

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Andrea Smith

Opinion No. 03-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

State of Vermont

For: Michael A. Harrington
Commissioner

State File No. KK-52108

**RULING ON CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, FOR AN INTERIM ORDER**

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
Robin O. Cooley, Esq., for Defendant

ISSUES PRESENTED:

1. Does Claimant have accepted claims for temporary total disability and medical benefits for an alleged injury arising out of and in the course of her employment with Defendant such that those benefits are due and payable now?
2. If not, is Claimant entitled to an interim order for benefits prior to the formal hearing?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts filed October 22, 2021
Claimant's Affidavit filed October 22, 2021

Claimant's Exhibit A:	Documents pertaining to a contract between Daniels Equipment Company and the State of Vermont for an ozone injection laundry system
Claimant's Exhibit B:	Undated email from Daniels Equipment Company to "Rick" concerning installation of an Aquawing ozone laundry system
Claimant's Exhibit C:	March 2018 emails concerning removal of the ozone system
Claimant's Exhibit D:	VOSHA citation and notification of penalty dated February 12, 2018 and related documents
Claimant's Exhibit E:	August 16, 2017 report to Daniels Equipment Company of an ozone odor at Defendant's Northeast Correctional Complex
Claimant's Exhibit F:	Trip report of Dave Spofford of AWOIS, LLC
Claimant's Exhibit G:	Second trip report
Claimant's Exhibit H:	February 28, 2018 emails between Rick Hoermann and Ralph Daniels

Claimant's Exhibit I:	August 31, 2017 report of odor in the mop room
Claimant's Exhibit J:	Photographs
Claimant's Exhibit K:	January 10, 2018 email from Alliance Laundry Systems to John Callan
Claimant's Exhibit L:	August 21, 2017 email from Katina Farnsworth to Norah Quinn
Claimant's Exhibit M:	March 1, 2018 email from Ralph Daniels to Rick Hoermann
Claimant's Exhibit N:	August 31, 2017 emails between Rick Hoermann and Dave Spofford
Claimant's Exhibit O:	OSHA Hazard Communication Program and Training Materials for the Aquawing Ozone Injection Systems, LLC
Claimant's Exhibit P:	August 17, 2017 emails between Claimant, James Davis and Brian Levesque
Claimant's Exhibit Q:	February 21, 2018 email from Defendant to AHS
Claimant's Exhibit R:	September 29, 2017 email from BGS safety officer David Morse to Kevin Allam <i>et al.</i> and reply from Kevin Allam
Claimant's Exhibit S:	October 2, 2017 email from state energy program manager Daniel Edson to John Callan and October 3, 2017 reply
Claimant's Exhibit T:	August 28, 2017 email from Rick Hoermann to Ralph Daniels; August 29, 2017 email from Dave Spofford to Rick Hoermann; and August 29, 2017 email from Rick Hoermann to Dave Spofford
Claimant's Exhibit U:	August 31, 2017 emails between Rick Hoermann, Dave Spofford, Alvin Simard and Maury Tinker
Claimant's Exhibit V:	Photograph
Claimant's Exhibit W:	Vermont Division of Fire Safety plumbing inspection results
Claimant's Exhibit X:	August 22, 2021 letter from Victoria Lawson, MD, to Claimant's counsel
Claimant's Exhibit Y:	August 26, 2021 letter from Carrie Redlich, MD, to Claimant's counsel
Claimant's Exhibit Z:	September 9, 2019 letter from Megan Garrigan, PA-C, to whom it may concern
Claimant's Exhibit AA:	June 1, 2017 remittance record from Corvel
Claimant's Exhibit BB:	Transcript of October 3, 2017 telephonic interview of Benjamin Morley
Claimant's Exhibit CC:	Transcript of September 28, 2017 interview of Jeffrey Reynolds
Claimant's Exhibit DD:	Transcript of September 28, 2017 interview of Jessica Berry
Claimant's Exhibit EE:	Transcript of September 28, 2017 interview of Katina Farnsworth
Claimant's Exhibit FF:	Transcript of September 28, 2017 interview of Robert Ball
Claimant's Exhibit GG:	Transcript of July 16, 2021 deposition of Katina Farnsworth
Claimant's Exhibit HH:	Transcript of September 28, 2017 interview of James Davis
Claimant's Exhibit II:	Transcript of September 28, 2017 interviews of Alvin Simard and David Morse
Claimant's Exhibit JJ:	Transcript of September 28, 2017 interview of Maury Tinker
Claimant's Exhibit KK:	OSHA Form 300: Log of Work-Related Injuries and Illnesses
Claimant's Exhibit LL:	CDC Clinical Guidance for Carbon Monoxide Poisoning

