

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

Rene Souliere) *Opinion No. 13-04WC*
)
)
 v.) *By: Margaret A. Mangan*
) *Hearing Officer*
)
 Webster Trucking) *For: Michael S. Bertrand*
) *Commissioner*
)
) *State File No. S-20725*

Hearing held on January 30, 2004
Record Closed on February 17, 2004

APPEARANCES:

Thomas C. Bixby, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Is claimant entitled to additional temporary total disability benefits from May 14, 2002 to June 3, 2003, less an advance of \$2,500 paid by defendant?

CLAIMANT SEEKS:

An award of TTD from May 14, 2002 to June 3, 2003 in the amount of \$16,830.42 and, if successful, an award of attorney fees and costs.

EXHIBITS:

Joint I: Medical Records

Joint II: Stipulation of facts

Claimant's 1: Report of Injury
Claimant's 2: Facsimile from Jennifer Bolduc dated
September 3, 2003
Claimant's 3: Claimant's attorney client ledger

STIPULATION OF FACTS:

1. *On May 29, 2001, claimant Rene Souliere was an employee and defendant, Webster Trucking his employer within the meaning of the Vermont Workers' Compensation Act (Act).*
2. *On May 29, 2001, claimant suffered an injury by accident arising out of and in the course of his employment with Webster Trucking.*
3. *Claimant returned to work for defendant in October of 2001.*
4. *Claimant was found to be at medical end result with a 5% permanent impairment to the spine by Dr. Banerjee on March 13, 2002. Defendant paid claimant permanency benefits based on that rating.*
5. *Claimant began losing time from work again on May 14, 2002.*
6. *At some point, defendant advanced claimant \$2,500.*
7. *Claimant was again found to be at medical end result with a 13% impairment by Dr. Weineke on June 3, 2003. Defendant paid the additional 8% permanency benefits to claimant.*
8. *The parties have stipulated to a compromise average weekly wage of \$559.18 for purposes of the current dispute.*
9. *At no point in time did claimant have any dependents.*

FINDINGS OF FACT:

1. *The stipulated facts are accepted as true and the exhibits are admitted into evidence.*
2. *Official notice is taken of all Department forms.*
3. *Claimant had worked at Webster Trucking for 15 years at the time of his May 29, 2001 injury to his low back. After that injury, he treated conservatively and was out of work until October 15, 2001.*

4. *The parties settled the claim for permanency for the 2001 injury on a Form 22.*
5. *On February 12, 2002, Carolyn Murray, M.D., an Occupational Medicine physician at Dartmouth, noted that claimant was still working only 2 days a week and that he could not drive long distances. She determined that he had reached medical end result and could not resume full-time, full-duty work at his previous employment.*
6. *On March 13, 2002, Dr. Sikhar Banerjee, M.D. determined that claimant had reached a medical end result with a 5% whole person permanent impairment, based on the 5th edition of the Guides to the Evaluation of Permanent Impairment. He noted that claimant had persistent low back pain, with an intensity of 6 to 7 out of 10, with the pain mostly localized to the lower back with occasional radiation to his left leg.*
7. *On May 13, 2002, claimant suffered another work-related injury to his back when he was unhitching a trailer. After that injury, claimant treated with Dr. Chard and Dr. Smith. At the defense request, Dr. Wieneke also examined him.*
8. *On May 20, 2002, Dr. Chard took claimant out of work until after proposed injections.*
9. *On July 3, 2002, Dr. Chard determined that claimant had reached a medical end result and, based on the 5th edition of the Guides, had an 8% whole person impairment.*
10. *Based on the physicians' determinations that claimant had reached a medical end result with an 8% whole person impairment, the parties entered into a Form 22 and defendant paid PPD based on the 8%.*
11. *Although physicians took claimant out of work after his May 2002 injury, claimant did not receive temporary total disability benefits.*
12. *Claimant returned to Dr. Chard on August 2, 2002 with a complaint of the exacerbation of pain unrelated to activity.*
13. *Dr. Fenton performed a records review for the claimant, after which he opined that the incident in May of 2002*

