

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Lee Patterson

Opinion No. 14-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

WestRock Services, Inc.

For: Michael A. Harrington
Commissioner

State File No. LL-62320

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

Erin J. Gilmore, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to judgment in his favor awarding him interest and penalties on his temporary total disability benefits as a matter of law?
2. Is Defendant entitled to judgment in its favor denying Claimant's claim for interest and penalties on his temporary total disability benefits as a matter of law?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts filed May 3, 2022

Defendant's Response to Claimant's Statement and Defendant's Statement of Undisputed Material Facts in Support of its Cross Motion filed May 31, 2022

Joint ¹ Exhibit 1:	April 2019 medical records of Susan Carol, MD
Joint Exhibit 2:	April 2019 medical records of UVM Medical Center
Joint Exhibit 3:	April 2021 independent medical examination report and July 2021 opinion letter of Victor Gennaro, DO
Joint Exhibit 4:	April 2021 deposition transcripts of Kevin Scheffler and Norm Boudreau
Joint Exhibit 5:	October 5, 2021 letter from Claimant's counsel to Defendant's counsel
Joint Exhibit 6:	Partially executed Agreement for Permanent Partial Disability Benefits (Form 22) and Notices of Change in Compensation Rate (Form 28)

¹ The parties' Exhibits 1 through 7 are the same.

Joint Exhibit 7: November 17, 2021 check payable to Claimant for temporary total disability benefits
Defendant's Exhibit 8: January 10, 2022 letter from the Department's specialist to the parties
Defendant's Exhibit 9: December 18, 2020 formal hearing docket referral on the issue of compensability

BACKGROUND:

There is no genuine issue as to the following material facts:

1. On March 31, 2019, Claimant filed a claim for workers' compensation benefits for a right upper extremity injury, carpal tunnel syndrome, arising out of and in the course of his employment as a pulper machine operator for Defendant. *Claimant's Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶ 1; *Defendant's Exhibit 8; First Report of Injury* (Form 1).
2. Defendant denied the claim on April 19, 2019, on the grounds that the medical report did not support a work injury. *Defendant's Response and Statement of Undisputed Material Facts* ("Defendant's Statement"), ¶ 18; *Defendant's Exhibit 8; Denial of Benefits* (Form 2).
3. On September 21, 2020, Claimant requested a hearing on the compensability of his claim. *Notice and Application for Hearing* (Form 6). On December 18, 2020, after an informal conference, the Department's specialist referred the parties' compensability dispute to the formal hearing docket. The specialist wrote: "After a review of the record on the whole and the parties' respective positions, the Department finds the Form 2 remains reasonably supported at this time." *Defendant's Statement*, ¶ 19; *Defendant's Exhibit 9*.
4. On September 22, 2021, the parties mediated their dispute but failed to resolve it. Defendant finally accepted the compensability of Claimant's right-sided carpal tunnel syndrome claim on October 4, 2021, two days before the scheduled formal hearing. *Claimant's Statement*, ¶ 11; *Defendant's Statement*, ¶ 11; *Defendant's Exhibit 8*. The Department has never issued an order for payment of temporary total disability benefits, and Defendant's denial remained in place until it accepted the claim on October 4, 2021. *Defendant's Statement*, ¶ 13; *Defendant's Exhibit 9*.
5. The parties have not submitted an executed Agreement for Temporary Disability Benefits (Form 32) to the Department for approval. *Judicial Notice*.
6. On October 5, 2021, Claimant's counsel sent Defendant's counsel a letter setting forth his calculation of the amounts due to Claimant. *Claimant's Statement*, ¶ 12; *Joint Exhibit 5*. Claimant sought a total of \$18,327.09 for retroactive benefits, penalties and interest. *Claimant's Statement*, ¶ 15; *Joint Exhibit 5*.

7. At the time of his injury, Claimant's average weekly wage was \$927.43, generating a \$618.60 weekly compensation rate. *Claimant's Statement*, ¶ 13; *Joint Exhibit 6*.²
8. Defendant sent a check dated November 17, 2021 to Claimant's attorney in the amount of \$12,683.46. This check represented payment for 20.57 weeks of temporary total disability benefits for the period from April 11, 2019³ through September 2, 2019. Defendant multiplied 20.57 weeks by a compensation rate of \$616.60⁴ to arrive at \$12,683.46. The check did not include any amounts for interest or penalties. *Defendant's Statement*, ¶ 13.
9. Claimant's counsel received Defendant's check on November 23, 2021.⁵ See *Claimant's Statement*, ¶ 14; *Joint Exhibit 7*. That same day, Claimant sent a letter and a Notice and Application for Hearing (Form 6) to the Department seeking interest and penalties on his temporary total disability benefits. *Judicial Notice*.
10. On January 10, 2022, the Department's specialist acknowledged receipt of Claimant's hearing request and wrote in a letter to the parties stating: Defendant accepted the claim on October 4, 2021, and Claimant requested payment of the following amounts on October 5, 2021: temporary total disability benefits from April 1, 2019 through September 2, 2019 in the amount of \$13,609.20; a ten percent penalty in the amount of \$1,360.92; and interest from September 2, 2019 through September 22, 2021 in the amount of \$3,356.97. After receiving payment of temporary total disability benefits on November 23, 2021 in the amount of \$12,683.46, Claimant then requested an order from the Department for a ten percent penalty plus interest on the temporary total disability payment through November 23, 2021 in the amount of \$3,634.11, with interest thereafter accumulating at a daily rate of \$4.47. *Defendant's Statement*, ¶ 18; *Defendant's Exhibit 8*.
11. On February 28, 2022, the Department's specialist referred the parties' dispute concerning interest and penalties to the formal hearing docket. *Judicial Notice of the*