Claimant's Exhibit MM: Printout of a document entitled "Carbon Monoxide" from the CDC website

Claimant's Exhibit NN: Printout of a document entitled "What is Carbon Monoxide?" from the CDC website

Claimant's Exhibit OO: January 26, 2021 pay-without-prejudice letter from Defendant filed with the Department by email on January 26, 2021

Claimant's Exhibit PP: Transcript of September 28, 2017 interview of Claimant

Claimant's Exhibit QQ: April 22, 2021 letter from Defendant to the Department's specialist concerning payment without prejudice

Defendant's Response to Claimant's Statement of Undisputed Material Facts and Defendant's Statement of Additional Material Facts filed November 8, 2021

Defendant's Exhibit 1: August 19, 2021 affidavit of Alan Cormier

Defendant's Exhibit 2: December 6, 2021 affidavit of Norah Quinn with notes attached

Defendant's Exhibit 3: Northeast Correctional Complex daily roster

Defendant's Exhibit 4: Claimant's time log

Defendant's Exhibit 5: Claimant's medical records through August 31, 2021

Defendant's Exhibit 6: May 18, 2018 letter from VOSHA to District Facilities Manager Al Simard with Notice of Settlement Agreement attached

Defendant's Exhibit 7: June 1, 2021 independent medical examination report of Lawrence DuBuske, MD

Defendant's Exhibit 8: *Curriculum vitae* of Lawrence DuBuske, MD

Defendant's Exhibit 9: August 25, 2021 addendum to Dr. DuBuske's report

Defendant's Exhibit 10: August 31, 2021 letter to the parties from the Department's specialist with approved Notice of Intention to Discontinue Payments (Form 27) attached

Defendant's Exhibit 11: February 18, 2021 check to Claimant for \$1,999.95 for temporary total disability benefits covering January 31, 2021 through February 13, 2021

Defendant's Exhibit 12: Defendant's January 26, 2021 pay-without-prejudice letter filed with the Department by email on January 26, 2021

Defendant's Exhibit 13: Defendant's January 28, 2021 cover letter to Claimant's counsel

Defendant's Exhibit 14: Defendant's April 22, 2021 letter to the Department's specialist concerning vocational rehabilitation screening

Defendant's Exhibit 15: Department's specialist's April 23, 2021 letter approving an extension of the pay-without-prejudice period to July 25, 2021

Defendant's Exhibit 16: August 24, 2017 email from Randy Durst to Ralph Daniels

Defendant's Exhibit 17: August 25, 2017 email from Mike Blanchet to Daniel Edson, Rick Hoermann, *et al.* and reply from Daniel Edson

Defendant's Exhibit 18: December 29, 2016 email from Ralph Daniels to Rick Hoermann regarding ozone generators

Defendant's Exhibit 19: December 19, 2016 email from Ralph Daniels to Rick Hoermann concerning Vermont prison attendees

Defendant's Exhibit 20: September 29, 2017 email from David Morse to James Davis, Kevin Allam, *et al.* and Kevin Allam's reply

BACKGROUND:

