

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Robert Bowers

Opinion No. 17-19WC

v.

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

Deerleap Transportation, Inc.

For: Michael A. Harrington  
Interim Commissioner

State File No. HH-212

**RULING ON CLAIMANT'S MOTION FOR LATE FEES, PENALTIES  
AND INTEREST**

**APPEARANCES:**

Ronald A. Fox, Esq., for Claimant  
Glenn S. Morgan, 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 late fees, penalties and interest under 21 V.S.A. §§ 650(e), 650(f) and 675(c)?

**EXHIBITS:**

Claimant's Exhibit A: Benefit payment history  
Claimant's Exhibit B: Late fee, penalty and interest calculations

Defendant's Exhibit 1: Interim Order of Benefits dated February 19, 2019

**BACKGROUND:<sup>1</sup>**

1. I take judicial notice of all forms in the Department's file relating to this claim, including the Agreement for Temporary Compensation (Form 32) approved June 2, 2016, the Notice of Intention to Discontinue Payments (Form 27) approved on or about March 8, 2017 and the Interim Order issued February 19, 2019.
2. Claimant was injured while working for Defendant on August 13, 2015. Defendant accepted his claim for benefits, and they entered into an Agreement for Temporary Compensation (Form 32) in May 2016.

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<sup>1</sup> Claimant's motion provides a chronology of events. Defendant has not disputed this chronology.

3. Claimant's average weekly wage at the time of injury was \$1,056.04, and his initial compensation rate was \$704.02. With cost of living increases, his compensation rate became \$723.73 on July 1, 2016; \$736.76 on July 1, 2017; and \$753.71 on July 1, 2018.

Temporary Total Disability Benefits

4. Claimant began receiving temporary total disability benefits as of August 14, 2015. On February 17, 2017, Defendant mailed a Notice of Intention to Discontinue Payments (Form 27) to the Department, seeking to discontinue temporary total disability benefits based on Dr. Gaughan's determination that Claimant had reached an end medical result on January 27, 2017. After an initial rejection on technical grounds, the Department approved the discontinuance effective March 15, 2017.
5. Between August 14, 2015 and March 15, 2017, Defendant paid Claimant \$58,570.30 in temporary total disability benefits. *See* Claimant's Exhibit A.

Permanent Partial Disability Benefits

6. Despite receiving notice that Claimant had reached an end medical result on January 27, 2017, Defendant took no steps to determine whether he had a permanent impairment as a result of his compensable injury.
7. Nevertheless, beginning March 22, 2017, upon the termination of his temporary total disability benefits, Defendant began sending Claimant a series of (mostly weekly) checks. The first check covered the week of March 16-22, 2017 and the last check covered the week of May 3-9, 2018. Thereafter, Defendant stopped sending checks to Claimant. It remains entirely unclear why Defendant stopped sending checks after May 9, 2018.
8. The payments made between March 22, 2017 and May 9, 2018 totaled \$41,976.34. *See* Claimant's Exhibit A. Each of these payments was designated temporary total disability, but as Claimant's temporary total disability benefits terminated on March 15, 2017, the parties agree that these payments may be considered permanent partial disability benefits.
9. Claimant's attorney scheduled him for a permanency evaluation with occupational medicine physician Verne Backus, MD in October 2018. Dr. Backus assessed Claimant with a 25 percent whole person impairment related to his work injury. A 25 percent impairment entitles an injured worker to 101.25 weeks of permanent partial disability benefits.<sup>2</sup> As Claimant's permanent partial disability benefits commenced with the week of March 16-22, 2017, his 101.25-week benefit period ran until March 2019.
10. Claimant's attorney received Dr. Backus' report on November 28, 2018 and provided it to Defendant's attorney on November 30, 2018. Claimant's attorney proposed that they enter into an Agreement for Permanent Partial Disability Compensation (Form 22) based on Dr. Backus' 25 percent impairment rating.

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<sup>2</sup> 405 weeks x 25% = 101.25 weeks. *See* 21 V.S.A. § 648 and Workers' Compensation Rule 10.1400.

