STATE OF VERMONT
DEPARTMENT OF LABOR

Tony Vohnoutka	Opinion No. 01-16WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
Ronnie's Cycle Sales of Bennington, Inc.	For: Anne M. Noonan Commissioner
	State File No. FF-00938

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's claim for workers' compensation benefits barred as a matter of law for failure to give timely notice of his alleged work-related injury as required by 21 V.S.A. §656(a)?

2. Is Defendant entitled to judgment in its favor as a matter of law on the question whether Claimant suffered a compensable work-related injury on or about February 22, 2013?

3. Is Defendant entitled to judgment in its favor as a matter of law on the question whether Claimant is entitled to workers' compensation benefits causally related to his alleged February 22, 2013 work injury?

EXHIBITS:[1]

Claimant's Exhibit 1:	Affidavit of Tony Vohnoutka, January 9, 2015
Claimant's Exhibit 2:	Office note and referrals (Melanie Clark, NP), 2/10/2014
Claimant's Exhibit 3:	Office note and referrals (Melanie Clark, NP), 6/20/2014

[1] Claimant failed to file a separate and concise statement of contested facts in response to Defendant's Motion for Summary Judgment, as is required by V.R.C.P. 56(c)(1)(A), and his memorandum in opposition was non-responsive to the issues presented. Given both Claimant's *pro se* status and the relatively informal nature of the formal hearing process, *Workers' Compensation Rule 17.1100*, in ruling on Defendant's motion I have considered various documents, identified herein as Claimant's exhibits, that were previously filed with the Department, as is permitted by V.R.C.P. 56(c)(3).

Claimant's Exhibit 4:	Doctor's progress report (Dr. Maggio), 6/25/2014
Claimant's Exhibit 5:	Doctor's initial report (Dr. Maggio), 6/26/2014
Claimant's Exhibit 6:	Office note (Melanie Clark, NP), 12/9/2014
Defendant's Exhibit A:	Letter from Denise Bourassa, March 27, 2014
Defendant's Exhibit B:	Timecards, March 4 – July 18, 2013; various tardy/absence reports; documented warnings; employee's statement verifying receipt of company handbook
Defendant's Exhibit C:	Affidavit of Dave Munson, March 18, 2015
Defendant's Exhibit D:	Office note (Dr. Robbins), 7/14/2014
Defendant's Exhibit E:	Independent medical evaluation report (Dr. Boucher), 9/25/2015

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), and taking judicial notice of all relevant forms contained in the Department's claim file, I find the following facts:

1. Claimant worked for Defendant, a retailer of recreational vehicles, as a service technician. *First Report of Injury (Form 1), March 27, 2014*.

Claimant's Alleged February 2013 Work Injury, Subsequent Medical Course and Employment Status

2. On or about November 12, 2013 Claimant informed Defendant's service manager, Dave Munson, that he wished to seek medical treatment for an injury he alleged he had suffered while at work in January or February 2013. *Letter from Denise Bourassa, Defendant's Exhibit A.*

3. More specifically, Claimant asserts by affidavit that he injured his neck on February 22, 2013, while helping Mr. Munson unload a snowmobile from the back of a truck. *Affidavit of Tony Vohnoutka, Claimant's Exhibit 1*. He further asserts that Mr. Munson later acknowledged that the incident had occurred, although he recalled it as having taken place at a later date. *Id.*

4. For his part, Mr. Munson denies any knowledge or recollection of the incident Claimant alleged, or of any other work-related accident or injury occurring in January or February 2013. According to his affidavit, prior to November 12, 2013 Claimant had never indicated either that he had suffered an injury or that he was unable to perform his routine job duties. *Affidavit of Dave Munson, Defendant's Exhibit C.* Nor had Mr. Munson observed anything in Claimant's performance that was suggestive of an injury. *Id.*

