

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Rodney Stearns

Opinion No. 11-21WC

v.

By: Stephen W. Brown
Administrative Law Judge

Ricane Crossman and
A+ Handyman Services, LLC

For: Michael A. Harrington
Commissioner

State File No. JJ-309

OPINION AND ORDER

Hearing held via Microsoft Teams on December 14, 2020
Record closed on January 14, 2021

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Ricane Crossman, *pro se*, for Defendants

ISSUE PRESENTED:

1. To what, if any, indemnity and medical benefits is Claimant entitled for his work-related back injury?

EXHIBITS:

Joint Medical Exhibit (“JME”)

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640
Temporary total disability benefits pursuant to 21 V.S.A. § 642
Costs and Attorney Fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms in the Department’s file for this claim.
2. Claimant is a 39-year-old man who resides in Charlotte, Vermont. He graduated from high school in 2000. After his graduation, he worked in a variety of positions in the hardware, restaurant, and agricultural industries.
3. In or around 2006, Defendant Ricane Crossman (“Crossman”) hired Claimant as an employee for his then-unincorporated handyman business. From that time until Crossman formed Defendant A+ Handyman Services, LLC (“the Company”) in 2010,

Claimant was Crossman's employee. Upon the Company's formation, Claimant became the Company's employee. Defendant Crossman was the Company's only member, and the Company has been inactive since 2016.¹

4. Claimant's primary duty for Defendants involved tile work, which was physically intensive and often required heavy lifting.
5. On September 14, 2015, Claimant injured his lower back while moving an 85-pound bag of mortar in the course of employment. At that time, his average weekly wage was \$1,278.13. Defendants did not have workers' compensation insurance coverage at the time of Claimant's September 2015 workplace injury. Claimant never returned to work for Defendant after this injury.
6. Claimant had suffered a previous back injury in or around 2007 while shoveling sand off the back of a truck. He received medical treatment for that injury and missed some work because of it, but that injury resolved after several months. After that time, Claimant experienced little or no ongoing pain, and he worked for Defendants for several years after that incident without any significant physical limitations. There is no convincing evidence that his 2007 injury either limited his activities in the months preceding his 2015 workplace injury or that it contributed to any of his complaints after September 2015.

Medical Treatment

7. The day after his September 2015 workplace injury, Claimant treated at Concentra, where his providers took him out of work for two days with a note that he could return to light duty as of September 17, 2015, with significant restrictions:

No repetitive lifting over 10 lbs. No pushing/pulling over 15 lbs. of force. No bending more than 0 times per hour. No squatting. No kneeling. No climbing stairs or ladders. No climbing. Sit as needed. Unable to drive or operate machinery. Please use cane for ambulation. All lifting/pulling/pushing activities are only to occur from waist level. No stooping.

(JME 1-5).

8. His Concentra providers prescribed him medications including metaxalone, methylprednisolone, and tramadol, and provided him with a walking cane. (*See id.*). His symptoms included intense physical pain shooting "like a knife" into his back, sciatic nerve pain in his left leg, and foot pain that "felt like it was on fire."
9. In addition to treating several times at Concentra, Claimant also visited the University of Vermont Medical Center's emergency room in September and October 2015 for pain he experienced in his lower back and left leg.

¹ I take judicial notice of the Company's publicly available filings with the Vermont Secretary of State, pursuant to Vermont Rule of Evidence 201(b)-(c) and Workers' Compensation Rule 17.1100.

10. Defendant Crossman referred Claimant to Onion Reiver Chiropractic, and Claimant visited that provider one time in October 2015. However, Defendant never paid Claimant's bill for that visit, so that provider refused to treat him any further.
11. In August 2016, Claimant underwent an MRI study which showed a left central disc extrusion at L5-S1 with a mass effect on the left S1 nerve root in the lateral recess, left-sided foraminal narrowing at L5-S1, and disc degeneration at L4-5 and L5-S1. (JME 39-42).
12. Claimant subsequently underwent multiple rounds of injections, some of which provided temporary relief. However, none of those injections provided any lasting relief of the knife-like pain that Claimant experienced radiating into his leg. (*E.g.*, JME 42, 49-50, 102-107).
13. Eventually, Claimant met with neurosurgeon Ryan Jewell, M.D. at the University of Vermont, who recommended surgery for a herniated disc, and Claimant underwent that surgery in March 2020. (JME 108-127).
14. Immediately following that surgery, Claimant felt that his condition had worsened, but his symptoms eventually began to subside after the swelling decreased and his leg pain improved. He continues to experience numbness in his leg and has not fully recovered from the surgery. However, he credibly testified that his symptoms are now "stable," and he knows what to expect, although he does not feel that he is improving any more.
15. Claimant has filed medical billing information with the Department relating to treatment he received for his September 2015 workplace injury. (*See* July 6, 2020 correspondence from Claimant's counsel to Department of Labor and attachments thereto). There is no serious contention that any of the treatments reflected therein relate to anything other than Claimant's September 2015 workplace injury, and I find that these documents accurately reflect the allowable costs of Claimant's medical expenses for this injury. Based on those submissions, I find that the billed amount for those treatments totals \$25,050.62 and that the amount allowable under the workers' compensation fee schedule totals \$15,031.55.