11. The attorneys exchanged emails between December 5, 2018 and February 7, 2019. The emails show that Defendant considered obtaining its own independent medical examination, but ultimately never did. On February 7, 2019, Claimant's counsel requested an interim order from the Department based on Dr. Backus' report.
12. On February 19, 2019, the Commissioner issued an Interim Order that Defendant pay permanent partial disability benefits based on Dr. Backus' 25 percent whole person impairment rating, including 99 weeks of benefits that were already due and payable and additional weeks of benefits as they came due.
13. Following the Interim Order, the attorneys had email discussions as to what payments had already been made to Claimant as permanent partial disability compensation. Defendant's attorneys provided several payment histories, including the payment history shown on Claimant's Exhibit A.
14. Claimant's counsel calculated the total amount of Claimant's permanent partial disability benefits at \$74,973.79. Defendant does not dispute this calculation. The parties agree that Defendant paid Claimant \$41,976.34 in permanent partial disability benefits between March 16, 2017 and May 9, 2018. *See* Background Para. No. 8 *supra*. Thus, Defendant owed Claimant an additional \$32,997.45 in weekly benefits.<sup>3</sup>
15. Shortly before the Interim Order issued, Defendant made one additional payment to Claimant: on February 11, 2019, it paid him \$7,237.30, representing ten weeks of benefits. After the Interim Order issued, Defendant began making weekly payments of \$723.73, plus several payments in other amounts. Defendant issued its final payments on June 24, 2019, sending Claimant one check for \$7,237.30 and a separate check for \$393.42.<sup>4</sup> *See* Claimant's Exhibit A. Defendant has not explained why it made payments in the amounts and on the dates that it did, and no reason is readily apparent.
16. Claimant has now received his permanent partial disability benefits in full, in the amount of \$74,973.79. *See* Claimant's Exhibit A. However, he did not receive this amount in a timely fashion, nor did Defendant ever designate a specific weekday for payment of his benefits, as required by statute. The parties now dispute the effect of Defendant's untimely and erratic payment schedule on its remaining obligations, including statutory interest and penalty payments.

## **DISCUSSION:**

1. Claimant seeks late fees, penalties and interest under 21 V.S.A. §§ 650(e), 650(f) and 675(c) as a consequence of the late payment of a substantial portion of his permanent partial disability benefits.

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<sup>3</sup> \$74,973.79 minus \$41,976.34 = \$32,997.45.

<sup>4</sup> The check for \$7,237.30 was marked "PPD/Paid in full." Claimant returned that check because he was concerned that the "paid in full" notation might waive his claim for interest, late fees and penalties. Defendant reissued the check without the notation on July 16, 2019, and Claimant's counsel received it on July 22, 2019.

Timeliness of Claimant's Permanent Partial Disability Benefits

2. 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).
3. 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 reached an end medical result as of January 27, 2017, and his temporary total disability benefits were discontinued on that basis effective March 15, 2017. Thus, Claimant's entitlement to permanent partial disability benefits began with the week of March 16-22, 2017.

Procedure for Assessing Permanent Impairment and Commencing Benefits

4. Within 45 days of receiving notice or knowledge that an injured worker has reached an end medical result, the employer or insurer must take action necessary to determine whether the worker has suffered a permanent impairment as a result of the compensable injury. Workers' Compensation Rule 10.1200. If so, then the employer or insurer "shall begin advancing benefits immediately." Workers' Compensation Rule 10.1800.
5. Defendant here received notice that Claimant had reached an end medical result when it received Dr. Gaughan's January 27, 2017 report. Further, it relied on that report when it sought to discontinue his temporary total disability benefits on February 17, 2017. Although the record does not show when Defendant received the report, it must have received it no later than February 17, 2017. Defendant therefore had 45 days from February 17, 2017, at the latest, to take action necessary to determine whether Claimant had a permanent impairment as a result of his compensable injury. Defendant took no such action.
6. Despite not referring Claimant for a permanency evaluation, Defendant paid him additional weekly benefits from the week of March 16-22, 2017 through the week of May 3-9, 2018, a period of 59 weeks. I therefore conclude that Defendant met its obligation to begin advancing benefits immediately under Workers' Compensation Rule 10.1800.

Discontinuance and Reinstatement of Claimant's Benefits

7. Although Defendant met its obligation to begin advancing benefits immediately, it stopped advancing those benefits after May 9, 2018 for reasons that remain unclear. As it had never sent Claimant for a permanency evaluation nor entered into an Agreement for Permanent Partial Disability Compensation with him, Defendant had no basis to stop advancing his weekly benefits. Based on Dr. Backus' later assessment of a 25 percent whole person impairment, Claimant was entitled to 101.25 weeks of benefits. By arbitrarily discontinuing his checks after 59 weeks, Defendant failed to pay a substantial portion of Claimant's permanent partial disability benefits in a timely manner.

