

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

James Barry

Opinion No. 10-18WC

v.

By: Beth A. DeBernardi, Esq.  
Administrative Law Judge

Ethan Allen Interiors Inc.

For: Lindsay H. Kurrle  
Commissioner

State File No. FF-62151

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Vincent Illuzzi, Esq., for Claimant  
Oliver A. Abbott, Esq., for Defendant

**ISSUES PRESENTED:**

1. Did Defendant fail to pay Claimant's weekly permanent partial disability benefits when due?
2. If yes, is Claimant entitled to interest and penalties under 21 V.S.A. §§ 650(e) and 650(f)?

**EXHIBITS:**

Claimant's Exhibit 1: Permanent partial disability benefits check totaling \$88,993.54, issued September 6, 2017 and received by Claimant's counsel September 22, 2017

Claimant's Statement of Material Facts<sup>1</sup> filed May 14, 2018, with exhibits:

Exhibit A: Dr. Macy's October 5, 2015 return to work status report  
Exhibit B: Dr. Macy's March 8, 2016 discharge from physical therapy  
Exhibit C: Adjuster's February 21, 2017 letter to Claimant enclosing proposed Agreement for Permanent Partial Disability Compensation (Form 22)

Claimant's Affidavit executed on May 11, 2018

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<sup>1</sup> Claimant captioned his filing as a Statement of Disputed Material Facts, but the assertions made therein do not contradict the assertions set forth in Defendant's Statement of Undisputed Material Facts. Rather, Claimant's statement is in the nature of additional material facts and is treated as such. Defendant did not file any statement disputing Claimant's Statement of Material Facts. Accordingly, Claimant's statement, to the extent that the assertions therein are material, is accepted as true for the purposes of these cross motions.

Defendant's Exhibit A: November 28, 2017 Ruling on Defendant's Motion to Reconsider and Motion to Stay the Interim Order of September 29, 2017  
Defendant's Exhibit B: June 5, 2017 letter from Claimant's counsel to Defendant's adjuster enclosing Dr. Turek's permanency rating report  
Defendant's Exhibit C: July 16, 2017 letter from Claimant's counsel to Defendant's adjuster

Defendant's Statement of Undisputed Material Facts filed April 2, 2018, with exhibits:

Exhibit 1: September 8, 2016 fax from Richard James, MD, concerning full-duty work release and end medical result  
Exhibit 2: Dr. James's September 8, 2016 office visit note concerning Dr. Macy's determination of end medical result  
Exhibit 3: Dr. White's October 31, 2016 permanency rating report  
Exhibit 4: Adjuster's February 21, 2017 letter to Claimant enclosing proposed Agreement for Permanent Partial Disability Compensation (Form 22)  
Exhibit 5: Adjuster's February 27, 2017 note concerning Claimant's voice mail message  
Exhibit 6: June 5, 2017 letter from Claimant's counsel to Defendant's adjuster enclosing Dr. Turek's permanency rating report  
Exhibit 7: July 16, 2017 letter from Claimant's counsel to Defendant's adjuster

Defendant's Exhibits included with its Reply Brief filed May 29, 2018:

Reply Exhibit A: March 8, 2016 fax from Dr. Macy  
Reply Exhibit B: Dr. Macy's progress notes for March 8, 2016 office visit

#### **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 Workers' Compensation Act. *See Claimant's Statement of Material Facts ¶ 3.*
2. Judicial notice is taken of all forms and correspondence in the Department's file relating to this claim, including Agreements for Temporary Compensation (Form 32s) approved on January 26, 2015 and May 5, 2016, the Specialist's September 29, 2017 *Interim Order* and her November 28, 2017 *Ruling on Defendant's Motions to Reconsider and to Stay the Interim Order.*
3. On March 26, 2014, Claimant injured his cervical spine and right shoulder while working for Defendant. *Defendant's Statement of Undisputed Material Facts ¶ 1; Claimant's Statement of Material Facts ¶ 3.*

