

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Larry Sweetser

Opinion No. 36-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Vermont Country Camper

For: Patricia Moulton Powden
Commissioner

State File No. U-07763

OPINION AND ORDER

Hearing held in Montpelier on April 25, 2008

Record closed on July 8, 2008

APPEARANCES:

Kelly Massicotte, Esq. for Claimant

John Valente, Esq. for Defendant

ISSUES:

1. Is Claimant's March 2003 hernia causally related to his compensable September 2000 work injury?
2. If yes, to what workers' compensation benefits is he entitled?
3. What is the appropriate average weekly wage for determining Claimant's compensation rate?
4. Should cost of living adjustments be applied to Claimant's compensation rate and if so, for what years?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Commissions spreadsheet

Joint Exhibit III: Excerpted portions of the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)*

Claimant's Exhibit A: *Curriculum vitae*, Dr. Mark Bucksbaum

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Medical benefits pursuant to 21 V.S.A. §640

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Interest, attorney fees and costs pursuant to 21 V.S.A. §§664 and 678(a)

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 case. Judicial notice also is taken of the *AMA Guides to Evaluation of Permanent Impairment, 5th Ed.* (the "AMA Guides").

Claimant's 2000 Work Injury and 2003 Hernia

3. On September 27, 2000 Claimant injured his lower back while working in the course and scope of his employment as a salesperson for Defendant. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.
4. Claimant treated conservatively for his injury. As part of the recommended treatment he enrolled in a multi-disciplinary rehabilitation program at the Vermont Center for Occupational Rehabilitation (VCOR) in January 2003. Claimant attended this program three times per week for several weeks. He received various treatments, including massage, osteopathic manipulation, physical therapy and work simulation exercises, each provided by different therapists. Dr. Johansson, the program director, examined him regularly to assess his progress.
5. Among the treatment providers with whom Claimant worked at VCOR was a physical therapist named Cheryl. Claimant testified that during one stretching exercise, Cheryl was particularly rough with him. She unexpectedly forced his leg down quickly, which stretched his psoas muscle and caused him to feel pain in his groin.
6. The psoas muscle helps keep the body upright, by stabilizing the base of the spine and rotating the hips. Throughout the VCOR program, Claimant's therapists had noted that he had a tight psoas muscle. This caused him to walk a bit hunched over. When Claimant used the treadmill, he walked at a steeper incline so that the activity would not stretch his psoas muscle as much.
7. Claimant clearly remembered the incident with Cheryl and the pain he experienced when she stretched his leg. His recollections may have been off by a day or two, but the events in question took place more than five years ago, so some minor inconsistencies between his memory and the medical records is to be expected.

8. After the incident with Cheryl, Claimant requested that he not be assigned to work with her again. On March 20, 2003, a Thursday, another physical therapist performed a mechanical release of Claimant's psoas muscle. The record from this session includes a pain diagram indicating that Claimant was experiencing pain in the area of his lower abdomen and groin. When Claimant had visited with Dr. Johansson earlier on that same day, he had not complained of any pain in that area. As will be seen below, however, later a hernia was discovered there.
9. While showering over the following weekend Claimant noticed a bulge in his groin area, again in the same location where his hernia ultimately was discovered. When he next returned to VCOR, on Monday, March 24th, one of his therapists asked Dr. Johansson to see him because of his increased groin pain.
10. Dr. Johansson concluded that Claimant had suffered a minor abdominal strain. He did not note the existence of any hernia. Dr. Johansson referred Claimant to his primary care provider for further treatment. Two days later, on March 26, 2003 Claimant saw his primary care provider, Dr. Blish, who suspected he had suffered a left inguinal hernia and referred him to Dr. Smale, a surgeon.
11. Dr. Smale evaluated Claimant on April 1, 2003. He confirmed Dr. Blish's diagnosis of left inguinal hernia.
12. Also in April 2003 Claimant concluded the VCOR program and was discharged. Dr. Johansson declared him to be at end medical result for his compensable low back injury, and on those grounds Defendant discontinued Claimant's temporary disability benefits effective May 15, 2003.
13. Dr. Smale surgically repaired Claimant's hernia on January 15, 2004. Unfortunately, Claimant has continued to experience discomfort at the surgical site while engaging in daily activities. He also has an ascending testicle and experiences pain during sexual activity.