Status of Claims for Indemnity and Medical Benefits

Claimant contends that Defendant failed to timely deny her claims for temporary disability and medical benefits, thereby accepting those claims as compensable and incurring the obligation to continue such payments until she reaches an end medical result or successfully returns to work. *Claimant's Motion*, at 23. Considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), and taking judicial notice of the relevant forms and correspondence in the Department's file, there is no genuine issue as to the following facts material to the status of Claimant's claims for temporary disability and medical benefits:

1. Claimant is a 53-year-old woman who lives in West Charleston, Vermont. *Claimant's Statement of Undisputed Material Facts* ("*Claimant's Statement*"), ¶ 1; Smith Affidavit, ¶ 1.
2. Claimant has worked for Defendant as a correctional officer with the Vermont Department of Corrections since 1994. She was Defendant's employee when ozone generators were in operation in the laundry facility of the Northeast Correctional Complex in St. Johnsbury, Vermont. *Claimant's Statement*, ¶ 2; Smith Affidavit, ¶ 2.
3. Claimant alleges that she was injured by Defendant's ozone laundry system and that she informed Defendant of her injury on August 15, 2017. *Claimant's Statement*, ¶ 122; Smith Affidavit, ¶ 46; Claimant's Exhibit PP. Defendant filed Employer's First Report of Injury (Form 1) with the Department on August 17, 2017 for this alleged injury. Box 24 of that Form states that the injured worker "believes she has been poisoned by the gases from the ozone laundry system in medium at NECC." *Id.*
4. Defendant issued payment for Claimant's medical expenses; the first date of service paid was August 16, 2017. *Claimant's Statement*, ¶ 125; *Defendant's Statement*, ¶ 125. None of the medical benefits paid by Defendant were made on a pay-without-prejudice basis. No bill submitted by any of Claimant's medical providers for any medical services related to the alleged injury was contested or unpaid until August 31, 2021. *Claimant's Statement*, ¶ 126.
5. On January 5, 2021, Claimant's primary care provider, physician assistant Megan Garrigan of North Country Primary Care, took her out of work effective January 6, 2021. *Claimant's Statement*, ¶ 3, Smith Affidavit, ¶ 3. Claimant has not worked since January 5, 2021. *Claimant's Statement*, ¶ 121; Smith Affidavit, ¶ 45. Claimant's Statement includes no assertion as to when she notified her employer that she was missing work due to her alleged injury, nor when she notified the employer of her claim for temporary disability benefits. *See generally Claimant's Statement*. A review of the Department's file did not find that information, either.
6. Defendant wrote Claimant a letter dated January 26, 2021. *Claimant's Statement*, ¶ 128; Claimant's Exhibit OO; Smith Affidavit, ¶ 50; *Defendant's Statement*, ¶ 128;

Defendant's Exhibit 12. The letter notified the Department and Claimant that Defendant "will pay, on a voluntary and without prejudice basis, indemnity benefits effective January 6, 2021 (the date that you began missing time from work) until further notice." The letter cited the Workers' Compensation Rules applicable to paying without prejudice, Rules 2.3500 and 3.2300. *Defendant's Statement*, ¶ 128; Defendant's Exhibits 12 and 13.

7. Defendant's letter further provided:

In accordance with Rule 3.2300, a Form 25 Wage Statement will be prepared and filed under separate cover. Please complete the enclosed Form 10 *Certificate of Dependency and Concurrent Employment* and return it to the above address, so that I can file it with the Department of Labor.

Defendant's Exhibit 12.