5. Upon learning of Claimant's claim that he had suffered a work-related injury, Defendant's human resources representative, Denise Bourassa, advised him "to

seek medical attention on his own accord because the claim was not made available at [the] time of the incident." As support for Defendant's position, Ms. Bourassa cited language from Defendant's Company Policy Handbook requiring that "any accident on the job, no matter how small, must be reported immediately to your supervisor." *Defendant's Exhibit A.*

6. The medical records do not document any treatment for neck pain or injury until February 10, 2014. On that date, Claimant presented to Melanie Clark, a nurse practitioner, with a complaint of neck pain that reportedly had begun "about a year ago at work moving a snowmobile." Ms. Clark diagnosed cervicalgia. Based on the history Claimant described, she determined that the February 2013 lifting incident was the "competent medical cause" of his injury. As treatment, Ms. Clark prescribed pain medications and made referrals for both physical therapy and an orthopedic consult. In the meantime, noting that Claimant had been able to work without restrictions since his injury, she did not change his work duties. *Melanie Clark office note, Claimant's Exhibit 2.*

7. Ms. Clark next examined Claimant on June 20, 2014. She reiterated that his complaints were consistent with the history he had reported, and again recommended both physical therapy (which Claimant had not yet initiated) and an orthopedic consultation. Notwithstanding his subjective report of worsening pain, Ms. Clark also reiterated that Claimant was capable of working without restrictions or limitations. *Melanie Clark office note, Claimant's Exhibit 3; see also Doctor's Progress Report, Claimant's Exhibit 4, and Doctor's Initial Report, Claimant's Exhibit 5.*

8. Claimant underwent an orthopedic consultation with Dr. Robbins on July 14, 2014. According to the medical record, he reported the sudden onset of neck pain some two years previously "as a result of lifting." Dr. Robbins' clinical impression was of a soft tissue and posterior element cervical spine injury, with resulting spasm and mechanical decompensation. I cannot discern from the medical record whether he attributed these conditions to an acute event or to "incremental repeat irritations," whether work-related or not. *Dr. Robbins office note, Defendant's Exhibit D.*

9. As treatment for Claimant's symptoms, Dr. Robbins recommended home exercises, ice and a short course of physical therapy. As for work capacity, consistent with Ms. Clark's prior determination, he too indicated that Claimant was capable of working full duty, without restrictions. *Id.*

10. In August 2014 Defendant terminated Claimant's employment "due to increasingly substandard performance." *Affidavit of Dave Munson, Defendant's Exhibit C.*

11. Between February 22, 2013 and August 2014, Claimant worked full time and performed his regular duties. *Affidavit of Dave Munson, Defendant's Exhibit C; timecards and absence reports, Defendant's Exhibit B.*

12. On December 9, 2014 Claimant returned to Ms. Clark, again complaining of ongoing neck pain. Ms. Clark reported that Claimant felt that his injury "has caused him a degree of disability and he is [now] unable to perform the type of work he did previously as a mechanic technician." As treatment, she referred him for chiropractic evaluation. She also expressed that vocational rehabilitation would be beneficial, "as he feels due to the ongoing neck pain he is unable to perform heavy lifting anymore." With that in mind, Ms. Clark determined that as of December 9th Claimant was able to work, but with limitations against bending, twisting, lifting and operating heavy equipment. *Melanie Clark office note, Claimant's Exhibit 6.*

13. At Defendant's request, on September 25, 2015 Claimant underwent an independent medical examination with Dr. Boucher. Dr. Boucher diagnosed myofascial pain, which in his opinion was not causally related to the alleged February 22, 2013 work injury. Dr. Boucher further determined that Claimant had reached an end medical result, with no permanent impairment and no need for additional medical treatment. As for work capacity, he found "no objective reason for any work restrictions."

14. Following Defendant's termination of his employment, Claimant applied for and received unemployment compensation, but the record does not indicate for how long. As of this date, he remains unemployed.

