

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kristy Lee Cote

Opinion No. 13-22WC

v.

By: Stephen W. Brown
Administrative Law Judge

A.D.A. Traffic Control LTD

For: Michael A. Harrington
Commissioner

State File No. LL-55514

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

James Martin, Esq., for Claimant
Krystn Perettine, Esq., for Defendant

ISSUE PRESENTED:

Did Defendant properly discontinue Claimant's temporary disability benefits based on her successful return to work?

EXHIBITS:

Claimant's Exhibit A:	March 8, 2022 Affidavit of Kristy Lee Cote
Claimant's Exhibit B:	October 6, 2020 Letter from Matthew J. Alef, MD to Claimant's Counsel
Claimant's Exhibit C:	Agreement for Temporary Compensation (Form 32); Wage Statement (Form 25); Certificate of Dependency and Concurrent Employment (Form 10)
Claimant's Exhibit D:	Interim Order of Benefits, dated January 20, 2022
Claimant's Exhibit E:	Records of Temporary Disability Benefit Payments
Claimant's Exhibit F:	May 4, 2021 Work Release with Restrictions from Craig Bartlett, MD
Claimant's Exhibit G:	Payroll Records for pay periods beginning May 23, 2021 and ending August 28, 2021
Claimant's Exhibit H:	June 4, 2021 Work Release with Restrictions from Craig Scott Bartlett, MD
Claimant's Exhibit I:	August 10, 2021 Work Release with No Restrictions from Craig Scott Bartlett, MD
Claimant's Exhibit J:	Payroll Records for pay periods beginning August 29, 2021 and ending December 25, 2021
Claimant's Exhibit K:	Payroll Records for pay period beginning May 23, 2021 and ending May 29, 2021

Claimant's Exhibit L:	Payroll Records for pay periods beginning August 29, 2021 and ending September 4, 2021
Claimant's Exhibit M:	Salary.com Entry for "Field Construction Manager"
Claimant's Exhibit N:	May 4, 2021 Medical Treatment Record from Craig Bartlett, MD
Claimant's Exhibit O:	Payroll Records for pay periods beginning August 29, 2021 and ending December 25, 2021
Claimant's Exhibit P:	Payroll Records for pay period beginning October 28, 2018 and ending November 3, 2018
Claimant's Exhibit Q:	Employee's Claim and Employer's First Report of Injury (Form 1)
Claimant's Exhibit R:	Medical Records Summary
Claimant's Exhibit S:	CD of Medical Records
Claimant's Exhibit T:	Payroll Records for pay periods beginning August 22, 2021 through September 4, 2021
Claimant's Exhibit U:	March 28, 2022 Affidavit of Kristy Lee Cote
Claimant's Exhibit V:	Notice and Application for a Hearing (Form 6)
Defendant's Exhibit A:	Defendant's Business Description
Defendant's Exhibit B:	Indemnity Benefit Payment Logs
Defendant's Exhibit C:	May 4, 2021 Work Release with Restrictions from Craig Scott Bartlett, MD
Defendant's Exhibit D:	April 20, 2021 Letter from Defendant to Claimant Offering Light Duty Position
Defendant's Exhibit E:	Payroll Records
Defendant's Exhibit F:	June 4, 2021 Work Release with Restrictions from Craig Scott Bartlett, MD
Defendant's Exhibit G:	August 10, 2021 Medical Treatment Record from Craig Scott Bartlett, MD
Defendant's Exhibit H:	August 26, 2021 Letter from Defendant to Claimant Offering Full Duty Position
Defendant's Exhibit I:	August 17-18, 2021 Email Correspondence Between Claimant and Patrick Murphy (Defendant's Vice President)
Defendant's Exhibit J:	January 27, 2022 Vocational Rehabilitation Entitlement Assessment by Vocational Rehabilitation Counselor Coleen Kearon, MA

BACKGROUND:

Considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), there is no genuine issue as to following material facts:

1. Defendant is in the business of providing traffic management solutions for construction projects, including certified traffic control flaggers. As of November 1, 2018, it employed Claimant as a flagger. On that date, she was involved in a motor vehicle accident in the course of her employment which caused a serious leg crush

injury. (Claimant's Statement of Undisputed Facts, "CSUF," 1-2; Defendant's Statement of Undisputed Facts, "DSUF," 1-3, 6).

