

J. D. v. Putney Paper Company

(April 8, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. D.

Opinion No. 13-08WC

By: David J. Blythe
Hearing Officer

v.

For: Patricia Moulton Powden
Commissioner

Putney Paper Company

State File No. T-12815 (Old)

APPEARANCES:

Charles L. Powell, Esq., for the Claimant

J. Justin Sluka, Esq., for the Defendant

ISSUES PRESENTED:

Claimant's claim presents two issues for determination by the Commissioner:

1. Is Claimant entitled to TTD benefits commencing on March 17, 2006 and continuing thereafter until Claimant has reached medical endpoint or is able to return to suitable employment?
2. Has Claimant received "wages" within the meaning of 21 VSA §650(a) in the twelve weeks preceding the compensable injury? For the purposes of this inquiry, it is Claimant's position that the relevant twelve week period should be the twelve weeks which preceded the November 1981 injury. It is Defendant's position that the twelve week period should be the twelve weeks which preceded the onset of disability on March 17, 2006.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

This matter is before the Vermont Commissioner of Labor (Commissioner) on Claimant's claim for temporary total disability (TTD) benefits commencing on March 17, 2006 and continuing thereafter during the period of total temporary disability. Defendant contests Claimant's entitlement to TTD benefits because Claimant did not earn wages within the meaning of 21 VSA §650(a). The parties waived an evidentiary hearing and submitted the matter to David J. Blythe, Contract Hearing Officer and designee of the Commissioner of the Vermont

Department of Labor, on the record and on each party's pleadings.

Except as may be noted otherwise, none of the below-stated facts are contested by the parties.

Actions of representatives of the Vermont Department of Labor referred to below are hereinafter referred to, for convenience, as acts of the Commissioner.

II. EVIDENTIARY EXHIBITS AND SUBMISSIONS

The parties submitted a joint exhibit of medical records (Joint Medical Exhibit dated April 27, 2007).

In addition, Defendant submitted the following copied materials with its Proposed Findings of Fact and Conclusions of Law dated May 3, 2007:

- Exhibit A: Deposition of Joseph Dupuis, dated April 13, 2006
- Exhibit B: Deposition of Dr. Cecile Beehler, dated April 14, 2006
- Exhibit C: Form 27, approved December 13, 2005
- Exhibit D: Letter from Denise J. Miller, Travelers Cas & Surety Company, to VT Department of Labor, dated July 27, 2006
- Exhibit E: Letter from Charles L. Powell, Esq. to VT Department of Labor, dated July 3, 2006
- Exhibit F: Letter from VT Department of Labor to Denise Mitchell and Charles Powell, Esq., dated March 17, 2006
- Exhibit G: Letter from VT Department of Labor to Charles Powell and Andrew Boxer, dated May 25, 2006
- Exhibit H: E-mail from Wesley M. Lawrence to J. Justin Sluka, dated March 23, 2007 (with previous emails included therein)
- Exhibit I: Letter from Charles L. Powell, Esq. to VT Department of Labor, dated October 4, 2006
- Exhibit J: Letter from VT Department of Labor to Charles L. Powell, Esq. and Wesley Lawrence, Esq., dated October 11, 2006
- Exhibit K: Letter from VT Department of Labor to Charles L. Powell, Esq. and Wesley Lawrence, Esq., dated October 30, 2006

The Joint Medical Exhibit and Exhibits A through K are received into and made a part of the record.

- (a) Judicial notice is taken of all forms and correspondence in the Commissioner's file on this claim, including without limitation those forms and correspondence submitted by the parties and which were sent to the parties by or on behalf of the Commissioner.

III. FINDINGS OF FACT

1. On or about November 24, 1981, Claimant was employed by Defendant. At that time and date, Claimant was injured within the scope of his employment.
2. Claimant's original injury was in the nature of a "degloving" injury to his left hand and upper left extremity ("Initial Injury"). Claimant has since developed medical problems with his right upper extremity as a consequence of the Initial Injury. See Findings 16, 18, 20-22 below.

