.S.A. § 648(d), "an impairment rating determined pursuant to this section shall be reduced by any previously determined permanent impairment for which compensation **has been paid** …" (emphasis added). Under the AMA Guides, according to Dr. Bucksbaum, apportionment is only used when it involves overlapping injuries to the same anatomic area, such as L3-4 and L4-5, both of which involve the lumbar area of the spine, but not to the wrist and neck because the anatomic zones are distinct.
3. Claimant has never been paid for the thoracic outlet syndrome or for the neck and shoulder problems from which she now suffers. Under these circumstances, she argues,

4. The defendant argues that the claimant cannot prove that she is entitled to summary judgment. Specifically, it relies on the opinion of Dr. Fenton who assessed claimant's whole person impairment at 5% for her cervical thoracic pain and who explained that the rating was not in addition to the 9% rating assessed by Dr. Hetman in 1997. As the defendant contends, Dr. Fenton determined that the 5% impairment accounted for all of claimant's impairment at the time of his examination. In Dr. Fenton's opinion, a myofascial pain syndrome at the cervicothoracic junction caused the claimant's symptoms. Dr. Bucksbaum assessed the same 5% rating for the same area of the body, but diagnosed the condition as thoracic outlet syndrome. The defendant interprets Dr. Fenton's opinion as one requiring apportionment of his rating with Dr. Hetman's earlier rating for loss of right wrist extension, mild entrapment of the median nerve of the right wrist, and crepitation in the metacarpalphalangeal joint. It maintains that these earlier conditions were attributable to the underlying condition for which she received the later 5% rating.

5. The employer characterizes the opinions of Dr. Bucksbaum and Dr. Fenton as "opposing." Clearly, Dr. Fenton disagreed that claimant had any permanency in her hands and wrists. Dr. Bucksbaum determined that the current shoulder problem must be considered separately from the previously paid hand and wrist problem. Those opinions are not opposing. In fact, Dr. Fenton never provided an opinion on apportionment; he simply assessed her current rating of the shoulder with the same percentage Dr. Bucksbaum determined and disagreed with the 1997 rating.

6. On the crucial issue whether one body part should be rated separately from another, there is no disagreement. Dr. Fenton found that claimant had a 0% impairment to her hand and wrists and 5% to her shoulder. He clearly separated the ratings. The employer's attempt to convert that opinion into one in support of apportionment must fail. While Dr. Fenton opined that it was not "appropriate" to assess an additional 5%, that opinion did not address apportionment. It merely reinforced his disagreement with Dr. Hetman's 1997 assessment of a 9% rating in 1997.

7. When Dr. Hetman assessed claimant's permanency of the hand and wrists in 1997, she specifically documented a normal shoulder examination. When Doctors Fenton and Bucksbaum assessed a rating for claimant's shoulder, neither factored in any impairment of the hands. The measurements are distinct. The anatomical regions are distinct. WSS has not produced evidence to support its assertion that disputed issues of fact exist.

8. The claimant has never received any compensation for the thoracic outlet syndrome or neck and shoulder problems from which she currently suffers. Because her current problems involve an area distinct from the one for which she had received compensation three years ago, as a matter of law the defendant is not entitled to a reduction in the permanency assessed for her shoulder. Accordingly, the claimant is entitled to an additional 5% permanency.

ORDER:

Therefore, claimant's motion for Summary Judgment is hereby GRANTED.

Dated at Montpelier, Vermont, this 30th day of May 2000.

Steve Janson
Commissioner