

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Sharon Fenton

Opinion No. 04-24WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Frank Cooper, Inc.

For: Michael A. Harrington
Commissioner

State File No. MM-00417

OPINION AND ORDER

Hearing held via Teams on November 8, November 9, December 6 and December 13, 2023
Record closed on February 12, 2024

APPEARANCES:

Vanessa B. Kittell, Esq., for Claimant
Bonnie J. Badgewick, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to temporary partial disability benefits from November 1, 2019 through March 12, 2020?
2. Is Claimant entitled to temporary total disability benefits from March 13, 2020 until the date she reached end medical result for her compensable work-related injury?
3. When did Claimant reach end medical result for her compensable work-related injury?
4. Is Defendant responsible for payment of Claimant's medical bills for the dates of service November 1, 2019 and November 8, 2019?
5. In the event benefits are awarded, is Defendant entitled to an offset pursuant to 21 V.S.A. § 651 for any benefits paid on a payment without prejudice basis and formally denied pursuant to a May 24, 2021 Denial (Form 2) for the period of March 13, 2020 to July 20, 2020?
6. Is Claimant entitled to an award of penalties or interest?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit ("JME")¹

¹ The parties divided the JME into separate chapters. In the page number references, the first number refers to the chapter, and the second number refers to the page(s) within that chapter.

Joint Exhibit II: Medical bills for November 1, 2019 and November 8, 2019

Claimant's Exhibit 1: Photograph of machine (writing redacted)

Claimant's Exhibit 2: Photograph of machine

Claimant's Exhibit 4-1: November 8, 2019 work release with restrictions

Claimant's Exhibit 4-2: December 11, 2019 part-time work release with restrictions

Claimant's Exhibit 4-8: February 1, 2021 out of work note

Claimant's Exhibit 6: Photograph of incisions

Claimant's Exhibit 12: July 13, 2020 texts between Claimant and Lance LeClair

Claimant's Exhibit 17: November 18, 2019 letter from Lance LeClair

Claimant's Exhibit 19: Agreement for Temporary Compensation (Form 32)

Claimant's Exhibit 22: *Curriculum vitae* of James D. Michelson, MD

Claimant's Exhibit 23: *Curriculum vitae* of Mark J. Bucksbaum, MD

Claimant's Exhibit 26: Photograph of scooter

Claimant's Exhibit 28: *AMA Physician's Guide to Return to Work* (excerpt)

Claimant's Exhibit 29: September 9, 2020 letter from Defendant's counsel to the Department, with attachments

Claimant's preservation deposition of James D. Michelson, MD, taken October 27, 2023

Defendant's Exhibit 1: November 18, 2019 letter from Lance LeClair

Defendant's Exhibit 2: July 13, 2020 letter to Claimant from Tiffany LeClair

Defendant's Exhibit 3: July 13, 2020 texts between Claimant and Lance LeClair

Defendant's Exhibit 4: Photograph of Claimant

Defendant's Exhibit 5: *Curriculum vitae* of Leonard M. Rudolf, MD

Defendant's Exhibit 6: *Curriculum vitae* of George P. White, Jr., MD

Defendant's Exhibit 7: Video of Dr. Rudolf's independent medical examination

CLAIMS:

Temporary disability benefits pursuant to 21 V.S.A. §§ 642 and 646

Permanent partial disability benefits pursuant to 21 V.S.A. § 648

Medical benefits pursuant to 21 V.S.A. § 640

Costs and attorney fees pursuant to 21 V.S.A. § 678

Penalties and interest pursuant to 21 V.S.A. §§ 650(e) and 664

Defendant's claim for offset pursuant to 21 V.S.A. § 651

FINDINGS OF FACT:

Background

1. Claimant is a 58-year-old woman who lives in Burlington, Vermont. Defendant is a laundry and dry-cleaning business with several locations in Chittenden County.
2. In 2013, Claimant underwent right knee replacement surgery unrelated to her employment. Since then, she continues to have pain in her right lower extremity.

3. In August 2021, Claimant was diagnosed with brain aneurysms unrelated to her employment. She underwent aneurysm surgery in October 2021 and February 2023.

Claimant's Employment with Defendant and her Work Injury

4. Claimant began working for Defendant in 2007. Her job duties included opening and closing the retail shops, vacuuming and mopping, and washing, drying and folding laundry. Her job duties also included ironing dress shirts on a shirt press.
5. To operate the shirt press, Claimant would load a clean shirt onto the press and engage the foot pedals to iron the shirt. The foot pedals were at floor level, about a shoulder's width apart. She would then remove the ironed shirt from the press and place it on a hanger. To press one shirt, Claimant would step on the pedals with her left foot five to eight times. Although there were right and left foot pedals, she used her left foot on both pedals because she had right lower extremity pain. Claimant would press up to sixty shirts per hour, and for the year prior to November 2019, operating the shirt press was her primary job activity.
6. On Friday, November 1, 2019, Claimant was operating the shirt press when she felt a sudden sharp pain in her left foot. She left work and went directly to UVM Medical Center's Urgent Care in Colchester.
7. Claimant reported to Urgent Care that she had been experiencing swelling and tenderness in her left foot and ankle for two months, with a recent increase in symptoms. A nurse practitioner diagnosed her with likely posterior tibial tendinitis. Claimant was discharged with a walking boot and a referral to orthopedics. (JME 1-1 to 1-8).