8. Defendant filed the letter with the Department via email on January 26, 2021. *Judicial notice from the Department's file*. On January 28, 2021, after learning that Claimant was represented by counsel, Defendant emailed Claimant's counsel a copy of the letter, along with a cover letter. *Defendant's Statement*, ¶ 128; Defendant's Exhibit 13.
9. On February 12, 2021, Defendant filed a completed Wage Statement (Form 25) and a Certificate of Dependency and Concurrent Employment (Form 10). Defendant did not enter into an Agreement for Temporary Compensation (Form 32) with Claimant, as its investigation of the claim was ongoing. *Judicial notice from the Department's file*.
10. Defendant issued the first temporary total disability payment to Claimant on February 18, 2021; that payment covered the period from January 31, 2021 to February 13, 2021.¹ *Defendant's Statement*, ¶ 127; Defendant's Exhibit 11.
11. The check stubs for the indemnity payments made to Claimant stated that the payments were "Temporary Total Disability." The language "paid without prejudice" did not appear on the check stubs. *Claimant's Statement*, ¶ 129; *Defendant's Statement*, ¶ 129.
12. On April 22, 2021, Defendant requested a 90-day extension of the pay-without-prejudice period, pursuant to the Department's memorandum entitled "Applying Rule 11 during the COVID-19 Pandemic." *Defendant's Statement*, ¶ 130; Claimant's Exhibit QQ. This request was made less than 90 days from Defendant's January 26, 2021 pay-without-prejudice letter and less than 90 days from the date of the first indemnity check issued on February 18, 2021. *Defendant's Statement*, ¶ 130. Claimant's counsel did not object to the extension request. *Id.*

¹ Claimant received sick pay from January 6, 2021 to January 30, 2021; Defendant later restored that benefit. *Defendant's Statement*, ¶ 127, n8.

13. On April 23, 2021, the Department's specialist approved the additional 90-day period, noting that the new deadline for rejecting the claim was July 25, 2021. *Defendant's Statement*, ¶ 130; Defendant's Exhibit 15.
14. On July 23, 2021, Defendant filed the Employer's Denial of Workers' Compensation Benefits (Form 2) with the Department. This document notified Claimant that no body parts or injuries were accepted and that temporary disability benefits were denied on the basis of Dr. DuBuske's opinion that none of her symptoms were related to the alleged work incident. *Id.*
15. On July 23, 2021, Defendant also filed Employer's Notice of Intention to Discontinue Payments (Form 27) with the Department. This document notified Claimant of Defendant's intent to discontinue both temporary disability and medical benefits. The stated basis for discontinuing indemnity benefits was Dr. DuBuske's opinion that Claimant had reached an end medical result for any work-related injury. The stated basis for discontinuing medical benefits was that none of Claimant's treatment was medically necessary or causally related to the alleged work injury. *See* Form 27.
16. Defendant's July 23, 2021 filings were accompanied by a letter from Defendant's counsel stating that the denial and discontinuances were made on the grounds that Claimant's symptoms were not causally related to work. *See* Defendant's July 23, 2021 letter attached to Form 2 and Form 27, at 1. Defendant supported its filings with Dr. DuBuske's independent medical examination report and a complete copy of Claimant's medical records. *Id.* The planned discontinuance date stated on Form 27 was August 2, 2021.
17. After receiving Defendant's filings, Claimant requested a 14-day extension of benefits pursuant to 21 V.S.A. § 643a. The Department's specialist granted that extension on August 3, 2021, extending benefits until August 16, 2021. *Judicial notice from the Department's file.*
18. By letter dated August 31, 2021, the Department's specialist approved Defendant's Form 27, authorizing the discontinuance of temporary disability and medical benefits as of August 16, 2021, based on a preponderance of the evidence. *Claimant's Statement*, ¶ 31; Smith Affidavit, ¶ 29; Defendant's Exhibit 10. Accordingly, the specialist declined to issue an interim order. *See* Defendant's Exhibit 10.
19. The specialist's August 31, 2021 letter stated that Defendant's filing of Form 2 was "not necessary at this time," as she had approved the discontinuances. Defendant's Exhibit 10.

Request for an Interim Order

In the event that Claimant is not entitled to partial summary judgment establishing her current entitlement to temporary disability and medical benefits, she requests an interim order for these benefits pending the formal hearing based on her contention that her claim is supported

by substantial admissible evidence that would justify such an order. A summary of each party's contentions and evidence concerning compensability of this claim is set forth below.

