

N. K. v. State of Vermont, Department of Health (September 4, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

N. K.

Opinion No. 36-08WC

v.

By: Jane Dimotsis
Hearing Officer
Adam Sherwin
Law Clerk

State of Vermont
Dept. of Health/Risk Management

For: Patricia Moulton Powden
Commissioner

State File No. W-05732

APPEARANCES:

Christopher McVeigh, Esq. for the Claimant
Andrew C. Boxer, Esq. for the Defendant

ISSUE:

Should Claimant's present degree of permanent partial disability be apportioned between the impairment from a pre-existing non-work related surgery and that attributable solely to her left hip work related injury?

EXHIBITS:

Joint Exhibit: Medical Records

Claimant's Exhibit: Nancy Kapusta's Deposition

FINDINGS OF FACT:

1. Claimant is a health outreach specialist for the Vermont Department of Health. She works in both the Barre and Morrisville offices, and has been employed by the State of Vermont since 1987.
2. On October 27, 2004, Claimant had replacement surgery for her left hip. This surgery was not related to her work, and her employer did not compensate her for it. The surgery was performed by Dr. Glen Neale, M.D. The Claimant was able to return to work in six weeks on a full time basis and did not need any pain medication following her return to work. She was physically able to continue to do all the activities she was able to do prior to this injury.
3. On February 8, 2005, Claimant slipped on the ice while heading out of her office to her car. This caused her hip and thigh area to twist, resulting in immediate pain.

4. Since this incident, Claimant has had pain in her left hip. She takes over the counter pain medication daily. The slip and twist injury has caused her difficulty in walking up and down the stairs at work, and has forced her to use the elevator. She also has trouble carrying items in front of her, which causes pain in her hip and thigh area. Additionally, she has difficulty walking, and begins to limp at the end of the day. The injury has also limited her ability to walk, ride a bicycle, hunt and exercise at the gym; all activities that she previously enjoyed.
5. The work injury was accepted by the Defendant's insurer and the Claimant has been receiving permanent partial disability payments from the day after her work injury. This was awarded voluntarily and without prejudice to the Defendant.
6. Dr. Glen Neale treated the Claimant for the twist and fall at work. On September 26, 2006, he wrote to the Defendant and estimated that based on the American Medical Association Guides of Permanent Impairment ("AMA Guides"), Claimant suffered a 6% whole person impairment from her injury on February 8, 2005. On January 16, 2007, Dr. Neale either changed his opinion or expanded on his opinion and wrote to the Defendant that based on his interpretation of the AMA Guides, Claimant suffered a 15% whole person impairment for her hip injury using the Harris Hip Score and measure function and pain both pre and post hip arthroplasty. While the AMA Guides indicate that the impairment was in part the result of the prior surgery, Dr. Neale believed 15% whole person impairment was appropriate since the Claimant had no pain prior to her fall on her hip at work. He believed that her measurable, functional impairment resulted from her February 8, 2005, slip and twist at work. This is outlined in his letter of January 17, 2007.
7. On March 16, 2007, Dr. Verne Backus conducted an independent medical examination ("IME") of the Claimant. He found that the condition of her hip after the surgery had been aggravated by her work-related injury. Additionally, he found that she had 20% whole person impairment. Of this impairment, 5% was the result of her injury at work and 15% was the result of her prior surgery. He disagreed with Dr. Neale on his reasoning and use of the AMA Guides. Dr. Neale used muscle weakness in his evaluation which is not commonly used under the AMA Guides. Dr. Backus found the Claimant's prior hip arthroplasty and condition were aggravated by her fall at work. However, he also stated that 5% was the proper amount of impairment under the AMA Guides for the Claimant's work related fall and 15% was the proper amount for her prior hip replacement surgery with good result. He stated he did not know how the 20% should be apportioned under Vermont law.
8. Both doctors agreed that the incident at work could result in the Claimant having a "replacement arthroplasty".
9. Attorney's costs in the amount of \$383.59 were requested as well as attorney's fees in the amount of \$9,000.00 or 20% of her recovery, whichever is less.

