

M. C. v. Rock of Ages

(July 21, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. C.

Opinion No. 32-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Rock of Ages

For: Thomas W. Douse
Acting Commissioner

State File No. U-07763

APPEARANCES:

Joseph C. Galanes Esq., for the Claimant
Keith J. Kasper Esq., for the Defendant

ISSUE:

The degree of permanent impairment Claimant suffered as a result of his work-related hernia.

CLAIMANT SEEKS:

1. Permanent Partial Disability Benefits pursuant to 21 V.S.A. § 648
2. Attorney fees and costs pursuant to 21 V.S.A. § 678(a)
3. Legal Interest

EXHIBITS:

1. Joint Medical Exhibit
2. Deposition transcripts of Claimant
3. Deposition transcripts of Dr. Kiernan
4. Deposition transcripts of Dr. Brigham
5. Supporting materials from the AMA Guides and Mastering the AMA Guides

STATEMENT OF FACTS:

1. Claimant began working for Rock of Ages on April 24, 1989 and works there presently. At all times relevant to this action, Defendant Rock of Ages was Claimant's "employer" and Claimant Myron Coburn was Defendant's "employee" within the meaning of the Vermont Workers' Compensation Act.
2. The relevant facts involving Claimant's injury that arose during the course of his employment are undisputed.
3. Claimant suffered a first work-related hernia on June 28, 2000. Dr. Kiernan repaired the hernia with stitches on July 14, 2000.
4. In the present claim, the Claimant suffered a work-related injury on November 12, 2003. He was pulling on a very long heavy steel and rubber 3 inch diameter hose that got caught. He yanked on it and noticed pain in the same location as his prior hernia. He reported it to his foreman.
5. Claimant's family physician referred Claimant to Dr. Kiernan who performed surgery to repair the second hernia in same location as the previous hernia.
6. Dr. Kiernan's pre-operative note describes this hernia as a "recurrent left inguinal hernia." The Claimant sustained both a direct hernia—a tear in the floor of the canal and an indirect hernia—material protruding through the ring as a result of this work accident. On January 5, 2004, Dr. Kiernan performed the second hernia repair, using a procedure that included placing a prolene mesh and a hernia prosthesis in the injured area. Dr. Kiernan described this hernia as a "pantaloon hernia" because it was a double hernia.
7. Dr. Kiernan's post-operative follow up examination on January 20, 2004 indicates that Claimant's hernia was healing well and that he should be able to return to work when quarry re-opened in the spring. However, Dr. Kiernan did note that Claimant should still "avoid very heavy lifting, i.e. 100#'s."
8. In response to a request from Defendant insurer for a decision regarding a medical end result, Dr. Kiernan examined Claimant on March 9, 2004. Claimant was released to return to work full duty with a cautionary note to be careful when doing extremely heavy lifting 100-150 pounds. Claimant's job requires extremely heavy lifting daily. Upon releasing Claimant for full duty, Dr. Kiernan conceded that he did not know how much Claimant was required to lift at work.

9. Liberty Mutual Insurance Company is responsible for Defendant's workers' compensation to the Claimant. Defendant insurer does not dispute the fact that Claimant suffered a work-related hernia. Defendant insurer paid Claimant all temporary total disability and all reasonable and necessary medical charges incurred as a result of the work-related injury.¹
10. Currently, over two years later, Claimant is able to work but continues to experience activity-dependent daily pain while performing his routine tasks at the Rock of Ages quarry. When questioned during his deposition about Claimant's continued pain, Dr. Kiernan averred that patients who undergo a mesh repair generally have some degree of discomfort during certain activities and some of Claimant's discomfort may be due to a "nerve that comes through that area called the ilioinguinal nerve, and it runs right underneath the external oblique fascia ..." and "An ilioinguinal nerve can cause discomfort whether you sew it or use mesh."
11. Dr. Kiernan's March 9, 2004 final examination did not show any evidence of hernia recurrence on physical examination prior to Claimant's return to work.
12. Defendant did not investigate whether Claimant suffered permanent impairment as a result of his work-related hernia, when, according to Dr. Kiernan, Claimant reached a medical end result.² Defendant insurer maintains that Dr. Kiernan's March 9, 1994 examination qualifies both for a medical end result and for a permanency rating. While Dr. Kiernan's final examination successfully establishes a medical end result, it fails to meet the requirements of a permanent impairment rating using the AMA Guides, which Dr. Kiernan did not do.
13. Claimant's counsel requested an IME, which was performed by Dr. Fenton on August 3, 2005. Dr. Fenton reported Claimant's experience of discomfort when he does heavy lifting as "significant pain and dysfunction that lasts around 1.5 days. If he doesn't do any heavy lifting he has no pain, only the occasional prickly sensation." Using the AMA Guides Fifth Edition, Table 6.9, Dr. Fenton assigned a 9% permanent impairment rating for the Claimant's injury "since he has to avoid heavy lifting, and surgical findings were of true hernia mass."
14. Pursuant to an interim order of December 12, 2005, Defendant began paying permanency benefits retroactive to the August 3, 2005 date of Dr. Fenton's permanency evaluation.