Claimant's contentions and evidence may be summarized as follows:

20. Claimant worked at the Northeast Correctional Complex. In December 2016, an ozone laundry system was installed at the complex. Smith Affidavit, ¶ 2.
21. The ozone laundry system was not installed properly, resulting in dangerous levels of ozone gas and carbon monoxide. Claimant's Exhibits E-N; P-W.
22. In September 2017, VOSHA undertook an investigation into Claimant's complaint about ozone in the workplace, resulting in a proposed citation and penalty for two safety violations on February 12, 2018. Claimant's Exhibit D.
23. Claimant was exposed to ozone and carbon monoxide from February 2017 through August 31, 2017, and as a result, she began to develop neurological and respiratory symptoms. Her symptoms included headache, nausea and memory loss, as well as muscle pain, joint pain and fatigue.
24. Claimant's treating provider, physician assistant Megan Garrigan, offered her opinion that Claimant's muscle and neurological symptoms were caused by ozone and carbon monoxide. Claimant's Exhibit Z.
25. Claimant also saw board-certified neurologist Victoria Lawson, MD. In Dr. Lawson's opinion, Claimant is suffering from non-specific neurocognitive symptoms and possibly small nerve fiber dysfunction that occurred in a temporal relationship to her reported carbon monoxide and ozone exposure at work. Claimant's Exhibit X.
26. Claimant also relies on a report from occupational medicine physician Carrie Redlich, MD, that work exposure to ozone and carbon monoxide substantially contributed to her current weakness and neuromuscular symptoms. Claimant's Exhibit Y.

Defendant's contentions and evidence may be summarized as follows:

27. The laundry system released ozone into a small area on August 15 and 16, 2017, and also briefly on August 31, 2017 (the day the system was taken out of commission). Other than on those dates, the system did not release any ozone. Further, the system never released or otherwise caused the presence of carbon monoxide in the workplace. Defendant's Exhibits 1-4; Claimant's Exhibits FF and HH.
28. The laundry system installer sent a certified ozone technician to the site on August 16, 2017 in response to a report of an odor. The technician took an ozone reading and found that the ozone level was "nowhere near" the OSHA safety limits. He noted that very low and safe levels of ozone have a strong smell that can be worrisome to people who notice it. Claimant's Exhibits F and G.

29. Claimant worked for Defendant on August 15 and 31 of 2017. She was stationed to a different building, but her duties brought her to the building with the laundry facility for two to four hours per day, including on August 15, 2017. She did not work on August 16, 2017, which was a state holiday. Defendant's Exhibits 1-4.
30. Defendant has submitted an independent medical examination report from Lawrence DuBuske, MD, a board-certified immunologist and internal medical physician. Dr. DuBuske reviewed Claimant's medical records from February 2007 to the present. In his opinion, the symptoms that Claimant attributes to ozone or carbon monoxide exposure were all present prior to any workplace exposure, as documented in her medical records. In his opinion, Claimant's condition is not causally related to ozone or carbon monoxide exposure but rather is a mere continuation of her pre-existing conditions.² In particular, her respiratory symptoms are caused by preexisting and progressive chronic obstructive pulmonary disease, not ozone exposure, and her muscle pain and other symptoms are likely from her pre-existing peripheral artery disease, cervical arthropathy, disc disease and diabetes. Further, the carbon monoxide level detected in her blood in August 2017 was just barely above the normal level, was consistent with exposure to second-hand cigarette smoke, and required no treatment. Defendant's Exhibits 7-9.
31. In Dr. DuBuske's opinion, not only are Claimant's symptoms unrelated to ozone exposure, but even if she were exposed to ozone over a period of months in 2017, her symptoms would no longer be present, let alone worsening, four years later. Defendant's Exhibit 7.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving 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). 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). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

² Dr. DuBuske reviewed over 1,400 pages of Claimant's medical records and identified multiple symptoms that pre-existed the alleged workplace exposure to ozone, including osteoarthritis, nerve pain, spine pain, headaches, elevated CO levels, arm pain, sinus pain, loss of balance, muscle weakness, joint stiffness and pain, chest pain, shortness of breath, cognitive issues, fatigue and difficulty walking. Defendant's Exhibit 7.

