

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Michael Deuso

Opinion No. 20-19WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Shelburne Limestone
Corporation

For: Michael A. Harrington
Interim Commissioner

State File No. JJ-718

OPINION AND ORDER

Hearing held in Montpelier on August 28, 2019
Record closed on September 24, 2019

APPEARANCES:

Michael J. Deuso, *pro se*
Glenn S. Morgan, Esq. and Charles A. Romeo, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to any temporary or permanent disability benefits arising out of any injuries he may have sustained during an April 21, 2017 workplace altercation?
2. Has Claimant reached an end medical result for his work-related hearing loss and tinnitus, and if so, as of what date?
3. What is Claimant's permanent impairment, if any, for his work-related hearing loss and tinnitus?

EXHIBITS:

Joint Exhibit I:	Medical records
Defendant's Exhibit A:	Noise Level Monitoring Report, October 2015
Defendant's Exhibit B:	MSHA Personal Health Sampling Results
Defendant's Exhibit C:	<i>Curriculum Vitae</i> of Verne Backus, MD

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. § 642
Permanent partial disability benefits pursuant to 21 V.S.A. § 648

FINDINGS OF FACT:

1. At all times relevant to this claim, Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers' Compensation Act.
2. I take judicial notice of all relevant forms and records in the Department's file relating to this claim, including the Commissioner's Ruling on Defendant's Motion for Summary Judgment in *Deuso v. Shelburne Limestone Corp.*, Opinion No. 13-18WC (September 14, 2018) ("*Deuso I*").

Claimant's Employment by Defendant

3. Claimant is a 59-year-old man who resides in Montgomery Center, Vermont.
4. Defendant is a family-owned business that operates several stone quarries, including one located in Swanton, Vermont. In 2017 Dennis Demers was vice president of the business, and his son Trampas Demers was president.
5. Claimant began working for Defendant in 1983. *Deuso I*, Finding of Fact No. 1. For many years, he worked as the operator and manager of Defendant's Swanton plant.

The April 21, 2017 Workplace Altercation and Claimant's Separation from Employment

6. On April 21, 2017, Dennis and Trampas Demers summoned Claimant to a meeting concerning his job performance. Shortly after the meeting started, Claimant yelled an obscenity, stormed out of the meeting, and headed for the exit downstairs. Dennis and Trampas Demers followed after him.
7. The three men got into a physical altercation by the exit door. Trampas Demers sustained a broken finger, and Claimant sustained a bump on his head.¹
8. Claimant relinquished the keys to his company vehicle and went home by taxicab shortly after the altercation. His employment ended that day for reasons unrelated to any claimed work injury. *See Deuso I*, Finding of Fact No. 24.
9. After Claimant returned home, he decided to drive himself to the emergency department of Northwestern Medical Center. An emergency department physician diagnosed a scalp contusion, with minimal scalp trauma and no signs of concussion, and released him to return home. *Joint Exhibit I ("Medical Records") at 109.*

Claimant's Activities from April 22, 2017 through September 12, 2017

10. Claimant was diagnosed with a hernia two years prior to the work altercation, but he declined his doctor's surgical referral at that time. *Deuso I*, Finding of Fact No. 46.

¹ Defendant has elected not to pursue the so-called "aggressor defense," under which this claim would be barred if Claimant willfully intended to injure another. *See* 21 V.S.A. § 649. Accordingly, I make no findings concerning whether Claimant willfully intended to injure Dennis or Trampas Demers in the altercation.

When his employment ended in April 2017, he used his period of unemployment to undergo hernia repair surgery. *Medical Records at 153-54.*

11. Eventually, Claimant “healed up” and began looking for a new job. On or about September 12, 2017, he returned to work for another employer in an electrical apprenticeship program.

Expert Medical Testimony on Claimant’s Altercation-Related Injuries

12. Claimant alleges that he sustained a scalp contusion, a concussion and a worsening of his tinnitus in the workplace altercation.² However, he offered no expert medical testimony concerning the nature and extent of any injuries he sustained.³
13. At Defendant’s request, Verne Backus, MD, performed an independent medical examination of Claimant on November 1, 2017. Dr. Backus is a board-certified occupational medicine physician. He graduated from Dartmouth Medical School and completed an occupational and environmental medicine residency at the Harvard School of Public Health. Dr. Backus has experience with workplace and environmental injuries, including head injuries and noise-related hearing loss.
14. Dr. Backus’ independent medical examination process included an interview, a medical records review and a physical examination. He also reviewed additional records and supplemented his report in August 2019.
15. Dr. Backus diagnosed Claimant with a scalp contusion causally related to the April 21, 2017 altercation. He did not diagnose an altercation-related concussion, nor did he find that Claimant’s pre-existing tinnitus was aggravated by the altercation.
16. In Dr. Backus’ opinion, Claimant reached an end medical result for his scalp contusion soon after the altercation without any permanent impairment referable to that injury.
17. I find Dr. Backus’ opinions concerning the injuries that Claimant sustained in the altercation to be clear, well-supported by the medical records, and persuasive.