4. Claimant underwent cervical spine disc fusion surgery in December 2014 and right shoulder replacement surgery in September 2015. *Defendant's Statement of Undisputed Material Facts* ¶ 2; *Claimant's Statement of Material Facts* ¶ 4.
5. Claimant missed time from work following both surgeries, and he received temporary total disability benefits each time. *Defendant's Statement of Undisputed Material Facts* ¶ 2. Beginning December 9, 2014, he had an initial period of temporary total disability, during which he received compensation at the minimum rate of \$389.00 per week. *Agreement for Temporary Compensation (Form 32)*, approved January 26, 2015. He subsequently returned to work. Beginning September 11, 2015, he had another period of temporary total disability, during which he received compensation at the minimum rate of \$408.00 per week. *Agreement for Temporary Compensation (Form 32)*, approved May 5, 2016.
6. On October 15, 2015, Claimant's doctor released him to return to work. *Claimant's Statement of Material Facts* ¶ 5. He returned to work in October or November 2015,<sup>2</sup> and his temporary total disability benefits of \$408.00 per week ceased at that time.
7. Claimant's last active medical intervention for his work-related injuries was a course of physical therapy, from which he was discharged on March 8, 2016. *Claimant's Statement of Material Facts* ¶ 11. On that date, treating orthopedic surgeon John Macy, MD, noted that he would continue to improve over the next several months and that he was not yet at an end medical result. *Defendant's Reply Exhibit B*.
8. Claimant's doctors never told him that there was anything further they could do for him after he finished physical therapy. Dr. Macy told him that he would die before he would need another shoulder surgery and that the equipment installed in his shoulder would last his lifetime. *Claimant's Statement of Material Facts* ¶ 10; *Claimant's Affidavit*, ¶ 10. Claimant was told following each of his surgeries that he would have permanent limitations regarding his neck and shoulder and that there was nothing further that could be done for him from a medical standpoint to improve either of his work-related disabilities. *Claimant's Statement of Material Facts* ¶ 11; *Claimant's Affidavit*, ¶ 11.
9. Claimant had post-operative office visits with Dr. Macy six months following his shoulder surgery (March 2016) and one year following that surgery (September 2016). Dr. Macy did not perform any medical interventions at either of those office visits. Claimant has another post-operative office visit scheduled for later this year. *Claimant's Statement of Material Facts* ¶ 12.
10. On September 8, 2016, one of Claimant's treating physicians, Richard James, MD, placed him at end medical result. *Defendant's Statement of Undisputed Material Facts* ¶ 4.

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<sup>2</sup> The record does not reflect the exact date of Claimant's return to work. He asserts that he returned to work shortly after October 15, 2015. *Claimant's Statement of Material Facts* ¶¶ 6-7. Defendant asserts that he returned to work in mid-November 2015. *Defendant's Statement of Undisputed Material Facts* ¶ 3.

