

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Tyler Martin

Opinion No. 08-23WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

The Sugarman of Vermont, LLC

For: Michael A. Harrington
Commissioner

State File No. RR-51404

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to temporary disability benefits beginning on the date when his new employer was unable to accommodate his work restrictions and ongoing thereafter?

EXHIBITS:

Claimant's Exhibit 1:	June 17, 2022 email from Defendant's adjuster to Claimant's counsel concerning requested reinstatement of temporary disability benefits
Claimant's Exhibit 2:	June 3, 2022 medical record and Work Capabilities Form of PA-C Helen Smith Hollenbach
Claimant's Exhibit 3:	Letter from Darn Tough to Claimant confirming the end of his employment due to Darn Tough's inability to accommodate his work restrictions
Claimant's Exhibit 4:	Wage Statement (Form 25) for employment with Darn Tough
Claimant's Exhibit 5:	Dr. Rudolf's August 11, 2022 independent medical examination report
Defendant's Exhibit A:	December 29, 2021 letter of Defendant's plant manager Chris Dartt concerning Claimant's termination
Defendant's Exhibit B:	March 24, 2022 letter of plant manager Chris Dartt to Defendant's adjuster concerning accommodation of work restrictions and Claimant's alleged termination for cause

FINDINGS OF FACT:

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 all relevant forms in the Department's file, there is no genuine issue as to the following material facts:

1. Claimant was an employee and Defendant was his employer as those terms are used in the Vermont Workers' Compensation Act. *Claimant's Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶ 1.
2. On July 28, 2021, Claimant slipped and fell on a wet floor at work, fracturing his left thumb. *Claimant's Statement*, ¶ 2. See Employer's First Report of Injury (Form 1).
3. Claimant reported the injury, and Defendant's workers' compensation insurance carrier accepted the claim. *Claimant's Statement*, ¶ 3. See Approved Agreement for Temporary Compensation (Form 32).
4. After remaining out of work briefly, Claimant was released to return to work on or about August 5, 2021. He returned to work for Defendant at that time, while he continued to receive treatment for his injury. *Claimant's Statement*, ¶ 4; *Claimant's Exhibit 1*. Defendant points out that Claimant's Statement, ¶ 4, states that he returned to "modified" duty work; however, Claimant's Exhibit 1 states that he was released to "full duty" work on August 5, 2021. See Defendant's Statement of Facts in Dispute ("*Defendant's Statement*"), ¶ 1. Although there appears to be a discrepancy concerning the nature of the August 5, 2021 work release, I find that this issue is not material to Claimant's summary judgment motion.
5. On December 29, 2021, Claimant was terminated from his job with Defendant for reasons "allegedly" unrelated to the work injury. *Claimant's Statement*, ¶ 5. See Defendant's June 29, 2022 Denial (Form 2). Defendant contends that Claimant's use of the word "allegedly" makes the existence of a dispute over the reason for Claimant's termination self-evident. *Defendant's Statement*, ¶ 2. Defendant further contends that, if Claimant were terminated due to his work injury, that would clearly determine his entitlement to temporary disability benefits. *Id.* Thus, according to Defendant, factual testimony concerning the reason for Claimant's termination is relevant and necessary. *Id.* Although the parties may not agree on the reason why Defendant terminated Claimant's employment on December 29, 2021, in the context of Claimant's summary judgment motion, I take the factual allegations in the light most favorable to Defendant as the non-moving party and find that, for purposes of this motion, Claimant was terminated for reasons unrelated to his work injury.
6. On May 2, 2022, Claimant began a new job with Cabot Hosiery Mills, Inc. ("Darn Tough"). *Claimant's Statement*, ¶ 6.
7. On June 3, 2022, Claimant's treating provider imposed new work restrictions relating to his accepted work injury. *Claimant's Statement*, ¶ 7; *Claimant's Exhibit 2*. Those restrictions were not to lift more than ten pounds with the left hand and no repetitive

pinching or gripping with the left hand. Claimant's right hand was unrestricted. *Claimant's Exhibit 2.*