Claimant's Employment History

3. Following the Initial Injury, Claimant was unable to work for a period of several years. *Exhibit A* at 14.
4. Claimant returned to work in approximately 1988, first as a heavy equipment operator and then as a supervisor for F. W. Whitcomb Company. *Exhibit A* at 13-14.
5. Claimant worked for F. W. Whitcomb Company until approximately 1998. *Exhibit A* at 17-19.
6. In approximately 1998, Claimant worked for approximately three months at Okemo Mountain, operating a compressor panel. *Exhibit A* at 37-38.
7. Although the record is not precisely clear about the dates, in approximately 1998 -1999 Claimant worked for Moulton Construction Company as a front end loader operator. *Exhibit A* at 58.
8. In the Winter of 1999, Claimant received his commercial driver's license (CDL). *Exhibit A* at 40.
9. In approximately 2000, Claimant purchased a tractor-trailer truck and worked as a contractor for Manchester Motor Freight for approximately two and one-half years. *Exhibit A* at 46.
10. In 2000 or 2001, Claimant was employed by Pike Industries as a reclaim foreman. *Exhibit A* at 61.
11. In 2001, Claimant left employment on a medical leave due to an infection in his left hand, which required a partial amputation in 2004. *Exhibit A* at 66-67, *Joint Medical Exhibit* at 19 VR 2200.

12. In the Spring of 2003, Claimant (after a period of vocational rehabilitation; see Findings Nos. 32-34 below), Claimant was employed for three to four months as an oil burner technician for Irving Oil. This period of employment was Claimant's last employment as of the date of submission of his claim.

Relevant Medical History

13. Between 1981 and the present, Kenneth A. Marshall, MD, has been Claimant's principal treating surgeon. *Joint Medical Exhibit* at 11 generally.
14. Between 2001 and 2005, Dr. Marshall performed a series of surgeries on Claimant's left hand and left upper extremity. *Id.* There is no dispute as to the compensability of those treatments or the periods of disability associated therewith.
15. In November 2005, Dr. Marshall placed Claimant at medical endpoint for his left hand/left upper extremity condition. *Id.* at 11 KAM 15400.
16. By September 2005, Claimant had begun to experience problems with his right upper extremity. On September 29, 2005, following a referral by Dr. Marshall, Claimant was examined by Elizabeth A. McLarney, MD, an orthopedic surgeon. Dr. McLarney reported that Claimant had begun to experience problems with his right upper extremity due to overuse caused by overcompensating for years for his inability to use his left arm. *Joint Medical Exhibit* at 7 EAM 100. In her report of that date, Dr. McLarney reported that Claimant "cannot do a job which requires significant manual labor and I believe a job which is in the classification of sedentary or light would be appropriate for him. Vocational rehab is definitely necessary . . ." *Id.* (emphasis added). Dr. McLarney also stated that "I do not think that there is a need for a functional capacity evaluation as I think the work restrictions are fairly well presented." *Id.*
17. Cecile C. Beehler, MD, became Claimant's primary treating physician in 2001. *Id.* at 10 generally; also *Deposition of Dr. Cecile Beehler* dated April 14, 2006. Exhibit B at 7-8.
18. In November 2005, Dr. Beehler determined that Claimant was experiencing problems with his right arm due to overuse syndrome related to the injury to Claimant's left upper extremity. *Id.* at 10 CCB 4400. Also Exhibit B at 35.
19. On December 13, 2005, the Commissioner approved the discontinuance of TTD benefits based upon Dr. Marshall's report (see Finding No. 15 above).

20. On January 18, 2006, Dr. Beehler wrote, in a letter to Claimant's counsel, that based upon a reconsideration of his own treatment and evaluations of Claimant, as well as the evaluations of Drs. McLarney and Orrechio, it was his opinion that Claimant's right shoulder condition was related to the original 1981 workplace injury. Although Dr. Beehler did not speak specifically to whether or not that condition constituted total disability from employment, it is reasonable to infer from his letter, and from his incorporation into the basis for his opinions the evaluations of Drs. McLarney and Orrechio, that as of at least the date of Dr. McLarney's examination of September 29, 2005, Claimant was disabled from employment reasonably available to him, at least to the extent that Claimant was justified in not resuming his search for work at that time. *Id.* at CCB 4400.
21. On January 10, 2006, following a referral by Dr. Beehler, Claimant was examined by Edward J. Orrechio, MD, a neurologist. Dr. Orrechio reported that Claimant had several medical issues with his right upper extremity, all related to overuse of the right arm, which is related to the original injury to the left upper extremity. Dr. Orrechio diagnosed and reported that Claimant had (1) a primary shoulder issue, (2) epicondylitis and (3) carpal tunnel syndrome. *Id.* at 6 EJO 100.
22. On February 22, 2006, at Defendant's request, Claimant was examined by Donald M. Kinley, MD, an orthopedic surgeon (Kinley IME). Dr. Kinley concluded that Claimant was suffering from overuse syndrome of the right upper extremity and required carpal tunnel surgery. Dr. Kinley specifically opined that Claimant should have work capacity after surgery. *Id.* at 3 DLK100, 300 (emphasis added). This opinion of the IME physician is consistent with Claimant's not actively seeking work (see Finding No. 20 above) or continuing with vocational rehabilitation efforts (see Finding No. 40 below).
23. On March 17, 2006, Dr. Beehler placed Claimant at total temporary disability until the carpal tunnel surgery and post-operative recovery was complete. *Id.* at 10 CCB 4700.
24. On August 23, 2006, Dr. McLarney performed carpal tunnel surgery on Claimant's right wrist. By January 16, 2007, Claimant had completely recovered from this procedure. *Id.* at 7 EAM 610.
25. On January 16, 2007, Dr. McLarney examined Claimant for continuing pain in his right shoulder. At that time, Dr. McLarney recommended surgery on Claimant's right shoulder. *Id.*
26. On April 13, 2007, Dr. McLarney performed surgery on Claimant's right shoulder. As of the date of submission of Claimant's claim to the Commissioner, Claimant apparently had not recovered fully from that surgery.
27. For the purposes of this Order, the total temporary disability which commenced on

