STATE OF VERMONT
DEPARTMENT OF LABOR

William Belville	Opinion No. 29-09WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
RHC, Inc. d/b/a Times Argus	For: Patricia Moulton Powden Commissioner
	State File No. X-63007

OPINION AND ORDER

Hearing held in Montpelier on April 17, 2009
Record closed on May 22, 2009

APPEARANCES:

Craig Jarvis, Esq., for Claimant
Robert Cain, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to permanent partial disability benefits as a result of his May 24, 2006 compensable work injury?

2. If yes, to what extent, if any, should Claimant's permanent partial impairment be apportioned between his May 2006 work injury and his pre-existing condition?

EXHIBITS:

Joint Exhibit I: Medical records

Defendant's Exhibit 1: *Curriculum vitae,* William Boucher, M.D.

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648
Interest pursuant to 21 V.S.A. §664
Costs and attorney 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 his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)*(the "*AMA Guides*").

3. Claimant has a varied work history. He has been a mason tender, a self-employed wood worker, a commercial truck driver, a parking garage superintendent and a microchip tester. At the time of the injury at issue here, he was employed part-time by Defendant as a newspaper delivery driver.

Claimant's Prior Medical History

4. Claimant has a long and complicated history of low back injuries, surgeries and pain. His problems began in 1982, when he herniated his L4-5 disc while lifting a car at home. Claimant underwent an L4-5 laminectomy, after which he recovered well.

5. In 1989 Claimant suffered a work-related low back injury while employed for Casella Waste Management. Claimant treated conservatively for this injury, and his claim for workers' compensation benefits was accepted. Claimant recalled being out of work for six to eight months, during which time he received temporary total disability benefits.

6. Claimant does not recall receiving any permanent partial disability benefits relating to his 1989 work injury. The Department's computer record reflects that an Agreement for Permanent Partial Disability Compensation was filed in July 1990, but does not specify how many weeks of benefits were awarded. Both the Department's and the employer's paper files relating to this injury have been destroyed, and therefore there is no way at this point to verify what, if anything, was paid.

7. In late 1995 and early 1996 Claimant suffered two slip-and-falls on the ice, neither work-related, as a result of which his low back pain worsened and became chronic. In 1997 Claimant underwent surgery to implant a dorsal column stimulator; complications ensued and the device was removed and re-implanted in 1998, then ultimately removed permanently in 2000.

8. Also in 1997 Claimant was found entitled to Social Security Disability Insurance (SSDI) benefits because of his chronic disabling low back pain. There have been periods since then during which Claimant was able to work part-time (and a one-year stint of full-time employment as well), but he has never been pain-free. Claimant has been prescribed narcotic pain medications regularly since the mid-1990's as treatment for his chronic pain.

9. In 2005 Claimant underwent a surgical fusion at L5-S1. Following this surgery, Claimant felt much improved. Although still not pain-free, his low back pain moderated somewhat, and the symptoms he had been experiencing in his legs abated significantly. Despite these improvements, however, Claimant continued to receive SSDI benefits and worked only part-time. He also continued to use narcotic medications for chronic pain relief.

Claimant's Work Injury

10. Claimant began working part-time for Defendant in April 2006. On May 24, 2006 he was involved in an accident while delivering papers when he was pinned by a forklift against the rear door of his truck. Claimant's back hurt, and he left work early that day, but he did not immediately seek medical treatment. In fact, because he had promised to cover a co-employee's vacation time in June, he continued to work until July 31, 2006. Claimant has not worked since.

11. Claimant testified that his low back pain is much worse since the May 2006 incident than it was at any time beforehand. It is unclear why this is so. Claimant's current treating neurosurgeon, Dr. Jewell, has hypothesized that the forklift accident caused the nerves in the area of Claimant's previous L5-S1 fusion to become stretched, but acknowledged that this was only a "guess," unsupported by any scientific evidence, case reports or experience.

12. Claimant has consulted with both orthopedic and neurosurgeons as to whether there might be a surgical remedy for his chronic pain, but none have endorsed this approach with any conviction. He continues to use narcotic medications for pain control. According to a functional capacities evaluation completed in March 2008, he has no current work capacity.

Independent Medical Evaluations and Permanency Opinions

13. Claimant has undergone two independent medical evaluations – one with Dr. White, at his own attorney's referral, and one with Dr. Boucher, at Defendant's request. Although neither expert has been able to explain the anatomical basis for Claimant's increased symptoms, both agree that his current complaints are causally related to the forklift incident. Both also agree that Claimant has reached an end medical result. The dispute between them centers on the appropriate permanency rating for Claimant's condition. The analysis is complicated by the fact that Claimant has suffered prior injuries to his lumbar spine.

