

J. B. v. Steven Betit

(July 21, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. B.

Opinion No. 32-08WC

v.

By: Phyllis G. Phillips, Esq.
Hearing Officer

Steven Betit

For: Patricia Moulton Powden
Commissioner

State File No. Y-51024

OPINION AND ORDER

Hearing held in Montpelier on April 21st and May 7th, 2008

APPEARANCES:

Joseph Galanes, Esq., for Claimant
Tammy Denton, Esq., for Defendant

ISSUE PRESENTED:

What is the appropriate permanent partial impairment rating for the injuries Claimant suffered in his June 28, 2006 work accident?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit

Claimant's Exhibit 1: Correspondence from Attorney Galanes to Attorney Denton,
November 14, 2007

Defendant's Exhibit A: *Curriculum Vitae*, William F. Boucher, MD

CLAIM:

Permanent partial disability benefits under 21 V.S.A. §648
Penalties and interest under 21 V.S.A. §650(e)
Attorney's fees and costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.
2. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
3. On June 27, 2006 Claimant was performing masonry work for his brother, a home builder and construction contractor. He was standing on second story staging, building a stone fireplace and chimney, when he fell approximately 15-20 feet to the floor, landing on his buttocks. He felt immediate pain in his back and partial paralysis in his legs.
4. As a result of the fall Claimant suffered a burst fracture of the L1 lumbar disc with 80% spinal canal compromise. On June 29, 2006 he underwent surgery to repair the damage, including a spinal fusion from T12 to L2.
5. Defendant accepted Claimant's claim as compensable and paid benefits accordingly.
6. Post-surgery Claimant's spinal surgeon, Dr. Cheney, diagnosed him with conus medullaris syndrome. Subsequently, Claimant's treating neurologist, Dr. Donaldson, diagnosed him with cauda equina syndrome as well.
7. The conus medullaris is the tapering end of the spinal cord, where the nerves going to the sacrum and pelvis are located. The cauda equina ("tail of the horse") is a bundle of peripheral nerve roots that branch off higher but dangle below the end of the spinal cord. Conus medullaris syndrome is caused by a spinal cord lesion involving the nerves to the sacrum and pelvis, whereas cauda equina syndrome refers to a peripheral nerve lesion. The difference between the two is often one of degree. A burst fracture of the L1 vertebra is likely to impact both the conus medullaris and the cauda equina. The symptoms that result may include severe pain, bowel, bladder and sexual dysfunction, saddle anesthesia, loss of motor and sensory function in the lower extremities and radicular pain.
8. Claimant's medical records document symptoms of severe neurological compromise consistent with both conus medullaris syndrome and cauda equina syndrome following the June 2006 work accident. Specifically, Claimant has experienced urinary leakage, fecal incontinence, unreliable sphincter function and inconsistent sphincter control, decreased genital, anal and pelvic sensation, erectile dysfunction, and numbness and weakness in his left lower extremity.
9. Claimant has a prior medical history of familial polyposis for which he underwent surgical removal of his large intestine in 1991. As a result of that surgery he had frequent loose stools, but no other symptoms of bowel dysfunction. Nor does Claimant's prior medical history include any of the other symptoms listed in Paragraph 7 above.

10. At Defendant's request, in July 2007 Claimant underwent an independent medical evaluation with Dr. Boucher. Dr. Boucher is board-certified in occupational medicine. His primary business involves performing independent medical evaluations. Based both on his review of the medical records and his own examination, Dr. Boucher concluded that Claimant had suffered a 23% whole person permanent impairment causally related to the June 2006 work injury. Dr. Boucher's impairment rating was premised on the following notable considerations:
- (a) Dr. Boucher noted that Claimant had radicular complaints at the time of the June 2006 injury, but opined that these neurological findings had since resolved and that there was no current evidence of radiculopathy. Thus, he concluded that Claimant's injury qualified for a maximum 23% whole person impairment rating under the applicable sections of the *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), and not for the higher impairment rating that would have been merited had there been evidence of radiculopathy.
 - (b) Dr. Boucher did not include any consideration of Claimant's reported bladder, bowel or sexual dysfunction in his impairment rating. Dr. Boucher noted that Claimant had not undergone any objective testing for either cauda equina syndrome or conus medullaris syndrome and therefore there was no objective corroboration for his complaints of bladder, bowel and/or sexual dysfunction. According to Dr. Boucher's interpretation of the *AMA Guides*, without such objective corroboration it would be inappropriate to assign any impairment rating referable to these symptoms.

