

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

)	State File No. M-23697
)	
Betty Darling)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
G.S. Precision)	Commissioner
)	
)	Opinion No. 07-01WC

Hearing Held in Montpelier on October 10, 2000.
Record Closed on October 31, 2000.

APPEARANCES:

John C. Mabie, Esq. for the claimant.
Robert P. Gerety, Esq. for the defendant.

ISSUES:

What is the nature and extent of any permanent impairment suffered by the claimant as a result of her work-related injury? What, if any, permanent partial disability benefits are due the claimant?

Is the claimant entitled to an award of attorney's fees and costs?

EXHIBITS ADMITTED:

Joint Exhibit I: Medical Records.
Joint Exhibit II: Transcript of deposition of John L. Carmody, M.D.
Joint Exhibit III: Form 28, Notice of Change in Compensation Rate.
Joint Exhibit IV: Form 22, Agreement for Permanent Partial Disability Compensation.

Claimant's Ex. 1: Fee agreement with attorney.
Claimant's Ex. 2: Statement of account.

FINDINGS OF FACT:

1. The claimant worked at G.S. Precision from August 1998 through September 1999 as a deburrer and tumbler. She testified that both jobs required extensive use of the hands. In the deburrer job, she pushed 3-inch long ½ inch wide steel rods through holes to remove rough edges on approximately 5,000 parts each day. As a tumbler, she gripped magnets

to remove parts from a tumbler. The First Report of Injury states that she was cleaning a tumbling barrel at the time of the injury.

2. While in the employ of G.S. Precision, the claimant suffered an injury to her upper extremities and sought treatment on May 19, 1999.
3. Dr. John Carmody, the claimant's treating physician, made the diagnosis of chronic bilateral upper extremity pain/overuse syndrome. Dr. Carmody is a Board Certified general surgeon with a subspecialty in hand surgery who has practiced medicine for 26 years. He had formal training at an American Society for Surgery Hand meeting that included the mechanics of the use of the *Guides*. In addition he has used the *Guides* in his many years of practice.
4. EBI Companies, Inc., the workers' compensation insurance carrier, paid the claimant temporary total disability benefits and reasonable and necessary medical expenses incurred as a result of the work-related injury. The claimant reached medical end result on September 28, 1999. The only remaining dispute is the degree of permanent impairment, if any.
5. In a report dated September 10, 1999, Dr. Donald Ayers, Board Certified Neurologist, made several comments regarding his examination and diagnosis of the claimant including the following: She had an exaggerated response to even pinprick throughout both extremities. There were no peripheral nerve or dermatomal distributions demonstrable. During direct examination, she reported exquisite tenderness in the muscles of the forearms bilaterally. However, that tenderness was absent when she was distracted at the time significant pressure was applied. EMG studies demonstrated only minimal slowing in the right medial transcarpal sensory conduction. Examination revealed no significant abnormalities of sensory or motor function.
6. The claimant's treating physician, Dr. Carmody, rated the claimant's permanent partial impairment at 28% whole person. Dr. Kuhrt Wieneke, whom the defendant consulted, determined that the claimant had no permanent impairment.
7. Based upon Dr. Wieneke's opinion, the insurer declined to pay permanent partial benefits and the claimant requested a hearing. After the request for a hearing, the insurer obtained another opinion on permanency, based on a record review.
8. Dr. Mark Bucksbaum conducted that review. He applied the 4th edition of the *AMA Guides to the Evaluation of Permanent Partial Impairment* ("*Guides*") to Dr. Carmody's examination findings, then rated the claimant's impairment at 9% whole person. Dr. Bucksbaum is Board Certified in Physical Medicine and Rehabilitation and as an Independent Medical Examiner. The certifications required courses and an examination to prove competence.
9. Based upon Dr. Bucksbaum's opinion, the insurer paid the claimant benefits based on a 9% whole person permanent partial disability rating.
10. Dr. Carmody analyzed the claimant's upper extremity impairment under § 3.1(k)

“Impairment of the Upper Extremity due to Peripheral Nerve Disorders” in the 4th Edition of the *Guides*. That section includes Table 11 entitled “Determining Impairment of the Upper Extremity due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders.” The classifications listed in Table 11 range from one to five, with sensory deficits from 0 to 100%. In Grade one, which has a zero rating, there is no loss of sensibility, abnormal sensation or pain. At a minimum, all other grade classifications in that table require a finding of “decreased sensibility.” Grade 3 specifies “[d]ecreased sensibility with or without abnormal sensation or pain, which interferes with activity.” It was from Grade 3, which assigns a 26 to 60% sensory deficit, that Dr. Carmody placed claimant’s impairment at a 50% deficit of the upper extremity, justifying that determination with the claimant’s report of pain that restricted activity. However, Dr. Carmody acknowledged that the claimant had no loss of sensibility. He testified that the total basis for his determination that she has Grade 3 impairment was the claimant’s reports of pain.

