Roger Rodrigue v. Enterprises Precision Inc. (January 16, 2015)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

Roger Rodrigue

v.

Enterprises Precision, Inc.

Opinion No. 16R-14WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. EE-59475

**RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION AND AMENDED ORDER**

The Commissioner previously decided this claim on November 4, 2016. On November 17, 2014 Claimant filed this Motion to Reconsider claiming three points of error: (1) that he had not returned to suitable employment for the purposes of determining whether he was entitled to vocational rehabilitation benefits; (2) that his temporary total and temporary partial disability benefits were improperly calculated; and (3) that he is entitled to indemnity benefits for the period between June 29, 2014 and August 3, 2014. Subsequent to his motion Claimant filed a Notice of Appeal from the Commissioner's decision. Thereafter, during his argument on the pending motion, he questioned whether the Commissioner continued to have jurisdiction.

Defendant opposes the Motion to Reconsider. As to the first and third points of error it argues first, that the Commissioner correctly decided the vocational rehabilitation issue, and second, that because Claimant refused its offer of suitable work he is not entitled to any indemnity benefits for the period between June 29, 2014 and August 3, 2014.

As to the second point of error, Defendant agrees that because the Commissioner used the wrong hourly rate to calculate Claimant's entitlement to temporary partial disability benefits, the award of temporary partial disability benefits must be recalculated. However, it requests reconsideration of the temporary total disability benefit award, on the grounds that the Commissioner failed to take into account undisputed evidence as to 90 hours worked over a two-and-one-half week period during June 2014.

*Jurisdiction*

A motion to alter or amend a judgment under Vermont Rules of Civil Procedure 59(e) gives the trier of fact broad power to alter or amend a judgment. Reporter's Notes to V.R.C.P. 59(e). Once a motion to amend or correct a judgment is filed, the trier of fact has the authority to make any appropriate modification or amendment to its original decision. *Drumheller v. Drumheller,* 2009 VT 23, ¶28 (March 6, 2009). This is true regardless of whether a notice of appeal has been filed, furthermore, as the filing of a motion to alter or amend tolls the appeal period. *Fournier v. Fournier,* 169 Vt. 600 (July 12, 1999). Therefore, the Commissioner

retained jurisdiction to consider the merits of Claimant's motion notwithstanding his subsequent notice of appeal.

*Entitlement to Vocational Rehabilitation Services*

A motion to reconsider should not be granted solely to relitigate an issue already decided. *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Id.*

Claimant fails to meet this standard here. His motion consists of a lengthy recitation of the same evidence he emphasized in his proposed findings of fact and argued in his proposed conclusions of law. Having failed to propound either law or facts that the Commissioner overlooked, his motion for reconsideration on this issue is **DENIED**.

*Calculation of Temporary Partial Disability Benefits*

The parties agree that the appropriate wage rate for calculating Claimant's temporary partial disability benefits is the pre-injury rate of $21.00 per hour, not the post-injury rate of $22.00 per hour used in the original opinion. Applying that rate, the chart showing Claimant's entitlement to temporary partial disability benefits, Conclusion of Law ¶17, is amended as follows:

| Week ending | Wages Earned | Adjusted Wages | Pre-injury AWW | Difference | TPD Owed |
|---|---|---|---|---|---|
| | | | | | |
| 2/21/2014 | 315.00 | 609.00 | 724.92 | (115.92) | 77.28 |
| 3/14/2014 | 651.50 | 829.50 | 724.92 | 104.58 | 0 |
| 3/21/2014 | 819.00 | 819.00 | 724.92 | 133.08 | 0 |
| 3/28/2014 | 724.50 | 759.00 | 724.92 | (0.42) | 0.28 |
| 4/4/2014 | 567.00 | 588.00 | 724.92 | (136.92) | 91.28 |
| 4/11/2014 | 168.00 | 210.00 | 724.92 | (514.92) | 343.28 |
| 5/2/2014 | 294.00 | 294.00 | 724.92 | (430.92) | 287.28 |
| 5/9/2014 | 693.00 | 819.00 | 724.92 | 94.08 | 0 |
| 5/16/2014 | 546.00 | 546.00 | 724.92 | (178.92) | 119.28 |
| 5/23/2014 | 672.00 | 766.50 | 724.92 | 41.58 | 0 |
| 5/30/2014 | 651.00 | 682.00 | 724.92 | (73.92) | 49.28 |

For the period from February 17, 2014 through May 30, 2014 I conclude that Claimant is actually owed $967.96, not $880.08 as previously determined. On this issue Claimant's motion for reconsideration is **GRANTED**.

*Entitlement to Temporary Total Disability Benefits in June 2014*

Defendant argues that the Commissioner erred in awarded temporary total disability benefits for the month of June 2014, because she failed to account for undisputed evidence establishing that Claimant worked a total of 90 hours during that period. I have since reviewed the evidence, particularly Claimant's testimony on cross-examination. Having done so, I find as a fact that Claimant worked as a laborer at the Lawson Farm for a total of 90 hours during the

first two and one-half weeks of June 2014. I also find that he did not work for the other one and a half weeks in June 2014.

Claimant testified that he was "on payroll" during the time he worked at the Lawson Farm, but did not introduce any evidence to indicate what his wages were. Without such evidence, I cannot determine how much, if any, he is owed in either temporary total or temporary partial disability benefits for that time. As he has failed to sustain his burden of proof on this issue, I conclude that he is not entitled to an award of temporary total disability benefits for the first two and one-half weeks of June 2014. At a weekly compensation rate of $501.50, that amounts to a total deduction of $1,253.75 from the original award of $4,012.00. Defendant's motion to amend the order is thus **GRANTED** accordingly, with the amended award now totaling $2,758.25.

*Entitlement to Indemnity Benefits from June 29, 2014 through August 3, 2014*

As originally presented, Claimant's claim for indemnity benefits was limited to those to which he proved his entitlement up to the date of the formal hearing, July 2, 2014. Subsequently, Defendant made two post-hearing requests to reopen the evidence in order to show the extent to which Claimant had been working since the hearing. The Commissioner granted the request and ruled the evidence admissible, *but only* as it related to Claimant's entitlement to vocational rehabilitation services, and not as to his entitlement, if any, to additional indemnity benefits. That ruling still stands, and on that basis, Claimant's motion for reconsideration is **DENIED**.

*Payment for Time Missed Due to Medical Appointments*

After the pending motion was filed, the parties attempted to reach agreement as to the wages Claimant was owed for hours he missed from work due to his attendance at medical appointments causally related to his injury. Under 21 V.S.A. §640(c), the employer, and not its workers' compensation insurance carrier, is obligated to pay these wages. *Hathaway v. S.T. Griswold & Company*, Opinion No. 04-14WC (March 17, 2014). If it fails to do so, the injured worker's remedy lies not with the Commissioner, but rather against the employer directly. *Id.* Unfortunately, the parties were unable to reach agreement as to the amount owed, and therefore Claimant is left to his remedies under 21 V.S.A. §640(c).

**ORDER:**

Claimant's Motion to Reconsider is hereby **GRANTED IN PART** and **DENIED in part**. The Commissioner's November 6, 2014 Opinion and Order is hereby amended, and Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits in the amount of $2,758.25, in accordance with 21 V.S.A. §642, with interest as calculated pursuant to 21 V.S.A. §664; and

2. Temporary partial disability benefits in the amount of $967.96, 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 16th day of January 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.