Status of Claimant's Claims for Medical and Temporary Disability Benefits

2. Claimant contends that Defendant has accepted her claims for medical and temporary disability benefits based on its failure to deny those claims within the timeframes set forth in the Workers' Compensation Rules. Accordingly, she contends, Defendant must continue those benefits until she reaches an end medical result or successfully returns to work. *See Claimant's Motion*, at 23.

Claimant's Medical Benefits

3. Workers' Compensation Rule 3.2200 provides as follows:

The employer or insurance carrier shall have 21 days (measured from the date on which the employer received notice or knowledge of a claimed work-related injury) within which to determine whether any compensation is due. If it determines that no compensation is due, within 21 days after receiving notice or knowledge of the injury, it shall file a *Denial of Workers' Compensation Benefits* (Form 2) with the Commissioner and the injured worker. The *Denial* shall clearly state the reason(s) for the denial, and shall be accompanied by copies of all relevant documentation, medical or otherwise, relied upon to support it.

4. Workers' Compensation Rule 3.2220 establishes a procedure for an employer to obtain an extension of the 21-day period for up to an additional 21 days, if it has made a good faith effort to investigate the claim but needs additional time.
5. Claimant here notified her employer of her alleged injury on August 15, 2017 and sought medical benefits for that injury. *See Background Section No. 3 supra*. Defendant accordingly had until September 5, 2017 to investigate the claim and issue a denial. Instead, Defendant paid Claimant's medical bills for treatment relating to the alleged injury and continued to do so for several years. *See Background Section No. 4 supra*. It did not deny the claim for medical benefits by the 21-day deadline; nor did it request an extension to do so.
6. Having failed to timely deny Claimant's medical claim, Defendant must follow the procedures set forth in Workers' Compensation Rule 12 if it wishes to stop paying her medical bills. Workers' Compensation Rule 12.1100 provides that the employer or insurance carrier shall not discontinue an injured worker's benefits until at least seven days after filing a Notice of Intention to Discontinuance Payments (Form 27), accompanied by all relevant evidence. *See also* Workers' Compensation Rule 12.1700 (discontinuance of medical benefits).
7. Upon receipt of a Notice of Intent to Discontinue Payments, the Department's specialist reviews the filing and determines whether the discontinuance is supported by a preponderance of the evidence. Workers' Compensation Rule 12.2010; *see also Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974) (burden of proof to

discontinue benefits is on the employer). If the discontinuance is supported by a preponderance of the evidence, the Department approves it. *Id.*

8. Defendant here filed Form 27 pertaining to Claimant's medical benefits on July 23, 2021, supported by relevant evidence. After reviewing the evidence, the specialist found the discontinuance of medical benefits supported by a preponderance of the evidence, and she approved it. Accordingly, Defendant is under no present obligation to pay Claimant any medical benefits for her alleged workplace injury.

Claimant's Temporary Disability Benefits

9. Claimant also contends that Defendant accepted her claim for temporary disability benefits by failing to deny that claim within the time limits provided by the Workers' Compensation Rules.
10. Recognizing that an investigation may take longer than the time limits provided in Rules 3.2200 and 3.2220, Workers' Compensation Rule 3.2300 provides as follows:

Payment without prejudice. At any time during its investigation, the employer or insurance carrier may elect to pay without prejudice all or a portion of any benefits to which the injured worker claims entitlement. The employer or insurance carrier shall notify both the injured worker and the Commissioner of its election to do so in writing. In the case of medical bills, the notice shall specify the nature and duration of all medical services or supplies to be paid without prejudice. In the case of indemnity benefits, the notice shall specify the type and duration of the benefit(s) to be paid without prejudice, and shall be accompanied by a Certificate of Dependency and Concurrent Employment (Form 10) and a Wage Statement (Form 25) sufficient to allow calculation of the compensation rate to be used. If the employer or insurance carrier fails to deny compensability of the claimed benefit(s) in accordance with **Rule 11.0000** within 90 days of making a payment without prejudice, it shall be deemed to have accepted responsibility for them. In that event, it shall follow the procedures outlined in **Rule 12.0000** prior to discontinuing payment.