Claimant's Subsequent Employment and Medical Course

8. When Claimant returned to work on Monday, November 4, 2019, Defendant took her off shirt press duty and assigned her to other tasks.
9. Claimant saw nurse practitioner Marie-Claire Smith at the UVM Foot and Ankle Program on November 8, 2019, reporting foot swelling and significant pain. NP Smith diagnosed her with flexor hallucis longus tendinitis ("FHL tendinitis"), a condition affecting the tendon that connects the back of the ankle to the big toe. NP Smith replaced Claimant's walking boot with a fiberglass short leg cast, gave her a pair of crutches, and released her to work "with minimal weightbearing." (JME 1-9 to 1-15).
10. Claimant returned to work at Defendant's Burlington shop for five hours per day. She found it difficult and tiring to perform her job duties, especially trying to walk with crutches and a fiberglass cast while balancing heavy loads of laundry.
11. On November 18, 2019, Defendant offered Claimant a position with more hours and less walking. The offer was for a seven-hour shift at Defendant's South Burlington shop from Monday to Friday, with six additional hours every other Saturday. *See Claimant's Exhibit 17*. Claimant declined this offer for several reasons. First, she was already

struggling to work five hours per day. Second, the South Burlington shop was larger and busier, adding to the potential difficulty of the workday. Third, she was not comfortable driving a car while wearing a leg cast; by continuing to work at the Burlington shop, she could ride to work with her boyfriend.

12. On November 27, 2019, Defendant filed a First Report of Injury (Form 1) and a Denial of Claimant's "entire claim" for workers' compensation benefits (Form 2). The Denial stated that Claimant did not sustain an injury arising out of and in the course of her employment. The adjuster's accompanying letter stated:

Concurrently, there is a dispute regarding [Claimant's] hours and accommodations at work. The employer confirms that they are able to accommodate the light duty release and have offered [Claimant] full time hours at a second location, but [Claimant] has chosen not to take them, and as such has been working reduced hours.

13. On December 2, 2019, Claimant went to UVM Medical Center's Emergency Department because her fiberglass cast had broken; she also complained about difficulty using crutches. Hospital staff fixed her cast and prescribed a knee scooter to improve her mobility. (JME 1-16 to 1-22). Claimant continued to work part time for Defendant, using her crutches and knee scooter.
14. On December 11, 2019, Claimant returned to the Foot and Ankle Program. NP Smith instructed her not to place any weight on her left foot until evaluated by a foot and ankle surgeon and **not to work more than five hours per day**. (JME 1-23 to 1-28) (emphasis added).
15. Claimant credibly testified that her foot pain from November 2019 through early March 2020 was constant, with jabs of pain in her ankle and on the bottom of her foot. Her foot also had a "pins and needles" sensation. Using the knee scooter helped with pain, but it was exhausting. Nevertheless, Claimant continued to work part time in accordance with NP Smith's December 11, 2019 work restrictions through March 12, 2020.

16. On February 13, 2020, Claimant saw orthopedic surgeon James Michelson, MD. He identified severe FHL tendinitis, hallux rigidus,² third metatarsophalangeal joint synovitis (MTP synovitis)³, and tarsal tunnel syndrome.⁴ (JME 1-29 to 1-33).
17. On March 13, 2020, Dr. Michelson performed surgery on Claimant's foot and ankle. His pre-and post-operative diagnoses were the same: FHL tendinitis, tarsal tunnel syndrome and hallux rigidus. Dr. Michelson released the FHL tendon and the tibial nerve, and he removed a bone spur over the main joint of her big toe. (JME 1-44, 1-54 to 1-56). When Claimant followed up with Dr. Michelson in March and early April 2020, he was not concerned about the progress of her recovery. (JME 1-57 to 1-59, 1-65).
18. On April 20, 2020, Claimant reported significant symptoms to Dr. Michelson, including widespread foot numbness, swelling and pain, and Dr. Michelson began to have concerns about her recovery. He prescribed nerve medication and estimated that Claimant would be out of work for another three to six months. (JME 1-66 to 1-67). On May 11, 2020, Dr. Michelson again declined to release Claimant to work. (JME 1-89 to 1-92).
19. Claimant credibly testified that, six to eight weeks after the surgery, she could not undertake most activities due to pain and swelling in her foot. She spent significant time lying back with her foot elevated and iced. She used a shower chair to bathe, and she could not do laundry, cook or climb stairs. Overall, her pain was worse than before the March 13, 2020 surgery.
20. On May 19, 2020, orthopedic surgeon Leonard Rudolf, MD performed a medical records review at Defendant's request. He thought that Claimant's FHL tendinitis and tarsal tunnel syndrome were related to work, but that her hallux rigidus was not. (JME 5-1 to 5-3).
21. On May 28, 2020, Dr. Michelson wrote a note that Claimant was "having some delays in surgical recovery" and that her "expected recovery date [was] December 2020." (JME 1-94). At the hearing, Dr. Michelson credibly explained that, by "expected recovery," he meant an expected return to work date.

² Hallux rigidus is a type of arthritis that affects the big toe joint. "Hallux Rigidus," <https://my.clevelandclinic.org/health/diseases/14665-hallux-rigidus/> last accessed February 14, 2024 at 9:04 AM.

³ MTP synovitis is located in the forefoot, where the metatarsal and phalanx bones meet. Synovitis is a swelling of the joint lining. "Metatarsophalangeal Joint Synovitis," <https://feetmd.com/foot-ankle-conditions/lesser-toe-problems/metatarsophalangeal-joint-synovitis/> last accessed February 14, 2024 at 9:00AM. Although this condition was included with Claimant's diagnoses on February 13, 2020, her medical records do not reflect any treatment for this condition, nor is the condition considered by her independent medical examiners.

⁴ Tarsal tunnel syndrome is caused by compression of the posterior tibial nerve as it travels through the tarsal tunnel, causing foot pain, tingling and numbness. "Tarsal Tunnel Syndrome," <https://www.hopkinsmedicine.org/health/conditions-and-diseases/tarsal-tunnel-syndrome/> last accessed February 14, 2024 at 9:08 AM.