8. Darn Tough could not accommodate the new work restrictions and terminated Claimant's employment as of June 6, 2022. *Claimant's Statement, ¶ 8; Claimant's Exhibit 3.*
9. On June 17, 2022, Claimant sought temporary total disability benefits from June 6, 2022 onward based on the wages he earned at Darn Tough, on the grounds that he had not been placed at end medical result and continued to receive treatment for his work injury. *Claimant's Statement, ¶ 9.* Defendant disputes Claimant's entitlement to such benefits. Defendant contends that, prior to his new employment with Darn Tough, Claimant did not receive, nor was he entitled to receive, temporary total disability benefits due to the circumstances of his termination from Defendant's employment. Further, following his separation from employment at Darn Tough, Claimant has not offered evidence of a job search that would support his entitlement to temporary disability benefits under an exception to *Andrew v. Johnson Controls*. *Defendant's Statement, ¶ 3.*
10. Claimant is not seeking any temporary disability benefits for the period between his termination by Defendant on December 29, 2021 and May 2, 2022, when he secured new employment with Darn Tough. *Claimant's Statement, ¶ 10.*
11. On or about June 29, 2022, Defendant filed a Denial (Form 2) of Claimant's request for temporary total disability benefits, claiming that he would still be working restricted duty for Defendant but for his termination in December 2021. *Claimant's Statement, ¶ 12. See Form 2 filed June 29, 2022.*
12. Claimant appealed, and on July 28, 2022, the Department issued an interim order directing Defendant to pay temporary partial disability benefits retroactive to June 6, 2022, when Claimant began losing time from his job at Darn Tough. *Claimant's Statement, ¶ 13. See Interim Order dated July 28, 2022.*
13. In the meantime, on or about July 19, 2022, Defendant received a preauthorization request for a second opinion concerning Claimant's hand pain from orthopedic physician Kevin Lutsky, MD, at the University of Vermont Medical Center. *Claimant's Statement, ¶ 14. See Medical Provider's Preauthorization Request.*
14. In response, on August 11, 2022, Defendant sent Claimant to orthopedic physician Leonard Rudolf, MD, for an independent medical examination. In Dr. Rudolf's opinion, Claimant was not at end medical result. Further, investigation of the source of his persistent thumb pain would be both appropriate and causally related to his accepted work injury. Dr. Rudolf also agreed with Claimant's work restrictions. *Claimant's Statement, ¶ 15; Claimant's Exhibit 5, at 6.* Based on Dr. Rudolf's opinions, Defendant approved the preauthorization request for Claimant to obtain a second opinion on his thumb condition from Dr. Lutsky. *Claimant's Statement, ¶ 16.*

15. Although Defendant disputes that Claimant's entitlement to medical benefits is material to the issue of his entitlement to temporary disability benefits, *Defendant's Statement*, ¶ 4, I find Dr. Rudolf's opinion that Claimant had not reached an end medical result relevant to his claim for temporary disability benefits.

CONCLUSIONS OF LAW:

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. Claimant here seeks summary judgment on his claim for temporary total disability benefits from June 6, 2022 and ongoing. Defendant opposes the motion.

Temporary Disability Following Termination for Reasons Unrelated to the Work Injury

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

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

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

4. Here, Claimant's employment ended on December 29, 2021, for reasons unrelated to his work injury. Finding of Fact No. 5 *supra*. He did not seek temporary disability benefits after his termination and eventually secured new employment with Darn

Tough on May 2, 2022. Finding of Fact No. 10 *supra*. However, Claimant was not able to hold onto his new employment after a month because Darn Tough could not accommodate the new work restrictions that were imposed for Claimant's work injury on June 3, 2022. Finding of Fact No. 8 *supra*. Thus, to prevail on a claim for temporary disability benefits following his June 6, 2022 termination from Darn Tough, Claimant must satisfy the three-pronged test above.

