

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

James Metivier)	State File No. S-12771
)	
v.)	
)	
Goss Dodge)	
)	
)	Opinion No. 15SJ-00WC

APPEARANCES:

Christopher J. McVeigh, Esquire, for the Claimant
Tammy Denton, Esquire, for the Defendant

MOTIONS FOR SUMMARY JUDGMENT

Both parties filed motions for summary judgment. Claimant seeks a ruling that he is entitled to permanent partial impairment benefits based on impairment of his upper extremity and interest on those benefits from the date due until today, and for an award of attorney's fees and costs. Defendant argues that claimant is only entitled to impairment of his index finger and seeks a ruling that claimant is not entitled to interest or attorney fees and costs.

ISSUES:

1. Whether claimant's permanent partial disability rating should be based on the left upper extremity or on the index finger.
2. Whether claimant's permanent partial disability payment should be assessed at benefits rate in effect on November 20, 1980 or at benefits rate in effect on November 3, 1982.
3. Whether claimant is entitled to interest on unpaid permanent partial disability benefits amount.
4. Whether award of attorney's fees and costs should be awarded to claimant.

For the purpose of this motion only are the following **FINDINGS OF FACT:**

1. At the stipulation and agreement of all of the parties, Premier Tire and Auto, Inc. was released from the claimant's currently pending claim against Goss Dodge, Inc. on May 2, 2000.

2. Claimant injured his left index finger at the PIP (proximal interphalangeal) joint on October 3, 1980 while at work for Goss Dodge, Inc. The cut became infected and was incised and drained. The infection did not subside and required subsequent hospitalization for IV antibiotics.
3. At the time of the injury, Goss Dodge, Inc. was insured by AIGCS.
4. Claimant returned to work before November 20, 1980 with full range of motion in his left index finger.
5. Claimant was not seen again for the injury regarding his left index finger until November 3, 1982. At this time, it was noted some loss of flexion and degenerative changes at the PIP joint. Hand therapy instruction was recommended at this time.
6. On January 6, 1994, Dr. Michel Y. Benoit examined the claimant. X-rays at that time showed significant osteoarthritis of the PIP joint in the left index finger. A fusion of the finger was recommended if pain became unacceptable. The claimant did not have the fusion treatment.
7. At AIG's request, Dr. Forest Brown performed an IME on June 4, 1997. Dr. Brown determined that the claimant had a 20% PPD of the upper left extremity based upon the loss of motion and strength in his left index finger. Additionally, he determined that the permanency was causally linked to claimant's 1980 work-related injury. At this time, Dr. Brown also recommended fusion treatment. The claimant did not have the fusion treatment.
8. Prior to June 4, 1997, AIG had not had claimant rated for any permanent partial impairment benefit.
9. On July 23, 1998, defendant offered to settle the claim with claimant who neither accepted nor rejected the defendant's offer until December 17, 1999 when claimant rejected the offer but offered a counteroffer. Claimant's counteroffer was rejected by defendant who then made a counteroffer that claimant rejected on February 25, 2000. The defendant has paid no permanent partial impairment benefits to claimant, (although, on April 7, 2000, defendant sent a check to claimant for \$11,727.52 that has not been cashed).
10. According to the First Report of Injury (Form No. 1) dated October 22, 1998, claimant aggravated his 1980 injury while at work for a different employer, Premier Tire and Auto, Inc. This employer was insured by Acadia Insurance at the time of the injury. As noted above, the parties stipulated to Premier Tire's dismissal from the instant action.
11. On October 22, 1998 Dr. Michel Y. Benoit determined that the claimant's condition was directly related to claimant's 1980 injury.

CONCLUSIONS OF LAW:

1. Summary judgment is appropriate when the party against whom the judgment is sought is given the benefit of all reasonable inferences but (1) there is no genuine issue of material

fact; and (2) the moving party is entitled to judgment as a matter of law. *V.R.C.P. 56(c), Toys, Inc., v. F. M. Burlington Co., 155 Vt. 44 (1990)*. Claimant seeks a ruling that he is entitled to permanent partial impairment benefits based on impairment of his upper extremity and interest on those benefits from the date due until today, and for an award of attorney's fees and costs. Defendant argues that claimant is only entitled to impairment of his index finger and seeks a ruling that claimant is not entitled to interest or attorney fees and costs. In this instance, there are several questions of fact that preclude summary judgment.

2. It is not in dispute that the claimant has suffered a permanent partial disability as a result of his October 3, 1980 work injury. As such, his employer had an affirmative obligation to investigate whether the claimant suffered any permanent impairment as a result of his work-related injury. *Longe v. Boise Cascade Corp.*, Opinion No. 42S-98WC (Sept. 9, 1998 and July 20, 1998); *Berno v. Stripping Unlimited, Inc.*, Opinion No. 07-98WC (Feb. 6, 1998); *Heaney v. Southwestern Vermont Medical Center*, Opinion No. 22-96WC (Apr. 29, 1996).
3. By handling a worker's compensation claim, an employer or its carrier must assume "the need to determine expeditiously the permanent impairment attributable to the claimant's work related injury, whether by inquiring of his own physician or obtaining the services of its own physician to evaluate the claimant." *Id.* Yet, the defendant merely assumed that claimant had no permanency when he returned to work. It never requested confirmation.
4. As a matter of law, the claimant is entitled to unpaid permanent partial disability benefits. *Longe, supra; Berno, supra; Heaney, supra*. It appears that Goss Dodge never investigated whether the claimant suffered a permanent impairment as a result of his work-related injury. It also appears that Goss Dodge never requested the claimant's physician to supply a report reflecting permanency, failed to ask claimant to be seen by a physician for a permanency rating until 1997, and failed to advise the claimant of his entitlement to permanency. Goss Dodge's failure to do its duty at the applicable time does not "relieve it of its duty to pay the amount owed to the claimant." *Longe, supra*.
5. There is no question that the claimant has reached a clear medical end result. Yet, neither party has established *when* this happened. "Medical end result" means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. *Workers' Compensation Rule 2(h)*. In this instance, the record indicates several possible medical end result dates. Determining the definitive date is a genuine issue of material fact best resolved at a hearing.
6. Consequently, the degree of permanency cannot be determined until it has been determined when the claimant reached a medical end point, because the two issues are so factually intertwined. As such, the degree of permanency remains an issue of material fact for which a hearing is necessary.
7. The claimant is entitled to an award of interest at the statutory rate of 12% starting with the date he reached a medical end result and running to the date of payment. *21 V.S.A. §*

678 (b); *Longe, supra*. However, until the medical end date has been established that precise time period cannot be determined.

8. The commissioner may award reasonable attorney fees and costs to a prevailing claimant. 21 V.S.A. § 678(a); *Worker's Compensation Rule 10(a)*. Because the claimant has succeeded on at least a portion of his claim because of the efforts of his attorney, attorney fees will be awarded as a matter of discretion. The amount of those fees will be determined at the hearing.
9. It is not in dispute that the claimant suffered a permanent partial disability as a result of his October 3, 1980 work injury. As such, as a matter of law, the claimant is entitled to unpaid permanent partial disability benefits. Yet, because there are several questions of fact, a hearing is necessary before the precise assessment can be made.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Claimant's motion for Summary Judgment on his entitlement to attorney fees and interest is GRANTED.
2. All other motions are DENIED.

Dated at Montpelier, Vermont, this 29th day of June 2000.

Margaret A. Mangan
Hearing Officer