Claimant’s Hearing Loss and Tinnitus

18. In October 2005 Defendant had the noise levels tested in its Swanton plant by an outside firm. *Defendant’s Exhibit A.* Based on the noise levels in his work area, Claimant was identified as someone who needed to wear hearing protection while performing certain aspects of his job. *Defendant’s Exhibits A and B.*

² Claimant also alleged a hernia related to the workplace altercation, but that claim was denied on summary judgment. *See Deuso I, Conclusion of Law No. 39.*

³ The Department advised Claimant repeatedly that he needed expert medical testimony to support his claims, but he opted to proceed without an expert. *See Deuso I, Finding of Fact Nos. 60 through 63.*

19. In 2006 Defendant instituted a workplace hearing conservation program. Claimant credibly testified that, from that time onward, he always wore his mandated hearing protection.
20. Beginning in February 2006 and annually thereafter, Claimant underwent workplace hearing testing and received the results of those tests every year. Each year the test results indicated that he had hearing loss, while also indicating: “No action required.” *Medical Records at 9, 11, 13, 19, 33, 35, 37, 41, 57, 70, 86 and 105.* His medical records also documented tinnitus in 2009. *See Medical Records at 28.*
21. On May 11, 2017, Claimant saw an audiologist for hearing loss and tinnitus. *Medical Records at 123.* She recommended binaural hearing aids. *Id.* Prior to this date, no medical provider had advised Claimant to obtain hearing aids. *See generally Medical Records at 1-123.*

Expert Medical Testimony on Causation and End Medical Result for Hearing Issues

22. Claimant offered no expert medical testimony concerning any aspect of his hearing loss and tinnitus.
23. Defendant offered Dr. Backus’ testimony as to Claimant’s hearing loss and tinnitus, based on his November 2017 independent medical examination and his August 2019 additional records review.
24. Claimant’s baseline level of noise-induced hearing loss was established on February 1, 2006. *Medical Records at 9.* In Dr. Backus’ opinion, the noise level in Claimant’s workplace, as established by the 2005 Noise Level Monitoring Report (Defendant’s Exhibit A), was sufficiently high to have contributed to Claimant’s baseline hearing loss. Accordingly, Dr. Backus credibly found a causal relationship between Claimant’s employment and his hearing loss as of February 2006.
25. Although Claimant’s hearing deteriorated after February 2006, Dr. Backus testified that none of the subsequent hearing loss was caused by workplace noise exposure for two reasons. First, Claimant always wore his required hearing protection from February 2006 onwards, thereby preventing any additional exposure to damaging noise levels. Second, the degree of hearing loss that he experienced between February 2006 and May 2017 was not large enough constitute a standard threshold shift.⁴ Rather, it was well within the expected range for normal age-related hearing loss. I find this testimony clear and persuasive.
26. In Dr. Backus’ opinion, Claimant reached an end medical result for his work-related hearing loss and tinnitus in February 2006. He explained that there is no curative treatment for noise-induced hearing loss and that reducing noise exposure or wearing hearing aids helps to manage the loss but does not reverse it. Thus, significant improvement in Claimant’s hearing loss as of February 2006 was not expected, with

⁴ A standard threshold shift is defined as a change in the average decibel detected by audiogram at 2000, 3000 and 4000 hertz of at least 25 decibels. *Dr. Backus’ Supplemental Report, Medical Records at 212.*

or without treatment. Dr. Backus' analysis is well-grounded in his experience as an occupational medicine physician and his understanding of end medical result status. I accept his opinion as persuasive, and there is no contrary expert opinion in evidence.

Expert Medical Testimony on Permanent Impairment for Hearing Issues

27. Dr. Backus determined that Claimant suffered no work-related hearing loss after February 2006. *See* Finding of Fact No. 25 *supra*. He therefore used the data from Claimant's February 1, 2006 hearing test to assess his work-related hearing loss and tinnitus. Applying the methodology set forth in the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)*, Dr. Backus determined that Claimant had a 0.6 percent binaural hearing impairment in 2006. He then used the tables set forth in the *AMA Guides* to convert the 0.6 percent binaural hearing impairment to a zero percent whole person impairment. I find Dr. Backus' analysis persuasive.
28. Claimant contends that he has a ten percent whole person impairment for his work-related hearing loss and tinnitus. Although Dr. Backus did assess Claimant with a ten percent whole person impairment based on his May 2017 hearing test results, *see Medical Records at 215*, he asserted that none of the ten percent was causally related to employment. Dr. Backus explained that because Claimant did not sustain any additional work-related hearing loss after February 2006, his work-related permanent impairment rating is unaffected by his subsequent hearing loss. I find Dr. Backus' explanation here to be clear and persuasive. Further, Claimant's assertion of a ten percent whole person impairment for work-related hearing loss and tinnitus is unsupported by any medical expert.

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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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, supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Claimant's Entitlement to Indemnity Benefits Related to the Workplace Altercation

2. Claimant seeks temporary total and permanent partial disability benefits for the injuries he sustained in the workplace altercation.
3. Defendant has conceded that the altercation arose out of and in the course of Claimant's employment. *See Defendant's Amended Final Disclosures, Statement of Uncontested Facts ¶¶ 1-2*. Accordingly, it is Claimant's burden to prove that his

altercation-related injuries disabled him from work after April 21, 2017 and that they resulted in a permanent impairment.

