

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

*Laurie Hawkins*

*Opinion No. 53-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*Visiting Nurse Association*

*For: Michael S. Bertrand  
Commissioner*

*State File No. T-52206*

**APPEARANCES:**

*Beth Robinson, Esq., for the Claimant  
Keith J. Kasper, Esq., for the Defendant*

**RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT**

*Claimant moves to reopen a permanency agreement based on her contention that it was based on mutual mistake, was accepted by the claimant when she was unrepresented and shortchanged her.*

**UNDISPUTED FACTS FOR SUMMARY JUDGMENT:**

- 1. Claimant incurred a work related injury to her right shoulder in November 2000 while working at Wake Robin. Six months later, On May 10, 2001, she underwent right shoulder arthroscopic surgery for debridement of tears and excision of the distal clavicle.*
- 2. Claimant reached medical end result for the 2000 injury on October 30, 2001 and received a permanency rating from Dr. Vargas of 3% to 5%. Royal and Sun Alliance paid claimant permanent partial disability benefits based on a 3% whole person impairment.*
- 3. On September 11, 2002, claimant injured her right shoulder again, but this time it was while working for the Visiting Nurses Association (VNA). According to her surgeon, Dr. Lawlis, she reached medical end result on August 26, 2003.*

4. *After the second injury, Dr. White assessed claimant's total impairment at 11% whole person, 6% of which he attributed to the earlier injury at Wake Robin and 5% to the recent injury. He based his rating not on the range of motion data but on the section of the AMA Guides dealing with resection arthroscopy.*
5. *Liberty Mutual, carrier of VNA, then prepared a Form 22 Agreement for Permanent Partial Disability benefits, for a 5% impairment after subtracting 6% from the total. Claimant, unrepresented at the time, signed that agreement.*
6. *Claimant seeks to have that Form 22 reopened so that only the impairment actually paid (3%) is deducted from the total.*

#### Department Form 22

7. *The claimant and the insurance adjuster signed the Form 22 approved by this Department on January 9, 2004 for a 5% (20.25 week) impairment. The form states that the rating is based on a report from George White, Jr., M.D.*
8. *The report from Dr. White clearly specifies under a heading identified as "apportionment" that claimant's total whole person impairment was 11%, that the prior impairment was 6% whole person and that the impairment from reinjury was 5%.*

#### Conclusions of Law

1. *The Vermont Rules of Civil Procedure apply to contested workers compensation proceedings, if they do not interfere with the informal nature of the hearing. WC Rule 7.100; see also Dodge v. Precision Construction Products, Inc. 2003 VT 11 ¶ 5. Therefore, this motion for summary judgment is properly before the Department and either party is entitled to judgment as a matter of law if there is no genuine issue of material fact. V.R.C.P. 56 (c)(3).*
2. *The issue for decision is whether the Form 22 can be reopened. "Once executed by the parties and approved by the division, these forms shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof." WC Rule 17.000. "To rule otherwise would*



3. *There is no allegation of fraud in this case, but claimant argues that there was a mutual mistake of material fact because she, the adjuster, and the Department all missed that Dr. White incorrectly recited what had previously been paid. Such an argument reads more into Dr. White's report than what is there. He identified the total impairment (11%) and what he determined was attributable to the prior injury (6%). He did not state what had been paid. In fact, the one person who knew what had been paid was the claimant, who had received the payment. Had claimant been represented at the time she signed the second Form 22, she may have been counseled not to accept the 5% rating. She now argues that in a system in which claimant are encouraged to navigate alone, she should not be bound by that uncounseled agreement. However, the Vermont Supreme Court rejected such an argument in a case of a previously unrepresented claimant upholding, "the time-honored principle that all persons are presumed to know the law." Longe v Boise Cascade Corp., 171 Vt. 214, 226 (2000).*
4. *In this case, claimant must be presumed to know what she had been paid. Dr. White's report was clear and available to all parties. On such a record, I cannot find mutual mistake or any other grounds that justify reopening the Form 22. Therefore, claimant's motion for summary judgment is DENIED.*

*Dated at Montpelier, Vermont this 3<sup>rd</sup> day of December 2004.*

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*Michael S. Bertrand  
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.*