Roger Rodrigue v. Enterprises Precision Inc. (November 4, 2014)

STATE OF VERMONT
DEPARTMENT OF LABOR

Roger Rodrigue	Opinion No. 16-14WC
v.	By: Jane Woodruff, Esq. Hearing Officer
Enterprises Precision, Inc.	For: Anne M. Noonan Commissioner
	State File No. EE-59475

OPINION AND ORDER

Hearing held in Montpelier, Vermont on July 2, 2014
Record closed on August 8, 2014

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to ongoing vocational rehabilitation services on the grounds that his current job assignment does not constitute suitable work?

2. Is Claimant entitled to temporary total and/or temporary partial disability benefits as a consequence of his reduced earnings from February through June 2014?

EXHIBITS:

Claimant's Exhibit 1:	Earnings chart
Claimant's Exhibit 2:	Andre Brochu letter to Ms. Smith, February 12, 2014
Claimant's Exhibit 3:	Attorney Moore letter to Ms. Smith, February 12, 2014
Claimant's Exhibit 4:	Record of hours worked, January – June 2014
Claimant's Exhibit 5:	Lusci Fortin letter to N.H. Dept. of Labor, November 20, 2014
Claimant's Exhibit 5A:	Defendant's final disclosures, June 13, 2014
Claimant's Exhibit 6:	Wage Statement (Form 25), February 28, 2013
Claimant's Exhibit 8:	Defendant's *Motion in Limine*, June 18, 2014
Claimant's Exhibit 9:	Langevin email, July 1, 2014
Claimant's Exhibit 10:	Attorney Moore email, February 14, 2014

Defendant's Exhibit A: Medical records
Defendant's Exhibit B: Vocational rehabilitation records
Defendant's Exhibit D: Langevin invoice #2230, November 11, 2013
Defendant's Exhibit E: Langevin invoice #2248, December 10, 2013
Defendant's Exhibit I: Jay Spiegel email, July 1, 2014
Defendant's Exhibit J: Work hour calendars, February – May 2014
Defendant's Exhibit K: Wage Statement (Form 25), October 16, 2014

CLAIM:

Temporary total and/or temporary partial disability benefits from February 17, 2014 through June 30, 2014 pursuant to 21 V.S.A. §§642 and 646
Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

Defendant's Request to Reopen Record

By correspondence dated September 4, 2014 and October 20, 2014, Defendant has requested that the record be reopened to consider "newly discovered evidence," specifically, a Wage Statement (Form 25) documenting the hours Claimant worked, and the wages he earned, for the weeks ending August 9, 2014 through October 11, 2014. Noting that his claim for indemnity benefits covers only the period from February 17, 2014 through June 30, 2014, Claimant asserts in response that the evidence Defendant now seeks to introduce, which pertains to a subsequent period, is irrelevant. On those grounds, he has objected to the request. The parties argued their positions in a telephone conference on October 24, 2014.

It is appropriate for an administrative agency to consider requests to reopen the evidence. *In re Hunter*, 167 Vt. 219, 224 (1997), citing *In re Twenty-four Vermont Utilities*, 159 Vt. 339, 356 (1992). In this case, I agree that the proffered evidence is not relevant to Claimant's claim for temporary total and/or temporary partial disability benefits. Therefore, I will not admit it for that purpose.

The proffered evidence is highly relevant to Claimant's claim for vocational rehabilitation services, however. By their nature, such services cannot be delivered retroactively, and as circumstances change, a claimant's need for them necessarily changes as well. Thus, in considering the question whether Claimant here is entitled to additional vocational rehabilitation services to assist him in successfully transitioning back to suitable work, it is important to know whether he has made the transition or not.

To the extent that Workers' Compensation Rules 51.2602 and 51.2700 define suitability at least in part by reference to a comparison of pre- and post-injury hours and wages, *see* Conclusion of Law No. 4 *infra*, the records Defendant now seeks to introduce will allow for a more current, and thus more accurate, comparison. For this reason, and solely for the purpose of determining whether Claimant is currently entitled to vocational rehabilitation services, Defendant's request to reopen the record for the purpose of introducing the more recent Wage Statement is **GRANTED**.