March 17, 2006 continues as of the date hereof.

Relevant Vocational Rehabilitation

28. In 2002, Defendant's workers compensation carrier referred Claimant to Intracorp for vocational rehabilitation. Claimant began to work with Laurie T. Langelier, MA, CRC of Intracorp. *Joint Medical Exhibit* at 19 VR 100.

29. On October 12, 2002, Ms. Langelier completed a Form VR9 Entitlement Assessment which provided, in pertinent part, the following summary of Claimant's medical status:

At that time he underwent various surgeries including skin grafts, neural graft, index finger ray resection, tip amputations to the long and ring fingers. In October 2001 Mr. Dupuis suffered from chronic infection of the tip of the ring finger and underwent surgery including resection of remnants of the nail bed. On May 17, 2002 he underwent long finger MCP joint arthroplasty. His treating physician is Dr. Kenneth Marshall. He is currently involved in physical therapy programs with Turner Hand Therapy and Crown Point Physical Therapy. Mr. Dupuis has a release to return to work with restrictions keeping in mind diminished sensation issues, limited grip, safety issues around prolonged exposure to cold or to direct mechanical stresses to the hand "skin".

Id. at 19 VR 300.

30. Ms. Langelier summarized Claimant's education and work skills as follows:

EDUCATION & WORK: Mr. Dupuis reports he completed the 10th grade. He has not obtained his GED. He reports that he has a Class A Commercial Drivers License.

SKILLS ANALYSIS: Machine Operator, General: DOT code 649.685-070
Physical Demand Medium Skills Classification: Semi-skilled SVP3.

Tractor Trailer Truck Driver: DOT code 904.383-010, physical demand: Medium
Skills Classification: Semi-skilled, SVP4.

Construction Worker I: DOT Code: 869.664-014, Physical Demand: Heavy,
Skills Classification: Semi-skilled, SVP4 (Pike Industries, Frank Whitcomb and
Moulton Construction).

Id. at 19 VR 400.

31. At that same time, Ms. Langelier found Claimant was "...entitled to vocational rehabilitation services as he is not able to return to suitable employment utilizing his

previous training or experience.” *Id.* at VR 400.

32. In December 2002, Ms. Langelier prepared a return to work plan (then referred to as Individual Written Rehabilitation Plan, hereinafter, “First VR Plan”), setting a vocational goal proposing, in pertinent part, as follows:

“...that Mr. Dupuis be provided with training through the New England Fuel Institute which upon his successful completion will result in his return to suitable employment as an Oil Burner Servicer and Installer.”

Id. at VR 600.

33. Consistent with the First VR Plan, Claimant successfully graduated from New England Fuel Institute. Claimant found employment with Irving Oil. On May 10, 2003 vocational rehabilitation services under the First VR Plan were closed on a Form VR5. *Id.* at VR 2000.
34. Following surgery in May 2004 involving amputation of a part of his left hand, Claimant was re-evaluated for his ability to continuing working as an oil burner technician. On June 14, 2004, Ms. Langelier reviewed a functional capacity evaluation and found that Claimant was unable to perform the functions required of an oil burner technician. *Id.* at VR 2200.
35. On January 31, 2005, the Commissioner approved a second work plan (“Second VR Plan”) involving Claimant taking courses in computers and medical technology at New Hampshire Community Technical College (NHCTC). *Id.*
36. On May 9, 2005, the Commissioner approved an amended work plan (“Amended Second VR Plan”) involving Claimant taking anatomy and physiology courses at NHCTC in anticipation of applying for a position at Dartmouth Hitchcock Medical Center. *Id.* at VR 2500.
37. On August 29, 2005, the Commissioner approved a subsequent amendment to the Second VR Plan involving Claimant continuing to take medically-related and mathematics courses (“Second Amendment to Second VR Plan”). *Id.* at VR 2600.
38. On October 17, 2005, Ms. Langelier noted that Claimant was having trouble with his college courses due to an inability to effectively take notes in class, specifically due to problems with his right arm. *Id.* at VR 4100.