¹ Pursuant to 21 V.S.A. §§ 662(a) and Worker's Compensation Rule 17.0000 Compensation Agreements—Temporary Total Disability Benefits (Form 21).

² Worker's Compensation Rule 18.11 requires that "The employer (insurer) shall take action necessary to determine whether an employee has any permanent impairment as a result of the work injury at such time as the employee reaches a medical end result."

15. At the request of Defendant's counsel, Dr. Brigham reviewed Claimant's medical records on January 24, 2006, and rendered a permanent impairment rating of 0%. Dr. Brigham disagreed with Dr. Fenton's impairment rating of 9%, because, in his opinion, Dr. Fenton did not properly apply AMA Guides; but he acknowledged that Dr. Fenton did put Claimant into the right categories and class under the guidelines. Dr. Brigham also supported his 0% permanent impairment rating by noting that Claimant's surgeon, Dr. Kiernan, set no restriction on lifting outside of "what would be normally reasonable for any individual."
16. After paying 2/3 of Claimant's 9% permanent partial disability benefits, the carrier filed and this Department approved an Employer's Notice of Intention to Discontinue Payments (Form 27) effective on February 2, 2006. The Form 27 included as evidence Dr. Brigham's 0% permanent impairment rating.
17. Dr. Brigham used medical records from Dr. Kiernan's March 9, 2004 examination and also the IME conducted by Dr. Fenton on August 3, 2005. He established a 0% permanent impairment rating because the medical records contained no evidence of a postoperative palpable defect. When asked about Claimant's pain, Dr. Brigham maintained that there was no permanent impairment resulting from the successful hernia surgery and, he suggested using chapter 18 of the AMA guidelines, which allow up to 3% maximum impairment of the whole person, based on the extent of patient's pain—rather than on impairment. To establish his permanent impairment rating of Claimant, Dr. Brigham relied solely upon medical records. Dr. Brigham did not speak with Claimant, conduct a physical examination of Claimant, or read Claimant's deposition testimony. Dr. Brigham did not address whether Claimant experienced any limitations affecting his activities of daily life.
18. Claimant has a bulge at the surgical site. He experiences regular discomfort at the hernia site. He is in pain every time he picks up something either at work lifting drilling equipment or at home lifting his thirty-two pound, three-year old grandson. Claimant has modified his daily routines at work due to the pain he experiences while lifting. He now leans the drill bits in a standing position rather than laying them down to avoid any extra lifting. Claimant stopped performing regular activities of daily living (ADL) due to discomfort from the second hernia surgery. He tries to be careful about what he does outside of work because he "just doesn't want to deal with the pain." For example, Claimant's wife brings in the groceries and takes care of all the cleaning; Claimant does not shovel snow or dirt in the garden anymore because that too irritates the hernia site. Another example of Claimant's inability to perform normal activities is that he no longer maintains and repairs the family cars. Claimant acknowledged a regular pattern of reoccurring activity-related pain that he rated at a seven, on a scale from one to ten.
19. Both parties agreed to resolve this matter on the papers in support of their respective positions: they submitted briefs, deposition transcripts, and medical records to the Department.

CONCLUSIONS OF LAW:

1. In a worker's compensation claim, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Claimant has established a work-related injury. At issue is the degree to which he is entitled to permanency benefits. The conclusions of the two experts, Dr. Fenton for the Claimant and Dr. Brigham for the Defendant, are sharply divided with Dr. Fenton finding a permanency impairment of 9% of whole person and Dr. Brigham finding no permanency rating. A closer look at the record indicates that the carrier paid 2/3 of the 9% permanency rating before discontinuing payment. Thus, the percentage in controversy is really the final 3% of the permanency rating of 9%.
3. Both experts, Drs. Fenton and Brigham rely on AMA Guides, Chapter 6, Table 6.9, Fifth Edition p.136, for their opinions. Table 6.9 describes three classes of hernia-related impairments, with permanent whole person ratings that range from 0 to 30%. Each class requires a "palpable defect in the supporting structures of the abdominal wall." In addition:
 - Class 1, with a 0% to 9% impairment, requires the palpable defect and:
a "sight protrusion at the site of defect with increased abdominal pressure,
readily reducible"
or
occasional mild discomfort at site of defect, but not precluding normal
activity."
 - Class 2, with a 10% to 19% rating, requires the palpable defect and:
"frequent or persistent protrusion at site of defect with increased abdominal
pressure, manually reducible"
or
"frequent discomfort, precluding heavy lifting, but not hampering normal
activity."