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant attended school until the ninth grade. He did not pursue a GED. He has performed heavy manual labor, such as farming and construction, for all of his working life.

4. Defendant's business, owned by Andre Brochu, consists of erecting structural steel, primarily along the eastern seaboard of the United States. Defendant has a New England crew and a southern crew. Claimant has worked for Defendant for seven or eight years as an ironworker on the New England crew. As Claimant is not a certified welder, he cannot perform certain work.

5. Claimant injured his right shoulder when he fell off a ladder on January 22, 2013. Defendant accepted the injury and paid benefits accordingly.

6. During the eleven weeks prior to his injury,[1] Claimant worked the following hours:

Week Ending	Hours worked
January 19, 2013	30.5
January 12, 2013	40
January 5, 2013	23.5
December 29, 2012	17
December 22, 2012	23
December 15, 2012	40
December 8, 2012	40
December 1, 2012	40
November 24, 2012	33.5
November 17, 2012	37
November 10, 2012	37.5

[1] Although Claimant had worked for Defendant in the past, at the time of his injury he had only been re-employed since November 8, 2012.

7. As the chart illustrates, prior to Claimant's work injury his hours varied considerably from week to week. This is consistent with Mr. Brochu's testimony as to the variation in all of his employees' work schedules. As he credibly explained, while billed as full-time work, his company could not always offer its employees forty hours of work per week. Depending on the weather and the work status of other contractors on the jobsite, in some weeks Defendant's employees worked more than forty hours, but in other weeks significantly fewer hours were available. In addition, every year there were between eight and twelve weeks, typically during the winter months, when Defendant had no work at all to offer any of its employees. I find from this evidence that, as with all of Defendant's ironworkers, a variable work schedule was an inherent condition of Claimant's employment even before his injury.

8. Prior to his injury Claimant worked an average of 32.9 hours per week, at an hourly rate of $21.00 and an average weekly wage of $724.92. This yielded an initial compensation rate of $493.28, which was updated on July 1, 2013 to $501.50.

Claimant's Course of Treatment

9. On the day of his injury, Claimant first sought treatment at the Weeks Medical Center emergency department. The attending physician diagnosed a suspected soft tissue injury, and advised Claimant to remain out of work until he could see Dr. Kamins, an orthopedist. Claimant saw Dr. Kamins two days later, on January 24, 2013. Dr. Kamins suspected a rotator cuff or labral tear, but could not be sure without an MRI. He did not release Claimant to return to work at this time.

10. In February 2013, Claimant transferred his care to Nella Wennberg, a physician assistant at Mansfield Orthopedics, which was closer to his home. Ms. Wennberg ordered an MRI and referred him to physical therapy.

11. Claimant returned to Ms. Wennberg in March 2013. At this point, Ms. Wennberg diagnosed adhesive capsulitis, or frozen shoulder. This is a condition in which the connective tissues around the shoulder joint become inflamed and stiff, causing both pain and restricted motion. As treatment, Claimant underwent a cortisone injection and was referred for a course of more aggressive physical therapy.

12. On October 25, 2013 Claimant self-referred to Dr. Varney, an orthopedic surgeon. He expressed frustration, as he did not believe he was progressing well in physical therapy. As Ms. Wennberg had, Dr. Varney diagnosed Claimant with adhesive capsulitis. He determined that there was no present need for surgical intervention, and instead ordered continued aggressive physical therapy with a follow-up in two months. Dr. Varney endorsed the "Vocational Rehab that [Claimant] is currently participating in," and also recommended that Claimant pursue light duty work with Defendant.

13. Claimant saw Dr. Varney again in December 2013, and in February and May 2014. At each of these visits Dr. Varney reported that Claimant could not yet return to his ironworker duties, but that he was capable of performing light duty work with restrictions. Claimant also continued with his physical therapy.

Dr. Davignon's Independent Medical Examination

14. At Defendant's request Claimant underwent an independent medical examination with Dr. Davignon, an occupational medicine specialist, on October 23, 2013. Prior to the examination, Dr. Davignon reviewed all of Claimant's pertinent medical records.