11. At his attorney's referral, in August 2007 Claimant underwent an independent medical evaluation with Dr. Gennaro. Dr. Gennaro is an osteopathic physician and orthopedic surgeon. Based on his review of Claimant's medical records as well as his own examination, Dr. Gennaro concluded that Claimant had incurred a 50% whole person impairment causally related to the June 2006 work injury. In contrast to Dr. Boucher's conclusions as to the extent of Claimant's permanent impairment, Dr. Gennaro considered the following factors in arriving at this higher rating:
 - (a) Dr. Gennaro noted objective evidence of both weakness and diminished sensation in Claimant's left lower extremity. These findings met the criteria of radiculopathy so as to justify inclusion in a higher impairment category under the *AMA Guides*, for which Dr. Gennaro rated a 28% whole person impairment.
 - (b) According to Dr. Gennaro, there was no question that the June 2006 injury caused significant impingement of Claimant's spinal cord and resulting damage to his conus medullaris and cauda equina. Claimant's subsequent complaints of bladder, bowel and sexual dysfunction all were consistent with such damage. In Dr. Gennaro's opinion, under these circumstances the causal relationship was sufficiently evident that an extensive diagnostic work-up for other possible causes would have been "a colossal waste of time and money." Thus, Dr. Gennaro included these symptoms as elements of his permanent impairment under the *AMA Guides*.
12. In March 2007 Defendant's workers' compensation insurance carrier received an Order and Writ of Execution on Trustee Process from the Vermont Agency of Human Services. The order obligated Defendant to pay any nonexempt workers' compensation benefits directly to the Office of Child Support in satisfaction of Claimant's outstanding child support arrearage. Claimant's attorney initially indicated that Claimant intended to dispute the enforcement of any child support lien against his workers' compensation benefits. Presumably because it was unclear to whom to make payment, whether it be to the Office of Child Support or directly to Claimant, Defendant did not advance any permanency benefits to Claimant upon receipt of Dr. Boucher's impairment rating in August 2007. By correspondence to Defendant's attorney dated October 29, 2007 Claimant's attorney clearly indicated that he was withdrawing his objections to the Order and would not dispute Defendant's payment of any permanent partial disability benefits directly to the Office of Child Support in accordance with the Order. Notwithstanding this correspondence, Defendant still has not paid any permanency benefits, even though the amount due at least in accordance with Dr. Boucher's impairment rating is undisputed.

CONCLUSIONS OF LAW:

1. The disputed issue in this claim is straightforward. Should Claimant be awarded permanent partial disability benefits in accordance with Dr. Boucher's 23% impairment rating or should Dr. Gennaro's 50% rating control instead?
2. 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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).
3. I find Dr. Gennaro's opinion as to the extent of Claimant's permanent impairment to be the more credible one. Dr. Gennaro noted sufficient evidence of radiculopathy in his examination of Claimant to justify the higher rating relative to Claimant's spine injury. In addition, I find persuasive Dr. Gennaro's opinion that given the nature and extent of the June 2006 injury, further diagnostic testing to rule out other possible causes for Claimant's symptoms of bladder, bowel and sexual dysfunction was not necessary. It was proper to consider these symptoms in determining the appropriate impairment rating, therefore.
4. I also conclude that once Claimant withdrew his objection to the lien imposed by the Office of Child Support, Defendant was remiss in not advancing permanent partial disability benefits at least to the extent of Dr. Boucher's 23% impairment rating. In situations where the amount of compensation due is disputed, Workers' Compensation Rule 3.1200 requires an employer to pay the amount it deems correct pending the Commissioner's resolution of the dispute. Under 21 V.S.A. §650(e), benefits that are not disputed must be paid within 21 days of becoming due and payable. I find that the permanency benefits owed in accordance with Dr. Boucher's impairment rating became due and payable 21 days after Claimant withdrew his objection to the Office of Child Support lien, or November 19, 2007. In accordance with §650(e), 10% of the overdue amount must be added and is now due.
5. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$2,442.59 and contingent attorney's fees 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's 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 fact and conclusions of law, Defendant is ORDERED to pay:

1. Permanent partial disability benefits in accordance with Dr. Gennaro's 50% whole person impairment rating;
2. A 10% penalty added to the amount payable in accordance with Dr. Boucher's 23% impairment rating;
3. Accrued interest commencing on November 19, 2007 and computed as of the date each weekly payment became due;
4. Costs of \$2,442.59 and attorney's fees of in accordance with Workers' Compensation Rule 10.1220.

DATED at Montpelier, Vermont this 21st day of July 2008.

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.