Claimant's Work and Income Since September 2015

16. Claimant experienced significant financial hardship after his September 2015 injury. He broke up with his girlfriend with whom he had been living and moved into his parents' home. Between the time of his September 2015 injury and approximately November 2020, his only income consisted of performing informal work for his parents around their home in exchange for "debt reduction."
17. Claimant's mother Donna Stearns credibly testified that this work-for-debt-reduction arrangement resulted from Claimant's own feeling that he needed to do something to "earn his keep."

18. There is no convincing evidence that Claimant actually incurred a legally enforceable debt to his parents. Nor is there any evidence as to the effective hourly rate of pay for his work for them. Claimant was not even certain of the precise amount of the debt forgiven due to this work, but his mother credibly estimated that the total amount of his debt forgiveness was approximately \$7,000.00.
19. Claimant's mother also bought him a truck to "give him hope." There is no evidence that Claimant incurred a debt for that truck or that it constituted compensation for his services.
20. I do not find that Claimant's work for his parents constituted a return to employment. Nor do I find that the \$7,000.00 of "debt reduction" constituted wages.
21. Beginning in November 2020, Claimant began working in the home remodeling industry in Vergennes, Vermont. In that capacity, his work primarily involves snap flooring, stair treads, and window replacement. I find that he returned to work by November 1, 2020.

Expert Medical Testimony

22. Claimant underwent two independent medical evaluations ("IMEs") with occupational medicine physician Philip Davignon, MD: the first in March 2017 and the second January 2019.
23. Based on his examination of Claimant and a thorough review of his medical records, Dr. Davignon credibly testified that Claimant suffered a disc herniation as a result of his September 2015 workplace injury, and that the treatments described above, including the March 2020 surgery performed by Dr. Jewell, were reasonable and necessary treatment for that injury.
24. In Dr. Davignon's opinion, the optimum result from the surgery Dr. Jewell performed would be decreased discomfort, improved strength, and a possible resolution of radicular symptoms. He credibly testified that the typical recovery time after such a surgery is approximately six months to one year after the operation.
25. Dr. Davignon also testified that as of his January 2019 examination, Claimant was not yet at end medical result. At that time, Claimant was still considering the surgery that he ultimately underwent in 2020. Dr. Davignon would expect that Claimant would reach end medical result within six to twelve months after that surgery.
26. Based on his 2019 examination of Claimant and review of his medical records, Dr. Davignon also testified Claimant was disabled from working as a carpenter or laborer due to sensory deficits and weakness. Specifically, the work that Claimant performed prior to his injury required lifting, twisting, bending, and repetitive movements, all of which tend to worsen the types of symptoms that he was experiencing.

27. I find Dr. Davignon's testimony clear, credible, and persuasive with respect to the reasonableness of Claimant's medical treatments and his work capacity as of the time of his 2019 examination of Claimant.

Prior Proceedings

28. On December 21, 2018, following an informal conference that was rescheduled multiple times due to Defendants' failure to appear, the Department of Labor issued an interim order requiring Defendants to pay certain medical and indemnity benefits. The Department subsequently issued an order requiring Defendants to pay Claimant's attorney fees incurred in obtaining that interim order.
29. To date, Defendants have paid no medical benefits and no indemnity benefits to Claimant.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Crossman is Personally Liable for Any and All Workers' Compensation Benefits to Which Claimant is Entitled

2. Vermont law requires employers to carry workers' compensation insurance or qualify as a self-insurer. *See* 21 V.S.A § 687(a). When an employer has failed to procure such insurance coverage or qualify as a self-insurer and its employee suffers an injury arising out of and during the course of his or her employment, the employer's owners or principals are personally liable for any workers' compensation benefits owing to such employee. *See* 21 V.S.A § 687(b).
3. In this case, the Company lacked workers' compensation insurance coverage at the time of Claimant's workplace injury. *See* Finding of Fact No. 5, *supra*. There is no evidence that it qualified as a self-insurer. As such, the Company failed to comply with the provisions of 21 V.S.A § 687(a).
4. Because the Company is a limited liability company, personal liability is governed by 21 V.S.A § 687(b)(3), which provides in relevant part as follows:

In the event an employer fails to secure workers' compensation as required by this section and an employee reasonably believes that he or she has received a personal injury by accident arising out of and in course of employment with that employer, then: ...

(3) If the employer is neither a corporation nor a partnership, the principals, executive officers, or controlling parties of the business, or all of these, shall be personally liable for any benefits owed to the injured employee under this chapter.