15. Consistent with both Ms. Wennberg's and Dr. Varney's assessments, Dr. Davignon diagnosed Claimant with adhesive capsulitis. As he explained, the condition presents itself in three stages:

- Freezing or painful phase, lasting three to nine months;
- Frozen phase, lasting from four to twelve months, during which range of motion worsens and muscular disuse occurs; and
- Thawing phase, lasting from twelve to 42 months, which, with the use of anti-inflammatory injections and aggressive physical therapy, is marked by a gradual return to shoulder mobility.

16. In Dr. Davignon's opinion, Claimant was most likely in the second, or frozen, phase of the condition, and therefore was not yet at end medical result. He further determined that the treatment Claimant had received to date was reasonable and necessary. Noting that one of the medically accepted treatments for frozen shoulder is to give the joint time to thaw while pursuing aggressive physical therapy, Dr. Davignon recommended that such treatments continue. Last, regarding work, he imposed modified duty restrictions for the right upper extremity, specifically (a) no work above shoulder level; (b) no lifting more than five pounds; and (c) no repetitive pushing or pulling.

Vocational Rehabilitation Efforts

17. Defendant initiated vocational rehabilitation services for Claimant in October 2013, after he had been out of work for more than ninety days. Shortly thereafter, Claimant requested a change of vocational rehabilitation counselors to Paul Langevin.

18. On November 11, 2013 Mr. Langevin completed an entitlement assessment in which he found Claimant entitled to vocational rehabilitation services. As grounds for this conclusion, Mr. Langevin made the following determinations:

- Claimant had not been medically cleared to return to work, and thus had no work capacity;
- Claimant had always engaged in heavy labor involving iron work; and
- Clearly Claimant would need vocational rehabilitation services in order to return to suitable employment at his pre-injury wage.

19. As specific support for his conclusion that Claimant had no work capacity, Mr. Langevin relied on Dr. Kamin's January 24, 2013 medical record, Finding of Fact No. 9 *supra*. It is true that at that time, just two days removed from the injury, Dr. Kamins had determined that Claimant should remain out of work. However, I find that Mr. Langevin was fully aware, by the time of his entitlement assessment some ten months later, that Claimant had long since transferred his care, first to Ms. Wennberg and more recently to Dr. Varney. He also knew, or should have known, that Claimant had undergone an independent medical evaluation with Dr. Davignon in October. I thus find that it was inappropriate for Mr. Langevin to rely on Dr. Kamins' initial declaration that Claimant should remain out of work without further investigating whether his work status had since changed, as indeed it had.

20. On December 3, 2013 Mr. Langevin and Claimant both signed a Return to Work Plan, the stated goal of which was to explore job opportunities as a construction inspector, a light duty position. Although Mr. Langevin was aware that Claimant had a follow-up appointment scheduled with Dr. Varney later in the month, he did not request an opinion whether Claimant was physically capable of such work, or indeed whether he had regained even more function in the months since his injury. Instead, Mr. Langevin stated in the plan, "Currently, Mr. Rodrigue does not have a work capacity." Again, I find that this statement did not accurately reflect Claimant's work capacity at the time.

21. On December 26, 2013 Mr. Langevin requested that the Department approve Claimant's Return to Work Plan. Defendant had not proposed any changes to the plan or otherwise noticed its objection to it within the statutory 21-day period for doing so, 21 V.S.A. §641(c), and therefore, on January 8, 2014 the Department's specialist approved it.

22. At Defendant's request, on February 13, 2014 the Department's specialist held an informal conference for the purpose of discussing whether it was advisable to continue vocational rehabilitation services. At that time, the specialist concluded both (a) that contrary to Mr. Langevin's assertions, Claimant had been released to modified-duty work; and (b) that Defendant had suitable work available at Claimant's pre-injury wage and with the same employment terms and conditions. Because the circumstances underlying the originally approved Return to Work Plan had thus changed, the specialist concluded that it was no longer appropriate. Instead, the specialist converted the plan into one in which Claimant would return to the job Defendant had offered, with a follow-up in 60 days to ensure he had done so successfully.

Claimant's Return to Work and More Recent Work Hours

23. Claimant returned to work on February 17, 2014. At that time, Defendant was working on the Williamson building at Dartmouth–Hitchcock Medical Center. Defendant assigned him to the "fire-watch" position. This position, which required Claimant to observe the welders as they worked and extinguish any stray sparks that might spatter, accommodated his light duty restrictions. Defendant paid Claimant $22.00 per hour for this work, an increase of $1.00 per hour over his pre-injury hourly wage.