11. As set forth in Discussion Section No. 3 *supra*, Workers' Compensation Rule 3.2200 provides that the employer has 21 days to determine whether compensation is due, measured "from the date on which the employer received notice or knowledge of a claimed work-related injury." An employer who wishes to pay without prejudice must notify the Department in writing within the 21-day period for denying a claim, or within any duly granted extension thereof. Otherwise, as set forth in Rules 3.2200 and 3.2210, it will be required to follow the discontinuance procedures set forth in Workers' Compensation Rule 12.
12. Claimant did not miss any work as a result of her alleged workplace injury from August 15, 2017 through January 5, 2021. On January 5, 2021, Claimant's nurse

practitioner wrote a note stating that she was unable to work due to her alleged work injury, and Claimant stopped working on January 6, 2021. *See* Background Section No. 5 *supra*. However, Claimant’s Statement of Undisputed Material Facts does not include any assertion that she provided notice to her employer that she was unable to work as a result of her alleged work injury, nor that she was seeking temporary disability benefits on this basis, as required by Workers’ Compensation Rule 3.2200.

13. Taking the facts in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find that Defendant filed its pay-without-prejudice notice within 21 days of the date on which Claimant notified her employer of her claim for indemnity benefits. Accordingly, its initial pay-without-prejudice election was timely.³
14. That is not the end of the inquiry, however. An employer’s pay-without-prejudice election must also comply with the other requirements of Workers’ Compensation Rule 3.2300. Although Defendant’s notice specified the benefit to be paid (indemnity) and the duration (until further notice), it was not accompanied by a Wage Statement (Form 25), as required by the rule. In fact, Defendant did not file a Wage Statement until February 12, 2021, seventeen days after filing its pay-without-prejudice election and well beyond the 21-day period for denying a claim under Rule 3.2200.⁴ Accordingly, Defendant’s pay-without-prejudice election was ineffective.
15. Further, Defendant did not issue the first temporary disability payment until February 18, 2021, which was 23 days after its election to pay without prejudice. As Rule 3.2300 requires the Wage Statement to accompany the pay-without-prejudice election, I conclude that the Rule contemplates making the payment either contemporaneous with, or close in time to, the election. Certainly, the Rule does not contemplate unilaterally delaying payment for an additional 23 days after agreeing to pay without prejudice. The manifest intent of the pay-without-prejudice rule is to provide benefits to injured workers quickly, without waiting for the employer to complete a lengthy investigation. It would run counter to the spirit of the Workers’ Compensation Act to permit an employer to unilaterally and significantly delay a payment that it has already agreed to make under these circumstances.
16. In April 2021, Defendant requested an additional 90-day period to pay without prejudice, as provided in the Department’s memorandum entitled “*Applying Rule 11 during the COVID-19 Pandemic*,” adopted pursuant to the Legislature’s 2020 Acts and Resolves, No. 150, § 1. However, an extension of the pay-without-prejudice period must be requested before the expiration of the initial 90-day period. *See Applying Rule 11 during the Covid-19 Pandemic*. Here, because Defendant’s right to

³ If Claimant notified her employer of her temporary disability claim on January 5, 2021, the date of her nurse practitioner’s note, then Defendant’s January 26, 2021 pay-without-prejudice notice was timely in any event.

⁴ *See also* Workers’ Compensation Rule 3.2000, which requires the employer to file a Wage Statement “**immediately**” when an employee is alleged to have been disabled from working for at least three calendar days.

pay without prejudice was not properly exercised in the first instance, any extension of the pay-without-prejudice period is ineffective.