Medical Opinions as to Causation of Hernia

14. Drs. Bucksbaum, Peterson and Johansson all have stated their opinions as to whether Claimant's hernia was caused by his participation in the VCOR program. Both Dr. Bucksbaum and Dr. Peterson concluded that the hernia probably was causally related. Dr. Johansson did not offer an opinion to the required degree of medical certainty.

15. Dr. Bucksbaum noted in particular that the mechanical release that the VCOR therapist performed on Claimant's psoas muscle on March 20, 2003 would have required a fair amount of intra-abdominal pressure, which likely would have caused the hernia to bulge. According to Dr. Bucksbaum, this would explain why Claimant was asymptomatic on the morning of March 20th, when Dr. Johansson checked in with him, and did not complain of pain in his lower abdomen and groin until after his physical therapy session. Dr. Bucksbaum noted other activities in which Claimant engaged at VCOR, such as leg lifts and lifting and bending exercises, which also probably contributed to cause the hernia to develop. Last, Dr. Bucksbaum noted that there was no evidence of any congenital defect, pre-existing condition or alternative cause that might explain why the hernia developed, other than Claimant's VCOR activities.
16. For his part, Dr. Johansson noted only that on his examinations of Claimant he did not observe any bulge in his groin area. Dr. Johansson admitted that he did not believe that Claimant's complaints of pain were somatic or not organically caused.
17. All three doctors agreed that the treatment Claimant received for his hernia injury was reasonable and necessary. Defendant does not dispute its responsibility for such medical treatment should the injury be determined to have been caused by Claimant's participation in the VCOR program. Claimant submitted evidence establishing that according to the Workers' Compensation Medical Fee Schedule, the value of the treatment Claimant received causally related to his hernia totaled \$7,384.51.
18. As for temporary total disability, Dr. Bucksbaum testified that in his opinion ten to fifteen days was an appropriate period of time during which Claimant would have been unable to work following his January 2004 hernia repair surgery.

Extent of Permanent Impairment Referable to Hernia

19. Both Claimant and Defendant retained medical experts to render their opinions as to the extent of any permanent impairment referable to Claimant's hernia – Dr. Peterson on Claimant's behalf and Dr. Davignon on Defendant's behalf.
20. The relevant section of the *AMA Guides*, Table 6-9, lists the criteria for rating a Class 1 permanent impairment due to herniation, for which the rating range is 0-9% whole person, as follows:

Palpable defect in supporting structures of abdominal wall
and
slight protrusion at site of defect with increased abdominal pressure;
readily reducible
or
occasional mild discomfort at site of defect but not precluding most
activities of daily living. (Emphasis in original).

21. Dr. Peterson performed an independent medical evaluation of Claimant on August 22, 2005. He observed that Claimant had a palpable defect with a slight protrusion. Dr. Peterson also noted that Claimant experienced ongoing discomfort at the surgical site during mundane daily activities such as leaning on a counter and additional discomfort with sexual activity. From these observations Dr. Peterson concluded that Claimant's permanent impairment ranked at the highest level allowed for a Class 1 hernia, or 9%.
22. Dr. Davignon conducted his independent medical evaluation on April 23, 2008. He reported that Claimant was still "mildly uncomfortable" even four years after his hernia repair, complaining of numbness in his left groin, an ascended testicle, pain with sexual activity and a "picking" sensation at times at the surgical site. Dr. Davignon could find no palpable defect or protrusion, however. As under his interpretation of the *AMA Guides*, such a finding was necessary for any impairment to be rated, Dr. Davignon concluded that Claimant had a 0% permanent impairment.