24. The following chart displays the number of hours that Claimant and his co-employees on the New England crew worked from February 21, 2014 through June 28, 2014:

Week ending	Claimant	Employee #1	Employee #2	Employee #3	Employee #4	Employee #5
2/21/2014	15	0	0	0	31.5	0
2/28/2014	0	0	0	0	0	0
3/7/2014	0	16	0	0	0	0
3/14/2014	31.5	15	0	0	37	0
3/21/2014	39	30	40	40	32	37
3/28/2014	34.5	37	21			
4/4/2014	27	29	28			
4/11/2014	8	10	0			
4/18/2014	0	0	0			
4/25/2014	0	0	0			
5/2/2014	14	14	14			
5/9/2014	33	39	39			
5/16/2014	26	21	31			
5/23/2014	32	36.5	36.5			
5/30/2014	31	29.5	31			
6/7/2014	0	0	0			
6/14/2014	0	0	0			
6/21/2014	0	0	0			
6/28/2014	0	0	0			

25. The credible evidence also established the following:

- Although Claimant only worked 15 hours during the week ending February 21, 2014 Defendant actually offered him 29 hours. Of the 14 hours he missed, eight were for medical appointments and six he declined for other reasons.[2]

- For the weeks ending February 28 and March 7, 2014 the only employee who was offered work (Employee #1 above) was a certified welder. Defendant had no work available for any of the other members of the New England crew, including Claimant.

- During the week ending March 14, 2014 Defendant had 39.5 hours available for Claimant to work, but due to physical therapy and medical appointments he only worked 31.5 hours.[3]

- After March 28, 2014 Defendant only had enough work for Claimant and two co-employees; due to the scarcity of work one of the remaining three ironworkers left Defendant's employment.

[2] It appears from the record that Claimant's employer did not pay him for the eight hours he missed while attending medical appointments causally related to his injury, as is required by 21 V.S.A. §640(c).

[3] Again, it appears from the record that Claimant's employer impermissibly withheld the wages he lost as a consequence of these appointments, in violation of 21 V.S.A. §640(c). *See* Footnote 2 above.

- After March 28, 2014 the only reason Claimant had fewer weekly hours than his co-employees was because of physical therapy or medical appointments, not because Defendant had fewer hours to offer him.

26. I find from this evidence that, as was the case prior to his injury, Claimant's weekly schedule fluctuated because Defendant's business was inherently variable, whether due to inclement weather, economic conditions or otherwise. Mr. Brochu credibly testified that the scarcity of work during the first six months of 2014 was very unusual as compared with recent years. Whatever its cause, I find that it impacted every employee equally, and would have impacted Claimant in the same manner even had he not been working in the light duty fire-watch position.

27. For the period from February 17, 2014 through June 28, 2014, Claimant worked an average of 17.2 hours per week in the fire-watch position, at an hourly rate of $22.00 and an average weekly wage of $378.40.[4]

28. From August 2, 2014 through October 11, 2014 Claimant worked the following hours in the fire-watch position:

Week Ending	Hours worked
August 9, 2014	58
August 16, 2014	50.5
August 23, 2014	52
August 30, 2014	51
September 6, 2014	20
September 13, 2014	0
September 20, 2014	58
September 27, 2014	45
October 4, 2014	35.5
October 11, 2014	0

29. As this chart illustrates, Claimant has worked significantly more than forty hours for most of the weeks covered by this time period. Both his average workweek – now 37 hours – and his average weekly wage – now $895.92 (based on an hourly rate of $22.00) – are now well in excess of his pre-injury averages. Also of note, they are more than two times his average wages and hours from February through June 2014, a period that Mr. Brochu had described as uncharacteristically slow for his company.

[4] These averages assume reimbursement from the employer for the hours and wages Claimant missed due to his attendance at medical appointments, as mandated under 21 V.S.A. §640(c). *See* Footnotes 2 and 3 above.

30. Mr. Brochu credibly described Claimant as a highly valued employee. He was convincing when he testified that he intends to restore Claimant to his pre-injury ironworker position at whatever point he is medically cleared to do so. Claimant himself credibly acknowledged that he did not think Mr. Brochu would "cut him loose."