17. As Defendant neither denied temporary disability benefits within 21 days nor effectively elected to pay them without prejudice, it must file a Notice of Intent to Discontinue Payments (Form 27) and meet its burden to discontinue those benefits by a preponderance of the evidence. Workers' Compensation Rules 12.1100 and 12.2010.
18. On July 23, 2021, Defendant filed a discontinuance (Form 27) of Claimant's temporary disability benefits. After reviewing the evidence, the specialist found that the discontinuance of temporary disability benefits was supported by a preponderance of the evidence, and she approved it. Accordingly, Defendant is under no present obligation to pay Claimant any temporary disability benefits for her alleged workplace injury.

Claimant's Request for an Interim Order

19. In the alternative, Claimant asks the Department for an interim order for temporary disability and medical benefits pending a formal hearing on the merits. In support of her request, she contends that there is "substantial, admissible evidence" from which the Department can find that her injuries arose out of and in the course of her employment with Defendant. *Claimant's Motion*, at 2. Further, she cites Workers' Compensation Rule 3.2400, which provides that, if the employer fails to issue a timely denial or pay without prejudice, the Commissioner shall issue an interim order for the benefits sought, provided the "available evidence does not reasonably support a denial."
20. On July 23, 2021, Defendant filed a Notice of Intention to Discontinue Payments (Form 27) related to temporary disability and medical benefits. The basis for discontinuing temporary disability was Dr. DuBuske's report stating that Claimant had reached end medical result for her alleged work injury. The basis for discontinuing medical benefits was that Claimant's medical treatment was neither medically necessary nor causally related to the work injury. *See* Defendant's Form 27.
21. Approval of a proposed discontinuance requires a finding that the discontinuance is supported by a preponderance of the evidence. Workers' Compensation Rule 12.2010. If the Department's specialist finds that a proposed discontinuance is *not* supported by a preponderance of the relevant evidence, then the specialist shall issue an interim order for the continuation of such benefits. *See* Workers' Compensation Rule 12.2020; 21 V.S.A. § 643a.
22. Here, the specialist reviewed Defendant's Form 27 and the relevant evidence. That evidence included Claimant's medical records and the June 1, 2021 independent medical examination report of Dr. DuBuske, offering his opinion that the symptoms that Claimant ascribes to ozone and carbon monoxide were all present prior to her alleged workplace exposure and unrelated to her employment. *See* Background

Section No. 30 *supra*. The specialist also reviewed Claimant's evidence, including medical reports from Dr. Lawson, PA Garrigan, and Dr. Redlich, that related her symptoms to the alleged workplace exposure. *See* Background Section Nos. 24-26 *supra*. Based on her review, the specialist found that the discontinuance of benefits was supported by a preponderance of the evidence. She approved Form 27 pursuant to Rule 12.2010 and declined to issue an interim order under Rule 12.2020.

23. Upon review of the file and the specialist's September 2, 2021 interim determination, I find that the specialist applied the appropriate legal standards under Workers' Compensation Rules 2.3700, 12.2010-12.2020, and 16.1400.
24. As the discontinuance was supported by a preponderance of the evidence, it also meets the less stringent "reasonably supported" standard set forth in Workers' Compensation Rules 2.2100 and 3.2400.
25. Interim orders are typically considered at the informal level. Unlike the Workers' Compensation Rules governing the informal dispute resolution process (Rules 16.0000 *et seq.*), the Rules governing the formal hearing process (17.0000 *et seq.*) do not contemplate the issuance of interim orders. The purpose of a formal hearing is to ultimately resolve the merits of matters that were disputed at the informal level. Reviewing the merits of every specialist's interim decision between the time of referral and the formal hearing would defeat the purpose of the two-tiered informal/formal procedural structure.
26. That said, I have reviewed the materials that the parties submitted in connection with Claimant's request, and I find no basis to disturb the specialist's interim determination in this case.

ORDER:

Based on the foregoing background and discussion, Defendant is under no present obligation to pay Claimant either temporary disability benefits or medical benefits. Accordingly, Claimant's Motion for Partial Summary Judgment is **DENIED**. Further, Claimant's Motion for an Interim Order is also **DENIED**.

DATED at Montpelier, Vermont this 25th day of January 2022.

Michael A. Harrington
Commissioner