The table does not distinguish between pre- and post-operative status.

4. Here, Claimant has suffered a work-related hernia. Thus, he satisfies this Department's previous finding in Knapp-Bowen that "A hernia is a defect. Because it is undisputed that Claimant had a work-related hernia, the threshold criterion for all three classes in Table 7 'palpable defect in the supporting structures of the abdominal wall' has been met" and that once a defect is determined the question arises as to whether the Claimant's symptoms put him in any of the three classes in Table 6.9 of the AMA Guides.³ *Erin Knapp-Bowen v. Equinox Terrace*, Op. No. 4-98WC (1998). The AMA Guides example 6-29 shows that an individual is assigned a 0% rating when there is "no significant risk of complications and no limit in ability to perform activities of daily living." Dr. Fenton's finding that Claimant is eligible for a rating higher than the 0% found by Dr. Brigham is supported by Claimant's testimony because his activities of daily living are curtailed; evidenced by his discomfort when lifting his three-year old grandson, that his wife carries in the groceries, his inability to shovel snow or dirt, and that he is no longer able to maintain and repair the family cars.
5. Dr. Fenton's August 4, 2005 IME noted that Claimant does not experience significant pain and dysfunction if he does not do any heavy lifting but that he still has an occasional prickly sensation. Claimant's surgeon, Dr. Kiernan, explained that individuals who have received a prolene mesh repair for a hernia commonly experience the occasional prickly sensation because the prolene mesh does not stretch the way skin does. Dr. Kiernan also asserted that Claimant's pain might be the result of irritation to the ilioinguinal nerve. Either of these explanations indicates that Claimant is impaired due to his hernia surgery. But, Dr. Brigham did not read either Drs. Kiernan and Fenton's nor Claimant's depositions, instead of addressing Dr. Fenton's statement that Claimant suffered "significant pain and dysfunction" in regard to the AMA Guides, Dr. Brigham recommended that Claimant be rated according to Table 18 for pain—rather Table 6.9 for impairment.⁴
6. Dr. Brigham's 0% impairment rating is incompatible with the AMA companion edition to the AMA Guides, which is published to assist physicians in applying the Guides, as indicated in Example 6-29 of the AMA Guides Fifth Edition, according to the *Master the AMA Guides*, "an uncomplicated hernia that does not limit the ability to perform ADL is given a 0% WPI rating." *Fifth Edition*, Chapter 6.6, p.81.

³ Table 7 in the 4th Edition of the AMA Guides is now Table 6.9 in the current 5th Edition of the AMA Guides.

⁴ According to the AMA Guides Glossary, impairment is the loss of, the loss of the use of, or derangement of a body part, function or system.