Expert Vocational Rehabilitation Opinion

31. Jay Spiegel has been a vocational rehabilitation counselor for workers' compensation cases since 1990 and has managed over 1,000 cases. At Claimant's request, he reviewed Claimant's file and gave his opinion whether Defendant had offered him suitable work.[5]

32. In Mr. Spiegel's opinion, the fire-watch position is not suitable employment for three reasons: (a) the position does not exist in the Dictionary of Occupational Titles; (b) it does not provide Claimant with a suitable wage, because his weekly pay in that position is less than his pre-injury average weekly wage; and (c) in reality the work is not full-time.

33. Conspicuously absent from Mr. Spiegel's analysis is any consideration of the terms and conditions of the fire-watch position vis-à-vis Claimant's pre-injury employment. Specifically, he failed to analyze whether the fire-watch position was any more or less "full-time" than Claimant's pre-injury job, or whether the wages Claimant has received since returning to work would average, on a year round basis, a suitable wage, as is required by Workers' Compensation Rule 51.2602. I find that these omissions significantly undermine Mr. Spiegel's opinion.

34. Additionally, Mr. Spiegel expressed the following opinions:

- There was no assurance that the fire-watch position constituted permanent, full-time employment;
- Defendant was paying Claimant for his unskilled fire-watch work at a skilled wage level, which meant that there likely would be enormous pressure to eliminate the position; and
- Claimant needed to make a full medical recovery in order to have transferable skills.

[5] Prior to the formal hearing, Defendant moved either to bar Mr. Spiegel's expert testimony on this issue or to continue the proceedings, on the grounds that Claimant had failed to disclose his opinions in a timely manner. The Hearing Officer allowed the testimony, but agreed to hold the record open so that Defendant could offer rebuttal testimony, which it later declined to do.

35. I do not find Mr. Spiegel's concerns compelling. I already have found credible Mr. Brochu's assurance that he would accommodate Claimant's restrictions at his pre-injury wage. In addition, there was no evidence presented to suggest that Claimant will not completely recover from his work injury. In fact, the opposite is true. As noted above, Finding of Fact No. 15 *supra*, one of the medically accepted treatments for frozen shoulder is to give the joint time to thaw while pursuing aggressive physical therapy. This is precisely the course of treatment Claimant has undertaken. Any speculation that Claimant will not ultimately enjoy a full recovery is just that, speculation.

36. Mr. Spiegel agreed with the Return to Work Plan that Mr. Langevin developed and that the Department's specialist originally approved. Noting that the Department favors early intervention as a policy, he saw no reason to delay implementation of vocational rehabilitation services in Claimant's case. However, he conceded that such services can at times be appropriately suspended to gather more information. Given Mr. Langevin's apparent failure to fully investigate Claimant's work capacity at the time he developed his plan, I find that the better course in this case would have been to suspend vocational rehabilitation services.

CONCLUSIONS OF LAW:

1. Claimant contends that the fire-watch position he was offered does not constitute suitable employment, and therefore that he is entitled to ongoing vocational rehabilitation services. In addition, he claims entitlement to temporary total disability benefits for the weeks Defendant had no work for him, and temporary partial disability benefits for the weeks he worked fewer than forty hours.

2. Defendant counters that the fire-watch job is in fact suitable employment under Workers' Compensation Rule 51.2600. It argues that because Claimant has successfully returned to work in that position, he is no longer entitled to vocational rehabilitation services. In addition, it argues that Claimant's reduced earnings were due to economic conditions, not injury-related factors. Therefore, it asserts, Claimant is not entitled to either temporary total or temporary partial indemnity benefits.

Claimant's Entitlement to Additional Vocational Rehabilitation Services

3. Pursuant to 21 V.S.A. § 641(a), "When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including re-training and job placement as may be reasonably necessary to restore the employee to suitable employment."

4. Workers' Compensation Rule 51.2600 defines "suitable employment" as follows:

> "Suitable employment" means employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;
>
> 51.2601 Located where the employee customarily worked, or within reasonable commuting distance of the employee's residence;
>
> 51.2602 Which pays or would average on a year-round basis a suitable wage; **AND**
>
> 51.2603 Which is regular full-time work. Temporary work is suitable if the employee's job at injury was temporary and it can be shown that the temporary job will duplicate his/her annual income from the job at injury.