Application of the Johnson Controls Test to Claimant's Situation

5. Claimant has satisfied the first prong of the *Johnson Controls* test by establishing that he sustained a work-related hand injury while in Defendant's employ.
6. As to the second prong of the *Johnson Controls* test, Claimant performed some type of work search that resulted in his hiring by Darn Tough in May 2022. However, the period of time for which he seeks temporary disability benefits is the period following his separation from Darn Tough on June 6, 2022. Claimant's Statement of Undisputed Facts includes no statement that he engaged in a reasonably diligent work search after he lost his employment with Darn Tough, nor has he offered any evidence supporting such a work search.¹ Accordingly, whether Claimant meets the second prong of the *Johnson Controls* test cannot be determined on this motion for summary judgment.
7. Claimant's June 3, 2022 work restrictions included no pinching or gripping with his left hand and no lifting of more than ten pounds with his left hand. His right hand was subject to no restrictions. *See* Finding of Fact No. 7 *supra*. Under the third prong of the *Johnson Controls* test, Claimant must show that his failure to return to the workforce after June 6, 2022 was due to his work injury or restrictions, rather than other factors.
8. In *Pitaniello v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008), the claimant was terminated after a work injury for reasons unrelated to his injury. He later returned to work for a subsequent employer, but at a lower wage. He accordingly sought temporary partial disability benefits, claiming that his work injury was the cause of his lower wages. The Commissioner found that the claimant suffered a work injury and performed a reasonably diligent work search, but concluded that the claimant failed to establish the third prong of the *Johnson Controls* test – he did not prove that his inability to find better paying employment was due to his injury-related disability. The Commissioner wrote:

The record does not reflect what types of jobs Claimant applied for, how many he was offered (if any), how many he rejected (if any), and why. He may have received and rejected other job offers, at wages closer to those he received from Defendant, because he did not like the work environment, or because they did not offer career advancement

¹ In his Reply Memorandum, Claimant contends that Defendant never notified him of an obligation to perform a work search. However, he did not include this allegation in his Statement of Undisputed Facts, nor did he support this allegation with admissible evidence, as required by V.R.C.P. 56(c)(1) (moving party must support its statement of undisputed material facts with specific citations to particular parts of materials in the record).

opportunities, or because the fringe benefit package was unacceptable, or for any number of other personal reasons, all unrelated to his work restrictions. . . . From the facts presented, there simply is no way to know. Without such evidence, it would be impermissible speculation to point to the work injury as the cause of Claimant's loss of earnings, particularly where other equally plausible explanations exist for his decision to take a lower-paying job.

Pitaniello, supra, at Conclusion of Law No. 9.

9. Claimant's motion here has similarly failed to connect his lack of work after June 6, 2022 to his work injury or work restrictions. Based on the record before me, it would be unduly speculative to conclude that the work restrictions issued on June 3, 2022 were the cause of any period of unemployment thereafter. Accordingly, whether Claimant meets the third prong of the *Johnson Controls* test cannot be determined on summary judgment, either.

Defendant's Position About the Availability of Restricted-Duty Work

10. Finally, Defendant maintains that, if Claimant had not been fired for reasons unrelated to his work injury, he would still be working for Defendant on restricted duty. Accordingly, Defendant contends that he is not entitled to temporary disability benefits after his termination by Darn Tough. This argument fails for two reasons.
11. First, the undisputed material facts do not establish that Defendant could have accommodated Claimant's June 3, 2022 work restrictions. Defendant's statement that it could have done so is speculative.
12. Second, even if Defendant could have accommodated Claimant's work restrictions, that is not the issue here. The issue is whether Claimant's period of unemployment subsequent to June 6, 2022 meets the criteria set forth in *Johnson Controls*. The possibility that Claimant might have been able to remain employed with Defendant had he not been fired on December 29, 2021 is simply not relevant to the analysis of his entitlement to temporary disability benefits after June 6, 2022.

Conclusion

13. Claimant may be entitled to temporary partial disability benefits following his separation from employment at Darn Tough, and there is in interim order in place for the payment of such benefits pending the formal hearing with which Defendant must continue to comply. However, the record before me is insufficient to determine that he is entitled to such benefits as a matter of law.

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont, this 22nd day of March 2023.

Michael A. Harrington
Commissioner