39. On January 6, 2006, Ms. Langelier noted that Claimant had successfully completed the mathematics course but that before pursuing further vocational rehabilitation, Claimant intended to complete medical evaluation by Dr. Orrechio scheduled for January 10, 2006. *Id.* at 4700.
40. Following examinations of Claimant by Dr. Orrechio on January 10, 2006 (see Finding No. 19 above), Dr. Kinley on February 22, 2006 (IME; see Finding No. 20 above) and Dr. Beehler on March 17, 2006 (see Finding No. 21 above), Dr. Beehler placed Claimant at total disability until the completion of the right carpal tunnel syndrome treatment. *Id.* at 10 CCB 4700. All of these physicians found that Claimant's disability was directly related to Claimant's November 1981 workplace injury.
41. Claimant's decision to discontinue vocational rehabilitation efforts in January 2006, pending completion of the medical evaluation and treatment, was reasonable and justified.
42. Claimant reached a medical endpoint for the carpal tunnel syndrome on January 16, 2007. See Finding No. 24 above. However, he was still disabled from employment due to the ongoing shoulder problems. See Findings Nos. 26 and 27 above.
43. Claimant last received wages from active employment in the Spring of 2003. See Finding No. 12 above.
44. Claimant's average weekly wages from employment at the time of the original workplace injury in November 1981 were \$1,030.00. See Form 25 dated November 24, 1981 and Form 25 dated November 5, 2001.
45. Claimant has not made more than an average weekly wage of \$1,030.00 from employment at any time since the date of injury in 1981.

Prior Orders of the Commissioner

46. On October 11, 2006, the Commissioner issued an Order (*Exhibit J*) which provided, in pertinent part, as follows:

The general rule, in regards to an employee who claims temporary total disability after leaving an employer, is that a claimant who voluntarily quits his job for reasons unrelated to the injury is not entitled to temporary total disability. However, the exception stated in *Pfalzer*, Opinion No. 23-01WC (2002) citing *Andrew vs. Johnson Controls*, Opinion No 3-93WC (1993) is that: “To avoid harsh results, there is an exception to the general rule for a claimant who can demonstrate:

1. A work injury;
 2. A reasonably diligent attempt to return to the work force; and
 3. The inability to return to the workforce or that return at a reduced wage is related to [the] work injury and not other factors [unrelated to the work injury].”
- Please note that the claimant has clearly established that he suffered a work injury and that although the claimant may not have demonstrated that he was actively searching for employment, he did however, actively participate in vocational rehabilitation until he began to experience difficulty completing the program because of the work injury. The claimant offered Dr. Beehler confirmation in a written report and Form 20 Work Capabilities Form that the worsening of the work injury and the overuse of his right arm had progressed; the claimant was again temporarily totally disabled.

In addition, the claimant was unable to obtain gainful employment because of the work injury. The claimant has no use of the left arm and the right arm is limited due to the years of overuse compensating for loss of the left. Therefore, I find the claimant is entitled to temporary total disability benefits from 3/17/06 through 5/26/06. (The carrier has been ordered already to pay benefits from 5/26 and continuing until the claimant reaches medical end.) Since the claimant had no wages prior to the date of disability, *Pfalzer* directs that the benefits be calculated based on the pre-injury wages plus any additional cost of living increases that could have accrued in the interim.

Therefore the carrier, is ORDERED to pay benefits from 3/17/06 through 5/26/06 effective immediately and no later than ten days from the date of receipt of this letter.

