

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Keith Cyr

Opinion No. 22-15WC

v.

By: Jane Woodruff, Esq.
Administrative Law Judge

Record Concrete

For: Anne M. Noonan
Commissioner

State File No. EE-54219

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Michael Sabbeth, Esq., for Claimant

Erin Gilmore, Esq., for Defendant

ISSUES PRESENTED:

1. As a matter of law, was Claimant at an end medical result for his June 2011 compensable work injury at least as of August 11, 2013?
2. If not, is Claimant entitled as a matter of law to additional temporary disability benefits retroactive to August 11, 2013?

EXHIBITS:

Claimant's Exhibit A:	<i>Cyr v. Record Concrete</i> , Opinion No. 26-13WC (November 26, 2013)
Claimant's Exhibit B:	Jackie Roy, FNP, office visit note, June 29, 2011
Claimant's Exhibit C:	Jackie Roy, FNP, office visit note, July 20, 2011
Claimant's Exhibit D:	Springfield Hospital emergency department note, July 19, 2011
Claimant's Exhibit E:	Jackie Roy, FNP, office visit note, August 1, 2011
Claimant's Exhibit F:	Cervical spine MRI, July 26, 2011
Claimant's Exhibit G:	Dr. Huyck, office visit note, November 30, 2011
Claimant's Exhibit H:	NGM Motion for Summary Judgment, August 20, 2013
Claimant's Exhibit I:	Dr. Glassman independent medical evaluation report, April 17, 2013
Claimant's Exhibit J:	Dr. Glassman independent medical evaluation report addendum, June 5, 2013
Claimant's Exhibit K:	Dr. Huyck, office visit note, July 11, 2013

Claimant's Exhibit L:	Employer's Notice of Intention to Discontinue Payments (Form 27), effective August 11, 2013
Claimant's Exhibit M:	Letter from Department Specialist to Attorney Valente, September 24, 2013
Claimant's Exhibit N:	Notice and Application for Hearing (Form 6), December 3, 2013
Claimant's Exhibit O:	Memorandum and Referral to the Formal Hearing Docket, February 28, 2014

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant FirstComp as the non-moving party, *see State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. I take judicial notice of the Commissioner's Decision and Order in *Cyr v. Record Concrete, Inc.*, Opinion No. 26-13WC (November 26, 2013)(*Cyr I*).
2. At all times relevant to these proceedings, Claimant was an employee of Record Concrete, Inc. He initially suffered a work-related neck injury in June 2011 while Defendant FirstComp was on the risk. Claimant's average weekly wage at the time of this injury was \$1,080.47, which yielded a weekly compensation rate of \$740.31.
3. On June 27, 2011 Claimant presented to his primary care provider, Jackie Roy, a family nurse practitioner, complaining of neck pain. Ms. Roy noted a decrease in his lateral cervical range of motion and ordered x-rays and physical therapy. At a July 18, 2011 return visit, he complained that the pain was getting worse. Ms. Roy ordered an MRI and advised him to minimize his lifting and to take regular breaks.
4. On July 19, 2011 Claimant was involved in a work-related motor vehicle accident in which he suffered a cervical strain. Claimant followed up with Ms. Roy on July 27, 2011 and reported that for approximately 48 hours after that accident he experienced increased neck pain. After that, he returned to the baseline level of pain he had been experiencing since his June 2011 injury.
5. Claimant began treating with Dr. Huyck, an occupational medicine physician, in August 2011. In late August, Dr. Huyck released him to part-time, restricted duty work. This status continued until October 21, 2011 when he was laid off for the winter months, as was customary. From late August until his layoff, FirstComp paid temporary partial disability benefits.
6. Claimant was called back to work in April 2012. FirstComp did not reinstate temporary partial disability benefits, however, because it considered that Claimant's previous return to work had been successful. Claimant did not appeal this determination.