Procedural History

15. Defendant filed a First Report of Injury (Form 1) with the Department on or about April 10, 2014. It denied the claim on the same date, on the grounds that the injury Claimant alleged had not arisen in the course and scope of his employment and was not causally related thereto. *Denial of Workers' Compensation Benefits by Employer or Carrier (Form 2), April 9, 2014.*

16. Claimant appealed Defendant's claim denial by way of a Notice and Application for Hearing (Form 6), filed on September 22, 2014 and supplemented on January 23, 2015. After informal dispute resolution efforts failed, the claim was forwarded to the formal hearing docket.

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). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15.

2. Defendant here seeks summary judgment on three grounds. First, it asserts that Claimant's claim for workers' compensation benefits is barred as a matter of law because he failed to give timely notice of his alleged work-related injury, as required by 21 V.S.A. §656(a). Second, it asserts that Claimant has failed to produce sufficient evidence to establish a *prima facie* case that he suffered a compensable work injury on or about February 22, 2013. Last, and in the same vein, it asserts that Claimant has failed to produce sufficient evidence to establish a *prima facie* case entitling him to the benefits available under Vermont's workers' compensation law.[2]

Timely Notice

3. Vermont's workers' compensation statute requires that a worker give notice of an alleged work-related injury to his or her employer "as soon as practicable" after the injury occurs, and that a claim for compensation be made within six months thereafter. 21 V.S.A. §656(a). These requirements are not absolute, however. Section 660(a) excuses the worker from them "if it is shown that the employer, the employer's agent, or representative had knowledge of the accident . . .."

4. Defendant here claims that Claimant failed to give timely notice of his alleged injury and resulting claim for benefits. True, this is what Claimant's supervisor has averred, Finding of Fact No. 4 *supra*, but Claimant has sworn otherwise, Finding of Fact No. 3 *supra*. Their conflicting statements thus present genuine issues of material fact, which cannot be resolved on summary judgment.

Compensability

5. To establish a compensable claim under Vermont's workers' compensation statute, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment," and that it "arose out of the

[2] I acknowledge that the only benefit Claimant specifically claimed in his September 22, 2014 Notice and Application for Hearing was for permanent total disability benefits. However, given both his *pro se* status and the relatively informal nature of these proceedings, *Workers' Compensation Rule 17.1100,* I consider his claim to encompass any other benefits to which he might be entitled should his injury be deemed compensable. Having participated in numerous status conferences at which indemnity, medical and vocational rehabilitation benefits were discussed, I presume that Defendant's counsel is well aware of the actual scope of Claimant's demands.

employment." 21 V.S.A. §618(a)(1); *Miller v. IBM Corp.*, 161 Vt. 213, 214 (1993).

6. An injury occurs "in the course of" employment "when it occurs within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964).

7. An injury "arises out of" the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed the claimant in the position where claimant was injured." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993) (emphasis in original).

8. Putting the two prongs of the compensability test together, the "in the course of" requirement generally "tests work-connection as to time, place and activity," *Cyr v. McDermott's, Inc.*, 2010 VT 19, ¶13 (internal quotations omitted), while the "arising out of" component establishes the required causal connection, *id.* at ¶10. In order to establish entitlement to benefits, it is the claimant's burden to prove both components of the compensability test. *Id.* at ¶9 (internal citations omitted).

9. Defendant here asserts that it is entitled to summary judgment on the grounds that Claimant has failed to produce evidence sufficient to raise genuine issues of material fact as to either element of compensability. I disagree. As to the first element, the "time, place and activity" component, Claimant has sworn in his affidavit that his injury occurred while moving a snowmobile at work, Finding of Fact No. 3 *supra*. That Mr. Munson has sworn otherwise, Finding of Fact No. 4 *supra*, establishes only that genuine issues of material fact exist. Summary judgment on this issue is therefore inappropriate.