8. Defendant started making payments again on February 11, 2019 by issuing Claimant a check for \$7,237.30, representing ten weeks of benefits. However, by that time, it owed about 40 weeks of benefits, not ten weeks.<sup>5</sup> In addition, Claimant should have received all of his benefits (101.25 weeks) by March 2019, but Defendant did not finish paying them until June 24, 2019.
9. Accordingly, I conclude that Defendant has failed to pay a significant portion of Claimant's permanent partial disability benefits when due.

Entitlement to Interest, Penalties and Late Fees

10. Claimant seeks interest, penalties, and late fees for Defendant's late payment of his weekly benefits pursuant to 21 V.S.A. §§ 650(e), 650(f) and 675(c). Defendant contends that interest, late fees and penalties are not due because it engaged in a good faith effort to pay Claimant's benefits and has now paid them in full.

Interest Provision for Late Payment under 21 V.S.A. § 675(c)

11. Section 675(c) of Vermont's Workers' Compensation Act provides as follows:

An employer who fails to make payment due to an employee under this chapter pursuant to an executed agreement under sections 642, 644, 646, or 648 of this title or pursuant to an interim order of the Commissioner within 15 days after the payment is due shall also pay the employee interest on the unpaid compensation at the statutory rate.

12. The statutory interest rate is 12 percent per annum. 9 V.S.A. § 41(a).
13. The Commissioner issued an Interim Order here on February 19, 2019, requiring Defendant to pay Claimant permanent partial disability benefits based on Dr. Backus' report, including 99 weeks of benefits that were already due and payable as of February 19, 2019, and the remaining 2.25 weeks of benefits as they came due. The Interim Order provides that payments are due and payable upon issuance of the order, and "[f]ailure to pay the benefits herein ordered when due may result in additional amounts and/or interest becoming due [to Claimant] pursuant to 21 V.S.A. § 675." See Defendant's Exhibit 1. Thus, payment for 99 weeks of benefits was due and payable on February 19, 2019, and interest would begin to accrue as of that date if payments were not made within 15 days (*i.e.*, by March 6, 2019).
14. As of February 19, 2019, however, Defendant had already paid a significant portion of the 99 weeks of benefits then due. First, it paid 59 weeks of benefits from March 16-22, 2017 through May 3-9, 2018, in the amount of \$41,976.34. Background Para. No. 8 *supra*. Second, it paid another ten weeks of benefits on February 11, 2019. Background Para. No. 15 *supra*. Thus, of the 99 weeks of benefits due on the Interim Order date, the amount remaining to be paid on that date was 30 weeks.

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<sup>5</sup> May 10, 2018 through February 11, 2019 = 39.6 weeks.

15. Defendant made three additional weekly payments between February 19, 2019 and March 6, 2019. *See* Claimant’s Exhibit A. Accounting for these payments, it still owed 27 weeks of benefits that were not paid by the 15-day (March 6, 2019) deadline. Each of these 27 weeks of benefits accrues interest from February 19, 2019 until the date on which each payment was made. *See Barry v. Ethan Allen Interiors Inc.*, Opinion No. 10-18WC (June 25, 2018).
16. As set forth in the Interim Order, Defendant was also obligated to pay the remaining 2.25 weeks of benefits as those amounts came due. Defendant’s Exhibit 1. The first payment, in the amount of \$753.71, became due on February 26, 2019. The second payment, in the same amount, became due on March 5, 2019. Finally, the last 0.25 weeks of benefits (\$188.43) became due on March 12, 2019. *See* Background Para. No. 13 *supra*. These amounts were not paid until June 24, 2019. *See* Claimant’s Exhibit A. Thus, 12 percent interest is due on these payments as well.
17. In summary, Defendant owes interest on 27 weeks of benefits from February 19, 2019 until the dates on which each weekly benefit was paid. The benefit amount for each of those weeks was \$753.71, as those payments were all due after July 1, 2018. *See* Background Para. No. 3 *supra*. Further, Defendant owes interest on \$753.71 from February 26, 2019 through June 24, 2019; interest on \$753.71 from March 5, 2019 through June 24, 2019; and interest on \$188.43 from March 12, 2019 through June 24, 2019.

*Penalty Provision for Late Payment under 21 V.S.A. § 650(e)*

18. 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.
19. Vermont’s Workers’ Compensation Act includes a provision for the imposition of a penalty 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. . . . Benefits are in dispute if the claimant has been provided actual written notice of the dispute within 21 days of the benefit being due and payable and the evidence reasonably supports the denial. . . .