2. Defendant accepted liability for this injury and paid some benefits accordingly. Before her injury, Claimant's average weekly wage was \$1,272.67. (CSUF 5-6; DSUF 5, 7).¹
3. Defendant began paying temporary total disability benefits ("TTD") the day after Claimant's injury. (DSUF 7-8).
4. On May 4, 2021, Claimant's treating provider, Craig Bartlett, MD, released her to work part-time, with restrictions. (DSUF 8). On May 24, 2021, Claimant returned to work for Defendant part-time with modified duties, four hours per day, at the rate of \$17.50 per hour. Defendant continued to pay TTD benefits through June 10, 2021. (DSUF 9-10).
5. On June 4, 2021, Dr. Bartlett released Claimant to work additional hours and again, modified her restrictions. Defendant reviewed the updated work-release and, as of June 9, 2021, Claimant increased her work to 6 hours per day at the same hourly rate. (DSUF 11-12).
6. On June 11, 2021, Defendant stopped paying TTD benefits and began paying temporary partial disability ("TPD") benefits. (DSUF 13).
7. On August 10, 2021, at Claimant's request, Dr. Bartlett released her to full-duty work, without restrictions. Specifically, he wrote as follows:

Assessment is that this woman has had a remarkable outcome she has full range of motion normal strength normal motor or sensory no pain and is back to work doing manual labor as a traffic safety person at a construction site. ***She wants to be released to doing all activities without restriction and we will do that today.*** Her heel cord is still somewhat tight but it is not affecting her and she has no interest in doing anything else for this but can always return in the future she will be released to follow-up on a [sic] as needed basis end of dictation.

(Defendant's Exhibit G, emphasis added; accord Claimant's Exhibit I (separate record entered the same day: "It is my medical opinion that Kristy Cote may return to full duty immediately with no restrictions as tolerated").²)

¹ The parties dispute Claimant's hourly rate as of the time of her injury. I need not resolve that factual issue for the purposes of the present motion.

² Notwithstanding the work release above, Claimant states in her Affidavit that she continues to have difficulty tolerating certain activities, including standing for more than one hour, walking significant distances, lifting significant weight, significant climbing, and sitting more than two hours. See Claimant's Exhibit A, ¶ 13. However, she cites nothing in her medical records submitted expressly conditions her work release on these restrictions.

8. Based on Claimant's positive performance in her part-time role, Defendant offered her a full-time salaried position as field supervisor, with a weekly pay of \$800.00, with health insurance, life insurance, retirement, and other benefits. In an email conversation discussing that role, Defendant's Vice President indicated that Defendant would rely on Claimant to "let us know what is too much," and stated that "for the foreseeable future, we will continue to avoid all flagging and setting up work zones, however you can now start to get out of the vehicle and interact with employees face to face, interact with contractors, deliver and pick up equipment, etc. 8-10 hours per day." (Defendant's Exhibit I).
9. On August 29, 2021, Claimant returned to full-duty employment for Defendant in that role. (CSUF 13-21; DSUF 14-17).
10. Defendant stopped paying TPD on that date based on Claimant's return to full-time, full-duty employment. It did not file a Notice of Intention to Discontinue Payments (Form 27) prior to discontinuing those payments. (DSUF 18; CSUF 19-21).
11. On December 4, 2021, Defendant terminated Claimant from her field supervisor position for reasons that Defendant contends are unrelated to her accepted workplace injury. (DSUF 19). Claimant disagrees with Defendant's characterization of the reasons for her termination, but the parties' submissions do not resolve this factual issue.
12. On January 27, 2022, Claimant's vocational rehabilitation counselor, Coleen Kearon, MA, found that Claimant was no longer entitled to vocational rehabilitation services based on her "return to suitable employment." (DSUF 20; Defendant's Exhibit J). Specifically, Ms. Kearon stated that Claimant's "most recent average weekly wage of \$800 is suitable and as close to 100% of her wage of \$1,272.67 that she can reasonably expect to earn in Vermont, based on her educational level and employment experience." (Defendant's Exhibit J). Ms. Kearon also stated that in her opinion, Claimant would still be in that role had the unspecified events of December 2021 that led to her termination not occurred. (*Id.*)³

CONCLUSIONS OF LAW:

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the

³ Claimant disputes Ms. Kearon's opinions as set forth in her entitlement assessment.

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. In workers' compensation cases, the claimant bears the burden of proof in the first instance to establish all facts essential to the recovery she seeks. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). However, once an employer has begun paying benefits, it incurs the burden to establish its right to terminate them. *See Merrill v. Univ. of Vermont*, 133 Vt. 101, 105 (1974).

