STATE OF VERMONT
DEPARTMENT OF LABOR

Sharon Dobson

v.

Ethan Allen Interiors, Inc.

Opinion No. 18-15WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-56664

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 6, 2015
Record closed on May 4, 2015

APPEARANCES:

Steven Adler, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to additional temporary disability benefits causally related to her November 29, 2007 compensable work injury, and if so, for what period(s) of time?

2. At what compensation rate should the temporary disability benefits to which Claimant is entitled as a consequence of her November 17, 2014 knee replacement surgery be paid?

EXHIBITS:

Joint Exhibit II:	Medical records
Claimant's Exhibit 1:	Claimant's chronology of events
Claimant's Exhibit 2:	Claimant's statement of issues
Claimant's Exhibit 3:	Letter from Dr. Latham, January 7, 2015
Claimant's Exhibit 4:	Claimant's IGA work hours, July 13, 2013 through November 19, 2014
Claimant's Exhibit 5:	Claimant's Colebrook Country Club work hours, January 5, 2013 through July 6, 2013

Claimant's Exhibit 6:	Claimant's 2013 Colebrook Country Club earnings
Claimant's Exhibit 7:	Claimant's calculation of temporary disability benefits owed
Defendant's Exhibit A:	Deposition of Lance Walling, March 5, 2015
Defendant's Exhibit B:	Vocational rehabilitation progress report, November 1, 2012

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Temporary partial disability benefits pursuant to 21 V.S.A. §646
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 her 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. Judicial notice also is taken of the Commissioner's Opinion and Order in *Dobson v. Ethan Allen (Dobson I)*, Opinion No. 11-14WC (July 25, 2014).

3. Claimant suffered a compensable work injury to her left knee on November 29, 2007. Defendant accepted the injury and paid benefits accordingly, both medical and indemnity. Claimant earned $14.00 per hour at the time, which yielded an initial compensation rate of $351.53 per week.

4. During the course of her medical treatment, Claimant exhausted all available conservative treatment options, and underwent three arthroscopies as well. By early 2012, both of her then-treating orthopedic surgeons expected that ultimately she would need a total knee replacement. However, due to her age, 53 years old, they recommended she delay that surgery for as long as she could.

5. At Defendant's request, Claimant underwent an independent medical examination with Dr. Boucher, a specialist in occupational medicine, in March 2012. Dr. Boucher concluded that she had reached an end medical result, with a three percent whole person permanent impairment attributable to quadriceps atrophy in her left leg.

6. With Dr. Boucher's opinion as support, the Department approved the parties' Agreement for Permanent Partial Disability Compensation (Form 22). Commencing on April 17, 2012 Claimant received 12.15 weeks of benefits, at

a compensation rate of $385.53 per week. She has not received any additional indemnity benefits since these payments concluded.

7. Were Claimant entitled to additional indemnity benefits, her compensation rate would have increased to $392.08 on July 1, 2013, to $402.67 on July 1, 2014, and to $411.93 on July 1, 2015.

Claimant's Continuing Medical Condition

8. Even after reaching an end medical result, Claimant continued to seek treatment for significant, disabling left knee pain. At her request, Dr. Latham, her primary care physician, referred her to Jason Raehl, a physician assistant at the Alpine Clinic, for a second opinion. Mr. Raehl evaluated her on June 5, 2012 and concluded that it was appropriate for her to pursue total knee replacement surgery. To that end, he facilitated a consult with Dr. MacArthur, an orthopedic surgeon in Mr. Raehl's practice. In the meantime, Mr. Raehl determined that Claimant was unable to work.

9. On October 31, 2012 Claimant saw Dr. MacArthur, who concluded that Claimant's best course of treatment was a total knee replacement.

10. On November 19, 2012 Defendant filed a Denial of Workers' Compensation Benefits (Form 2), in which it asserted that total knee replacement surgery was neither reasonable nor necessary treatment causally related to Claimant's November 2007 work injury. On January 18, 2013 Claimant appealed the denial and requested a formal hearing, which occurred on March 28, 2014. By Opinion and Order dated July 25, 2014 the Commissioner concluded that the recommended surgery was in fact both medically necessary and causally related. Pursuant to 21 V.S.A. §640, Defendant was ordered to pay medical benefits accordingly.