22. On July 13, 2020, Defendant sent Claimant a text message, stating as follows:

Hi Sharon. It's Monday July 13th at 12:50pm and I just left a message on your cell for you regarding your return to work date. We have a position open and ready for you beginning July 20th at Sears Lane. The doctors note you provided us shows a recovery date (not return to work date) and very little info about what accommodations we'd need to make. But it did mention using the walking boot and sitting as needed. And both of those things can be accommodated here, as they were before surgery. Please confirm you received this email and/or my voicemail, and we will expect to see you Monday July 20th at 8:30 am

Claimant responded:

I don't have a return to work date. I meet with my surgeon again the 16th. I have no feeling in my foot at all still.

Defendant replied:

Without a note saying you cannot work at all then we require you to return to work and use a walking boot and knee scooter as needed. Same as before surgery. Your drs note does not state you can not work at all and we have an open position that you need to full [sic] The doctors note states that you can wear a walking boot and be weight bearing as tolerated. We can accommodate those things Please plan to report to work on July 20th at 8:30am to 27 sears lane in Burlington

Claimant's Exhibit 12; Defendant's Exhibit 3.

23. On July 13, 2020, Defendant sent Claimant a letter confirming the text messages. Claimant did not respond to the letter.
24. During his July 23, 2020 office visit, Dr. Michelson provided a note confirming that Claimant was unable to work at least until her next scheduled appointment on September 3, 2020.⁵ (JME 1-100 to 1-102).
25. On July 29, 2020, Dr. Rudolf performed an independent medical examination of Claimant at Defendant's request. Dr. Rudolf thought that her FHL tendinitis and tarsal tunnel syndrome were work-related and that she could perform sedentary work. (JME 5-9 to 5-10).
26. By letter dated September 9, 2020, Defendant accepted Claimant's tarsal tunnel and FHL tendinitis conditions as work-related based on Dr. Rudolf's opinion. It also accepted payment for her medical treatment related to tarsal tunnel and FHL tendinitis. However,

⁵ That visit was rescheduled to September 24, 2020.

Defendant expressly continued to deny payment of indemnity benefits on September 9, 2020 for several reasons, including Dr. Rudolf's opinion that Claimant had a sedentary work capacity and Claimant's declining the July 20, 2020 an offer of employment. *Defendant's Counsel's September 9, 2020 Letter*, at 1-2. Further, Defendant did not accept any other foot conditions, including Claimant's hallux rigidus.⁶ *Id.*

27. Claimant's last treatment visit with Dr. Michelson took place on September 24, 2020. On October 21, 2020, Dr. Michelson wrote a note that her FHL tendinitis and tarsal tunnel syndrome were related to her employment and that her medical care and ongoing inability to work were related to those conditions. (JME 1-104 to 1-105).
28. On January 29, 2021, Claimant saw her primary care physician, Christopher Hebert, MD, for left foot pain and numbness. Dr. Hebert made a referral to Marshfield Orthopedics for a second opinion. He also wrote an out-of-work letter stating that Claimant was unable to work from the date of her surgery on March 13, 2020 and would continue to be unable to work for the "foreseeable future." (JME 2-18 to 2-23).
29. On February 8, 2021, Claimant's counsel requested a hearing on her claim for temporary disability and medical benefits. On February 10, 2021, Defendant agreed to pay retroactive temporary total disability benefits on a without prejudice basis for the 18.5-week period from March 13, 2020 to July 20, 2020.⁷ On or after February 10, 2021, Defendant paid these retroactive benefits in a lump sum.
30. On February 17, 2021, Claimant saw orthopedic foot surgeon Bryan Monier, MD, at Mansfield Orthopedics. Dr. Monier ordered an MRI and an EMG. (JME 4-1 to 4-2).
31. On April 6, 2021, the Department's specialist issued an interim order that Defendant pay medical benefits related to Claimant's FHL tendinitis and tarsal tunnel injury.⁸
32. Claimant saw Dr. Monier again on April 28, 2021. He noted that her MRI and EMG studies were unremarkable, but that she might have pain from a different nerve that was not tested in those studies. If so, Dr. Monier did not recommend additional surgery because "messing around" with Claimant's nerves again could make her symptoms worse. (JME 4-5). Dr. Monier suggested that she could talk with another foot surgeon or nerve specialist, if she was interested. Dr. Monier also counseled Claimant that "nerves could take 1-2 years to kind of fully regenerate and fully heal themselves." (JME 4-5).
33. On May 24, 2021, Defendant formally denied responsibility for the closed period of temporary total disability benefits that it had paid without prejudice. *See Denial (Form 2)*.

⁶ The compensability of Claimant's hallux rigidus was not an issue to be determined in this hearing.

⁷ This interval begins with the date of surgery and ends on the date Claimant declined an offer to return to work.

⁸ Defendant had already accepted medical treatment for FHL tendinitis and tarsal tunnel syndrome on September 9, 2020. The record does not reflect why an interim order was necessary seven months later.

34. Claimant saw Dr. Hebert for foot pain and twitching twice in June 2021 and once in August 2021. He recommended physical therapy. (JME 2-28 to 2-29, 2-33, 2-36).
35. On July 8, 2021, Dr. Hebert completed a work capacity form requested by Claimant's vocational rehabilitation counselor. He indicated that Claimant would probably have a sedentary work capacity when she completed her recovery, but that she was unable to work at present and that it could be up to two years from her surgery before she would be ready to work. (JME 2-35).
36. Claimant engaged in physical therapy from July through October 2021. (JME 1-113, 1-117, 1-137). The following month, she underwent surgery for an unrelated brain aneurysm.
37. In July 2022, following her recovery from brain surgery, Claimant began another course of physical therapy for her foot, this time with physical therapist Lee Stanton. (JME 1-141). As this course of physical therapy progressed, Mr. Stanton noted that Claimant's tolerance to palpation was improving, which was "encouraging." (JME 1-152). He also noted that she was making improvements in tolerance to touch and range of motion. (JME 1-159). On October 5, 2022, Mr. Stanton wrote:

To date, [Claimant's] self treatments have been avoidance behaviors without significant improvement in [symptoms]. I suggested . . . we change approach and confront her pain a little more directly focusing on purposefully touching her ankle . . . and other desensitization techniques.