Temporary Disability Benefits

3. The Workers' Compensation Act provides for temporary disability benefits during an injured worker's recuperation period until the injured worker is as far restored as the permanent character of his injuries will permit. *Fleury v. Kessel/Duff Const. Co.*, 148 Vt. 415, 417 (1987). Such benefits are awarded during periods of incapacity from work because the claimant cannot earn wages in the former work, or similar work, or in other work for which the claimant has the mentality and attainment. *Id.*, at 418. Thus, eligibility is not based solely on the physical impairment, but also on the capacity to obtain work. *Bishop v. Town of Barre*, 140 Vt. 564, 571.
4. The Act establishes two types of temporary disability benefits: TTD, which is payable when a workplace injury temporarily causes a total disability from work, *see* 21 V.S.A. § 642, and TPD, which is payable when a workplace injury causes a partial disability from work, *see* 21 V.S.A. § 646. Although the Act does not define "partial" disability, the Department's Workers' Compensation Rule 9.1200 provides as follows:

If as a result of a compensable injury an injured worker is temporarily disabled **from working in a full time and/or full duty capacity**, he or she shall be entitled to temporary partial disability benefits[.]”

Id. (emphasis added).

Discontinuance of Temporary Disability Benefits Based on Successful Return to Work Does Not Require Notice

5. Generally, an employer may not discontinue temporary disability benefits without first filing a Notice of Intention to Discontinue Benefits (Form 27) with supporting evidentiary materials. *See* 21 V.S.A. § 643a; Workers' Compensation Rule 12.1100 *et seq.*
6. However, no such filing is necessary where the reason for the discontinuance is that the injured worker has successfully returned to work. *See* 21 V.S.A. § 643a (“**Unless an injured worker has successfully returned to work**, an employer shall notify both the Commissioner and the employee prior to terminating benefits under either section 642 or 646 of this title.”) (emphasis added); Workers' Compensation Rule 12.1500 (“The provisions of Rule 12.1100 shall not apply in situations where the employer or

insurance carrier seeks to discontinue temporary disability benefits *on the grounds that the injured worker has successfully returned to work...*) (emphasis added).

7. The Department’s Rules define “successful return to work,” in turn as follows:

a return to employment that the injured worker has demonstrated the physical capacity and actual ability to perform without imminent risk of re-injury. Where the injured worker was employed in a temporary or part-time capacity prior to his or her injury, ‘successful return to work’ means a return to employment under the same or similar circumstances.

Worker’s Compensation Rule 2.4100.

Claimant’s Contention that Successful Return to Work Requires Strict Wage Parity with Pre-Injury Earnings

8. Despite her physician’s unconditional work release, Claimant contends that she is unable to earn the same level of wages that she had earned before her injury. In support of this contention, she notes that her pre-injury average weekly wage as a flagger was significantly higher than her post-injury average weekly wage as a full-time field supervisor. Therefore, she contends, her employment as a field supervisor was not successful as a matter of law, and Defendant was not entitled to discontinue her TPD benefits when she began working in that role in August 2021.
9. In support of her legal contention that a lower average weekly wage precludes a finding that a return to work was successful, Claimant cites *Wood v. Fletcher Allen Health Care*, 169 Vt. 419 (1999); *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996); and *Orvis v. Hutchins*, 123 Vt. 18 (1962). These cases do not support that proposition.
10. In *Wood*, the claimant became pregnant while receiving temporary disability benefits, and her pregnancy lengthened the duration of her disability. The Court held that her pregnancy was not an intervening event that would break the causal connection between her workplace injury and her disability. Thus, she was entitled to continued benefits during her pregnancy. In its recitation of the law, the *Wood* Court noted that temporary benefits are
- awarded during periods of incapacity from work because the claimant ***cannot earn wages*** in the former work, or similar work, ***or in other work for which the claimant has the mentality and attainment.***
- Id.* at 423 (emphasis added).
11. *Wood’s* statement above does not support Claimant’s ongoing entitlement to temporary disability benefits in this case. Here, Claimant did earn wages, albeit less than before her injury. She did so by performing work for which she demonstrated at least enough “mentality and attainment” to work for three months before being

terminated for reasons that Defendant asserts are unrelated to Claimant's workplace injury. Nothing in *Wood* purports to require full wage parity with the pre-injury earnings as a strict condition precedent for a claimant's return to work to be successful.