10. Similarly, determining the second element of compensability will require me to evaluate whether Ms. Clark's opinion on medical causation, as reflected in her office notes, Finding of Fact Nos. 6, 7 and 12 *supra*, is more compelling than that of Defendant's expert, Dr. Boucher, Finding of Fact No. 13 *supra*. Again, genuine issues of material fact have been presented, sufficient to defeat summary judgment in Defendant's favor.

Entitlement to Benefits

11. Last, I consider whether summary judgment in Defendant's favor is appropriate as to any of the benefits Claimant seeks. Establishing both components of the compensability test is a necessary prerequisite to every workers' compensation benefit, 21 V.S.A. §618(a)(1). With that in mind, and for the reasons stated above, genuine issues of material fact exist as to Defendant's responsibility for Claimant's medical treatment under 21 V.S.A. §640(a), and also as to Claimant's entitlement to vocational rehabilitation benefits under 21 V.S.A. §641. Only after

I resolve the discrepancies between Claimant's and Mr. Munson's testimony regarding the "in the course of" component, and those between Ms. Clark and Dr. Boucher on the "arising out of" component, will I be able to determine to what extent, if any, Defendant is responsible for providing these benefits.

12. Given the record before me, I must evaluate Claimant's claim for temporary disability benefits in two parts – before and after December 9, 2014. Prior to that date, Ms. Clark, Dr. Robbins and Dr. Boucher each determined that he was capable of working full time and full duty, with no activity restrictions whatsoever. Claimant has not proffered any evidence to the contrary, despite having had ample opportunity to do so. He thus has failed to raise a genuine issue of material fact, and for that reason, I conclude as a matter of law that he is not entitled to temporary disability benefits for any period prior to December 9, 2014. *See, e.g., Doe v. Doe*, 172 Vt. 533 (2001); *Poplaski v. Lamphere*, 152 Vt. 251, 254-255 (1989) (summary judgment mandated where, after adequate time for discovery, a party fails to make a sufficient showing to establish the existence of an element essential to its case).

13. After December 9, 2014 Ms. Clark imposed activity restrictions, Finding of Fact No. 12 *supra*, which if found credible might entitle Claimant to temporary disability benefits from that date forward. Summary judgment on this issue is therefore inappropriate.

Summary

14. The sole purpose of summary judgment review is to determine if a genuine issue of material fact exists. If such an issue does exist, it cannot be adjudicated in the summary judgment context, no matter how unlikely it seems that the party opposing the motion will prevail at trial. *Fonda v. Fay*, 131 Vt. 421 (1973); *Southworth v. State of Vermont Agency of Transportation*, Opinion No. 45-08WC (November 12, 2008). However tenuous or unlikely the evidence in support of Claimant's claims for medical and vocational rehabilitation benefits are, he is entitled nonetheless to present his case and litigate the fact questions that surround them. The same is true with respect to his claim for temporary disability benefits after December 9, 2014. Summary judgment against him on these issues is not appropriate. *Bohannon v. Town of Stowe*, Opinion No. 03-14WC (February 26, 2014).

15. Because no genuine issues of material fact exist as to Claimant's claim for temporary disability benefits for any period prior to December 9, 2014, summary judgment on this issue is appropriate.

ORDER:

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

1. Summary judgment in Defendant's favor is **GRANTED** as to Claimant's claim for temporary disability benefits for any period prior to December 9, 2014, and Claimant's claim for such benefits is hereby **DENIED**;

2. Summary judgment in Defendant's favor is **DENIED** on the question whether Claimant's claim for workers' compensation benefits is barred for failure to give timely notice as required by 21 V.S.A. §656(a);

3. Summary judgment in Defendant's favor is **DENIED** on the question whether Claimant suffered a compensable work-related injury on or about February 22, 2013;

4. Summary judgment in Defendant's favor is **DENIED** as to Claimant's claim for medical, vocational rehabilitation and/or temporary disability benefits for any period(s) after December 9, 2014.

DATED at Montpelier, Vermont this _____ day of _____, 2016.

_____
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.