Id.

Mr. Stanton's record for this October 5, 2022 visit sets forth short-term and long-term goals for physical therapy, indicating that he expected some improvement in her condition. However, for reasons that are not reflected in the record, Claimant did not continue her course of physical therapy beyond October 5, 2022. (JME 1-159).

38. On January 25, 2023, Claimant underwent an independent medical examination at Defendant's request performed by occupational medicine physician George White, MD. Dr. White placed her at end medical result and assessed her with a 16 percent whole person impairment related to her work injury. (JME 7-1 to 7-8).

Permanent Partial Disability Benefits and Potential Offset

39. The parties have accepted Dr. White's permanent impairment rating of 16 percent. Based on this rating, they agree that Claimant is entitled to 64.8 weeks of permanent partial disability benefits.
40. Sometime after January 25, 2023, Defendant began paying Claimant's permanent partial disability benefits. The record does not reveal whether it paid those benefits weekly or in a lump sum. In any event, Defendant withheld from Claimant's permanent partial

disability benefits as an offset the amount that it paid her without prejudice for 18.5 weeks of temporary total disability benefits.⁹

Vocational Rehabilitation

41. Claimant finished high school without earning a diploma. Prior to her employment with Defendant, she worked at a shoe store and as a hotel housekeeper.
42. A year after her work injury, in November 2020, Claimant began meeting with vocational rehabilitation counselor Kenneth Yeates. In his June 1, 2021 progress report, Mr. Yeates noted that Claimant was impacted not only by her left foot condition, but also by right upper extremity restrictions from a motor vehicle accident and a prior right knee replacement unrelated to her employment.
43. In July 2021, Mr. Yeates sought information from Claimant's primary care provider, Dr. Hebert, on her work capacity. Dr. Hebert wrote that he had not yet released Claimant to work, but he projected that she might have a sedentary work capacity in March 2022. *See* Finding of Fact No. 35 *supra*. Thereafter, in October 2021, the parties reached a contingent settlement of Claimant's workers' compensation claim, and vocational rehabilitation services were placed on hold.
44. After pending for many months, the settlement ultimately did not come to fruition. Accordingly, Claimant sought to continue vocational rehabilitation services in October 2022 with counselor Brit McKenna. However, services remained on hold because Claimant was facing a second brain surgery in February 2023. Claimant met with Ms. McKenna in April 2023, but there are no subsequent vocational rehabilitation reports in the file.
45. Although vocational rehabilitation services were often on hold during the pendency of this claim, Claimant credibly testified that she did everything that her vocational rehabilitation counselors asked her to do and that they never advised her to apply for any jobs. Further, none of the vocational rehabilitation counselors' reports document any present work capacity.

Expert Medical Opinions

46. Claimant presented expert testimony from James Michelson, MD and Mark Bucksbaum, MD. Defendant presented expert testimony from Leonard Rudolf, MD and George White, MD.

A. James Michelson, MD

⁹ Neither party submitted evidence of the amount of temporary total disability benefits Defendant paid without prejudice. Claimant stated that Defendant paid \$8,298.40. *Claimant's Memorandum of Law*, at 26. In its February 10, 2021 letter agreeing to pay without prejudice, Defendant stated that it would pay \$8,084.50. However, Defendant apparently withheld the sum of \$8,343.50 from Claimant's permanent partial disability benefits for the offset. *See Specialist's Second Referral Memorandum dated July 25, 2023*.

47. James Michelson, MD, is a board-certified orthopedic surgeon. He graduated from Yale Medical School in 1982 and completed his residency in orthopedic surgery in 1987. He later completed a foot and ankle surgery fellowship in 1990. Dr. Michelson is an experienced foot and ankle surgeon and a professor of orthopedics at the University of Vermont Medical School. He has published numerous medical articles on foot and ankle conditions, including FHL tendinitis. *Claimant's Exhibit 22.*

Disability Status Prior to Surgery

48. Dr. Michelson was Claimant's treating orthopedic surgeon from February 13, 2020 through September 24, 2020. When Claimant arrived for her first office visit on February 13, she had NP Smith's five-hour per day work restriction already in place. In Dr. Michelson's opinion, that work restriction was reasonable up to the date of her surgery, based on Claimant's reported pain levels and his own examination of her on February 13. In particular, he noted that Claimant's pain levels gradually increased while she was working from November 2019 to March 2020, which indicated to him that work was exacerbating her symptoms. I find Dr. Michelson's opinion to be clear, thorough, and well-grounded in his role as Claimant's treating physician and in his training and experience as an orthopedic foot surgeon.

Disability Status After Surgery

49. Dr. Michelson offered his opinion that Claimant was not able to return to work at any time from the date of her March 13, 2020 surgery through his last visit with her on September 24, 2020, nor did he release her to return to work on or after that date. Dr. Michelson based his opinion on his treating relationship with Claimant, including periodic visits to follow her condition post-surgery, during which she consistently reported high pain levels and foot dysfunction beyond what was typical for post-surgical recovery. Dr. Michelson explained the mechanism of Claimant's ongoing foot pain as stemming from the tarsal tunnel release procedure, which caused her released nerve to swell and led to a poor recovery. I find Dr. Michelson's opinion on Claimant's lack of work capacity to be clear, thorough, and well-grounded in his role as her treating physician and in his training and experience as an orthopedic foot surgeon.