5. Because Crossman was the uninsured Company's sole member and principal, *see* Finding of Fact No. 5, *supra*, he, along with the Company, is personally responsible for paying any and all workers' compensation benefits that the Company may owe to Claimant.

The Medical Treatments Claimant Received Were Reasonable and Necessary

6. Vermont's Workers' Compensation Act requires employers to furnish injured workers "reasonable surgical, medical, and nursing services and supplies, including prescription drugs and durable medical equipment." 21 V.S.A. § 640(a). The Department's Workers' Compensation Rules, in turn, define "[r]easonable medical treatment" as "treatment that is both medically necessary and offered for a condition that is causally related to the compensable work injury." Workers' Compensation Rule 2.3800.
7. Based on Dr. Davignon's credible testimony, *see* Findings of Fact Nos. 22-27, I conclude that all the medical treatments described above were reasonable and necessary medical treatments for Claimant's September 2015 workplace injury.
8. To date, the allowable amount of those services under Workers' Compensation Rule 40 is **\$15,031.55**. *See* Finding of Fact No. 15, *supra*. Defendants are presently responsible for paying that amount. Additionally, they remain financially responsible for any additional reasonable medical treatment that Claimant receives for his September 2015 workplace injury.

Claimant is Entitled to Temporary Total Disability Benefits from the Time of His Injury Until His Return to the Workforce

9. Claimant seeks temporary total disability ("TTD") benefits for the period after his September 2015 workplace injury and continuing until he returned to work in November 2020.
10. Vermont law provides that TTD benefits are available when a workplace injury "causes total disability for work[.]" 21 V.S.A. § 642. Generally, such benefits are payable until reaching an end medical result or successfully returning to work. *See Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).

11. Claimant's September 2015 workplace injury totally disabled him from work immediately upon its occurrence, as evidenced by Concentra's contemporaneous out-of-work note. *See* Finding of Fact No. 7, *supra*. Therefore, he is entitled to TTD benefits beginning on September 14, 2015. The end date of Claimant's TTD entitlement requires more analysis.
12. The determination of end medical result is a question of fact for the Commissioner. *See Coburn, supra*, 165 Vt. at 529. Based on Dr. Davignon's credible testimony that Claimant was physically unable to work and had not yet reached end medical result when he examined him in 2019, *see* Finding of Fact Nos. 25-27, *supra*, I conclude that Claimant was not at end medical result at that time. There is no clear evidence of precisely when, if at all, Claimant completed his medical recovery following his March 2020 surgery. As such, there is no factual basis for finding a date by which Claimant reached end medical result. Accordingly, the endpoint of his TTD entitlement must be analyzed based on his return to work rather than upon his reaching end medical result.
13. In determining the end date for an injured worker's TTD entitlement based on a return to work or capacity to return to work, "[i]t is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded." *McAllister v. S. T. Griswold & Co.*, Opinion No. 07-03WC (February 5, 2003) (citing *Moody v. Humphrey & Harding, Inc.*, 127 Vt. 52, 57 (1968)).
14. Concentra's note released Claimant to work at light duty with restrictions as of September 17, 2015. However, that release included prohibitions against stooping, kneeling, climbing stairs or ladders, climbing, driving, or operating machinery, and required a cane for walking. Those conditions were so restrictive as to effectively render Claimant unable to perform any meaningful work in his field. *Cf.* Finding of Fact No. 7, *supra*. There is no convincing evidence of any work that Claimant would have been able to do, whether for Defendant or any other handyman business, that complied with those restrictions. Nor is there any evidence that Defendants ever advised Claimant of any obligation to conduct a good faith search for suitable work within his restrictions, as would be required to terminate his entitlement to continued TTD benefits on the basis of any putative failure to return to work. *See* Workers' Compensation Rule 12.1300-12.1320. Without such evidence, I do not consider Concentra's limited work release instructive in determining the endpoint of Claimant's period of disability.
15. Additionally, although Claimant performed some informal work for his parents in exchange for "debt reduction," I cannot conclude either that such work was genuine employment or that his "debt reduction" constituted real wages. This is particularly so given the lack of evidence of any enforceable debt, Claimant's rate of pay, or the extent of any control that his parents exercised over Claimant's work for them. From the evidence before me, I conclude that the work-for-debt-reduction arrangement was a form of mutual generosity within a nuclear family that allowed Claimant to satisfy his own understandable desire to contribute something to his family while relying on it

for food, shelter, and other financial support. Moreover, I am not convinced that his family's financial support of him was conditioned upon his performance of any work, as would suggest a bona fide employment relationship.

