STATE OF VERMONT
DEPARTMENT OF LABOR

Terry Bergeron

v.

Rock-Tenn Co.

Opinion No. 08-18WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. FF-52125

OPINION AND ORDER

Hearing held in Montpelier on September 21, 2017
Record closed on March 15, 2018

APPEARANCES:

William Skiff, Esq., for Claimant
Erin Gilmore, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a compensable low back and/or lower extremity injury causally related to his July 3, 2013 accident at work?

2. What is the correct permanent impairment rating referable to Claimantôs compensable neck injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimantôs Exhibit 1:	*Curriculum vitae*, Michael Barnum, MD
Claimantôs Exhibit 2:	*Curriculum vitae,* Douglas Kirkpatrick, MD, FAAOS, CIME
Claimantôs Exhibit 3:	*Curriculum vitae*, George White, MD, MS
Defendantôs Exhibit A:	Dr. Backus preservation deposition, December 6, 2017

CLAIM:

All workersô compensation benefits to which Claimant proves his entitlement as causally related to his alleged low back and/or lower extremity injury

Permanent partial disability benefits referable to Claimantôs accepted cervical spine injury, pursuant to 21 V.S.A. §648

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

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 the Vermont Workersô Compensation Act.

2. Judicial notice is taken of all forms and correspondence in the Departmentôs file relating to this claim.

3. Claimant has worked at the same Sheldon Springs, Vermont paper mill for 32 years. During his tenure, various companies have owned and operated the mill, including Specialty Paper, Boise Cascade, Defendant and, since approximately 2015, WestRock. The millôs end product is recycled paperboard.

4. Claimant began his employment in the wood room, loading heavy chunks of wood onto a cart and pushing the cart to the grinder. For the past 17 or 18 years, he has been a Millwright A maintenance worker. In that position, he repairs and maintains all types of mill machinery. The work is very physical, and much of it requires heavy lifting.

5. Claimant enjoys his job and loves working at the mill. Prior to the incident at issue here, in 32 years of employment he had never been absent due to a work-related injury.

6. In addition to his work at the mill, Claimant also tends a vegetable garden. Prior to the incident at issue here, with his sonôs assistance he planted as much as 30 acres of produce, which he sold at local farmersô markets, restaurants and schools.

Claimant's July 2013 Work Injury and Subsequent Medical Course

7. On July 3, 2013 Claimant was assigned the task of repairing the ñbox shopò elevator. This required him to climb down into the pit beneath the elevator and dismantle one of its pistons. To do so, he stood on a step ladder and hammered at the three-pound pin that held it in place. Finally, the piston came loose. As he stepped off the ladder and onto the concrete sill plate below, he turned, lost his balance and fell to the floor, landing hard on his right side.

8. Immediately after the accident, Claimant felt pain in his neck, low back and right knee. According to his testimony, while eating lunch an hour or so later, he noticed that his right leg felt numb and his toes were ñprickly.ò Later that day, he iced his neck and his knee.

9. In the weeks that followed, Claimant treated his symptoms with Advil and continued to work. When his pain failed to abate, he sought medical treatment with Dr. Sumner, an occupational medicine specialist.

(a) *Claimant's Neck Injury*

10. Dr. Sumner first evaluated Claimant on August 19, 2013, some seven weeks after the accident. His medical record indicates a chief complaint of neck soreness, with the following history: ñPatient reports that back in July he fell on his right side. He had some soreness that cleared up in his back but now reports pain in the neck.ò Dr. Sumnerôs examination appears to have been limited to the neck and shoulder area, with no observations noted as to Claimantôs low back, legs or feet.

11. Initially, Dr. Sumnerôs treatment efforts focused on Claimantôs neck and shoulder pain. A cervical MRI study revealed multi-level degenerative disc and facet disease, leading to a diagnosis of chronic mechanical neck pain. Claimant treated conservatively, first with physical therapy and later with cervical facet joint injections and Celebrex, a non-steroidal anti-inflammatory medication. At times he reported periods of increased pain, likely due to awkward postures he had to assume while tending to machinery at work. Through it all, he continued to work full-time and full-duty.