5. The parties do not disagree that the fire-watch position Defendant offered once Claimant was released to return to work with restrictions was work for which he had "the necessary mental and physical capacities, knowledge, skills and abilities," and also that it was suitably located. Where they disagree is as to whether the position paid a suitable wage, and also as to whether it constituted regular full-time work.

6. Workers' Compensation Rule 51.2700 defines a "suitable wage" as "a wage as close as possible to 100 percent of the average weekly wage . . .. If the goal of 100 percent of average weekly wage is not reasonably attainable then the closest reasonably attainable wage to 100 percent may be considered suitable."

7. As with any hourly employee, Claimant's average weekly wage is a function of two variables – the hourly rate at which he is paid and the number of hours he is able to work. Here, because his post-injury hourly rate is actually slightly *more* than it was pre-injury, the determination whether his current wage is suitable depends solely on whether Defendant has sufficient hours to offer him. Thus, in this case the controlling question arises not under Rule 51.2602 – is Claimant being paid a suitable wage? – but rather under Rule 51.2603 – is he being offered suitable hours?

8. On this issue, I have accepted as credible the testimony Mr. Brochu offered, both as to the seasonal and economic fluctuations in his industry and as to the unusual circumstances leading to the scarcity of work during the first six months of 2014. I also have accepted as credible the evidence documenting that Claimant worked as many hours as his co-employees did during this period, and that he would have worked the same number of hours even had he not been injured.

9. I conclude that Claimant's current fire-watch position offers "regular full-time work," within the meaning of Rule 51.2603, at least to the same extent that it did prior to Claimant's injury. Again, the credible evidence more than adequately documents the inherently variable nature of Defendant's business, and thus the inherently variable nature of Claimant's work hours as well, both before and after his work injury. Indeed, although Defendant had no work to offer any of its workers in June 2014, more recently Claimant has been able to average well in excess of his pre-injury hours.

10. As the circumstances of this case demonstrate, at times the concept of suitability involves more than merely comparing pre- and post-injury wages earned, or hours worked, during discrete snapshots in time. The goal of vocational rehabilitation is to return the injured worker to work that resembles, as nearly as possible, the conditions of his or her pre-injury employment. Where the pre-injury job involved consistent hours at a consistent weekly wage, a simple mathematical comparison will determine whether a post-injury job is suitable or not. However, where, as here, the pre-injury job involved widely fluctuating hours resulting in widely fluctuating weekly wages, a broader perspective is required.

11. It is exactly for this reason that both Rules 51.2602 and 51.2603 suggest that annualized income be used as the benchmark for determining suitability in appropriate cases. Here, because Claimant had worked for Defendant for only eleven weeks prior to his injury, it is not possible to accurately calculate what his pre-injury annualized earnings would have been.[6] Nevertheless, from the credible evidence in this case, I conclude that over the course of a year the fluctuations in Defendant's business, and therefore in Claimant's weekly hours and earnings, likely existed to the same extent in 2012 as they have in 2014. For that reason, I conclude that his current work is as suitable now, in terms of both wages and hours, as it was prior to his injury.

12. I am mindful of the possibility, as Mr. Spiegel suggested, that at some point the fire-watch position will no longer amount to suitable employment for Claimant, either because Defendant eliminates the position or because it reduces the hourly wage it pays for the work. If and when that occurs, Claimant may be entitled to additional vocational rehabilitation assistance. The scope and substance of that assistance will depend on as yet undetermined factors, however. Chief among these will be whether his frozen shoulder has resolved to the point where he becomes able to resume his pre-injury ironworker duties, and also whether Defendant continues to offer suitable alternative work in the meantime.

13. For now, at least, I conclude that Claimant's current job fulfills the goal of vocational rehabilitation services as reflected in the statute – that they be used "to restore the employee to suitable employment." There being no current need for further assistance, I conclude that Claimant is not entitled to additional vocational rehabilitation services at this time.

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[6] The annualized earnings of a comparably employed co-worker might have been relevant in this regard, *see* 21 V.S.A. §650(a), but this evidence was not offered.