11. With the Commissioner's decision in hand, on November 17, 2014 Claimant underwent total knee replacement surgery.

Claimant's Vocational Rehabilitation and Re-employment Efforts

12. Claimant was found entitled to vocational rehabilitation services in March 2009. At the time, she had been released to return to modified-duty work, but Defendant had no suitable work available. As a consequence, the return to work plan focused on retraining her for a clerical or retail sales position. These positions did not approximate her pre-injury average weekly wage. However, given the barriers to reemployment that she faced, which included not only her functional restrictions but also her limited transferable experience and education and her lack of computer skills, the Department approved the plan. I find it was reasonable for it to do so.

13. Independent from Defendant's vocational rehabilitation efforts, Claimant secured part-time employment as a gardener for the City of Colebrook. In October 2009 the job became permanent, and at that point Claimant agreed to close her vocational rehabilitation file.

14. Over the course of the next two years, Claimant's left knee symptoms progressively worsened. At some point during this period she again became totally disabled from working, but the record is silent as to when this occurred. In February 2011, she underwent a third arthroscopic surgery.

15. In June 2011 Claimant was again referred for vocational rehabilitation services. At this time she was not released to return to work and had not yet reached an end medical result. Vocational rehabilitation efforts were directed at securing employment as a grocery clerk, fast food server or cashier, at wages ranging from $8.00 to $9.00 per hour. As was the case with the vocational goals identified in the 2009 plan, these wages were significantly lower than her pre-injury wages, but the same reemployment barriers she had faced before persisted, and for that reason the Department approved the plan. Again, I find that under the circumstances, the plan was reasonable.

16. A significant barrier to Claimant's reemployment involved her lack of a high school diploma. For that reason, a principal goal of the approved return to work plan was that she pursue and obtain her GED. However, the plan was suspended in December 2011 for medical reasons causally related to her work injury.

17. Vocational rehabilitation services resumed in June 2012. This time, the return to work plan identified kitchen work, laundry and housekeeping as vocational goals, positions that paid wages ranging from $8.21 to $9.80 per hour. Again, as with the prior plans, I find that these were reasonable vocational goals under the circumstances.

18. In keeping with all three return to work plans, by June 2012 Claimant had passed three of the five tests necessary to secure a GED. Claimant applied herself diligently to the GED process for the remainder of the calendar year. By December she needed only to pass the mathematics test in order to complete her studies and earn her high school equivalency.

19. Once again acting on her own and without vocational rehabilitation assistance, on January 3, 2013 Claimant obtained a position as a housekeeper at Colebrook Country Club. Her husband had suffered a disabling stroke and as a consequence of his inability to work their household income had decreased by more than 75 percent. Claimant credibly described that her family could not survive on such drastically reduced income. She felt she needed to work to support her family. I find this testimony credible in all respects.

20. Claimant's starting pay at Colebrook Country Club was $8.00 per hour. Her duties included making beds, cleaning bathrooms (oftentimes on her hands and knees) and carrying laundry up and down stairs. Claimant credibly testified that these tasks made her left knee hurt to the extent that she would return home almost every night in tears.

21. Claimant continued in this job until July 2013, when she began working as a grocery store deli clerk at LaPerle's IGA in Colebrook. As before, she secured this job independent of any vocational rehabilitation assistance from Defendant. Her starting salary was somewhat lower than the Colebrook Country Club housekeeping job, $7.40 per hour, but the job offered several other advantages, which made it far more suitable overall. Most notably, the IGA job offered more hours, which were more regular, and the work itself was easier on her knee and therefore less painful. In addition, it was close by, so she could walk to work.

22. Claimant continued in her IGA job for more than a year. During that period, she returned to high school, and successfully graduated in June 2014. I find that she thus accomplished one of the primary goals of Defendant's return to work plan – to obtain a high school or equivalent degree – albeit by an alternate route.

23. On November 5, 2014, Claimant took a leave of absence from her IGA job in anticipation of her impending knee replacement surgery, which occurred on November 17, 2014. She used the time off to prepare meals for her husband to eat during her immediate post-surgery recuperation, because his disability prevented him from using an oven safely. She also wanted time to prepare herself emotionally for her surgery. While Claimant's desire to take time off for these reasons is certainly understandable, no doctor disabled her from working during this period. I therefore find from the credible evidence that it was not medically necessary for her to do so.

24. Aside from five hours of work on November 12, 2014, which occurred as a result of her manager's emergency request, Claimant has not worked since November 5, 2014. As of the formal hearing, she had not yet been released to return to work. She credibly testified that her job will be available, with no loss of seniority, after she completes her convalescence. Her store manager, Lance Walling, corroborated this testimony.