12. The medical records do not document any curative treatment for Claimantôs neck injury after July 15, 2014, when he was examined for swelling in his face and neck following his second cervical facet joint injection. Thereafter, he requested a referral to an acupuncturist, which Doreen Benoit, an Advance Practice Registered Nurse in Dr. Sumnerôs practice, provided. Ultimately, Claimant declined to pursue this treatment.

13. At a follow-up visit on August 22, 2014, Ms. Benoit stated that she was ñnot sure what else can be doneò for Claimant and declared, ñI would say he is at [end medical result].ò Nevertheless, she suggested he seek an independent medical examination to determine future treatment. As discussed *infra*, Finding of Fact No. 30, in November 2014 Claimant underwent an independent evaluation with Dr. Backus, who concluded that he had reached an end medical result at least as of July 2014.

14. Considering this timeline, I find that Claimant likely reached an end medical result for his compensable cervical injury as of Ms. Benoitôs August 22, 2014 evaluation.

(b) Claimant's Low Back and Lower Extremity Symptoms: Timing

15. As for Claimantôs complaints of low back pain and numbness and tingling in his legs, the medical records reflect a somewhat inconsistent history. Consistent with Dr. Sumnerôs August 19, 2013 record, Claimantôs initial physical therapy evaluation on August 28, 2013 reflected his report that he ñstrained his back, right knee with his neck pain presenting later that afternoon.ò Thereafter, the records are more variable, particularly as regards the timing of his lower extremity symptoms:

- Dr. Sumnerôs September 5, 2013 record describes Claimantôs report of numbness in his left thigh as a ñnew problem,ò which started ñabout a week and a half ago,ò and was not present at the time of his July fall. Similarly, the physical therapistôs September 6, 2013 record reflects Claimantôs statement that he first noticed numbness in his left toes ñthe other day.ò

- Some weeks later, however, Dr. Sumnerôs October 28, 2013 office note reflects Claimantôs report that his leg numbness ñbegan 3-4 days after his fall.ò

- The record of Claimantôs November 2013 consult with Dr. Waheed, a neurologist, reflects Claimantôs report that ña few days after the [July 2013] fall, once his low back pain started improving, he started experiencing intermittent bilateral right greater than left lower extremity paresthesias.ò

- In his November 2014 independent medical examination, Dr. Backus reported that Claimant ñadmitted that he does not recall when his leg symptoms began that well but believes there was at least 3 weeks after the [July 2013] fall before they started.ò

- Dr. Whiteôs January 2016 independent medical examination reflects Claimantôs report that he began experiencing a ñprickly sensationò in his right leg within hours after his fall.

16. As the medical records closest in time to the July 2013 accident, the symptom progression Claimant reported to Dr. Sumner on August 19th and September 5th, 2013 are likely more accurate than either his later reports or his testimony at hearing. I therefore find that Claimant did not begin to experience numbness and tingling in his lower extremities until some seven weeks after his fall.

17. As for Claimantôs low back pain, as noted above, Finding of Fact No. 10 *supra*, the medical record reflects Dr. Sumnerôs understanding that the ñsorenessò in that area had cleared up by the time of his initial evaluation in August 2013. However, Claimant testified that his low back pain never completely resolved, but that Dr. Sumner decided to focus primarily on treating his neck pain first because that was the more problematic issue at the time. I find Claimantôs testimony in this regard entirely credible.

(c) Claimant's Low Back and Lower Extremity Symptoms: Causation

18. The medical evidence as to the cause of Claimantôs low back and lower extremity symptoms is also difficult to decipher. Initially, Dr. Sumner expressed uncertainty as to whether the numbness Claimant reported was related to his July 2013 fall. The ñwandering natureò of his symptoms ï first in the left thigh, then in the right thigh, then moving to the left and then the right toes ï made determining their specific origin problematic. Without a definitive diagnosis, Dr. Sumner posited that the symptoms might be due to a fall-related back injury, but that other explanations were possible as well.[1] Ultimately, he declined to address causation and instead suggested that an independent medical examination ñwould be helpful to define what is and is not relatedò to Claimantôs work accident.