11. After receiving Dr. Jamesøend medical result finding, Defendant scheduled Claimant for an October 31, 2016 permanency evaluation with George White, MD. *Defendant's Statement of Undisputed Material Facts ¶ 5; Claimant's Statement of Material Facts ¶ 15.*
12. Dr. White rated Claimant with a 21 percent whole person impairment referable to his cervical spine and a 21 percent whole person impairment referable to his right shoulder. Defendant received Dr. White's written report on November 1, 2016. *Defendant's Statement of Undisputed Material Facts ¶ 6.*
13. On February 21, 2017, Defendant sent Claimant a proposed Agreement for Permanent Partial Disability Compensation (Form 22) and a copy of Dr. White's report. Defendant offered to pay Claimant his permanent partial disability benefits based on Dr. White's impairment rating in a lump sum. *Defendant's Statement of Undisputed Material Facts ¶ 7; Claimant's Statement of Material Facts ¶¶ 16-17.*
14. On February 25, 2017, Claimant left Defendant's adjuster a voicemail message stating that he would seek legal advice on the permanency matter. *Defendant's Statement of Undisputed Material Facts ¶ 8.* Prior to March 4, 2017, Claimant was not represented by an attorney and had not received legal advice from anyone about his work injury. *Claimant's Statement of Material Facts ¶ 2; Claimant's Affidavit, ¶ 2.*
15. Claimant met with attorney Vincent Illuzzi on March 4, 2017. *Claimant's Statement of Material Facts ¶ 18; Claimant's Affidavit, ¶ 18.* On March 6, 2017, Mr. Illuzzi informed Defendant that he would obtain his own permanency rating. *Defendant's Statement of Undisputed Material Facts ¶ 9.*
16. On June 5, 2017, Claimant's counsel produced Dr. Turek's permanent impairment rating. Dr. Turek assessed a 24 percent whole person impairment for Claimant's cervical spine and a 22 percent whole person impairment for his right shoulder. *Defendant's Statement of Undisputed Material Facts ¶ 10.*
17. In response to Dr. Turek's report, Defendant's adjuster sent Claimant's counsel an email proposing a compromise of 22.5 percent whole person impairment referable to Claimant's cervical spine and 21.5 percent whole person impairment referable to his right shoulder. *Defendant's Statement of Undisputed Material Facts ¶ 11.*
18. On July 16, 2017, Claimant's counsel responded that he was willing to compromise the permanency ratings as set forth in the adjuster's email but was also seeking interest and penalties for late payment. *Defendant's Exhibit C.*
19. On August 6, 2017, Claimant submitted a request at the informal level for an interim order that Defendant pay interest and penalties pursuant to 21 V.S.A. §§ 650(e) and 650(f) based on its failure to pay his permanent partial disability compensation in a timely manner.

20. Defendant paid no permanent partial disability compensation to Claimant until it issued a lump sum check for \$88,993.54 on September 6, 2017, which Claimant's counsel received on September 22, 2017. *Claimant's Statement of Material Facts* ¶ 20; *Claimant's Exhibit 1*.

### Procedural History

21. The Department's Specialist held an informal conference on September 19, 2017, during which the parties confirmed their agreement to the compromised permanent partial disability rating of 22.5 percent for Claimant's cervical spine and 21.5 percent for his right shoulder. These amounts form the basis for 123.75 weeks of permanent partial disability benefits referable to Claimant's spine and an additional 87.07 weeks referable to his shoulder, for a total of 210.82 weeks of permanent partial disability compensation. On September 29, 2017, the Specialist issued an Interim Order that Defendant pay interest and penalties on the permanent partial disability payments that were made after they were due.
22. On October 13, 2017, Defendant filed Motions to Reconsider and to Stay the Interim Order. Both motions were denied on November 28, 2017.
23. On April 2, 2018, Defendant filed a summary judgment motion seeking a determination that no interest or penalties are due. That motion was referred to the formal docket for adjudication. On April 23, 2018, the parties clarified at a status conference that they are seeking a determination as to whether interest and penalties are due, but not a calculation of the amounts due. On May 14, 2018, Claimant filed an opposition to Defendant's motion and his own summary judgment motion seeking a determination that interest and penalties are due. On May 29, 2018, Defendant filed a reply brief to Claimant's motion.

### **CONCLUSIONS OF LAW:**

1. Defendant seeks a summary judgment determination that Claimant cannot recover interest or penalties under 21 V.S.A. §§ 650(e) and (f) as a result of the alleged late payment of his weekly permanent partial disability benefits because the amount was in dispute and the parties were engaged in good faith negotiations.
2. Claimant contends that Defendant was obligated to commence payment of his permanent partial disability benefits when he returned to work in October or November 2015. As Defendant did not pay any such benefits until September 22, 2017, Claimant seeks a summary judgment determination that he is entitled to interest and penalties under 21 V.S.A. §§ 650(e) and (f).
3. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that the party is entitled to 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, 48 (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, 428 (1979).