16. Though Claimant's informal work for his parents shows that he had some *activity* capacity, it does not show that he had returned to his pre-injury *earning* capacity. Cf. *McAllister, supra*. Even if Claimant's parents' "debt reduction" reflected a fair value of the work Claimant performed for them, the putative value of those services would be \$7,000.00 over the course of five years. Given Claimant's pre-injury average weekly wage of \$1,278.13, he would have been able to earn \$7,000.00 in less than six weeks but for his injury. Accordingly, his work for his parents does not suggest a work capacity that would justify terminating his TTD entitlement.
17. Claimant returned to work in November 2020. See Finding of Fact No. 21, *supra*. There is no convincing evidence that he either reached end medical result or was able to return to genuine employment before that time. Accordingly, I conclude that his entitlement to TTD benefits terminated as of November 1, 2020, and the final day of his entitlement to such benefits was October 31, 2020.
18. For the period between September 14, 2015, and October 31, 2020, Claimant's total TTD entitlement is **\$240,689.17**, calculated as follows:
 - a. Claimant's initial compensation rate, equal to two-thirds his average weekly wage² of \$1,278.13,³ was \$852.51 per week.⁴ He remained eligible for TTD benefits at that rate until June 30, 2016. Thus, for the 41.4 weeks⁵ between September 14, 2015, and June 30, 2016, Claimant was entitled to receive \$35,293.91 in TTD benefits.
 - b. From July 1, 2016 forward, his compensation rate increased in accordance with 21 V.S.A. § 651(d) and the table published by the Department entitled "Minimum and Maximum Compensation Rates: Annual Change."⁶ Under the values set forth in the rightmost column of that table, Claimant's compensation rate increased by the following multipliers on the following dates, resulting in the following effective compensation rates and TTD entitlements:

² See 21 V.S.A. § 642 ("...the employer shall pay the injured employee a weekly compensation equal to two-thirds of the employee's average weekly wages..."); Workers' Compensation Rule 8.1600 (providing for a multiplier of 0.667).

³ See Finding of Fact No. 5, *supra*.

⁴ $\$1,278.13 \times .667 = \852.51 .

⁵ There are 290 days between September 14, 2015, and June 30, 2016. $290 \div 7 \approx 41.4$ weeks.

⁶ Available at https://labor.vermont.gov/sites/labor/files/doc_library/historicalrates.pdf (last visited June 9, 2021, at 4:26 PM).

| <u>Effective Date</u> | <u>Multiplier</u> | <u>Compensation Rate</u> | <u>Weeks at Rate</u> | <u>Total TTD</u> |
|-----------------------|-------------------|---------------------------------|----------------------|------------------|
| July 1, 2016 | 1.028 | \$876.38 ⁷ per week | 52 | \$45,571.76 |
| July 1, 2017 | 1.018 | \$892.15 ⁸ per week | 52 | \$46,391.80 |
| July 1, 2018 | 1.023 | \$912.67 ⁹ per week | 52 | \$47,458.84 |
| July 1, 2019 | 1.032 | \$941.88 ¹⁰ per week | 52 | \$48,977.76 |
| July 1, 2020 | 1.037 | \$976.73 ¹¹ per week | 17.4 ¹² | \$16,995.10 |

- c. The sum of \$35,293.91¹³ plus the values in the rightmost column of Conclusion of Law No. 14(b) is **\$240,689.17**.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendants are jointly and severally **ORDERED** to pay:

- 1) Temporary total disability benefits pursuant to 21 V.S.A. § 642 for the period between September 14, 2015, and October 31, 2020, in the total amount of **\$240,689.17**;
- 2) Medical benefits pursuant to 21 V.S.A. §§ 640(a) in the current amount of **\$15,031.55**;
- 3) Additionally, Defendants remain responsible for any future medical benefits, to be computed in accordance with Workers' Compensation Rule 40, for reasonable and necessary medical treatment or services that Claimant receives for his September 2015 workplace injury; and
- 4) Attorneys' fees and costs pursuant to 21 V.S.A. § 678.

Additionally, Defendants are **REFERRED** to the Director of Workers' Compensation and Safety for investigation and, if appropriate, prosecution for their failure to comply with the Department's December 21, 2018 interim order and for their failure to maintain the workers' compensation insurance coverage required by Vermont law.

⁷ $\$852.51 \times 1.028 = \876.38 .

⁸ $\$876.38 \times 1.018 = \892.15 .

⁹ $\$892.15 \times 1.023 = \912.67 .

¹⁰ $\$912.67 \times 1.032 = \941.88 .

¹¹ $\$941.88 \times 1.037 = \976.73 .

¹² Claimant's entitlement to TTD benefits ended on November 1, 2020; thus, the last day he was entitled to those benefits was October 31, 2020. There are 122 days, or 17.4 weeks, between July 1, 2020, and October 31, 2020.

¹³ See Conclusion of Law No. 18(a), *supra*.

DATED at Montpelier, Vermont this 14th day of June 2021.

Michael A. Harrington
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.