47. On October 30, 2006 (*Exhibit K*), the Commissioner affirmed the October 11, 2006 Order, stating, in pertinent part, as follows:

The Defense does not dispute that the Claimant was totally disabled during this period as a consequence of his 1981 work injury; rather, the defendant argues that, because the claimant earned no wages in 12 weeks prior to March 17, his benefit calculation would return a “zero” result. In support of this contention, the defendant cites to *Plante vs. Salomon Skiwear*, Op. No. 1995WC and its progeny, including *Knoff vs. Knoff Illuminating*; Op. No. 39-05WC and *Harness vs. Therian Foundation*[sic] Op., No. 53R-05WC.

That line of cases is distinguished from the present situation on a key point—the reason that the claimant did not earn wages in the twelve weeks prior to the period of disability. The claimant in *Plante* did not earn wages because of a layoff, unrelated to her work injury. The claimant in *Knoff* did not earn wages because he instead worked at a business from which he earned profits, and the evidence did not indicate loss of those profits with the onset of the disability. The claimant in *Harness* did not earn wages because he did not return to work but had terminated VR for reasons unrelated to his work injury. In that *Pfalzer* also addresses a situation where the Claimant is without wages for reasons unrelated to the work injury, I do not believe it is necessary to apply the three-pronged *Pfalzer* test to this situation.

Here, Mr. Dupuis was unable, because of his work injury to continue in or return to employment for which he has experience and training. Vocational rehabilitation services were appropriately provided, and Mr. Dupuis was actively engaged in his return-to work plan until work-related right arm symptoms apparently brought about suspension of those activities. Accordingly, his failure to earn wages in the twelve weeks prior to the March 17 onset of a new interval of total disability was a direct result of the work injury. This circumstance is, I believe, contemplated and addressed by 21V.S.A. section 650(c).

Accordingly, after reconsideration, the Interim Order of October 16, 2006 is upheld and the carrier is to provide Temporary Total Disability benefits for the period March 17, 2006 through May 26, 2006.

IV. DISCUSSION AND CONCLUSIONS OF LAW

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984); *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161, 166 (1962); *Nutbrown v. Roadway Express*, Opinion No. 2-93, at 4 (June 7, 1993).
2. There must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incidents complained of were the cause of the injury and the resulting disability and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); see also *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
3. Pursuant to 21 V.S.A. § 642, an employee/claimant is entitled to TTD benefits where the work-related injury causes “total disability for work”. It has been well established that entitlement to TTD benefits exists while a claimant is:
 - (1) in the healing period and not yet at maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18, 24 (1962); or
 - (2) unable, as a result of the injury either to resume his former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, *Roller v. Warren*, 98 Vt 514, 519 (1925).
4. Temporary disability benefits (which term includes TTD benefits) are awarded on the basis of a claimant’s incapacity for work, which involves consideration not only of the physical injury, but also of other factors restricting a claimant’s capacity to obtain suitable employment. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).
5. A claimant is entitled to temporary disability benefits until reaching a medical end result or successfully returning to work. *Coburn v. Frank Dodge and Sons, Inc.*, 165 Vt. 529 (1996).
6. A period of total temporary disability need not be continuous, but may be broken into continuing intervals. *Wilkins v. Blanchard-McDonald Lumber Co.*, 115 Vt. 89, 92 (1947); *Orvis*, supra, at 23.
7. When an injury causes total disability for work, an employer shall pay the injured employee weekly compensation equal to two-thirds of the injured employee’s average weekly wages, but not more than the maximum nor less than the minimum weekly compensation, provided that the weekly compensation shall not be greater than the injured employee’s weekly net income. 21 VSA §642.

8. For the purposes of determining TTD benefits under 21 VSA §642, “average weekly wages” shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding the injury. . . . 21 VSA §650(a) (emphasis added).
9. When temporary disability does not occur in a continuous period but occurs in separate intervals, each resulting from the original injury, compensation shall be adjusted for each recurrence to reflect any increases in wages or benefits prevailing at that time. 21 VSA §650(c) (emphasis added).
10. The medical evidence is conclusive and not disputed that Claimant’s disability as of March 17, 2006 was directly related to his original compensable injury of November 1981. See Findings Nos. 20-23, 40 above. As of the date of the submission of this matter to the Commissioner, that disability is ongoing. *Id.*
11. Defendant’s argument that Claimant is not entitled to TTD benefits because (1) Claimant did not have wages from employment in the twelve weeks which preceded the March 17, 2006 determination of total disability, and (2) Claimant had discontinued vocational rehabilitation as of January 2006 is misplaced. First, the relevant twelve week period for calculation of TTD benefits is the twelve weeks preceding the original injury, not the twelve weeks preceding a recurrence of that disability related to the original injury, unless there has been an increase in Claimant’s wages. 21 VSA §650(c). In this case the record discloses that Claimant has never made higher wages than he did in the twelve weeks preceding the original injury. Therefore, the relevant period for calculation of TTD benefits is the twelve weeks preceding the original injury of November 1981. Second, Claimant was participating in an ongoing vocational rehabilitation program originally begun upon Defendant’s referral for vocational rehabilitation. The record amply shows that Claimant participated in the vocational rehabilitation with conviction and in good faith, and that Claimant’s decision to discontinue vocational rehabilitation in January 2006 was reasonable under the circumstances. See Finding No. 41 above. Even though the relevance of Claimant’s participation in, or discontinuation of, vocational rehabilitation is not necessarily determinative, to the extent it may be so lends support only to Claimant’s position.

