

L. M. v. Home Depot USA, Inc. (October 20, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. M.

Opinion No. 41-08WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

Home Depot USA, Inc.

For: Patricia Moulton Powden
Commissioner

State File No. S-04149

APPEARANCES:

Stephen Robinson, Esq., for Claimant
J. Christopher Callahan, Esq., for Defendant

ISSUE:

Should Claimant's permanent partial impairment rating be apportioned between his work-related injury and a prior condition?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit A: *AMA Guides to the Evaluation of Permanent Impairment*, §1.6 (5th Ed., 2002)

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648
Costs and attorney's fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Claimant worked for Defendant as a retail sales associate in the electrical department. On August 24, 2001 he injured his lower back while pulling a roll of electrical wire from a shelf. Defendant accepted the injury as compensable and paid benefits accordingly.
3. Claimant's prior medical history includes knee replacement surgery in September 2000. Claimant testified that he suffered some back pain associated with his knee condition, but that it resolved with an epidural injection. Claimant testified that he did not experience any further back pain until the August 2001 work injury.
4. As treatment for his work injury, on December 4, 2001 Claimant underwent a lumbar laminectomy and L3-4 fusion. Unfortunately, during the surgery he suffered a dural tear, as a result of which he developed a neurogenic bladder and left foot drop. This surgical complication caused significant bladder dysfunction as well as sexual impotence.
5. At Defendant's request, Claimant underwent an independent medical examination with Dr. John Johansson, an osteopath, on May 9, 2002. Dr. Johansson concluded that Claimant had reached an end medical result, and was left with a 33% whole person permanent impairment attributable to both the lumbar spine injury and the bladder dysfunction.
6. In calculating that portion of the impairment rating referable to the lumbar spine, Dr. Johansson considered medical records indicating that Claimant had a history of back complaints pre-dating the August 2001 work injury. He also noted a pre-injury MRI study documenting spinal stenosis with disc herniation at L1-2 and diffuse lumbar spine degenerative disc disease. Notwithstanding these pre-existing conditions, however, Dr. Johansson concluded that the August 2001 work injury "clearly aggravated this somewhat benign condition" to the point where Claimant was unable to work and required disc surgery.
7. At the time he rendered his impairment rating, Dr. Johansson did not know that the December 2001 surgery also had resulted in a loss of sexual function. Nor did he know the full extent of Claimant's bladder dysfunction, which was not revealed until urodynamic studies were performed later.

8. At Defendant's request, in a September 12, 2003 letter Dr. Johansson considered how to apportion his 33% impairment rating between the August 2001 work injury and Claimant's pre-existing lumbar spine condition. Dr. Johansson noted that although the work injury did aggravate the pre-existing condition, "most certainly [Claimant] would have progressed on to having a chronic lumbar condition even despite his work." With that in mind, Dr. Johansson concluded that "the fair apportionment" would be to attribute one-third of his impairment rating, or 11%, to the pre-existing condition, and two-thirds, or 22%, to the work injury.
9. At his own request, Claimant underwent an independent medical examination with Dr. Victor Gennaro on August 29, 2006. Dr. Gennaro concluded that Claimant had suffered a 55% whole person permanent impairment. In doing so, Dr. Gennaro departed from Dr. Johansson's original (pre-apportionment) 33% impairment rating in two important respects. First, Dr. Gennaro ascribed a higher impairment rating to Claimant's bladder dysfunction than what Dr. Johansson had assessed. Second, Dr. Gennaro attributed additional permanency to account for Claimant's sexual dysfunction, which Dr. Johansson had not considered.
10. After reviewing Dr. Gennaro's assessment and considering new information concerning the bladder impairment, Dr. Johansson agreed that without considering the apportionment issue, Claimant's whole person impairment rating was in fact 55%, as Dr. Gennaro had stated it. Applying his apportionment rationale to the higher rating, Dr. Johansson concluded that the portion of Claimant's permanent partial impairment referable to his work injury was 48%.

CONCLUSIONS OF LAW:

1. The sole issue in this case is whether it is appropriate to apportion Claimant's 55% impairment rating between his pre-existing lumbar spine condition and his August 2001 work injury. Given the Vermont Supreme Court's prior holdings on this issue, I conclude that there is no basis to do so.
2. In *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95 (1963), the claimant suffered a compensable injury when he slipped and fell on the ice and injured his hip. Doctors examining him after his fall discovered that he had prostate and bladder cancer. Four months later, following surgery and "deep x-ray therapy," the claimant died.

3. On appeal, the Vermont Supreme Court first addressed the issue whether the medical evidence supported the jury's finding that the claimant's work-related fall had accelerated the progress of his underlying disease so as to cause his death earlier than it otherwise would have occurred. Having concluded that it did, *Id.* at 104, the Court next turned to the issue whether the claimant's entitlement to workers' compensation benefits should be apportioned between the work-related injury and the cancer. The Court noted that the workers' compensation statute then in force made "no exceptional provision for apportionment of the compensation . . . between the injury and the pre-existing disease." Without such a provision, the Court concluded, "there is no requirement that the commissioner . . . determine the relative contribution of the accident and the prior disease to the final result." *Id.* at 104; *see also Stamper v. University Apartments, Inc.*, 147 Vt. 552, 554 (1986) (applying *Marsigli* ruling to preclude apportionment of permanent partial disability benefits between work injury and pre-existing condition).
4. In the current claim, there is no dispute that Claimant's work injury aggravated or accelerated the pre-existing problems in his lumbar spine, thus hastening the onset of disabling symptoms and the need for surgical treatment. Applying the rule of *Marsigli*, under these circumstances the Commissioner is not required to apportion permanency.
5. It is true that the statute under which both *Marsigli* and *Stamper* were decided has since been amended. Under 21 V.S.A. §648(d), apportionment now is required in cases where a prior impairment has been both rated and paid. Absent those specific circumstances, however, in all other cases the Commissioner retains discretion whether to apportion or not. *See N.K. v. State of Vermont Department of Health*, Opinion No. 36-08WC (September 4, 2008).
6. The circumstances here dictate that it is more appropriate to award all of the permanency rated than it is to apportion. Notwithstanding the fact that Claimant may have had some degree of pre-existing disc disease in his lumbar spine, it was not disabling and did not require medical treatment until the August 2001 work injury. Clearly the work injury acted in such a way as to aggravate and accelerate it, and Claimant's permanency award should fully reflect that result.
7. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$540.73 and attorney's fees based on a contingent fee of 20% of the recovery, not to exceed \$9,000.00, in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find they are appropriate here, 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 reflecting a 55% whole person impairment referable to the spine; and
2. Costs in the amount of \$540.73, and attorney's fees totaling \$9,000.00.

DATED at Montpelier, Vermont this 20th day of October 2008.

Patricia Moulton Powden
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.