(i) Dr. Barnum

19. Following evaluations in February 2014 and May 2015, Dr. Barnum, a board-certified orthopedic surgeon and Claimantôs treating orthopedist, settled on a diagnosis of mechanical low back pain with radiculopathy. Based both on the history Claimant had reported ï that after his July 2013 fall his radicular symptoms ñcame on suddenly [and] got gradually worse over the ensuing several weeksò ï and on the fact that he ñdid not have back or leg pain prior to his fall,ò Dr. Barnum concluded that his symptoms were ñabsolutelyò related to his work injury.

20. Having found that Claimantôs lower extremity symptoms did not manifest themselves until some weeks later, Finding of Fact No. 15 *supra*, I must reject Dr. Barnumôs assertion that they ñcame on suddenlyò after his July 2013 fall. Particularly as it relates to Claimantôs lower extremity symptoms, to the extent that Dr. Barnumôs analysis relies on a closer temporal relationship than what actually existed, I find his causation opinion unpersuasive.

[1] In his September 5, 2013 office note, Dr. Sumner posited that Claimantôs thigh numbness could be originating from his lumbar spine, or alternatively that it could be due to pressure on his femoral cutaneous nerve caused by his ñlarge pannus.ò In his September 19, 2013 note, Dr. Sumner added diabetes or ñsomething like a mononeuritis cutaneous multiplexò as other possible explanations. Dr. Sumner did not testify, and neither party proffered additional evidence to assist my understanding of these differential diagnoses.

(ii) Dr. White

21. At Claimantôs attorneyôs request, in January 2016 Dr. White, a board-certified occupational medicine specialist, conducted an independent medical examination. As part of his evaluation, Dr. White reviewed Claimantôs post-injury medical records. As to his pre-injury history of low back problems, he relied solely on Claimantôs assertion that he had none.

22. Dr. White diagnosed Claimant with chronic mechanical low back pain. Based on Claimantôs report that his low back and lower extremity symptoms began with his July 2013 fall and never completely resolved thereafter, he concluded that they were causally related.

23. As with Dr. Barnumôs opinion, I find that Dr. Whiteôs reliance on Claimantôs recollection regarding the timing of his lower extremity symptoms weakens his causation analysis.

(iii) Dr. Kirkpatrick

24. In March 2017, Claimantôs attorney referred him for a second independent medical examination, this time with Dr. Kirkpatrick, a board-certified orthopedic surgeon. In addition to his clinical examination, Dr. Kirkpatrick reviewed Claimantôs post-July 2013 medical records as well as his primary care records dating back to April 2010.

25. Dr. Kirkpatrick noted that the initial post-injury medical records reflected Claimantôs report of a low back injury, followed ñin a short time periodò by the development of numbness in his thighs and eventually into his right foot. In his opinion, these symptoms correlated well with electrodiagnostic findings of L5 compression. Finding no prior history of any musculoskeletal conditions in the pre-injury primary care notes, Dr. Kirkpatrick concluded that Claimantôs low back and lower extremity symptoms were ñclearly . . . tied to his work injury.ò

26. As with Dr. Barnumôs and Dr. Whiteôs analyses, Dr. Kirkpatrickôs causation opinion is based in part on his assumption that Claimantôs low back pain began with his July 2013 fall, and that his lower extremity symptoms followed ñin a short time periodò thereafter. Having found that the latter symptoms did not occur until some weeks later, Finding of Fact No. 15 *supra*, I consider Dr. Kirkpatrickôs analysis in this regard unpersuasive.

27. As for Dr. Kirkpatrickôs reliance on Claimantôs pre-July 2013 medical history to support his causation analysis, the partiesô joint medical exhibit includes only his summary of the primary care providerôs records, not the records themselves. Dr. Kirkpatrickôs notes provide the following information:

- In September 2010 Claimant was evaluated for right calf pain radiating into the heel, and right hand and foot numbness at night for the past month. An ultrasound of the calf was requested, and the evaluation one week later was described as ñfollow up for DVT[2] examination.ò

- In March 2012 Claimant was evaluated for acute, intermittent back pain, with improving symptoms. According to Dr. Kirkpatrickôs summary, a physical therapy referral was discussed, but no back examination was performed.

- In July 2012 Claimant was evaluated for complaints of leg pain, stiffness and calf tenderness, markedly increased over the past two days. Dr. Kirkpatrickôs summary notes that the primary care physicianôs assessment was for edema and pain in the leg below the knee. As had occurred in September 2010, the plan was for an ultrasound to rule out DVT.