Entitlement to Permanent Partial Disability Benefits and End Medical Result Status

4. Where an injury results in a permanent partial impairment, the injured worker is entitled to permanent partial disability compensation following the termination of his or her temporary total disability. 21 V.S.A. §648(a).
5. Temporary total disability terminates when the injured worker either reaches an end medical result or successfully returns to work, whichever comes first. *See* 21 V.S.A. §643a; Workers' Compensation Rule 12.1200. Claimant here successfully returned to work in October or November 2015. Thus, in order to determine when his entitlement to permanent partial disability compensation begins, it is necessary to determine whether he reached an end medical result for his work-related injury before or after that date.
6. Claimant's treating physician, Dr. James, determined that he had reached an end medical result on September 8, 2016, approximately one year following his shoulder replacement surgery. Finding of Fact No. 10 *supra*. Despite any inferences that Claimant might draw from various conversations with his doctors, *see* Finding of Fact No. 8 *supra*, he did not reach an end medical result on March 8, 2016, when he was discharged from physical therapy. At that time, Dr. Macy noted that he expected Claimant to continue to improve. That expectation is inconsistent with the definition of end medical result, under which significant further improvement is not expected. Workers' Compensation Rule 2.2000. Indeed, Dr. Macy specifically wrote in his office note for March 8, 2016 that Claimant had *not* reached an end medical result as of that date. Finding of Fact No. 7 *supra*; *Defendant's Reply Exhibit B*.
7. Accordingly, I conclude that Claimant reached an end medical result for his work-related injury on September 8, 2016, in accordance with his treating physician's determination.
8. As Claimant successfully returned to work before reaching an end medical result for his work-related injury, his entitlement to permanent partial disability benefits began when he returned to work in October or November 2015. *See* Conclusion of Law No. 5 *supra*.
9. The fact that Claimant's entitlement to permanent partial disability benefits accrued in October or November 2015 does not mean that those benefits were capable of calculation at that time, however. The statute provides benefits for a partial impairment which is permanent. 21 V.S.A. §648(a). One cannot know whether an impairment is permanent until the recovery process is complete. Further, the formula for the computation of permanent partial disability benefits includes the employee's percentage impairment, as determined under the *AMA Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> ed.) (the "AMA Guides")*. 21 V.S.A. §§ 648(a) and (b). Assessment of impairment, in turn, requires that the injured worker have reached an end medical result. *AMA Guides* §2.4. Accordingly, an employer cannot determine whether an injured worker has a permanent impairment, nor can it calculate the benefits due as a result of any such impairment, until the injured worker reaches an end medical result and undergoes a permanency evaluation. *See Laumann v. Department of Public Safety*, 2004 VT 60 ¶ 13; *Phillips v. Orange North Supervisory Union*, Opinion No. 05-14WC (March 21, 2014), Conclusion of Law No. 8.