7. Claimant followed up with Dr. Huyck on April 4, 2012. She indicated he could return to full time work, with restrictions on his lifting and rest breaks as needed.
8. Claimant returned to see Dr. Huyck on September 5, 2012. By that time, overall he felt fifty percent improved. However, he reported that he only worked when his employer had light duty work available, as he had been unable to increase his lifting capacity to the heavy physical demand level. Dr. Huyck recommended that he continue working in accordance with her previous release, that is, full time with lifting restrictions and rest breaks as needed.
9. On September 21, 2012 Claimant suffered a new work-related injury to his low back. By this time National Grange Mutual (NGM) was on the risk. Claimant's average weekly wage during the 26-week period prior to this injury was approximately \$534.00. NGM accepted the injury as compensable and began paying temporary total disability benefits based upon those earnings. Including two dependents, his weekly compensation rate was \$402.00.
10. Initially the Department's workers' compensation specialist disagreed with NGM's average weekly wage calculation, and instead instructed the carrier to use the 26-week period prior to Claimant's June 2011 neck injury as the basis for calculating his temporary total disability payments. NGM objected to this analysis.
11. In March 2013 both defendants participated in an informal conference, after which the specialist issued an interim order. Because Claimant had not reached an end medical result for the June 2011 neck injury at the time he injured his low back, the specialist determined that both carriers should share responsibility for his ongoing temporary disability benefits. Based on Claimant's average weekly wage for the 26-week period prior to the low back injury, NGM was ordered to pay \$402.00 per week. On top of that, FirstComp was ordered to pay an additional \$225.33 per week as a temporary partial disability benefit. This amount represented two-thirds of the difference between Claimant's compensation rate at the time of the June 2011 neck injury and the amount he was to receive from NGM. *See* 21 V.S.A. §646.
12. At FirstComp's request, in April 2013 Claimant underwent an independent medical evaluation with Dr. Glassman, a physiatrist. Dr. Glassman specifically noted in his report that he was only evaluating Claimant for the neck injury he had sustained as a consequence of his July 19, 2011 motor vehicle accident. Specifically with regard to that accident, Dr. Glassman diagnosed a cervical strain. In his opinion, Claimant had reached an end medical result for that injury no later than October 14, 2011 and had suffered no permanent impairment. Later, in a June 5, 2013 addendum Dr. Glassman reaffirmed these opinions.

13. In both of his reports, Dr. Glassman stressed several times that the injury for which he had evaluated Claimant was the cervical strain he had suffered as a result of his July 19, 2011 motor vehicle accident injury. For example:
- In his April 17, 2013 report Dr. Glassman wrote, “It was explained to [Claimant] that today’s visit was specifically for the injury date of 07/19/11, which was a motor vehicle accident.”
 - Later in that same report, Dr. Glassman stated, “It is felt this claimant is at maximum medical improvement for the cervical strain injury that occurred on 7/19/11.”
 - In his June 5, 2013 addendum, Dr. Glassman clarified that Claimant’s September 2012 back injury “is a different date of injury than the date of injury I was seeing claimant for, which was July 19, 2011.”
 - Summarizing his findings further on in the addendum, Dr. Glassman again indicated that the date of injury to which his evaluation pertained was July 19, 2011. As to end medical result, he stated, “No further treatment is felt to be reasonable, medically necessary, or causally related to the motor vehicle accident of 7/19/2011.”
14. On July 11, 2013 Claimant followed up with Dr. Huyck for his June 2011 neck injury. Claimant indicated that his neck and arm symptoms were unchanged and had persisted since June 2011. Dr. Huyck agreed with Dr. Glassman that he had reached an end medical result for the cervical strain suffered in the July 2011 motor vehicle accident. However, she clarified that he was not yet at an end medical result for his June 2011 neck injury; to the contrary, cervical surgery was now being recommended. Dr. Huyck also wrote “Workers’ compensation form completed without change with clearance to return to limited modified work.” I find from this notation that Dr. Huyck intended to reiterate the terms of her prior return to work releases – full time with lifting restrictions and rest breaks as needed.
15. Claimant next saw Dr. Huyck on August 1, 2013, this time for his September 2012 low back injury. He reported both lower back and leg pain, which Dr. Huyck diagnosed as consistent with lumbar radiculopathy from disk protrusions at the L4-5 and L5-S1 levels. At the conclusion of this visit Dr. Huyck again completed Claimant’s workers’ compensation form “without change with release to limited modified work.” Again, I consider this to mean that Claimant was still capable of full time work, with lifting restrictions and rest breaks as needed.
16. On the present record, it is unclear if NGM is still paying temporary total disability benefits on account of Claimant’s September 2012 low back injury. Nor can I discern the extent, if any, to which his hours remain reduced as a consequence of his June 2011 neck injury.