- In May 2013 Claimant was evaluated for a complaint of pain in his right back. The treating provider prescribed muscle relaxants for an apparent muscle strain diagnosis. The follow-up appointment two weeks later was for ñright-sided positional back pain,ò with an assessment that included thoracic neuritis. Later still, a June 11, 2013 examination was reported to be for a one-and-a-half-month history of ñinspiratory right upper back discomfort.ò According to Dr. Kirkpatrickôs summary, no back examination was performed; the assessment was pleurisy.

28. It would have been preferable for the parties to have proffered the pre-July 2013 records themselves, rather than just Dr. Kirkpatrickôs summary. Nevertheless, assuming they accurately reflect the recordsô contents, Dr. Kirkpatrickôs notations permit two findings. First, the records do not document any significant prior medical history of either lumbar spine injury or radiculopathy. Second, however, they reflect at least two prior instances of lower extremity numbness, both of which appear to have triggered further investigation for a distinctly non-musculoskeletal cause.

29. Dr. Kirkpatrick did not testify, and I cannot discern from his summary alone whether the lower extremity symptoms Claimant reported in 2010 and 2012 were the same or different from those he experienced following his July 2013 injury. Nor can I discern whether the treating providerôs concerns regarding possible DVTs were ruled in or ruled out upon further investigation at the time. I can make no finding as to whether Claimant did or did not have a prior medical history relevant to the determination of causation in the pending claim, therefore.

[2] ñDVTò is a common medical abbreviation for deep vein thrombosis; in laymanôs terms, a blood clot.

(iv) Dr. Backus

30. At Defendantôs request, in November 2014 Claimant underwent an independent medical examination with Dr. Backus, a board-certified occupational medicine specialist. In addition to his clinical examination, Dr. Backus reviewed Claimantôs post-July 2013 medical records. Later, he reviewed Dr. Kirkpatrickôs summary of his pre-July 2013 primary care records as well. Dr. Backus testified by deposition.

31. Dr. Backus acknowledged that Claimant likely suffered from some mechanical low back pain in the days immediately following his July 2013 work injury. He could not state, to the required degree of medical certainty, that Claimantôs lower extremity symptoms were causally related, however. Dr. Backusô analysis proceeded along the following lines:

- Dr. Sumnerôs August 2013 initial evaluation reported only that Claimant had suffered some low back pain ñearly on,ò but that had resolved; it did not reference any ongoing low back pain or lower extremity complaints, and did not reflect any objective signs of low back involvement;

- Claimant acknowledged to Dr. Backus that he did not recall exactly when his lower extremity symptoms began, but believed they did not start until at least three weeks after his July 2013 fall;

- The first reference to numbness and tingling in Claimantôs lower extremities did not occur until Dr. Sumnerôs September re-evaluation, which reflected that they had only recently begun;

- Neither Claimantôs MRI findings nor his electrodiagnostic studies identified any nerve root compression or impingement that would fit the distribution of his lower extremity symptoms; it was thus unlikely that they were radicular in origin;

- Claimantôs low back and lower extremity symptoms were too far removed from his July 2013 fall to justify a finding, to the required degree of medical certainty, that they were causally related, particularly given other possible etiologies such as age-related degenerative disease.

32. Having found credible Claimantôs testimony that his low back pain began with the July 2013 fall and did not fully resolve thereafter, Finding of Fact No. 16 *supra*, I must reject Dr. Backusô analysis as to that injury. However, as to Claimantôs lower extremity complaints, for which both the timing and the etiology remain unclear, I find Dr. Backusô analysis persuasive.

Claimant's Current Status

33. Claimant credibly testified at hearing regarding his current symptoms and functional status. His neck is typically stiff when he wakes up in the morning and hurts when he turns it ñjust right.ò His low back bothers him every day. He continues to experience intermittent numbness and tingling in his legs and feet bilaterally. Nevertheless, although he has had to scale back his gardening activities, he is still able to work full-time and full-duty at his regular job. To manage his symptoms, he takes Advil.