14. The *AMA Guides* provide two methods for calculating spinal impairment – the diagnosis-related estimate (DRE) method and the range-of-motion (ROM) method. The DRE method is generally favored, but in certain situations the *Guides* direct that the ROM method be used instead. Specifically, the *Guides* suggest that the ROM method be used "when there is multilevel involvement in the same spinal region," *AMA Guides* §15.2, paragraph 2 at p. 380, or "where there is recurrent injury in the same spinal region," *Id.* at paragraph 4.

15. Dr. White determined that both of these exceptions applied to Claimant's case – the first because he had suffered prior injuries at both L4-5 and L5-S1, and the second because the forklift incident had caused a repeat injury at the latter level. For those reasons, he applied the ROM method and concluded that Claimant now has a 26% whole person permanent impairment.

16. Dr. White next considered how much of that impairment probably pre-existed the forklift incident and therefore should be attributed to Claimant's prior injuries instead. The *AMA Guides* offer guidance in this respect as well. Generally, the *Guides* suggest using a subtraction methodology – calculate the total current impairment, then subtract whatever impairment is referable to the prior injury; the remainder is the amount attributable to the current injury. *AMA Guides* §15.2a, paragraph 9 at p. 381. The *Guides* further state:

> Ideally, use the same method to compare the individual's prior and present conditions. If the ROM method has been used previously, it must be used again. If the previous evaluation was based on the DRE method and the individual now is evaluated with the ROM method, and prior ROM measurements do not exist to calculate a ROM impairment rating, the previous DRE percent can be subtracted from the ROM ratings. Because there are two methods and complete data may not exist on an earlier assessment, the apportionment calculation may be a less than ideal estimate.

Id.

17. No data exists from which to calculate Claimant's prior impairment using the ROM method. With reference to the paragraph quoted above, Dr. White used the DRE method to determine that Claimant had suffered a 20% whole person impairment referable to his prior fusion surgery. Subtracting this amount from the 26% total current impairment Dr. White had derived using the ROM method, he concluded that Claimant had incurred a 6% whole person impairment referable to the forklift incident.

18. Dr. Boucher found Dr. White's methodology to be flawed. In particular, he objected to Dr. White's use of both the DRE and ROM methods in the same analysis. Dr. Boucher used a different approach. Noting that there was no objective evidence that the condition of Claimant's spine had changed at all as a result of the forklift incident, he concluded that the DRE method properly should be applied to determine the extent of Claimant's current impairment, not the ROM method. According to Dr. Boucher, doing so offered the further advantage of allowing for both the current and the prior impairment to be calculated via the same methodology.

19. Claimant's impairment rating under the DRE method is straightforward. Both before and after the forklift incident, his L5-S1 fusion places him in Category IV, a 20-23% whole person impairment. The forklift incident having had no impact on the appropriate diagnosis-related category, according to Dr. Boucher's analysis that event caused no additional permanent impairment, and therefore there is nothing to apportion.

20. Both Dr. White and Dr. Boucher are well known to this Department as qualified experts. Both have substantial experience rating permanency in accordance with the *AMA Guides*. The fact that each used a different methodology to arrive at his impairment rating reflects their different interpretations of the same sections of the *Guides*.

21. With Dr. Boucher's end medical result determination as support, Defendant terminated Claimant's temporary disability benefits on April 28, 2008. Claimant's compensation rate for permanent partial disability benefits as of that date was $186.76, updated to $194.23 as of July 1, 2008.

22. Claimant was 48 years old on April 28, 2008. According to Vermont's Medicaid Manual, his remaining life expectancy as of that date was 28 years, or 336 months.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press,* 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. The dispute here centers on the extent, if any, of the permanent impairment Claimant suffered as a result of the forklift incident. Vermont's workers' compensation statute specifically designates the *AMA Guides* as the controlling authority for making such a determination. 21 V.S.A. §648(b). Unfortunately, however, the *Guides* are not always so clear as to be subject to only one interpretation, and well-qualified medical experts often disagree as to their application in particular circumstances.

3. Here, I find Dr. White's interpretation of the relevant sections of the *Guides* to be more compelling than Dr. Boucher's. I agree with his reading of the *Guides* as directing that the ROM method be used in situations where, as here, a patient has suffered a recurrent injury to the same spinal region.[1] I accept as valid, therefore, his conclusion that Claimant's current total impairment is 26% whole person, calculated in accordance with that method.