CONCLUSIONS OF LAW:

1. In workers' 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. Claimant here seeks temporary total and/or temporary partial disability benefits retroactive to June 5, 2012, the date when Mr. Raehl determined that she was totally disabled from working, *see* Finding of Fact No. 8 *supra*, and ongoing until she either returns to work or reaches an end medical result from her November 2014 knee replacement surgery. In addition, because her earning capacity has been diminished as a consequence of her injury throughout this timeframe, she asserts that the wages she earned prior to her initial period of disability in 2007 should dictate the compensation rate at which any current benefits (those following her recent surgery) are paid.

3. Defendant counters that Claimant reached an end medical result for her work injury in March 2012, and therefore is not entitled to temporary disability benefits for any period prior to her November 2014 surgery. As for the rate at which any current benefits should be paid, Defendant asserts that because Claimant's wages have decreased for reasons other than her 2007 work injury, her compensation rate should be based on the (lower) wages she earned prior to her most recent period of disability.

Claimant's Entitlement to Temporary Disability Benefits

4. It is axiomatic that temporary disability benefits are only payable for so long as the medical recovery process is ongoing. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982). Once an injured worker reaches an end medical result, his or her entitlement to temporary disability benefits ends, and the focus shifts instead to consideration of permanent disability. *Id.*

5. In most cases an injured worker only attains the point of end medical result once – he or she reaches a plateau following treatment and does not treat or become disabled again. Not every case follows this path, however. Even after attaining the point of end medical result, an injured worker's condition might still worsen to the point where additional curative treatment becomes necessary, and along with it an additional period of temporary disability. *See* 21 V.S.A. §650(c), discussed *infra* at Conclusion of Law No. 12.

6. I conclude in this case that at least initially, Claimant acquiesced to the determination that she had reached an end medical result in March 2012 when she signed the parties' proposed Agreement for Permanent Partial Disability Compensation, and then accepted permanency benefits in accordance with it.

That barely two months later she sought another evaluation for her persistent knee pain does not negate that determination.

7. However, when after consulting with Dr. MacArthur on October 31, 2012 Claimant opted to proceed with knee replacement surgery, she thus embarked on a new course of treatment, one that carried with it the expectation of "significant further improvement" in her condition, *see Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996) (defining end medical result in accordance with Workers' Compensation Rule 2.1200). At that point, her prior end medical result determination was negated. To the extent that she was still functionally restricted from full employment as a consequence of her work injury, she thus became eligible once again for temporary disability benefits.

8. That two years passed before Claimant actually underwent Dr. MacArthur's recommended surgery was as a result of Defendant's choice, not hers, furthermore. It was Defendant's choice to deny coverage, thus inviting the litigation that resolved the matter in Claimant's favor, *see Dobson I, supra*. Had it chosen otherwise, the period of temporary disability for which it now faces responsibility would have been much shorter, likely a matter of weeks rather than years.

9. Defendant's assertion that because Claimant's knee replacement surgery was "elective," her prior end medical result determination remained intact is unpersuasive. This issue as well was fully resolved in *Dobson I*. There, the Commissioner concluded that with the passage of time knee replacement surgery had become the "treatment of choice," and thus constituted "reasonable" medical treatment under 21 V.S.A. §640. *Id.* at Conclusion of Law Nos. 9 and 10. Defendant having tried and failed to disqualify the surgery from medical coverage under the Workers' Compensation Act on the grounds that it was not medically necessary, it cannot now dispute its responsibility for indemnity coverage on the same grounds.

10. I conclude that Claimant has established her entitlement to temporary disability benefits for the periods after October 31, 2012 during which she was either totally or partially disabled from working. Specifically, I conclude from the credible evidence that she was totally disabled from working until January 3, 2013, partially disabled from that date until November 5, 2014, and then totally disabled again from November 17, 2014 forward. She is entitled to temporary total and temporary partial disability benefits accordingly.

Average Weekly Wage and Compensation Rate

11. Having concluded that Claimant is owed additional benefits for a new period of temporary disability that began on October 31, 2012, the remaining issue before me is to determine the rate at which any current benefits, that is, those

following her November 2014 surgery, should be paid. Claimant asserts that her compensation rate should be based on the (higher) wages she earned prior to her initial period of disability in 2007. Defendant asserts that because her wages have decreased for reasons other than her 2007 work injury, her compensation rate should be based on the (lower) wages she was earning at the IGA in the weeks prior to her most recent period of disability.

12. At the time of Claimant's 2007 work injury, Vermont's workers' compensation statute stated: "Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 12 weeks preceding an injury." 21 V.S.A. §650(a).[1] As to subsequent periods of disability arising from the same compensable injury, §650(c) states: "When temporary disability . . . does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time."