Claimant's Entitlement to Temporary Total and/or Temporary Partial Disability Benefits

14. Temporary disability benefits are awarded on the basis of an injured worker's incapacity for work. *Bishop v. Town of Barre*, 140 Vt. 564 (1982). Unlike permanency benefits, which are intended to compensate for a probable future reduction in earning power, temporary disability benefits are designed to counteract the injured worker's immediate or present loss of wages during the period of physical recovery. *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962). Once the worker either regains full earning power or reaches an end medical result, his entitlement to temporary disability benefits, whether total or partial, ends. *Id.* at 24; 21 V.S.A. §§643 and 647.

15. It is true, as Defendant asserts, that in those weeks between February and June 2014 when Claimant earned less than his pre-injury average weekly wage, his co-workers as well were underemployed, a consequence of the inherent variability of Defendant's business. However, unlike his co-employees, Claimant was limited by modified duty restrictions during this time. As he had not yet regained full earning power, he is entitled to temporary disability benefits for those weeks in which he either earned no wages at all or earned less than his pre-injury average weekly wage.

16. I conclude that Claimant is entitled to temporary total disability benefits for the weeks ending February 28, March 7, April 18, April 25, June 7, June 14, June 21 and June 28, 2014. At a compensation rate of $501.50 per week, *see* Finding of Fact No. 8 *supra*, the total for these eight weeks is $4,012.00.

17. I conclude that Claimant is entitled to temporary partial disability benefits totaling $880.08, calculated as follows:

Week ending	Wages Earned	Adjusted Wages[7]	Pre-injury AWW	Difference	TPD Owed[8]
2/21/2014	330.00	638.00	724.92	(86.92)	58.24
3/14/2014	693.00	869.00	724.92	144.08	0
3/21/2014	858.00	858.00	724.92	133.08	0
3/28/2014	759.00	759.00	724.92	34.08	0
4/4/2014	594.00	616.00	724.92	(108.92)	72.98
4/11/2014	176.00	220.00	724.92	(504.92)	338.30
5/2/2014	308.00	308.00	724.92	(416.92)	279.34
5/9/2014	726.00	858.00	724.92	133.08	0
5/16/2014	572.00	572.00	724.92	(152.92)	102.46
5/23/2014	704.00	803.00	724.92	78.08	0
5/30/2014	682.00	682.00	724.92	(42.92)	28.76

18. As Claimant has prevailed only on his claim for temporary disability benefits, he is entitled to an award of only those costs that relate specifically thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have thirty days from the date of this opinion to submit evidence of his allowable costs and attorney fees.

[7] As noted above, Finding of Fact No. 25 and Footnotes 2 and 3 *supra*, in various weeks Claimant worked fewer hours than what his employer offered, either because (a) he declined to work for reasons unrelated to his injury; or (b) he missed work due to his attendance at medical appointments causally related to his injury. As to (a), temporary partial disability benefits are not payable for wages lost as a consequence of the injured worker's voluntary choice not to work, *see Pawley v. Booska Movers*, Opinion No. 02-14WC (February 19, 2014). As to (b), under 21 V.S.A. §640(c) Claimant is not entitled to temporary partial disability benefits for these hours; rather, his remedy lies directly against his employer for any wages improperly withheld. 21 V.S.A. §640(c); *Hathaway v. S.T. Griswold*, Opinion No. 04-14WC (March 18, 2014). The Adjusted Wages column reflects the wages Claimant would have earned but for these circumstances, and these are the earnings used to calculate the difference between his pre- and post-injury wages.

[8] The weekly temporary partial disability benefit is equal to two-thirds of the difference between the injured worker's pre-injury average weekly wage and his or her post-injury weekly wage. 21 V.S.A. §646.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for ongoing vocational rehabilitation benefits is hereby **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits in the amount of $4,012.00, in accordance with 21 V.S.A. §642, with interest as calculated pursuant to 21 V.S.A. §664;

2. Temporary partial disability benefits in the amount of $880.08, in accordance with 21 V.S.A. §646, with interest as calculated pursuant to 21 V.S.A. §664; and

3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 4th day of November 2014.

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Anne M. Noonan
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.