4. I also concur with Dr. White's assessment that the *Guides* contemplate circumstances in which it is necessary to mix a ROM-based impairment calculation with a DRE-based one in order to make an appropriate determination as to apportionment. Claimant's case presents one of those circumstances. I accept Dr. White's assessment that the extent of Claimant's impairment attributable to the forklift incident is 6%.

[1] Of note, the use of the term "recurrent" in the context of the *AMA Guides* should not be interpreted to conflict in any way with both Dr. White's and Dr. Boucher's determination that Claimant suffered an "aggravation" as a result of the forklift incident. Both terms have legal meanings completely distinct from their medical usage. *Rolfe v. Textron, Inc.*, Opinion No. 08-00WC (May 16, 2000).

5. What remains to be determined is whether apportionment is appropriate under the particular circumstances of this case. The *AMA Guides* specifically defer to state law on this issue. *Kearney v. Addison-Rutland Supervisory Union*, Opinion No. 21-09WC (June 24, 2000) (citing to §§1.6b, 2.5h and 15.2a of the *AMA Guides*); *Langdell v. G.W. Savage Corp.*, Opinion No. 19-09WC (June 24, 2009) (same).

6. Vermont's workers' compensation statute requires apportionment in cases where a prior impairment has been both rated and paid. 21 V.S.A. §648(d). Absent those specific circumstances, the Commissioner retains discretion whether to apportion or not. *Kearney, supra*.

7. Although there is evidence in the current claim that Claimant's prior impairment was rated, it is unclear whether anything was ever paid. The statute requires evidence of both a prior rating *and* prior payment in order for mandatory apportionment to be triggered. *Langdell, supra.* Thus, I conclude that the decision whether to allow apportionment here lies within my discretion, but is not required by the statute.

8. I am mindful of the remedial purpose of Vermont's workers' compensation statute, and the requirement that it be construed broadly in order to make injured workers "whole." *Hodgeman v. Jard Co.*, 157 Vt. 461, 464 (1991). Nevertheless, I am convinced that to award Claimant all of the permanency Dr. White has rated, with no apportionment at all for his many previous injuries, would be an abuse of discretion. The fact is Claimant's prior spine injuries had caused him to be significantly disabled even before the forklift incident. He was receiving SSDI benefits, he was working only part-time and he was taking narcotic medications for chronic pain. These consequences did not result from the forklift incident; they were merely continued by it.

9. Claimant's situation is distinguishable from that of the claimants in other recently decided apportionment claims. *Kearney, supra; Murray v. Home Depot USA, Inc.*, Opinion No. 41-08WC (October 20, 2008); *Kapusta v. State of Vermont Department of Health*, Opinion No. 36-08WC (September 4, 2008). In each of those claims, the prior condition was no longer disabling and had resulted in few, if any, functional limitations at the time of the work injury. The difference between the circumstances of those claimants and the situation presented here is significant. Apportionment would have prevented those claimants from being made "whole." Fairness dictates a different result in this case.

10. I conclude, therefore, that under the specific facts of this claim, it is appropriate to award Claimant only the permanency attributable to the forklift incident – 6% whole person according to Dr. White – and to apportion away that part of the total that is referable instead to his prior injuries.

11. Pursuant to 21 V.S.A. §652(c), Claimant is entitled to have these permanency benefits prorated over his life expectancy. In accordance with Finding of Fact No. 21 above, Claimant's 6% permanency award totals $6,340.87. In accordance with Finding of Fact No. 22 above, and not including any reduction for attorney fees, Claimant's permanency award is prorated at the rate of $18.87 per month for the remainder of his life expectancy.

12. Claimant has filed a request for costs totaling $3,247.22 and attorney fees totaling $5,175.00 (57.5 hours at the mandated rate of $90.00 per hour). An award of costs to a prevailing claimant is mandatory under the statute. Although Claimant has only partially prevailed, it is impossible under the circumstances to separate out those costs that relate only to his successful claim. *See Abare v. Ben & Jerry's*, Opinion No. 44-08WC (November 5, 2008); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003). I decline to do so, therefore, and instead I award Claimant all of the costs he has requested.

13. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. I find it appropriate to award Claimant 25% of the fees he has requested, or $1,293.75.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits totaling $6,340.87, representing a 6% whole person impairment to the spine;

2. Interest on the above amount pursuant to 21 V.S.A. §664, calculated from April 28, 2008;

3. Costs totaling $3,247.22 and attorney fees totaling $1,293.75.

DATED at Montpelier, Vermont this 29th day of July 2009.

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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.