7. Dr. Brigham disputes Dr. Fenton's 9% permanency rating as inaccurate because Dr. Fenton based his finding on Claimant's subjective experience of pain. However, Dr. Brigham does not mention that the AMA Guides Fifth Edition, p. 2 states that, "Although the Guides emphasize objective assessment, subjective symptoms are included within the diagnostic criteria." Dr. Brigham also interprets the AMA Guides, Table 6.9 Class 1 to require as a threshold that Claimant have a "palpable defect in the supporting structure of the abdominal wall." Despite Dr. Brigham's unfavorable opinion and regardless of Dr. Fenton's failure to use language that easily translates his 9% rating into the language of the AMA Guides, his substantive statements, Claimant's testimony, and case precedent support a 9% rating.
8. The fundamental difference between the opinions, which the defense argues is dispositive, rests upon differing interpretations of how to apply the AMA Guides. Dr. Fenton based his opinion on Claimant's need to avoid heavy lifting and surgical findings of a "true hernia mass." Thus, according to *Erin Knapp-Bowen v. Equinox Terrace*, Claimant is eligible for a permanency rating from 0-10% depending on the degree of protrusion, discomfort, or limitation in activities. Op. No. 4-98WC (1998).
9. The Department applied *Knapp-Bowen* to the facts of *Mason Estabrook v. New England Precision & USF&G Insurance*, Op. No. 10-00WC (2000) and found that Mr. Estabrook had suffered an undisputed work-related hernia that "if upon physical examination claimant has resulting frequent discomfort, precluding heavy lifting but not hampering normal activity, his permanent impairment must result in at least a Class 2 impairment according to Table 6.9 of the AMA Guides." Mr. Estabrook's treating physician found an abdominal wall defect during surgery and repaired it using prolene mesh. Similarly, here, Dr. Kiernan found an abdominal wall defect, a direct and indirect double hernia, in Claimant's abdominal wall, which he repaired using prolene mesh.
10. In *Estabrook*, this Department relied on expert medical interpretation of the AMA Guides that determined an impairment "is best understood as a residual observable or otherwise identifiable abnormality following an injury or illness" and that a rating greater than zero depended upon "the impact of the residual abnormalities on the individual's ADL, as they are listed according to the AMA Guides, and on the degree to which an individual's capacity to carry out daily activities such as those listed on page 317 is diminished."⁵ Op. No. 10-00WC (2000). Here, Claimant continues to suffer with residual signs and symptoms two years following his surgically repaired hernia. Therefore, he has an impairment. Furthermore, Claimant does have limited ability to perform ADL, thus, he is eligible for a higher WPI rating.
11. Dr. Fenton rated Claimant according to the Class 1 scale because Claimant experiences "mild discomfort at the site of the defect"—where the prolene mesh is located, which places Claimant in Class 1. Additionally, Claimant experiences frequent discomfort when lifting, which places Claimant in Class 2. But, Dr. Fenton did not place Claimant

⁵ AMA Guides, p. 317 which list ADL in the Fourth Edition is now listed in Chapter 1, p.7. Relevant ADL include vigorous activities such as lifting heavy objects, carrying groceries, moving a table, or sports like playing golf.

in Class 2 because, unlike Mr. Estabrook who was rated at Class 2, it does not preclude Claimant from heavy lifting, despite Claimant's experience of activity-related pain on a daily basis, which he chooses to endure in order to continue working at the Rock of Ages quarry. Unlike Mr. Estabrook, Claimant's daily life activities are, however, curtailed due to discomfort resulting from his hernia repair, thus, Dr. Fenton correctly placed Claimant in the high end of the Class 1 permanent impairment rating, at 9%.

12. Dr. Brigham is undisputedly a qualified expert and author on applying the AMA Guides. However, Dr. Brigham's application of Table 6.9 of the AMA Guide, in this instance, is contrary to precedent set by this Department in *Knapp-Bowen* and *Estabrook*.
13. The credible evidence is also contrary to Dr. Brigham's conclusion that there was no palpable mass: Claimant's description of a bulge at the surgical site and Dr. Fenton's report of a surgical finding of a mass.
14. Dr. Brigham did not speak with Claimant, conduct a physical examination of Claimant, or read Claimant's deposition testimony. Dr. Brigham uses a formulaic approach to apply the AMA Guides in an effort to standardize their national application but, in so doing, he neglects to take into account Claimant's credible testimony, evidencing a clear diminution in the quality of his daily life outside of work, and he failed to apply the AMA Guides according to his own standards, which require a physical examination to determine whether the Claimant has a palpable defect.
15. Therefore, based upon this Department's precedent in *Knapp-Bowen*, Dr. Fenton's IME, and Claimant's credible testimony, the most probable premise is that Claimant sustained a 9% permanent impairment.

ATTORNEY'S FEES AND COSTS:

16. Attorney's Fees and Costs: Pursuant to 21 V.S.A. §678, Claimant's entitlement to reasonable and necessary cost is a matter of law; his right to attorney's fees is a matter of discretion. *Morriseau v. Legac*, 123 Vt. 70 (1962). See *Lowell v. Rutland Area Visiting Nurses Assoc.*, Op. No. 42-99WC (1999).

ORDER:

WHEREFORE, it is hereby ordered that Defendants pay Claimant:

1. Permanent partial disability benefits based on a 9% whole person impairment;
2. Interest at the statutory rate from August 3, 2005 to the date of payment;
3. Costs of litigation totaling \$875.94;
4. Attorney's fees equaling 20% of the award not to exceed \$6,000.

Dated at Montpelier, Vermont this 21st day of July 2006.

Thomas W. Douse
Acting 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.