Procedure for Assessing Permanent Impairment and Commencing Benefits

10. Within 45 days of receiving notice or knowledge that an injured worker has reached an end medical result, the employer or insurer shall take action necessary to determine whether the worker has suffered a permanent impairment as a result of the compensable injury. Workersø Compensation Rule 10.1200. If so, then the employer or insurer öshall begin advancing benefits immediately.ö Workersø Compensation Rule 10.1800.
11. Upon learning that Claimant reached an end medical result on September 8, 2016, Defendant scheduled him for an independent medical examination with George White, MD. Dr. White assessed Claimantø permanent impairment on October 31, 2016, and Defendant received Dr. Whiteø report on November 1, 2016. Finding of Fact Nos. 11-12 *supra*. Receipt of Dr. Whiteø report established Defendantø knowledge that Claimant had a permanent partial impairment for which compensation was due. I therefore conclude that, as of November 1, 2016, Defendant was obligated to begin advancing weekly benefits immediately pursuant to Workersø Compensation Rule 10.1800.
12. To calculate an injured workerø permanent partial disability benefits, it is necessary to determine the number of weeks for which the worker is entitled to benefits and the applicable compensation rate. Here, Claimant is entitled to 210.82 weeks of benefits. Finding of Fact No. 21 *supra*. In cases where the injured worker returns to work before reaching an end medical result, the compensation rate for permanent partial disability benefits is the rate in effect when the workerø temporary total disability terminated. *Laumann v. Department of Public Safety*, 2004 VT 60 ¶¶ 8, 13-15; *Phillips v. Orange North Supervisory Union*, Opinion No. 05-14WC (March 21, 2014). Claimantø temporary total disability benefits terminated upon his return to work in October or November 2015, at which time his weekly compensation rate was \$408.00. Accordingly, that figure is the applicable compensation rate for calculating his permanent partial disability benefits, subject to any subsequent cost of living increases. *Laumann*, 2004 VT 60 ¶ 13.
13. Defendant was obligated to begin paying permanent partial disability benefits on November 1, 2016. Conclusion of Law No. 11 *supra*. On that date, it owed Claimant retroactive permanent partial disability benefits from his return to work date (in October or November 2015) through November 1, 2016. The weeks from his return to work date through June 30, 2016 were payable at the compensation rate of \$408.00, *see* Finding of Fact No. 6 *supra*, and the weeks from July 1, 2016 through November 1, 2016 were payable at the minimum rate of \$420.00. These retroactive benefits were due and payable in a lump sum on November 1, 2016.
14. Defendant was also obligated to commence weekly payments of Claimantø permanent partial disability benefits as of November 1, 2016, at the weekly compensation rate of \$420.00. On July 1, 2017, the weekly compensation rate increased to \$427.00. As Defendant paid all of Claimantø permanent partial disability benefits in a lump sum on September 22, 2017, no further annual cost of living increases apply.

The Parties' Dispute Regarding Claimant's Impairment Rating

15. Defendant contends that the interest and penalty provisions of 21 V.S.A. §§ 650(e) and (f) do not apply to its failure to commence weekly payments under Workers' Compensation Rule 10.1800 because the payment of such benefits was in dispute. The dispute arose when Claimant notified Defendant of his intent to seek his own permanency rating on March 6, 2017. Finding of Fact No. 15 *supra*. Defendant's contention fails for two reasons.
16. First, Defendant received Dr. White's impairment rating on November 1, 2016, but it did not notify Claimant that he was entitled to permanent partial disability benefits based on Dr. White's impairment rating until February 21, 2017. By that time, weekly benefit payments were almost four months overdue. Thus, Defendant's failure to commence payment in a timely manner had nothing to do with Claimant's decision to seek his own impairment rating.
17. Second, Workers' Compensation Rule 10.1800 provides that in all cases in which permanent partial disability benefits are owed, the employer or insurer "shall begin advancing benefits immediately." Neither the statute nor the rules provide an exception to that requirement for the relatively common situation where the injured worker seeks a second impairment rating with a physician of his or her own choosing. Accordingly, Defendant's obligation was to begin advancing permanent partial disability benefits as of November 1, 2016, at least to the extent of Dr. White's impairment rating. *See, e.g., J.B. v. Steven Betit*, Opinion No. 32-08WC (July 21, 2008). The fact that Claimant later obtained his own rating does not change Defendant's obligation to commence payments as provided in Rule 10.1800 to the extent of its own expert's rating.
18. Defendant did not pay any permanent partial disability compensation to Claimant until it issued the lump sum check dated September 6, 2017, which Claimant's attorney received on September 22, 2017. Finding of Fact No. 20 *supra*. I therefore conclude that the retroactive lump sum that was due on November 1, 2016 was paid late and that each weekly payment covering the period from November 2, 2016 through approximately September 21, 2017 was likewise paid late.

Interest and Penalty Provisions for Late Payment under 21 V.S.A. §650(e)

19. Unless the Commissioner approves payment in a lump sum or on some other schedule, permanent partial disability compensation is payable weekly. *See* 21 V.S.A. §§ 648(a) and 652.