11. Next, using Table 15, “Maximum Upper Extremity Impairments Due to Unilateral Sensory or Motor Deficits or Combined Deficits of the Major Peripheral Nerves,” Dr. Carmody noted that the claimant had three nerves involved in her forearms and hands: median, ulnar and radial. Then he multiplied what he determined was a 38% impairment to the median nerve below the elbow by the previously determined 50%, ($38\% \times 50\% = 19\%$); a 5% upper extremity impairment due to the radial nerve by 50% ($5\% \times 50\% = 2.5\%$); and 7% impairment of the ulnar nerve by the 50% ($7\% \times 50\% = 3.5\%$). After adding the three together, he determined that the claimant’s total upper extremity impairment was 25% which, according to Table 3 on page 20 of the *Guides*, converts to 15% whole person impairment. Because the claimant’s impairment is bilateral, Dr. Carmody combined 15% for the right side with 15% for the left using the Combined Values Chart, resulting in a 28% impairment of the whole person.
12. Dr. Bucksbaum determined that proper application of the *Guides* would lead to the conclusion that the claimant has a 9% permanency rating. If one were to use Table 11 for a worker with no loss of sensibility, the rating would be zero. He explained that Table 11 is not intended to be used to evaluate cases where there has been no loss of sensibility. According to Dr. Bucksbaum, Dr. Carmody did not follow the letter or spirit of the *Guides* when he arrived at the 28% rating.
13. Dr. Bucksbaum based his 9% rating on application of Dr. Carmody’s clinical findings and Dr. Ayers’s electrodiagnostic tests to the *Guides* criteria. He determined that the claimant suffered a mild median nerve entrapment at the right wrist that equals 10% impairment of the upper extremity under Chapter 3, Table 16 “Upper Extremity Impairment Due to Entrapment Neuropathy.” That upper extremity impairment converts to a 6% whole person impairment. Next, he added 3% for bilateral pain by following a provision in the *Guides* that permits a physician in rare cases to increase the impairment when he determines that it does not reflect the severity of the claimant’s condition. *Guides*, Chapter 3, pages 63-64, “Other Musculoskeletal System Defects.” Combining the two impairment ratings, Dr. Bucksbaum arrived at a total whole person rating of 9%.
14. The claimant submitted evidence of her fee agreement with her attorney and a statement

reflecting 68.75 hours worked and \$121.80 in disbursements.

CONCLUSIONS OF LAW:

1. With the sole issue for decision the degree of permanent partial impairment the claimant sustained as a result of her work-related injury, the choice to be made is between Dr. Carmody's 28% rating and Dr. Bucksbaum's 9%. When choosing between conflicting expert opinions, this Department traditionally has considered several factors: 1) the nature of the treatment and length of time there has been a patient-provider relationship; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion, including whether the report or evaluation is clear and thorough. *Yee v. IBM*, Opinion No. 38-00WC (Nov. 9, 2000); see also *Morrow v. Vermont Financial Services*, Opinion No. %0-98WC (Aug. 25, 1998); *Miller v. Cornwall Orchards*, Opinion No. 20-97 WC (Aug. 4, 1997).
2. These factors must be considered in light of the narrow question presented and the directive in the *Guides* that provides: "This comparison [between the medical evaluation and criteria specified in the *Guides*] is distinct from the preceding clinical evaluation and need not be performed by the physician who did that evaluation; rather any knowledgeable person can compare the clinical findings with the *Guides* criteria and determine whether or not the impairment estimates reflect those criteria. *Guides* at 2/8.
3. In this case, only Dr. Carmody has had a treating physician relationship with the claimant. Both he and Dr. Bucksbaum have the requisite education and experience, although Dr. Bucksbaum has the advantage of having had more intense training with the use of the *Guides*. Both physicians had the necessary accident, medical and treatment records when they conducted their evaluations.
4. Dr. Bucksbaum's interpretation of the *Guides* is more logical and consistent than that presented by Dr. Carmody, who conceded the claimant had no sensory deficit. Without that crucial criterion, application of the percentages in Table 11 was not appropriate. Dr. Bucksbaum recognized the slightly abnormal nerve conduction test in the right upper extremity and applied the proper analysis under the *Guides* in arriving at a 9% rating. In fact, he seemed to have exceeded the objective measures when he added the additional 3% for pain. In contrast, Dr. Carmody's entire impairment rating seems to be based on the claimant's subjective reports of pain.
5. On balance, I am satisfied that Dr. Bucksbaum properly applied the *Guides* criteria and that his analysis regarding permanent impairment must be accepted.
6. Because the claimant has not prevailed, she is not entitled to fees.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the claimant's request for permanency benefits above the 9% paid is DENIED.

Dated at Montpelier, Vermont this 22nd day of February 2001.

R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.