13. The rationale underlying §650(c) is to prevent an injured worker from being penalized in situations where more recent wages – those immediately preceding a subsequent period of disability – have been diminished as a consequence of work restrictions imposed following the original injury and earlier period of disability. *Plante v. State of Vermont, Agency of Transportation*, Opinion No. 19-13WC (August 22, 2013); *Griggs v. New Generation Communications*, Opinion No. 30-10WC (October 1, 2010). By the same token, however, an injured worker should not receive a windfall when a reduction in earnings is due to circumstances completely unrelated to the work injury. *Plante, supra* at Conclusion of Law No. 5.

14. Defendant asserts two arguments in support of its claim that Claimant's wages have not diminished as a consequence of any injury-related restrictions, but rather because of unrelated circumstances. Noting first that the Beecher Falls plant at which Claimant was employed at the time of her injury closed in 2009, it argues that she would have been required to seek alternative employment, possibly at a lower wage, even had she not been injured. This argument is entirely unpersuasive. It ignores the fact that Claimant was both actively treating in 2009 and functionally restricted to modified-duty work, which even Defendant was unable to accommodate. Her injury thus impacted her employability in a direct and obvious manner.

15. Defendant's second argument deserves closer scrutiny. It contends that the reason Claimant was unable to secure employment that approximated her pre-injury average weekly wage was because she failed to meaningfully engage in the vocational rehabilitation process. Specifically, it asserts that Claimant abandoned the path to the higher paying positions that the approved return to

[1] The statute was amended in 2008 to increase the computation period from 12 to 26 weeks.

work plan envisioned, opting for lower paying, and therefore less suitable, jobs instead. As further evidence, it points to the fact that Claimant failed to complete the process for earning her GED. Notably, in making the latter claim, Defendant ignores the fact that she accomplished the end result – a high school diploma – by returning to high school on her own.

16. I acknowledge that there may be circumstances where a claimant's decision to accept less suitable employment rather than pursue the goals enunciated in an approved return to work plan might not be justifiable as anything other than a personal choice. A claimant in such cases might have to bear fully the financial consequences of his or her actions, and thus forego any further entitlement to workers' compensation wage replacement assistance. *See, e.g., Knoff v. Josef Knoff Illuminating,* Opinion No. 25-12WC (October 15, 2012) (link between claimant's current earning capacity and previous work injury severed by virtue of his choice to accept full and final settlement rather than additional vocational rehabilitation services).

17. This is not such a case, however. Claimant here faced financial exigencies that dictated hard choices and immediate action. The vocational rehabilitation plan Defendant would have had her pursue envisioned the same types of jobs as the ones she secured on her own. With actual wages less than ten percent lower than what the plan anticipated, furthermore, any perceived disparity between what Claimant was able to accomplish and what Defendant asserts might otherwise have been possible is negligible at best.

18. Considering the particular circumstances of this case, I conclude that the remedial purposes of Vermont's Workers' Compensation Act would not be served by penalizing Claimant for taking proactive steps to return to work, in jobs that closely approximated the vocational rehabilitation goals Defendant previously had recommended, so that she could provide immediate and ongoing financial support for herself and her disabled husband. *See Lydy v. Trustaff,* 2013 VT 44, ¶19 (acknowledging that the statute is to be construed liberally "to accomplish the humane purpose for which it was passed"). For that reason, I will not construe her actions in such a way as to disqualify her from receiving indemnity benefits at a rate that adequately compensates her for the loss of earning capacity engendered by her work injury.

19. I conclude from the credible evidence that Claimant has sustained her burden of proving that the wages preceding her current period of disability were diminished as a consequence of work restrictions imposed following her July 2007 work injury, and not because of personal or otherwise unrelated circumstances. Therefore, as required by 21 V.S.A. §650(c), I conclude that the compensation rate for the temporary disability benefits owed her from November 17, 2014 forward must be based on the average wages she earned in the twelve weeks prior to her November 29, 2007 compensable work injury.

20. As Claimant has substantially prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits payable at the rate of $385.53 per week from October 31, 2012 through January 2, 2013, in accordance with 21 V.S.A. §642;

2. Temporary partial disability benefits from January 3, 2013 through November 4, 2014, in accordance with 21 V.S.A. §646;

3. Temporary total disability benefits at the initial rate of $402.66 per week and adjusted in accordance with 21 V.S.A. §650(c) from November 17, 2014 and ongoing until appropriately discontinued pursuant to statute and rule, in accordance with 21 V.S.A. §642;

4. Interest on the above amounts, in accordance with 21 V.S.A. §664; and

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

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.