B. Mark Bucksbaum, MD

50. Mark Bucksbaum, MD, is board-certified in physical medicine and rehabilitation and in pain management. Dr. Bucksbaum graduated from St. George's University School of Medicine in Granada, West Indies in 1984 and did a residency in physical medicine and rehabilitation at the Albert Einstein Medical Center in the Bronx, New York. Dr. Bucksbaum is the medical director of the Center for Integrative Medicine in Rutland. *Claimant's Exhibit 23.*
51. On June 9, 2021, Dr. Bucksbaum performed an independent medical examination of Claimant at her request. (JME 6-1 to 6-25). His process included an interview, a medical records review, and a physical examination. He performed a second independent medical examination at Claimant's request on March 20, 2023. (JME 6-26 to 6-52).

Disability Status Prior to Surgery

52. Dr. Bucksbaum noted that Claimant was restricted to five hours of work per day prior to her March 13, 2020 surgery due to her work-related FHL tendinitis and tarsal tunnel syndrome. Although he did not see her prior to her surgery, Dr. Bucksbaum noted that she was working part time with a knee scooter. According to his credible testimony, ambulating with a knee scooter is difficult, tiring and slow. Knee scooters are also tricky to balance, as the user is not strapped into the device. Therefore, in Dr. Bucksbaum's opinion, Claimant was not able to work more than five hours per day prior to her surgery. I find this opinion to be clear and well-explained, based on Dr. Bucksbaum's training and experience as a physical medicine and rehabilitation physician.

Disability Status After Surgery

53. In Dr. Bucksbaum's opinion, Claimant had no work capacity beginning on March 13, 2020, the date of her foot surgery, and continued to have no work capacity through the date of his second independent medical examination on March 20, 2023.
54. Dr. Bucksbaum based his work capacity opinion on Claimant's consistent and credible reports of a high level of foot pain. He explained that a person with a moderate pain level can generally tolerate a work environment, but when the pain level is higher, the patient is distracted and cannot work safely. Dr. Bucksbaum did not have concerns about the accuracy of Claimant's pain reports because they were consistent over time and across providers, and because he did not observe any abnormal pain behaviors during either of his examinations.
55. Dr. Bucksbaum attributed Claimant's post-surgical high pain levels to ongoing nerve compression. He explained that the nerve in her tarsal tunnel was compressed for so long that it was unable to recover following the March 2020 surgical release. Dr. Bucksbaum analogized the nerve to a garden hose. If someone steps on a garden hose and then removes her foot, the hose springs back into shape; but if the hose is trapped under a bench all winter, it may not spring back to its original shape when the bench is removed. In Claimant's case, the tarsal tunnel release did not restore her nerve; rather, it irritated the nerve and made her condition worse.
56. Dr. Bucksbaum acknowledged that Claimant worked part time prior to her surgery even though her pain level was high then, too. He explained that people can work with a high pain level, but that it is not sustainable long term. In his experience, significant pain wears patients down over time, eventually causing their skills for pain compensation to falter, leaving them feeling "wiped out." In his opinion, Claimant was such a patient, with high pain levels that impacted her whole life, not just her foot. I find this explanation to be clear and credible.
57. Based on Dr. Bucksbaum's experience as a board-certified pain management physician and physical medicine and rehabilitation physician, I find his testimony about Claimant's inability to return to work from March 13, 2020 through the date of his second

independent medical examination on March 20, 2023 to be well-explained, with an objective basis, and credible.

End Medical Result

58. In Dr. Bucksbaum's opinion, Claimant reached an end medical result on January 25, 2023, when Dr. White placed her at end medical result. Dr. Bucksbaum based this opinion on a record made by Claimant's physical therapist on October 5, 2022, noting that her physical therapy to date had yielded only modest gains, but that he was actively planning to try a different approach and still expected some improvement at that time. However, by January 25, 2023, when Claimant still had not realized any improvement, Dr. Bucksbaum concluded that improvement was no longer reasonably expected. I find Dr. Bucksbaum's end medical result opinion to be clear and well supported by Claimant's medical records.

Reasonable Medical Treatment

59. Finally, Dr. Bucksbaum offered his opinion that the medical services provided on November 1, 2019 and November 8, 2019, for which there are disputed invoices, were reasonable treatment for Claimant's work-related injury. He based this opinion on his knowledge of Claimant's condition and treatment and on his review of the two medical invoices at issue. I find this opinion well supported and persuasive.

C. Leonard Rudolf, MD

60. Leonard Rudolf, MD, is a board-certified physician and retired orthopedic surgeon. He obtained his medical degree at the University of Besancon in France and completed an orthopedic residency at the Jewish Hospital and Medical Center in Brooklyn, New York. Currently, he performs independent medical examinations in Vermont and New Hampshire.
61. At Defendant's request, Dr. Rudolf performed a medical records review on May 19, 2020 and an independent medical examination on July 29, 2020. (JME 5-1 to 5-11). Dr. Rudolf agreed that Claimant was correctly diagnosed with FHL tendinitis, tarsal tunnel syndrome and hallux rigidus. He thought that her FHL tendinitis and tarsal tunnel syndrome were related to work, but that her hallux rigidus was not. He explained that hallux rigidus is the gradual development of degenerative arthritis and bone spurs in the big toe; he would not relate this condition to Claimant's employment.

Disability Status After Surgery

62. In Dr. Rudolf's opinion, Claimant had a sedentary work capacity when he examined her on July 29, 2020. He did not indicate whether that capacity was full time or part time, nor did he indicate whether her ability to perform sedentary work would be subject to any limitations or restrictions. Further, Dr. Rudolf did not offer an opinion that Claimant could return to work *for Defendant*, but opined only that she generally had a sedentary work capacity.