Claimant's Altercation-Related Injuries

4. Claimant sustained a mild scalp contusion, and Dr. Backus' credible testimony established that the contusion was causally related to the workplace altercation. Although Claimant has also alleged a concussion and a worsening of his tinnitus from the altercation, he offered no medical testimony to establish that he sustained either of these injuries.
5. When the causal connection between a workplace incident and a claimant's injury is obscure, such that a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lewis v. Town of Stowe*, Opinion No. 12-15WC (June 3, 2015), citing *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). Having presented no such testimony, Claimant has failed to establish any altercation-related injuries other than a scalp contusion.

Indemnity Benefits Related to The Altercation

6. When an injured worker's employment ends for reasons unrelated to a work injury, then the injury is not the cause of the earnings loss and the worker is not entitled to temporary disability benefits. *See, e.g., Andrew v. Johnson Controls*, Opinion No. 03-93WC (June 13, 1993) (employee who voluntarily quit employment not entitled to temporary indemnity benefits); *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003) (employee fired for cause not entitled to temporary indemnity benefits). However, the Commissioner has recognized an exception to this rule, providing that temporary disability benefits are payable if the claimant can show that the work-related disability is the cause of his or her inability to find or hold new employment. The test for this exception provides:

Thus, in order to fit within the exception, a claimant has the burden of demonstrating (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that the inability to return to the work force, or a return at a reduced wage, is related to the work injury and not to other factors.

D.P., Jr. v. GE Transportation, Opinion No. 03-08WC (January 17, 2008), citing *Andrew v. Johnson Controls, supra*.

7. Claimant's employment ended on April 21, 2017 for reasons unrelated to any claimed work injury. Finding of Fact No. 8 *supra*. Thus, to prevail on a claim for temporary total disability benefits, he must satisfy the three-pronged test laid out above.
8. Claimant has satisfied the first prong by establishing that he sustained a work-related scalp contusion. However, he offered no evidence supporting a reasonably diligent attempt to return to the workforce beyond his testimony that, after he healed up from

the hernia surgery, he began looking for a job. This testimony is insufficient to establish the second prong of the test.

9. As to the test's third prong, expert medical testimony is required to establish the extent, if any, to which an injured worker is incapable of working. *See Brown v. Casella Waste Management*, Opinion No. 19-15WC (September 3, 2015). Claimant offered no medical evidence that his scalp contusion prevented him from working between April 21, 2017 and September 12, 2017. Instead, he spent that time undergoing unrelated hernia surgery and looking for a new job. Accordingly, he has failed to establish test's third prong as well.
10. Claimant has failed to prove that his scalp contusion disabled him from work following the April 2017 altercation. He is therefore not entitled to temporary total disability benefits for this injury.
11. Claimant also asserts a claim for permanent partial disability benefits related to the scalp contusion. However, he has presented no evidence that his injury resulted in any permanent impairment. Further, Dr. Backus credibly testified that it did not. Accordingly, I conclude that Claimant is not entitled to any permanent partial disability benefits for the injury he sustained in the altercation.

Claimant's Entitlement to Hearing Aids

12. In August 2019 Dr. Backus found a causal relationship between Claimant's noise-related hearing loss and his employment. *Medical Records at 213*. Defendant therefore withdrew its opposition to providing Claimant with hearing aids prior to the August 28, 2019 hearing. *See Defendant's Counsel's August 9, 2019 letter to the Administrative Law Judge*. Nevertheless, Claimant's Proposed Findings of Fact state that he is seeking "payments for required hearing aids." *See Claimant's Proposed Findings of Fact, at 5*. Based on Defendant's withdrawal of its opposition to hearing aids, Claimant is entitled to medically necessary hearing aids without further order.

End Medical Result for Work-Related Hearing Loss and Tinnitus

13. The Workers' Compensation Rules define "end medical result" as "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." *Workers' Compensation Rule 2.2000*.
14. Applying this definition, Dr. Backus credibly testified that Claimant reached an end medical result for his work-related hearing loss and tinnitus in February 2006. There is no medical opinion to the contrary. Accordingly, I conclude that Claimant reached an end medical result for his work-related hearing loss and tinnitus in February 2006.

Claimant's Permanent Impairment for Work-Related Hearing Loss and Tinnitus

15. Claimant seeks permanent partial disability benefits for his work-related hearing loss and tinnitus. Dr. Backus' credible testimony established that Claimant has a zero

percent whole person permanent impairment for these injuries. Claimant has offered no medical opinion to the contrary. Accordingly, Claimant has failed to meet his burden of proving that he is entitled to any permanent partial disability benefits for his work-related hearing loss and tinnitus.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for temporary total and permanent partial disability benefits relating to the April 21, 2017 workplace altercation is **DENIED**. Further, his claim for permanent partial disability benefits for his work-related hearing loss and tinnitus is likewise **DENIED**.

DATED at Montpelier, Vermont this 30 day of October 2019.

Michael A. Harrington
Interim 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.