Permanent Impairment Ratings

34. Both Dr. Backus and Dr. White offered permanent impairment ratings referable to Claimantôs cervical injury.[3] Both experts determined their ratings in accordance with the American Medical Associationôs *Guides to the Evaluation of Permanent Impairment* (5th ed.) (the ñ*AMA Guides*ò). More specifically, in formulating their opinions, both experts referenced Table 15-5, which states the criteria for rating impairment due to cervical disorders using the Diagnosis Related Estimate (DRE) method.

35. Finding that Claimant suffers from ñpersistent neck pain, associated with range of motion abnormalities and voluntary guarding on motion testing,ò Dr. White placed Claimant in DRE Category II, described in pertinent part as follows:

> Clinical history and examination findings are compatible with a specific injury; findings may include muscle guarding or spasm observed at the time of the examination by a physician, asymmetric loss of range of motion or nonverifiable radicular complaints . . .

36. DRE Category II allows for an impairment range of five to eight percent; in Claimantôs case, Dr. White assessed a five percent whole person impairment.

37. Dr. Backus rated Claimant with a zero percent permanent impairment. In doing so, he placed Claimant in DRE Category I, described as follows:

> No significant clinical findings, no muscular guarding, no documentable neurologic impairment, no significant loss of motion segment integrity, and no other indication of impairment related to injury or illness; no fractures.

[3] Dr. White also rated the permanent impairment referable to Claimantôs low back injury. Dr. Backus declined to do so, because he determined that Claimantôs low back and lower extremity symptoms were not causally related to his July 2013 fall. In the context of the pending proceeding, the current dispute is solely as to the permanency referable to Claimantôs cervical injury.

38. In his deposition testimony, Dr. Backus acknowledged that the primary difference between his assessment and Dr. Whiteôs was whether Claimantôs examination justified a finding of either muscle guarding and/or asymmetric loss of range of motion. *Backus deposition (Defendant's Exhibit A)* at p. 12. Using these concepts, which Dr. Backus described as ñnebulous,ò to distinguish between DRE Categories I and II is difficult even for experienced examiners. *Id.* at pp. 12-13, 15. Low back symptoms are known to wax and wane over time, and what the individual exhibits on examination by one evaluator can be different from what he or she exhibits on another day. In the end, Dr. Backus conceded that Dr. Whiteôs rating was not necessarily wrong. Rather, on the day of each of their examinations, ñHe found what he found, I found what I found.ò *Id.* at p. 15. I find this analysis credible.

CONCLUSIONS OF LAW:

1. In workersô compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press,* 144 Vt. 367 (1984). 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); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. The parties here have presented two issues for resolution. First, they dispute whether Claimantôs low back and/or lower extremity complaints are causally related to his July 2013 fall at work and therefore compensable. Second, they dispute the extent, if any, of the permanent impairment referable to Claimantôs compensable cervical injury. The parties proffered conflicting expert medical opinions on both issues. In such cases, the Commissioner traditionally uses a five-part test to determine which expertôs opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

Compensability of Claimant's Low Back and Lower Extremity Symptoms

3. In cases such as this, where the cause of Claimantôs low back and lower extremity symptoms is not readily apparent, expert testimony is the sole means of establishing a causal connection between the work accident and the injury sufficient to support an award of workersô compensation benefits. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).

4. Claimant presented testimony from three qualified medical experts ï Drs. Barnum, White and Kirkpatrick. All three concluded, to a reasonable degree of medical certainty, that his low back and lower extremity complaints were causally related to his July 2013 fall. In reaching this conclusion, all three placed significant emphasis on their assumption that Claimantôs symptoms arose shortly after his fall and did not abate thereafter.

5. Based on his assumption that Claimantôs low back symptoms initially resolved shortly after his July 2013 fall and that his lower extremity symptoms did not arise until some weeks thereafter, Defendantôs expert, Dr. Backus, concluded otherwise. In his analysis, the temporal gap between the fall and the ensuing complaints was too wide to establish work-related causation to the required degree of medical certainty.