63. Dr. Rudolf based his opinion on the fact that Claimant had been working part time prior to her surgery, making use of a knee scooter and crutches. He reasoned that if she could work prior to surgery, then she could work after surgery. Although Claimant did, in fact, work part time prior to her surgery using crutches and a knee scooter, Dr. Rudolf's opinion fails to consider how sustainable such accommodations are over time. In particular, he did not address whether using a knee scooter and crutches, in the presence of significant pain, might wear down her ability to compensate for her injuries, as Dr. Bucksbaum explained.
64. Further, in concluding that Claimant had a sedentary work capacity, Dr. Rudolf did not ask her to perform any motions or otherwise test whether she could perform work from a sedentary position. He testified that he did not need to do that because she already told him that she spends a lot of time sitting at home. However, sitting at home while unengaged in any specific activity is not the same as sitting and attempting to perform work duties, which might require lifting, reaching or relocating to another sitting position throughout the day. Further, Dr. Rudolf did not take into account that Claimant's treating orthopedic surgeon had not released her to return to work.
65. To be fair, Dr. Rudolf is not a functional capacity evaluator or an occupational medicine physician, nor was he hired to perform any such evaluation. Nevertheless, without a more complete evaluation, his opinion that Claimant could perform sedentary work in July 2020 is not well supported.
66. For all these reasons, I find Dr. Rudolf's sedentary work capacity opinion unpersuasive.

End Medical Result

67. In Dr. Rudolf's opinion, Claimant had not reached an end medical result when he saw her in July 2020. He thought her prognosis was guarded and that she was unlikely to return to her pre-injury condition or work status. (JME 5-9). Although he testified that he would expect someone who underwent the same surgical procedures as Claimant to reach end medical result one year after surgery, Dr. Rudolf did not see Claimant again to make any such determination. Accordingly, he did not offer an opinion on when she reached end medical result.

D. George White, MD

68. George White, MD, is an occupational medicine physician. He graduated from the University of Vermont College of Medicine in 1982 and completed a residency in occupational medicine at the University of Cincinnati College of Medicine in 1991. Dr. White has substantial experience in performing independent medical examinations and permanent impairment ratings. *Defendant's Exhibit 6.*
69. At Defendant's request, Dr. White performed an independent medical examination of Claimant on January 25, 2023. Dr. White interviewed Claimant, performed a physical examination, and reviewed some of her medical records. (JME 7-1 to 7-8).

End Medical Result and Permanent Impairment

70. Applying the findings of his examination and his knowledge and experience as an occupational medicine physician, Dr. White credibly placed Claimant at end medical result for her work-related foot injury when he saw her on January 25, 2023. However, he was not asked to determine *when* she had reached end medical result and accordingly did not offer an opinion on that issue.
71. Dr. White assessed a 16 percent whole person impairment for Claimant's left foot condition under the *AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition)*, and both parties accept this assessment. Accordingly, I find that Claimant has a 16 percent whole person impairment referable to her left foot injury.

CONCLUSIONS OF LAW:

Burden of Proof

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). The claimant must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). Once a claim is accepted and benefits are paid, however, the burden shifts to the employer to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974); *Houle v. Verizon Communications Inc.*, Opinion No. 02-20WC (January 16, 2020).
2. In this case, Defendant denied Claimant's entire claim. *See* Denial (Form 2) filed November 27, 2019. Thereafter, by letter dated September 9, 2020, it accepted Claimant's tarsal tunnel and FHL tendinitis conditions as work-related based on the report of its expert, Dr. Rudolf. It also accepted reasonable medical treatment related to tarsal tunnel syndrome and FHL tendinitis. However, Defendant expressly maintained its denial of indemnity benefits on September 9, 2020 for several reasons, including Dr. Rudolf's work capacity opinion and Claimant's declining an offer of employment with proposed accommodations on July 20, 2020. *Defendant's Counsel's September 9, 2020 Letter to the Department*, at 1-2.

3. Accordingly, as Defendant accepted the claim for medical benefits on September 9, 2020, it has the burden of proof to establish a sufficient basis for terminating those benefits. As Defendant did not accept the claim for temporary indemnity benefits, however, Claimant retains the burden of proof to establish her entitlement to those benefits.¹⁰
4. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

Temporary Partial Disability Benefits from November 1, 2019 to March 12, 2020

5. Temporary partial disability benefits are payable to an injured worker who has not yet fully regained his or her earning power and has not yet reached an end medical result. 21 V.S.A. § 646; *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962).
6. Claimant here seeks temporary partial disability benefits from November 1, 2019 through March 12, 2020, the day before her foot surgery. She alleges that her work injury precluded her from working more than part time during this interval. She points to NP Smith's December 11, 2019 note restricting her to working no more than five hours per day as the basis for her claim, at least from that date through March 12, 2020.
7. It is undisputed that Claimant was restricted to working five hours per day by her treating provider on December 11, 2019. That restriction remained in place until her March 13, 2020 surgery, as no other medical provider modified or rescinded that restriction.
8. Claimant's treating orthopedic surgeon, Dr. Michelson, credibly testified that he thought the five-hour per day work restriction prior to surgery was reasonable based upon his examination of Claimant and the pain she was reporting at that time. Finding of Fact No. 48 *supra*. Dr. Bucksbaum agreed. In his credible opinion, using crutches and a knee scooter, as Claimant was doing at work prior to her surgery, is difficult and exhausting. See Finding of Fact No. 52 *supra*. Defendant's expert, Dr. Rudolf, did not offer any contrary opinion.
9. Accordingly, I conclude that Claimant's work injury precluded her from working more than five hours per day from December 11, 2019 through March 12, 2020. Having thus established the necessary relationship between her work injury and her reduced earnings, Claimant is entitled to temporary partial disability benefits from December 11, 2019 through March 12, 2020.

¹⁰ Claimant contends that Defendant has the burden of proof on temporary disability benefits because it agreed to pay some retroactive temporary total disability benefits in a lump sum without prejudice and then failed to meet the deadline for either making that payment or for filing a denial within 90 days. However, neither party offered evidence of the date of the retroactive temporary total disability payment, and without that information, I am unable to determine whether Defendant either timely paid the retroactive indemnity benefits without prejudice or timely filed its eventual denial. In any event, I have concluded that Claimant is entitled to the temporary total disability benefits that she seeks, even with her retaining the burden of proof. See Conclusion of Law No. 20 *infra*. It follows *a fortiori* that if Claimant were correct that Defendant bears the burden of proof in this regard, she would still prevail.