20. The Vermont workers' compensation statute includes provisions for the imposition of interest and penalties if weekly benefits are not paid in a timely manner. The statute provides in relevant part as follows:

If weekly compensation benefits or weekly accrued benefits are not paid within 21 days after becoming due and payable pursuant to an order of the Commissioner, or in cases in which the overdue benefit is not in dispute, 10 percent of the overdue amount shall be added and paid to the employee, in addition to interest and any other penalties. . . . Interest shall accrue and be paid on benefits that are found to be compensable during the period of nonpayment.

21 V.S.A. §650(e).

21. On November 1, 2016, Defendant received Dr. White's permanency rating. Although Claimant later indicated his intent to obtain his own rating, payment of benefits based on at least the degree of permanent impairment assessed by Dr. White was not in dispute. Conclusion of Law No. 17 *supra*. Thus, the undisputed portion of Claimant's permanent partial disability compensation became due and payable beginning on November 1, 2016.
22. First, a retroactive lump sum covering the period from Claimant's return to work through November 1, 2016 was due and payable on November 1, 2016. When that payment was not made within 21 days of November 1, 2016, the provisions set forth in 21 V.S.A. §650(e) for interest and penalties became applicable.
23. Next, Claimant's first weekly check, covering the period from November 2, 2016 through November 8, 2016, should have been paid by November 8, 2016.<sup>3</sup> When that payment was not made within 21 days of November 8, 2016, the provisions set forth in 21 V.S.A. §650(e) for interest and penalties became applicable to that payment. Thereafter, for each weekly check that was late, the provisions of 21 V.S.A. §650(e) are applicable.
24. Section 650(e) provides for a penalty of ten percent of the overdue amount. The retroactive lump sum that was due on November 1, 2016 was overdue. Thereafter, Claimant's weekly checks through approximately September 21, 2017 were overdue. I therefore conclude that Defendant owes Claimant a ten percent penalty of these overdue amounts pursuant to 21 V.S.A. § 650(e).

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<sup>3</sup> 21 V.S.A. §650(f) requires the employer to establish a day of the week for payment of weekly benefits; in the absence of an established day, payment is due on the employee's regular pay day. Here, Defendant failed to establish a day for payment, and the record does not contain evidence of Claimant's regular pay day. Accordingly, I conclude that the first weekly check, covering November 2, 2016 through November 8, 2016, was due no later than November 8, 2016.

25. Defendant also owes Claimant interest, which shall accrue and be paid on benefits that are found compensable "during the period of nonpayment." 21 V.S.A. §650(e). As Claimant's permanent partial disability benefits were due and payable beginning November 1, 2016, interest began to accrue as of that date. *See, e.g., Phillips v. Orange North Supervisory Union*, Opinion No. 05-14WC (March 21, 2014) (permanent partial disability benefits are payable at the rate in effect as of the termination of temporary total disability due to claimant's return to work, but interest does not begin to accrue until end medical result).
26. Thus, interest accrues on the retroactive lump sum amount from November 1, 2016 until the date of payment and on each weekly installment from the date each installment was due until the date each was paid, at the 12 percent annual interest rate set forth in 9 V.S.A. §41(a).

*Additional Penalty Provision under 21 V.S.A. §650(f)*

27. The Vermont workers' compensation statute has an additional penalty provision, as follows:

When benefits have been awarded or are not in dispute as provided in subsection (e) of this section, the employer shall establish a weekday on which payment shall be mailed or deposited and notify the claimant and the Department of that day. The employer shall ensure that each weekly payment is mailed or deposited on or before the day established. If the benefit payment is not mailed or deposited on the day established, the employer shall pay to the claimant a late fee of \$10.00 or five percent of the benefit amount, whichever is greater, for each weekly payment that is made after the established day. . . .

21 V.S.A. section 650(f).

28. The Workers' Compensation Rules further provide as follows:

**Weekly payment day.** When weekly benefits have been awarded or are not in dispute as described in 21 V.S.A. §650(e), the employer or insurance carrier shall establish the weekday on which payment shall be mailed, deposited or credited, and shall notify the injured worker and Commissioner of that day. The employer or insurance carrier shall ensure that each weekly payment is mailed or deposited on or before the day established. 21 V.S.A. §650(f).