14. *When Rebecca Smith, M.D. saw claimant on December 6, 2002, she noted that he had been improving until his second accident the previous May, which led to pain in a different location, quality and intensity.*
15. *Claimant continued to receive physical therapy although he noted no improvement.*
16. *On February 7, 2003, Dr. Chard retracted his August 2002 opinion about medical end result and proposed radio ablation. He opined that claimant could not be at medical end result until after the treatment, something he had not anticipated when he made the determination the previous summer.*
17. *On May 19, 2003, claimant underwent injections at Dartmouth with a one-week improvement in his pain.*
18. *It was two weeks after the radio ablation, on June 2, 2003, that Dr. Weineke placed claimant at medical end result with a 13% whole person impairment.*
19. *On July 8, 2003, Dr. Chard noted that the injections really did not help claimant and that his condition had stabilized. He concurred with Dr. Wieneke's permanency rating.*
20. *In his support of the claimant for attorney fees, counsel submitted a client ledger with time worked in 0.25-hour increments.*

DISCUSSION:

1. *Contrary to claimant's argument, the defendant has not denied the compensability of the 2002 incident. It voluntarily entered into a Form 22 agreement and paid the claimant permanency benefits. However, it did not accept the claim for temporary total benefits from May 14, 2002 to June 3, 2003, the subject of this action.*

2. *Where, as here, a subject is beyond the ken of a layperson, expert medical evidence is necessary. See Lapan v. Berno's Inc., 137 Vt. 393 (1979). That evidence comes from the medical records and the hearing testimony of Doctors Fenton and Wieneke.*
3. *"Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation until reaching medical end result or successfully returning to work." Coburn v. Frank Dodge & Sons, 165 Vt. 529, 532 (1996); Orvis v. Hutchins, 123 Vt. 18, 24, 179 A.2d 470, 474 (1962) (temporary disability ends when maximum earning power has been restored or recovery process has ended).*
4. *Dr. Chard took claimant out of work on May 20, 2002 for his work related injury after which claimant underwent conservative medical treatment, reaching medical end result on July 3, 2002. Therefore, claimant is entitled to TTD for that period.*
5. *Furthermore, because periods of temporary total disability may be intermittent, 21 V.S.A. § 650 (c), and a decision to have elective treatment may need to be delayed for any number of reasons, additional TTD may be warranted. See e.g. Bertrand v. McKernon Group, Opinion No. 20-03WC(2003). In Bertrand, TTD was resumed after the claimant elected to have surgery.*
6. *A comparable situation is present here. When Dr. Chard placed claimant at medical end result in July of 2002, it was a reasonable decision because claimant "had reached a substantial plateau in the medical recovery process, such that significant further improvement [was] not expected, regardless of treatment." WC Rule 2.1200. Therefore, the insurer was justified in terminating temporary benefits at that time.*
7. *However, it is clear from Dr. Chard's notes that he expected significant improvement in the claimant's condition when he realized that radio ablation treatments were an option. "The proper test to determine medical end result is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." Coburn, 165 Vt. at 533. That the treatment did not have the anticipated desired effect does not change the fact that improvement in his condition was anticipated. Therefore, claimant was entitled to the resumption of TTD when those*

8. Pursuant to 21 V.S.A. § 678(a) and WC Rule 10.000, a successful claimant is entitled reasonable attorney fees when supported by a fee agreement and itemized statement of house. When an award is based on an hourly rate, increments must not be greater than one tenth of an hour. See Bertrand, Op. No. 20-03WC.

CONCLUSIONS OF LAW:

1. Pursuant to 21 V.S.A. § 648, claimant is entitled to temporary total disability payments from May 20, 2002 to July 3, 2002 and from February 7, 2003 to June 2, 2003, less \$2,500 advanced to the claimant.
2. Claimant has thirty days from the date of this order to revise his attorney fee request to comply with the requirements set out above.

SO ORDERED

Dated at Montpelier, Vermont this 10th day of March 2004.

*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.