6. Having found credible Claimantôs testimony that his low back pain began with his July 2013 fall and did not completely resolve thereafter, I accept the strong temporal relationship between these symptoms and the work injury. Given a well-documented new event, combined with a relatively unremarkable prior history, as to Claimantôs specific complaints of low back pain I conclude that the evidence is sufficient to establish work-related causation. *J.G. v. Eden Park Nursing Home*, Opinion No. 52-05WC (September 8, 2005); *see also Brace v. Vergennes Auto*, 2009 VT 49, ¶10 (acknowledging sufficiency of temporal relationship combined with other factors to establish causation).

7. I reach the opposite conclusion as to Claimantôs lower extremity symptoms, however. Notwithstanding Claimantôs hearing testimony, I remain unconvinced that these complaints arose as soon after his July 2013 fall as his experts assumed. From the evidence presented, I am also unsure whether Claimantôs prior history of lower extremity numbness is at all relevant to his more recent presentation. Absent clarification on this issue, I must reject the analysis that Claimantôs experts proffered as incomplete. *See Puzic v. Huber+Suhner*, Opinion No. 05-13 (February 5, 2013) (expert causation opinion based solely on claimantôs report of when symptoms began and lacking medical clarity as to etiology deemed insufficient to support compensability).

8. I accept instead Dr. Backusô conclusion that the temporal relationship between Claimantôs July 2013 fall and his lower extremity symptoms was too tenuous to support causation to the required degree of medical certainty. Dr. Backusô opinion was clear, thorough, objectively supported and therefore persuasive.

9. I thus conclude that although Claimant has sustained his burden of proving that his chronic mechanical low back pain is causally related to his July 2013 fall, he has failed to do so with respect to his lower extremity symptoms. As to these, the evidence is insufficient to establish either a temporal relationship or a credibly probable diagnosis.

Permanent Partial Impairment Referable to Claimant's Cervical Injury

10. The *AMA Guides* recognize that rating the extent of an individualôs permanent impairment requires not only the ñability to apply the *Guides* as intended,ò but also the exercise of sound ñclinical judgment.ò The process thus combines ñboth the óartô and the óscienceôof medicine.ò *AMA Guides* §1.5 at p. 11, cited in *Marshall v. State of Vermont*, Opinion No. 01-11WC (January 25, 2011).

11. The impairment ratings that Drs. White and Backus offered in this case forcefully illustrate this concept. Both experts conducted thorough evaluations, documented their findings and derived their ratings from the same table in the *AMA Guides*. Yet where Dr. White rated Claimant with a five percent whole person impairment referable to his cervical injury, Dr. Backus found a zero percent impairment.

12. Dr. Backus acknowledged that where the two experts disagreed was as to the presence or absence of muscle guarding and/or asymmetrical range of motion ï concepts he described as ñnebulous,ò and challenging for even experienced evaluators to assess. Dr. Backus admitted that neither Dr. Whiteôs process nor his conclusion was ñnecessarily wrong.ò Rather, each expertôs rating was supported by the findings each made on the day they evaluated Claimant.

13. I conclude that Dr. Whiteôs rating is the most persuasive. Considering the waxing and waning nature of low back pain generally, Dr. Whiteôs rating better accounts for Claimantôs ongoing symptoms. For that reason, I accept it as the most credible.

14. I thus conclude that Claimant has sustained a five percent whole person permanent impairment referable to his compensable cervical spine injury.

15. As Claimant has only partially prevailed on his claim for workersôcompensation benefits, he is entitled to an award of only those costs that relate directly to the issues upon which he sustained his burden of proof.[4] *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 claimantôs success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of his allowable costs and attorney fees, in accordance with 21 V.S.A. §678e).

[4] These are (1) Claimantôs claim for workersôcompensation benefits referable to his mechanical low back pain (as distinguished from his lower extremity symptoms); and (2) his claim for permanency benefits referable to his compensable cervical injury.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant is hereby **ORDERED** to pay:

1. All workersô compensation benefits to which Claimant proves his entitlement as causally related to his compensable mechanical low back pain injury only, and excluding any benefits referable specifically to his lower extremity symptoms, in accordance with 21 V.S.A. §640(a);

2. Permanent partial disability benefits as compensation for a five percent whole person permanent impairment referable to the spine, a total of 27.5 weeks commencing on August 22, 2014, in accordance with 21 V.S.A. §648, with interest as calculated in accordance with 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 _____ day of May 2018.

_____
Lindsay H. Kurrle
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.