. . .

3.2622 If the employer or insurance carrier fails to mail or deposit a weekly benefit payment on the day established (or if no day has yet been established, then on the injured worker's regular pay day), it shall pay to the injured worker a late fee of \$10.00 or five percent of the benefit amount, whichever is greater, for each weekly payment that is made after the established day. . . . 21 V.S.A. §650(f).

Workers' Compensation Rules 3.2620 and 3.2622.

29. In this case, Defendant did not establish a weekday for the payment of Claimant's weekly permanent partial disability benefits. Accordingly, his payments were due on his regular pay day each week. Workers' Compensation Rule 3.2622.
30. Defendant contends that the penalty provision of 21 V.S.A. §650(f) does not apply because Claimant's weekly benefits were in dispute. As set forth in reference to the interest and penalty provisions of 21 V.S.A. §650(e), Defendant was still required to pay the undisputed portion of Claimant's weekly benefits based on its own doctor's impairment rating. The same analysis applies here.
31. Defendant also relies upon the purpose of section 650(f), which is to mandate consistency in a claimant's receipt of weekly benefits. Such predictability allows injured workers the same ability to budget and manage their expenditures as active employees who receive a paycheck. Defendant contends that this purpose would not be fulfilled in Claimant's case because he had already returned to work and was therefore not relying on his weekly benefits for budgeting. Further, because his benefits were actually paid retroactively in a lump sum, payment on or before an established weekday has no relevance.
32. The statute does not make any distinction between the receipt of weekly permanent partial disability benefits by a claimant who has returned to work and one who has not. Each of them is entitled to payment on or before a designated weekday. Moreover, without knowing a claimant's financial situation, one cannot assume that his permanent partial disability benefits are not part of his regular household budget. Defendant's more persuasive argument is that once the benefits are being paid retroactively in a lump sum, the particular day of the week on which they were originally due loses relevance and the purpose for imposing penalties pursuant to section 650(f) is not fulfilled.
33. Although Defendant may be right that imposing a section 650(f) penalty under the circumstances presented here would not directly serve the purpose for which the penalty provision was adopted, that does not change the penalty's mandatory nature. The statute provides that the employer "shall ensure that each weekly payment is mailed or deposited on or before the day established. If the weekly benefit payment is not mailed or deposited on that day, the employer shall pay a late fee to the claimant. 21 V.S.A. §650(f). Defendant here failed to make Claimant's weekly payments on or before the designated day (his regular pay day) and therefore it owes a late fee for each payment that was not timely paid, in the amount of ten dollars or five percent of the late payment, whichever is greater.

### Summary

34. Defendant seeks a summary judgment determination that no interest or penalties are due for its failure to pay Claimant's benefits in a timely manner because Claimant disputed Defendant's permanency rating and the parties were engaged in good faith negotiations. However, Defendant had an obligation to begin advancing the undisputed portion of Claimant's permanent partial disability benefits immediately. Accordingly, penalties and interest are mandated, and Defendant's summary judgment motion is denied.

35. Claimant seeks a summary judgment determination that Defendant owes him interest and penalties for late payment of his permanent partial disability compensation from October or November 2015 through September 22, 2017. He is entitled to interest and penalties under 21 V.S.A. §§ 650(e) and 650(f), but the starting date for interest is November 1, 2016, not October or November 2015. Thus, Claimant's motion for summary judgment is granted in part and denied in part.

**ORDER:**

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

1. Interest at the statutory rate of 12 percent per year on Claimant's late-paid permanent partial disability benefits from November 1, 2016 through the date of payment, pursuant to 21 V.S.A. §650(e);
2. A ten percent penalty pursuant to 21 V.S.A. §650(e);
3. Late fees pursuant to 21 V.S.A. §650(f); and
4. Costs and attorney fees commensurate with Claimant's success pursuant to 21 V.S.A. §§ 650(e) and 678(d) in an amount to be determined.

**DATED** at Montpelier, Vermont this 25<sup>th</sup> day of June 2018.

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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.