Procedural History

17. In response to the Department's March 2013 interim order, Finding of Fact No. 11 *supra*, FirstComp requested a formal hearing. NGM filed a motion for summary judgment in August 2013, to which FirstComp responded in September 2013.
18. In the meantime, citing Dr. Glassman's April and June 2013 reports as support, Finding of Fact No. 12 *supra*, effective August 11, 2013 FirstComp sought to discontinue Claimant's temporary partial disability benefits on the grounds that he had reached an end medical result for his June 2011 neck injury. The Department approved the discontinuance, in response to which Claimant requested a hearing.
19. Following an informal conference in February 2014, the Department's specialist determined that FirstComp's discontinuance was reasonably supported, at least as it pertained to Claimant's July 2011 work-related motor vehicle accident. As for the June 2011 injury, the specialist questioned whether he was still entitled to indemnity benefits. Claimant argued that he was not yet at an end medical result for that injury and therefore that he was entitled to temporary partial disability benefits retroactive to their discontinuance on August 11, 2013. The specialist disagreed, and approved FirstComp's discontinuance as to the June 2011 injury as well.
20. In the meantime, the Commissioner's decision on NGM's summary judgment motion, *Cyr v. Record Concrete*, Opinion No. 26-13WC (November 26, 2013) (*Cyr D*), had already issued. In it, the Commissioner ruled that NGM was obligated to pay benefits on account of Claimant's September 2012 lower back injury at a compensation rate based on his average wages during the 26-week period prior thereto, or \$402.00. At least as it pertained to NGM, the Commissioner thus accepted the same analysis that the Department specialist had applied in crafting her interim order.
21. As to the defenses FirstComp had raised in response to the specialist's March 2013 interim order, the Commissioner determined that because they were directed at Claimant and not at NGM, it would be improper to consider them in the context of her ruling on NGM's motion for summary judgment. She thus concluded that the March 2013 interim order remained in full force and effect as against FirstComp. However, by this time FirstComp's discontinuance had already been approved.
22. Claimant filed the pending motion for summary judgment on January 26, 2015. FirstComp responded on March 4, 2015.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).
2. Claimant here seeks summary judgment in his favor on the question whether he has yet reached an end medical result for his June 2011 work-related cervical injury. He asserts that there is no genuine issue of material fact on this issue, and that as a consequence he is entitled as a matter of law to reinstatement of his temporary partial disability benefits retroactive to the date they were discontinued, August 11, 2013.
3. FirstComp counters that Dr. Glassman's independent medical examination report and addendum raise sufficient material issues of fact so as to render summary judgment inappropriate.

Was Claimant at End Medical Result for his June 2011 Neck Injury as of August 11, 2013?

4. Vermont's workers' compensation rules define end medical result as "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Workers' Compensation Rule 2.1200.¹ The date of end medical result marks an important turning point in an injured worker's progress. It signals a shift in treatment from curative interventions, the goal of which is to "diagnose, heal or permanently alleviate or eliminate a medical condition," to palliative ones, which aim instead to "reduce or moderate temporarily the intensity of an otherwise stable medical condition." Workers' Compensation Rule 2.1310.²
5. I have carefully reviewed Dr. Glassman's two reports, which form the sole basis for FirstComp's contention that factual issues exist as to whether Claimant was or was not at an end medical result for his June 2011 work injury as of August 2013. I count eight instances in which Dr. Glassman clearly stated that his analysis of Claimant's condition, including his opinion as to end medical result, related solely to the July 19, 2011 work-related motor vehicle accident. Notwithstanding FirstComp's attempt to inject an element of uncertainty, there simply is no basis

¹ Effective August 1, 2015 this rule has been re-codified as Rule 2.2000.