² Defendant has not filed a Wage Statement (Form 25) with the Department. Joint Exhibit 6 is a draft Agreement for Permanent Disability Benefits (Form 22) signed by Defendant but not signed by Claimant or approved by the Department. The form sets forth Claimant's average weekly wage and compensation rate. The parties did not dispute these figures, and Claimant's counsel used them in his calculation of benefits. See *Joint Exhibit 5*.

³ Defendant used April 11, 2019 as the indemnity benefit starting date because Claimant's medical provider first took him out of work on that date. *Defendant's Exhibit 8*, footnote 2.

⁴ The draft Agreement for Permanent Disability Benefits (Form 22) and the Notices of Change in Compensation Rate (Form 28) all list Claimant's compensation rate as \$618.60, not \$616.60. *Joint Exhibit 6*. Further, an average weekly wage of \$927.43 multiplied by 0.667 yields a compensation rate of \$618.60. See Workers' Compensation Rule 8.1600. Thus, Defendant's use of \$616.60 as the compensation rate appears to be a clerical error.

⁵ Paragraph 14 of Claimant's Statement states that he received the check on November 25, 2021. However, his letter and hearing request (Form 6) sent to the Department on November 23, 2021, specifically stated that the check was received on November 23, 2021. *Judicial Notice of the Department's file*. I have therefore corrected what appears to be a clerical error in Claimant's Statement.

Specialist's second referral memorandum dated February 28, 2022. Cross motions for summary judgment followed.

12. The parties' submissions presented medical and other evidence concerning the causal relationship between Claimant's right upper extremity condition and his employment for Defendant, none of which is material to the current dispute concerning interest and penalties. *See Claimant's Statement*, ¶¶ 2 -10; *Defendant's Statement*, ¶¶ 2-10.
13. Paragraphs 13, 15, 16 and 17 of Claimant's Statement, and paragraph 13 of Defendant's Statement, include assertions that are in the nature of legal argument, rather than undisputed facts. Those assertions are not included in this Background, but are considered in the Discussion, *infra*.

DISCUSSION:

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). 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).
2. Where the parties have filed cross motions for summary judgment, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc.*, *supra* at 48.

Entitlement to Additional Temporary Total Disability Benefits, Penalties and Interest

3. Claimant seeks penalties and interest on Defendant's payment of his retroactive temporary total disability benefits pursuant to 21 V.S.A. §§ 650(e) and 675(c), as well as a correction to the amount of temporary total disability benefits paid. Defendant contends that it paid the correct amount of temporary total disability benefits and that no penalties or interest are due because the Department never ordered Defendant to pay those benefits.

Calculation of Claimant's Temporary Total Disability Benefits

4. The parties do not agree on the amount of temporary total disability benefits due and payable to Claimant through September 2, 2019. Claimant calculated the amount as \$13,609.20; Defendant calculated the amount as \$12,683.46.
5. The \$925.74 discrepancy arises for two reasons. First, the parties used different starting dates. Claimant used April 1, 2019, based on his assertion that he began missing work on that date due to his injury. Defendant used April 11, 2019 as the starting date, based on the earliest out-of-work note provided by Claimant's doctor.

6. The Vermont Workers' Compensation Act provides for the payment of temporary total disability benefits when an injury causes total disability for work. 21 V.S.A. § 642. However, a claimant may not determine his own disability status; he must provide medical evidence of his disability for work. *See Workers' Compensation Rule 9.1300*. In this case, Claimant's treating provider first issued an out-of-work note on April 11, 2019. *See Background, ¶ 8 supra*. Accordingly, I find that he was entitled to temporary total disability benefits from April 11, 2019 through September 2, 2019, a period of 20.57 weeks.
7. The second reason for the discrepancy between the parties' calculations is that each used a different compensation rate. Defendant has not filed a Wage Statement (Form 25) in this case, as required by Workers' Compensation Rule 3.2000, but the parties included a draft Agreement for Permanent Disability Benefits (Form 22) with their motions. That document sets forth a compensation rate of \$618.60 per week. *Joint Exhibit 6*. Defendant's adjuster endorsed that rate by signing the draft Form 22, and Claimant used \$618.60 as the compensation rate in his calculations. I therefore conclude that Claimant's compensation rate for April 11, 2019 through September 2, 2019 is \$618.60.
8. Accordingly, I calculate the temporary total disability benefits to which Claimant is entitled for the period from April 11, 2019 through September 2, 2019 as follows:
 $\$618.60 \times 20.57 \text{ weeks} = \$12,724.60$.
9. Defendant paid Claimant \$12,683.46 for his temporary total disability benefits. Accordingly, I find that it owes him an additional sum of \$41.14 for those benefits through September 2, 2019.