Claimant's Average Weekly Wage

23. Rather than paying Claimant a fixed wage, Defendant compensated him solely on the basis of the sales commissions he earned. After Claimant completed a sale, Defendant credited him with the commission he had earned thereby in a ledger account. Whenever he wished to, Claimant could draw from this account, in whatever amount he desired. There were no regular disbursements, and Defendant simply noted debits to Claimant's account on its ledger as they were paid out. It was, in effect, a private savings account.
24. During the twelve weeks preceding his 2000 work injury, the period from July 2, 2000 through September 23, 2000, Claimant earned a total of \$11,584.65 in sales commissions. During this same twelve-week period, Claimant received disbursements from his commission account totaling \$10,100.00.
25. It is apparent from reviewing Defendant's ledger that Claimant routinely drew less from his account than what he had earned, and thus Defendant routinely carried a credit balance on his behalf. Defendant's ledger indicates that the last time Claimant had zeroed out his account – meaning that he had drawn out all of the commissions he had earned – was in April 2000, nearly five months before the date of injury. As of September 23, 2000, the week preceding his original injury, Claimant had a credit balance in his account totaling \$6,531.79.
26. Using the sales commissions Claimant earned during the twelve weeks preceding his injury, his initial compensation rate would have been \$643.92. With cost of living adjustments in 2001 and 2002, his compensation rate at the time temporary disability benefits were discontinued in May 2003 would have been \$704.52. As of January 2004, during the two weeks Claimant was recuperating from hernia surgery, the rate would have been \$721.43. As of August 2005, when Dr. Peterson placed him at end medical result and rated his permanent impairment, it would have been \$774.31.

27. Using the disbursements Claimant took during the twelve weeks preceding his injury, his initial compensation rate would have been \$561.39. This would have been updated to \$614.22 as of May 2003, \$628.96 as of January 2004, and \$675.05 as of August 2005.

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).

Causation

2. Here, Claimant alleges that his hernia resulted from his participation in the VCOR program, which in turn was necessitated by his compensable September 2000 work injury. Certainly, if the medical evidence establishes this causal link, then Claimant is entitled to workers' compensation benefits referable to the hernia, as that injury counts as a direct and natural consequence of the original compensable injury. 1 *Larson's Workers' Compensation Law*, §10.09.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
4. I find Dr. Bucksbaum's opinion to be the most credible. He adequately explained how Claimant's VCOR activities, and particularly the mechanical release of his psoas muscle, most likely caused his hernia to develop. Dr. Peterson concurred with this analysis. Given that Dr. Johansson did not offer any contrary opinion to the required degree of medical certainty, I conclude that Claimant has sustained his burden of proof on the issue. The hernia was causally related to the work injury and is therefore compensable.
5. I also find credible Dr. Bucksbaum's opinion as to the extent of Claimant's temporary total disability following his hernia repair surgery. Thus I conclude that Claimant was entitled to temporary total disability benefits beginning on January 15, 2004 and ending fifteen days later, on January 30, 2004.
6. There being no dispute as to the reasonable necessity of the medical treatment Claimant received for his hernia, I conclude that according to the Workers' Compensation Medical Fee Schedule the value of such treatment totaled \$7,384.51.

Extent of Permanent Impairment

7. As for the permanent impairment referable to Claimant's hernia injury, Dr. Peterson's interpretation of the *AMA Guides* most closely follows that adopted by previous opinions. *Abare v. Ben & Jerry's*, Opinion No. 44-08WC (November 5, 2008); *Estabrook v. New England Precision*, Opinion No. 10-00WC (May 16, 2000); *Knapp-Bowen v. Equinox Terrace*, Opinion No. 4-98WC (January 19, 1998). I accept his impairment rating over Dr. Davignon's, therefore, and conclude that Claimant has suffered a 9% whole person impairment referable to his compensable hernia injury.