12. Claimant also cites *Coburn, supra*, for the proposition that she "is entitled to have her temporary disability compensation continue through and after 8/29/2021 because her maximum earning power was not and has not been restored and she has not reached an end medical result." (Claimant's Brief at 8). In its recitation of the law, the *Coburn* Court noted that an injured worker receiving temporary disability benefits is entitled to continue receiving them "until reaching medical end result or successfully returning to work." *id.*, 165 Vt. at 532. However, it did not address whether the claimant in that case had successfully returned to work, because the disputed issue was whether the Department had erred in finding that the claimant had reached end medical result. As such, I find *Coburn* inapposite to the instant dispute.
13. Finally, Claimant cites *Orvis, supra*, for the proposition that she is entitled to have her temporary disability benefits continue "until her reduced earning power is removed and replaced by her maximum earning power, or until she reaches an end medical result." (Claimant's Brief at 8). The central holding in *Orvis* was that an employer may not credit its payment of temporary disability benefits against its liability for permanent disability benefits. In distinguishing between permanent and temporary disability benefits, the Court noted that

... [i]n order to justify weekly compensation for temporary partial disability to continue it must appear from the facts presented that the claimant, though able to earn some wages, has not regained full earning power and that he is still in the process of physical recovery. When maximum earning power has been restored or the recovery process ended, the temporary aspects of the workman's disability are concluded.

Id. at 24.

14. However, the *Orvis* Court did not articulate any monetary or other test for determining whether a return to work was successful; it never equated an injured workers' actual receipt of wages with earning "power."
15. Here, Claimant was released to work with no restrictions on August 10, 2021. The fact that she accepted employment that was less lucrative than her pre-injury employment does not compel a conclusion that she lacked the "power" to earn as much as she did before her injury, even if there remain certain work-related activities that she experiences difficulty tolerating. *Cf. Orvis, supra*, at 24-25. Construed in the light most favorable to Defendant, Claimant's unconditional work release and acceptance of full-time work would support an inference that she had as much earning "power" as of August 10, 2021 as she ever had previously. *Cf. id.*

16. None of the foregoing is to say that Claimant’s pre- and post-injury wage differential is irrelevant in evaluating the success of her return to work. Indeed, the Department has considered a claimant’s wage rate as one factor in determining whether a return to work was successful for the purposes of terminating temporary disability benefits, but it has not treated it as a strict mathematical prerequisite. *E.g.*, *Burrows v. Georgia Pacific Corp.*, Opinion No. 44-96WC (July 29, 1996) (holding that where claimant had worked for defendant full-time before injury, his subsequent part-time work for a different employer at a fraction of his previous hourly rate was not a successful return to work). Thus, Claimant’s earnings before an injury and after returning to work may be relevant evidence at a formal hearing in assessing the success of her return to work, *see Orvis, supra*, but the ultimate question is her earning power, not the amounts she actually earned.
17. “A claimant with a release to work is obligated to try to find work consistent with his release.” *Reed v. Fay’s Drugs*, Opinion No. 65-96WC (October 31, 1996) (holding that defendant was entitled to terminate temporary disability benefits; claimant was released to work, found employment in a full-time on call position, and worked in that position for nearly sixty days before voluntarily quitting without good cause). Imposing a strict mathematical wage test for the purposes of assessing the success of a return to work would be fundamentally inconsistent with the goal of encouraging injured workers to return to the workforce within the confines of their capacities. *Cf. e.g.*, *Samson v. Gifford Medical Center*, Opinion No. 11-18WC (July 5, 2018) (vocational rehabilitation context; noting that “[t]he workers’ compensation system embraces successful return to work as the ultimate goal[.]”); *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011) (permanent total disability context; same).

Conclusion

18. While Defendant bears the ultimate burden to establish the propriety of discontinuing benefits, this is Claimant’s motion for summary judgment. To prevail on that motion, she must establish that as a matter of law, she did not successfully return to work on August 29, 2021. Her primary argument in favor of that conclusion is that she earned less after returning to work full-time on that date than she was earning before her injury. The cases she cites do not support her contention that such wage disparity, standing alone, renders her return to full-time work unsuccessful. I find nothing in the language of the Act, the Department’s rules, or the policies underlying them that would compel that result.
19. Claimant was released to return to work full time without restrictions as tolerated in August 2021, and she began working full time later that month, albeit at a lower weekly wage level than she earned pre-injury. She retained that job for over three months before being terminated. Construing the record in Defendant’s favor as the non-moving party, those facts would support an inference that Claimant “demonstrated the physical capacity and actual ability to perform” that work “without imminent risk of re-injury.” *Cf.* Workers’ Compensation Rule 2.4100 (defining “successful return to work”). I conclude that there is a genuine issue of material fact as

to whether Claimant successfully returned to work on August 29, 2021. As such, Claimant's motion must be denied.

ORDER:

For the reasons stated above, Claimant's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 21st day of June 2022.

Michael A. Harrington
Commissioner