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

10. The Vermont Workers' Compensation Act includes a penalty provision if weekly benefits are not paid in a timely manner. The statute provides in relevant part as follows:

If weekly compensation benefits or weekly accrued benefits are not paid within 21 days after becoming due and payable pursuant to an order of the Commissioner, or in cases in which the overdue benefit is not in dispute, 10 percent of the overdue amount shall be added and paid to the employee, in addition to interest and any other penalties. In the case of an initial claim, benefits are due and payable upon entering into an agreement pursuant to subsection 662(a) of this title, upon issuance of an order of the Commissioner pursuant to subsection 662(b) of this title, or if the employer has not denied the claim within 21 days after the claim is filed. Benefits are in dispute if the claimant has been provided actual written notice of the dispute within 21 days of the benefit being due and payable and the evidence reasonably supports the denial. ...

21 V.S.A. § 650(e).

11. Here, Claimant's entitlement to temporary total disability benefits was initially "in dispute" for purposes of the penalty provision, as the specialist found that the evidence reasonably supported the denial. However, once Defendant accepted the claim as compensable on October 4, 2021, the payment of temporary total disability was no longer in dispute. Accordingly, from that date forward, if Claimant's weekly accrued benefits were not paid within 21 days after becoming due and payable, Defendant would be liable for a ten percent penalty.
12. To determine whether Defendant's payment of the no-longer-disputed temporary total disability benefits was made within 21 days, it is first necessary to determine when that payment was due.
13. Defendant's acceptance of the claim on October 4, 2021, came with an obligation to pay undisputed benefits in a timely manner. Workers' Compensation Rule 9.1400 provides as follows:

In all cases in which temporary total and/or temporary partial disability benefits are owed, the employer or insurance carrier shall enter into an *Agreement for Temporary Compensation* (Form 32) with the injured worker, and shall begin paying benefits **immediately**. Once executed by the parties, the completed *Agreement* shall be filed with the Commissioner for review and approval (emphasis added).
14. Based on the mandate of Workers' Compensation Rule 9.1400 that the carrier begin paying benefits "immediately," I conclude that Defendant's obligation to commence payment of Claimant's retroactive temporary total disability benefits began on October 4, 2021. Thereafter, Defendant had a 21-day grace period in which to initiate payment before any penalty would be imposed pursuant to 21 V.S.A. § 650(e). Twenty-one days from October 4, 2021 was October 25, 2021.
15. Defendant paid Claimant's temporary total disability benefits on November 23, 2021, which was 50 days after the benefits were due. As this exceeds the 21-day grace period, I conclude that a ten percent penalty is required under 21 V.S.A. § 650(e).
16. Defendant owed Claimant \$12,724.60 in accrued temporary total disability benefits. *See* Discussion, ¶ 8 *supra*. Ten percent of this amount is \$1,272.46. Accordingly, Defendant owes Claimant a penalty of \$1,272.46.

Interest Pursuant to 21 V.S.A. §§ 675(c) and 664

17. Two sections of the Vermont Workers' Compensation Act provide for an award of interest on unpaid compensation due to an injured worker. Section 675(c) of the Act addresses the obligation to pay interest in the absence of a formal hearing decision. Section 675(c) provides as follows:

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

18. The statutory provision for interest when an injured worker prevails at formal hearing is set forth in 21 V.S.A. § 664. That section provides that the Commissioner shall award interest at the statutory rate to a prevailing claimant.
19. These statutory interest provisions differ from the penalty provision set forth in 21 V.S.A. § 650(e) in a significant way. The penalty provision requires a penalty where “the overdue benefit is not in dispute.” Neither § 675(c) nor § 664 provides for interest simply when the overdue benefit is not in dispute. Instead, § 675(c) requires either an executed compensation agreement or an interim order; § 664 requires an award after formal hearing.
20. The circumstances presented here do not fit within either of these statutory interest provisions, as Defendant’s obligation to pay retroactive temporary total disability benefits arose from its acceptance of the claim on October 4, 2021 without any order being issued by the Department and without the execution of any of the written agreements contemplated in 21 V.S.A. §§ 642, 644, 646 or 648.
21. Therefore, I conclude that Claimant is not entitled to an award of interest.

ORDER:

Based on the foregoing, Claimant’s Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**, and Defendant’s Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**. Defendant is hereby **ORDERED** to pay:

1. Additional temporary total disability benefits through September 2, 2019 in the amount of \$41.14;
2. A ten percent penalty, in the amount of \$1,272.46, pursuant to 21 V.S.A. § 650(e); and
3. Attorney fees for this motion commensurate with Claimant’s success, in an amount to be determined.

DATED at Montpelier, Vermont this 1st day of July _____ 2022.

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.