10. Claimant's claim for temporary partial disability benefits from November 1, 2019 through December 10, 2019, stands on different footing, however. No medical provider or medical expert offered an opinion that she was unable to work full time prior to December 11, 2019. Rather, Claimant reduced her own hours between November 1 and December 10, 2019 without any medical restriction from a treating provider. An injured worker cannot disable himself or herself from employment. *See Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 16-17WC (December 8, 2017), citing *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001). Lacking medical evidence to justify her reduced hours prior to December 11, 2019, Claimant is not entitled to temporary partial disability benefits from November 1, 2019 through December 10, 2019.¹¹

Temporary Total Disability Benefits Beginning March 13, 2020

11. When an injured worker is unable to work as a result of a work-related injury, the worker is entitled to temporary total disability benefits until he or she reaches an end medical result or successfully returns to work. 21 V.S.A. §§ 642, 642a, 643a; *Felion v. Church Street Hospitality, Inc.*, Opinion No. 20-23WC (December 18, 2023), citing *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003).
12. Claimant here seeks temporary total disability benefits from the date of her foot surgery, March 13, 2020, through the date on which she reached an end medical result, which she contends is January 25, 2023.
13. The parties disagree about when and whether Claimant was able to return to work following her March 13, 2020 surgery. Claimant offered testimony from Dr. Michelson and Dr. Bucksbaum on this issue, and Defendant offered testimony from Dr. Rudolf. In such cases, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
14. Dr. Michelson was the only treating physician who offered testimony on this issue. He not only performed Claimant's surgery on March 13, 2020, but he also followed up with her regularly through September 24, 2020. As a well-qualified orthopedic surgeon specializing in foot conditions, and as Claimant's treating physician and surgeon, Dr. Michelson was in the best position to evaluate her post-surgical recovery and capabilities while he was treating her.

¹¹ Defendant offered Claimant an alternate position for seven hours per day on or about November 18, 2019, before she was restricted to working five hours per day. *See* Finding of Fact No. 11 *supra*. As I have already concluded that Claimant is not entitled to temporary partial disability benefits prior to December 11, 2019 due to a lack of evidence concerning her work capacity, I need not consider whether she was obligated to perform the alternate position from the date of offering through December 10, 2019.

15. Dr. Michelson never released Claimant to return to work following her March 13, 2020 foot surgery. In his opinion, she was totally disabled from work from the date of her surgery through and beyond the date of his last treatment visit with her on September 24, 2020. Based on Dr. Michelson's extensive training and experience as an orthopedic foot surgeon, and his treating relationship with Claimant, I find his opinion to be persuasive as to her condition and disability for work through September 24, 2020.
16. Claimant stopped treating with Dr. Michelson after September 24, 2020, however. Accordingly, to determine whether she could return to work after that date, I weigh the opinions of independent medical examiners Dr. Bucksbaum and Dr. Rudolf.
17. Neither Dr. Bucksbaum nor Dr. Rudolf had a treating relationship with Claimant. Dr. Bucksbaum performed independent medical examinations of Claimant in June 2021 and March 2023. Dr. Rudolf performed just one independent medical examination, in July 2020, four months after her surgery. As Dr. Bucksbaum examined Claimant later in her recovery period, I find that he had access to more relevant medical information than Dr. Rudolf had. This factor favors Dr. Bucksbaum's opinion.
18. Dr. Bucksbaum is a board-certified physical medicine and rehabilitation physician; he is also board-certified in pain management. Dr. Rudolf is a board-certified physician and retired orthopedic surgeon. The education, training and experience of both physicians render them qualified to offer opinions on Claimant's recovery and ability to return to work. However, Dr. Bucksbaum's board-certification in pain management provides him with an additional relevant qualification that specifically applies to Claimant's foot condition, as her pain is a significant factor relevant to her ability to work. Accordingly, the fifth *Geiger* factor favors Dr. Bucksbaum's opinion.
19. Finally, the third *Geiger* factor also favors Dr. Bucksbaum's opinion that Claimant could not work from March 13, 2020 through March 20, 2023. His explanations of nerve compression and the long-term impact of pain on a person's ability to work were particularly clear and thorough. In contrast, Dr. Rudolf's sedentary work capacity opinion was neither clear nor thorough. He did not explain whether her capacity was full time or part time, nor did he address whether any restrictions were applicable. Further, the basis of his opinion was that if she could work before surgery, then she could work after surgery. This opinion does not take into consideration the long-term impact of chronic pain, nor does it consider that sometimes a patient's condition is worse after surgery, as was the case here.
20. For these reasons, I conclude that Claimant was not able to return to work from the date of her surgery, March 13, 2020, through the date of Dr. Bucksbaum's second independent medical examination on March 20, 2023. Therefore, she is entitled to temporary total disability benefits from March 13, 2020 until such time as she reached an end medical result.