21 V.S.A. § 650(e).

20. Here, Claimant’s entitlement to permanent partial disability benefits was not “in dispute,” as that term is defined in Section 650(e). Defendant had 45 days in which to arrange for a

permanency evaluation after being notified of Claimant's end medical result status. Rather than arranging for an evaluation, it commenced payment of additional weekly benefits. Thus, not only did it fail to provide actual written notice to Claimant that his benefits were in dispute as required by Section 650(e), but it affirmatively paid them for more than a year.

21. Dr. Backus' impairment rating is not in dispute, either. Although Defendant considered obtaining its own rating, it ultimately declined to do so. Further, it did not provide actual written notice to Claimant of any dispute within 21 days, nor does it have evidence reasonably supporting a denial of benefits based on Dr. Backus' 25 percent impairment rating, as required by the statute. Accordingly, I conclude that the penalty provision of Section 650(e) is applicable here.
22. Claimant was entitled to 101.25 weeks of benefits totaling \$74,973.79. Defendant timely paid his benefits from March 16, 2017 through May 9, 2018 in the amount of \$41,976.34. The rest of his benefits, in the amount of \$32,997.45, were not paid within 21 days of becoming due and payable. Accordingly, Defendant owes a penalty in the amount of ten percent of \$32,997.45, or \$3,299.74.

Late Fee Provision for Late Payment under 21 V.S.A. §650(f)

23. The Vermont workers' compensation statute also has a late fee 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. § 650(f).

24. 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.

25. As Claimant's benefits were not in dispute as that term is defined in Section 650(e), *see* Discussion Para. Nos. 20-21 *supra*, Defendant had a duty to establish a weekday on which his benefits would be deposited or mailed. Defendant failed to do this. Accordingly, it was required to deposit or mail Claimant's payments on his regular pay day each week. Workers' Compensation Rule 3.2622.
26. The record before me does not establish Claimant's regular weekly pay day. Claimant's attorney treated the week ending date as the date on which each payment should have been deposited or mailed, and Defendant has raised no objection. *See* Claimant's Motion, Para. 13; Claimant's Exhibit B. Accordingly, for purposes of Section 650(f), I find that the weekly benefit due date is the last day of each benefit week. *See Barry v. Ethan Allen Interiors Inc.*, Opinion No. 10-18WC (June 25, 2018), footnote 3 (treating the week ending date as the date on which each payment should be deposited or mailed when the claimant's regular pay day is unknown).
27. Claimant's Exhibit A reveals multiple instances where Defendant did not deposit or mail Claimant's benefit check by the last day of the benefit week. For each such instance, Defendant shall pay Claimant a late fee of ten dollars or five percent of the late payment, whichever is greater, pursuant to 21 V.S.A. § 650(f).
28. Defendant contends that the penalty and late fee provisions of 21 V.S.A. §§ 650(e) and (f) should not apply here because they would not serve the purpose for which they were adopted – namely to encourage consistent payment of permanent partial disability benefits. I strongly disagree. Claimant was entitled to 101.25 weeks of permanent partial disability benefits. Defendant stopped paying his benefits at 59 weeks, after which he received no payments for nine months. Even after his benefits resumed in February 2019, he did not receive payments in a timely manner. Moreover, to the extent that payments were not deposited or mailed by a specific day each week, Claimant was unable to rely on those payments for budgeting purposes, as contemplated by the statute. *See Barry v. Ethan Allen Interiors Inc.*, Opinion No. 10-18WC (June 25, 2018). In this case, therefore, the late fee and penalty provisions of Sections 650(e) and (f) do in fact serve the purpose for which they were adopted.<sup>6</sup>

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<sup>6</sup> Even if §§ 650(e) and (f) did not serve their intended purpose in this case, the statute provides that the employer "shall" pay these penalties and late fees. Thus, they are mandatory in nature.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Interest at the statutory rate of 12 percent per annum on the benefits ordered by the Commissioner from the date of the Interim Order (or the date the benefits became due, whichever is later) until the date of payment, pursuant to 21 V.S.A. § 675(c);
2. A ten percent penalty, in the amount of \$3,299.74, pursuant to 21 V.S.A. § 650(e);
3. Late fees on each permanent partial disability payment that was not deposited or mailed on or before the last day of the benefit week, pursuant to 21 V.S.A. § 650(f);  
and
4. Attorney fees for this motion, pursuant to 21 V.S.A. § 678(d), in an amount to be determined.

**DATED** at Montpelier, Vermont this 25<sup>th</sup> day of September 2019.

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Michael A. Harrington  
Interim Commissioner