12. Defendant's reliance on *J. P. v. Pollution Solutions of Vermont*, Op. No. 23A-01WC (August 1, 2001) (referred to in previous submissions of the parties as *Pfalzer*) is similarly misplaced. In that case, the Commissioner noted that there is an exception to the general rule that an employee who voluntarily leaves employment for reasons unrelated to the injury for which temporary benefits are claimed is not entitled to TTD benefits. That exception applies when the claimant demonstrates (1) a work-related injury, (2) a reasonably diligent effort to return to employment, and (3) an inability to return to employment or that a return to employment at a reduced wages is related to the compensable injury and not other, unrelated factors. *Id.* at Conclusions of Law Nos. 5 and 6. In this case, the evidence establishes that Claimant has satisfied the requirements of the *Pfalzer* exception.
13. Defendant also argues that its position is supported by the Commissioner's rulings in *Plante v. Slalom Skiwear*, Op. No 19-95WC (May 24, 1995), *J. K. v. Joe Knoff Illuminating*, Op. No. 39-05WC (July 12, 2005), and *J. H. v. Therrien Foundations*, Op. No. 53-05WC (August 9, 2005). However, each of those cases is distinguishable on the facts. In *Plante*, the claimant did not earn wages due to a lay-off unrelated to her employment. In *J. K.*, the claimant did not earn wages because he worked at a business in which his compensation was based on profits, and the lack of profits in the twelve weeks preceding disability were not related to the disability. In *J. H.*, the claimant had terminated vocational rehabilitation benefits for reasons unrelated to his workplace injury. See Findings Nos. 46 and 47 above.
14. Defendant also argues, citing *Wroten v. Lamphere*, 147 Vt. 606 (1987), that because participation in a vocational rehabilitation program is voluntary, that Claimant is not entitled to temporary benefits if Claimant has a work capacity but opts for vocational rehabilitation training instead. However, in this case Claimant's ability to obtain reasonable employment after 2003 was directly related to his original workplace injury. His faithful participation in a series of vocational rehabilitation programs, all proposed with the Defendant's concurrence and each approved by the Commissioner, justified Claimant's absence from the workforce in the Winter of 2005-2006. See Finding No. 41 above and Conclusion of Law No. 11 above.
15. Based upon the foregoing, the Commissioner does not reach the issue of whether, in this case, use of permanent partial disability (PPD) benefits are a valid basis for computing average weekly wages and/or TTD benefits.
16. Based upon the foregoing, Claimant has prevailed.

Attorney's Fees and Costs

17. Under WC Rule 10 and 21 VSA §678(a), the Commissioner, in her discretion, may award reasonable attorney's fees to the prevailing party. Under WC Rule 10.1210, the award for services rendered on an hourly basis is limited to \$90.00 per hour. In addition, when a claimant prevails, the Commissioner shall award necessary costs of the action to the claimant. Because Claimant has prevailed, he is therefore entitled to an award of costs and attorney's fees consistent with Rule 10.

ORDER

1. Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, Travelers Casualty and Surety Company, or in the event of its default, Defendant Putney Paper Company, is hereby ORDERED to pay Claimant TTD benefits commencing as of March 17, 2006 and continuing thereafter until Claimant has reached his medical endpoint for the disability which began on that date or Claimant has successfully returned to work and the Commissioner has approved the termination of such TTD benefits.
2. Counsel for Claimant shall have fifteen (15) days from the date of this Order to submit an itemized statement of hours of professional services rendered to Claimant in this case and an itemized list of all costs or expenses for which reimbursement is sought. Such submissions shall be made directly to the Contract Hearing Officer for review and approval. Failure to make such submissions timely shall result in a denial of any award for attorney's fees and costs.

Dated at Montpelier, Vermont this 8th day of April 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.