² Effective August 1, 2015 this rule has been re-codified as Rule 2.3400.

for me to conclude that Dr. Glassman intended to state an opinion as to Claimant's end medical result status vis-à-vis his June 2011 work injury when he repeatedly and emphatically stated otherwise in his reports.

6. An opponent of summary judgment cannot rely upon conjecture or speculation as a basis for finding a genuine issue of material fact. *Richards v. Nowicki*, 172 Vt. 142, 150 (2001), citing *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990); *Estate of Carr v. Verizon New England*, Opinion No. 08-11WC (April 29, 2011). With no evidence to support FirstComp's hypothesis that Dr. Glassman somehow intended to include Claimant's June 2011 work injury in his end medical result analysis, I am left with Dr. Huyck's July 2013 opinion, which was both clearly stated and credible, as the only expert medical evidence on the issue.
7. Based on the record now before me, and even considering the evidence in the light most favorable to FirstComp, *State v. Delaney, supra*, I can find no genuine issue of material fact on the question whether Claimant was or was not at an end medical result as of August 11, 2013. I thus conclude as a matter of law that he was not.

Is Claimant Entitled to Temporary Partial Disability Benefits Retroactive to August 11, 2013?

8. Having concluded as a matter of law that Claimant was not at an end medical result for his June 2011 neck injury as of August 11, 2013, the next question is whether any genuine issue of material fact exists as to his entitlement to temporary partial disability benefits retroactive to that date.
9. 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 a period of physical recovery referable to a compensable work injury. *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. This limitation on temporary disability benefits applies equally to both the initial period of disability following an injury and to any subsequent periods of disability.
10. Expert medical testimony is required to establish the extent, if any, to which an injured worker is incapable of working. *See, e.g., Maluk v. Plastic Technologies of Vermont*, Opinion No. 06-13WC (February 5, 2013); *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001).

11. Considering the evidence in the light most favorable to FirstComp, *State v. Delaney, supra*, the record establishes that as of August 2011 and continuing at least through his seasonal layoff in October 2011, Dr. Huyck had limited Claimant, on account of his June 2011 cervical injury, to part-time, restricted duty work. Dr. Huyck eased these restrictions in April 2012, by releasing him to full-time as opposed to part-time work. Claimant was not receiving temporary partial disability benefits as of that date, though the record does not establish whether this was because he was earning full wages or because he had failed to appeal FirstComp's prior discontinuance of indemnity benefits. In any event, presumably Claimant's full-time work status remained unchanged until September 12, 2012 when his low back injury occurred and he became totally disabled from working for a time.
12. Dr. Huyck's medical records resume in July 2013, at which time she was treating Claimant for both his June 2011 cervical injury and his more recent September 2012 low back injury. It is impossible to determine which, if any, of the work restrictions she subsequently imposed were causally related to Claimant's low back injury and which, if any, were causally related to his June 2011 cervical injury. Without clarity on that issue, I cannot determine to what extent Claimant remained disabled on account of the latter injury, which means that I also cannot determine whether he is owed additional temporary partial disability benefits as a consequence of that injury. *See Brown v. Casella Waste Management*, Opinion No. 19-15WC (September 2, 2015).
13. I thus conclude that genuine issues of material fact exist as to the extent, if any, to which Claimant was partially disabled from working on account of his June 2011 cervical injury as of August 11, 2013. Notwithstanding that he had not yet reached an end medical result as of that date, his entitlement to temporary partial disability benefits remains uncertain, and therefore inappropriate for resolution as a matter of law.

ORDER:

Claimant's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Summary judgment in Claimant's favor is **GRANTED** as to his claim that he had not yet reached an end medical result for his June 2011 work-related cervical injury as of August 11, 2013; and
2. Summary judgment in Claimant's favor is **DENIED** as to his claimed entitlement to temporary partial disability benefits from August 11, 2013 forward.

DATED at Montpelier, Vermont this ____ day of _____, 2015.

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.