Average Weekly Wage, Compensation Rate and Cost of Living Adjustments

8. What remains is to determine the appropriate average weekly wage and compensation rate for paying the benefits to which Claimant is entitled, both for his original September 2000 back injury and for his January 2004 hernia repair. Two issues are subsumed under this question: first, whether Claimant's initial compensation rate should be based on the commissions he earned during the twelve weeks prior to his injury or on the commissions he was paid; and second, whether he is entitled to cost of living adjustments and if so, for what years.
9. Vermont's workers' compensation statute provides that a claimant's average weekly wage "shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding the injury." 21 V.S.A. §650(a).
10. Here, the amount Claimant earned was clearly calculated and based entirely on the sales he had completed during each week. Defendant did not pay him a regular salary, as typically happens in a draw against commission situation; rather, it merely held the money in Claimant's account and disbursed it to him in whatever amount he requested, at his sole discretion. Claimant could have dipped into his previous savings and drawn far more than what he had earned in a week, or he could save more aside and take something less.
11. Thus, the amount Claimant was paid every week bore no real relationship at all to the amount he earned. It does not in any way represent Claimant's "average weekly earnings," which is what the statute directs should be the basis for his compensation rate.
12. Claimant's situation is markedly different from the one considered in *Bebon v. Safety-Kleen*, Opinion No. 64-05WC (November 4, 2005). The claimant there earned a base salary plus monthly bonus commissions, all paid out on a biweekly basis. Thus, the first biweekly check he received in the twelve weeks preceding his injury included commissions that had been earned previously, while the last one omitted commissions that had been earned during the period but were not due to be paid until later. The claimant argued that both commission checks should have been included in his average weekly wage calculation. The Commissioner concluded otherwise, and selected the commissions paid out as the amount most representative of the claimant's weekly earnings. For the reasons stated above, however, in this case the commissions Claimant earned are more representative.

13. I conclude, therefore, that Claimant's average weekly wage should have been based on the commissions he earned during the twelve weeks preceding his injury, a total of \$11,584.65, which yields an initial compensation rate of \$643.92. With the appropriate cost of living adjustments for 2001, 2002 and 2003, following Claimant's hernia repair in January 2004 Defendant should have paid Claimant temporary total disability benefits at the rate of \$721.43 per week.
14. The compensation rate at which the permanency benefits for Claimant's hernia should have been paid must be determined as of the date his temporary disability ended, not as of the date he reached end medical result. *Laumann v. Department of Public Safety*, 177 Vt. 52 (2004). The Supreme Court reached this conclusion by interpreting the plain language of 21 V.S.A. §§648 and 650; its holding is as applicable to the current claim as it was to the claim at issue there.
15. The relevant date for calculating the benefits due Claimant on account of Dr. Peterson's 9% impairment rating, therefore, a total of 36.45 weeks, is January 30, 2004, the date on which his temporary total disability ended. Claimant's compensation rate as of that date was \$721.43. The first 21.5 weeks of permanency benefits should have been paid at that rate. As of July 1, 2004 the rate would have been updated to \$745.96; the remaining 14.95 weeks should have been paid at the new rate.
16. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$2,177.55 and attorney 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 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 facts and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Medical benefits totaling \$7,384.51;
2. Temporary total disability benefits commencing on January 15, 2004 and ending on January 30, 2004 payable at the rate of \$721.43 per week;
3. Permanent partial disability benefits in accordance with a 9% whole person impairment rating; a total of 36.45 weeks, the first 21.5 weeks payable at the rate of \$721.43 per week and the remaining 14.95 weeks payable at the rate of \$745.96 per week;
4. Interest on the above amounts in accordance with 21 V.S.A. §664; and
5. Costs and attorney fees in accordance with Conclusion of Law No. 16 above.

DATED at Montpelier, Vermont this 24th day of September 2009.

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.