CONCLUSIONS OF LAW

1. First, it must be determined whether Claimant has suffered an injury from work, and whether any of her impairment is the result of her previous surgery.
2. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support his claim. *King v. Snide*, 144 Vt. 395 (1984); *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984). Here, Claimant has met this burden, and this dispute is over the appropriate apportionment rating for her injury.
3. The major disagreement between the parties is whether the Claimant should receive the 20% whole person rating for her work related injury or whether the 20% should be apportioned due to her prior hip surgery. The Department finds Dr. Backus's opinion regarding the Claimant's permanency rating more persuasive than that of Dr. Neale. Dr. Backus's experience in using the AMA Guides and his status as an Independent Medical Examiner outweigh that of Dr. Neale's experience and use of the AMA Guides.
4. Consequently, I find that Claimant suffered a work-related injury as a result of her accident at work. This caused a 20% permanent partial impairment, with 15% being the result of her previous hip surgery with a good result and the remaining 5% being the result of her accident at work.
5. Next, it must be determined whether Claimant's present degree of permanent partial disability should be apportioned between impairment from a pre-existing surgery and one that is attributable solely to the work related injury.
6. The statutes provide under 21 V.S.A § 648(d), that apportionment must be made or subtracted for a pre-existing impairment where compensation has been paid. The second statutory reference states, under 21 V.S.A § 648(b), that any determination of impairment shall be made only in accordance with the AMA guidelines.
7. The AMA Guides, 5th Edition, page 12 provides that most states have their own customized methods for calculating apportionment. Thus, the AMA Guides acknowledge that apportionment is one of the issues that are decided differently in different states. There is, therefore, no mandate from the Guides requiring the Department to apportion.
8. The Commissioner addressed this issue under the 4th Edition of the AMA Guides, and wrote:
"I think the AMA Guides' procedure and 21 § 648(d) can be reconciled as follows: impairment ratings must be reduced for pre-existing impairments where compensation has been paid, and *may be* reduced by the physician if valid evidence of a defined pre-existing injury exists." *Miller v Cornwall Grounds*, Opinion No. 20-97WC (August 4, 1997). (emphasis added.)

9. Thus, while 21 V.S.A § 648(d) requires that impairments must be reduced for pre-existing impairments where compensation has been paid, 21 V.S.A § 648(b) gives the Department discretion in apportioning permanency if valid evidence exists for a pre-existing injury pursuant to the AMA Guides.
10. The fact that the Vermont's Workers' Compensation Act "makes no exceptional provision for apportionment of the compensation or medical benefits between the injury and the pre-existing disease," also strengthens the decision that the Department has discretion over the apportionment issue. *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95 (1963). As the Vermont Supreme Court stated in *Stamper v University Apartments, Inc.*, 147 Vt. 552 (1986), the Department or Commissioner has discretion regarding the permanency issue and the statutory scheme "does not require the commissioner to make [...] a determination of the relative contributions of the accident at issue and prior disease to the end result....."
11. Generally, the Department has approved apportioning permanency in cases where the prior injury is completely unrelated to the present injury. In *Aker v. ALIIC*, Opinion No. 53-98WC (Nov. 5, 1998), the Department approved apportioning permanency for a claimant who had suffered a non work-related injury years before his work-related injury. The Department apportioned permanency because the pre-existing condition did not combine with the work-related injury to cause permanent disability.
12. Unlike *Aker*, where the pre-existing condition did not combine with the work-related injury, here Claimant's slip on the ice and twisting of her hip was directly related to her hip surgery only four months prior. This is because both the surgery and the work-related injury involved Claimant's hip, and her impairment from the surgery exacerbated her work-related injury.
13. Defendant also argues that apportionment of permanency is appropriate when the injury has not substantially interfered with Claimant's daily and leisure activities. While I agree that Claimant's injury has not completely impaired her ability to work, I reject Defendant's argument that the injury suffered at work did not result in serious limitations of the Claimant's ability to function in her daily life and at work. It is clear under Vermont law that an aggravation or acceleration of a preexisting condition by an employment accident is compensable under the worker's compensation law. *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989); *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31 (1980). Claimant was not at all limited prior to her work injury. She was recovering from successful hip surgery and would not be limited or in pain at all if not for her work injury aggravating the condition. Thus, it is appropriate for the Department to exercise its discretion and not apportion the impairment from the prior hip surgery.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, the insurer should readjust the claim as follows and pay:

1. 20% partial permanency with medical end result having been achieved and paid at the legal rate pursuant to 21 V.S.A. § 664 from the date the benefit was due (date of the injury) until paid; and
2. Attorney's costs in the amount of \$383.59, and Claimant's attorney's fees determined reasonable in the amount of 41.2 hours at \$90.00 per hour.

DATED at Montpelier, Vermont this 4th day of September 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.