End Medical Result

21. End medical result means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. *Workers' Compensation Rule 2.2000*.
22. Claimant contends that she reached an end medical result on January 25, 2023, based on Dr. Bucksbaum's opinion. Dr. Bucksbaum based his opinion on Claimant's October 5, 2022 physical therapy record, which documented that further improvement was still expected at that time. When that improvement failed to materialize within the next three months, Dr. Bucksbaum reasonably concluded that further improvement was no longer expected, and he placed Claimant at end medical result as of January 25, 2023. I find this opinion clear and persuasive.
23. Defendant has not offered an expert opinion on when Claimant reached an end medical result. Instead, Defendant asks me to review Claimant's medical records and draw my own conclusion that she reached end medical result no later than April 28, 2021. Defendant points to the record of Claimant's visit with Dr. Monier on that date, indicating that he had no other treatment options to offer at that time, and asks me to conclude that all subsequent treatment was expected to be palliative.
24. I reject Defendant's contention that Claimant reached end medical result on April 28, 2021 for several reasons. First and foremost, its contention is not supported by an expert opinion. Second, although Dr. Monier did not recommend surgery for Claimant's condition on that date, he told her that it can take one to two years for nerves to regenerate. Dr. Monier's expectation of further nerve regeneration is inconsistent with the definition of end medical result. Further, Dr. Monier told Claimant that she might want to consult with another foot surgeon or nerve specialist; this, too, suggests that further treatment might be expected to improve her condition. Accordingly, Defendant's contention that Claimant reached end medical result on April 28, 2021 is not persuasive.
25. Based on the foregoing, I find Dr. Bucksbaum's end medical result opinion persuasive. Accordingly, I conclude that Claimant reached an end medical result on January 25, 2023 and that she is entitled to temporary total disability benefits from March 13, 2020 to January 25, 2023.
26. Defendant already paid a portion of those benefits on a without prejudice basis, covering the period from March 13, 2020 to July 20, 2020. It therefore owes additional temporary total disability benefits from July 21, 2020 through January 25, 2023.

Medical Benefits for November 1, 2019 and November 8, 2019

Unpaid Bills

27. Claimant next seeks a determination that Defendant is liable to pay for her medical treatment on November 1, 2019 and November 8, 2019 pursuant to 21 V.S.A. § 640(a). Under the statute, the employer or carrier is responsible for "reasonable" medical

treatment. Vermont law defines reasonable treatment as treatment that is medically necessary and causally related to the work injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010); *Brodeur v. Energizer Battery Mfg., Inc.*, Opinion No. 06-14WC (April 2, 2014).

28. Joint Exhibit II shows the following charges for November 1 and November 8, 2019:

Date	Description	Amount billed
11/1/19 hospital	Basic metabolic panel	79.60
11/1/19 hospital	Ankle x-ray	528.94
11/1/19 hospital	Foot x-ray	547.17
HOSPITAL SUBTOTAL		\$1,155.71
11/1/19 physician	Ankle x-ray radiologist	36.00
11/1/19 physician	Foot x-ray radiologist	35.00
11/1/19 physician	NP office visit	276.00
PHYSICIAN SUBTOTAL FOR 11/1/19		\$347.00
11/8/19 physician	NP apply short-leg cast	264.00
PHYSICIAN SUBTOTAL FOR 11/8/19		\$264.00

29. Dr. Bucksbaum reviewed these charges. He testified that the services described on the invoices pertain to Claimant’s accepted FHL tendinitis and tarsal tunnel conditions. Further, he offered his opinion that the treatment on those dates was medically necessary treatment for those conditions. No expert physician testified to the contrary. I thus find Dr. Bucksbaum’s testimony on this issue to be persuasive.
30. Accordingly, Defendant is responsible to pay for the services listed on the November 1, 2019 and November 8, 2019 invoices pursuant to 21 V.S.A. §§ 640(a) and 640(d).
31. Joint Exhibit II includes a printout of all medical charges processed by Defendant. The printout indicates that Defendant processed the November 1, 2019 hospital charges totaling \$1,155.71 and paid them at the rate of 83 percent of the amount charged, or \$959.24. This payment was made on April 16, 2021. However, the printout does not reflect payment of the remainder of the November 1, 2019 invoice (\$347.00) or payment of the November 8, 2019 (\$264.00) invoice. Accordingly, I conclude that Defendant is liable for those charges at the rates set forth in Workers’ Compensation Rule 40.

Interest on Medical Bills

32. The workers’ compensation statute provides for interest on unpaid medical bills. 21 V.S.A. § 640a(e). The statute also requires that medical bills be submitted to the employer or carrier in a specific format, with every relevant field and data element completed and with medical coding that complies with the NCCI coding requirements. 21 V.S.A. § 640a(g). *See also* Workers’ Compensation Rule 40.021(G).

33. In this case, although Claimant’s counsel sent the medical invoices to Defendant’s counsel on September 18, 2020 and October 28, 2020, she has not presented evidence that those submissions complied with 21 V.S.A. § 640a(g) and Workers’ Compensation Rule 40.021(G). Accordingly, I cannot determine when Defendant’s obligation to pay these invoices accrued. For this reason, I decline to award interest on the unpaid medical bills. *See King v. Century Arms, Inc.*, Opinion No. 13-23WC (August 7, 2023).

Offset Pursuant to 21 V.S.A. § 651

34. Defendant contends that it did not owe the temporary total disability benefits that it paid to Claimant without prejudice on or after February 10, 2021, and it seeks to offset that payment against its obligation to pay permanent partial disability benefits.
35. 21 V.S.A. § 651 provides as follows:

Payments made by an employer or his or her insurer to an injured worker during the period of his or her disability . . . which, by the provisions of this chapter, were not due and payable when made, may, subject to the approval of the Commissioner, be deducted from the amount to be paid as compensation.

36. The success of Defendant’s offset claim depends in part on whether it actually owed Claimant the temporary total disability benefits that it paid without prejudice. I have found that it did. Conclusion of Law No. 20 *supra*. Accordingly, Defendant is not entitled to the offset that it seeks. *Cf. Knoff v. Joe Knoff Illuminating*, Opinion No. 39-05WC (July 12, 2005) (defendant paid the claimant temporary disability benefits on a without prejudice basis that were later determined not to be owed such that defendant is entitled to an offset under § 651).
37. Anticipating that it would be entitled to an offset, Defendant has withheld approximately \$8,343.50¹² of Claimant’s permanent partial disability benefits. As Defendant is not entitled to an offset, I conclude that it owes Claimant the remainder of her permanent partial disability benefits pursuant to 21 V.S.A. § 648.

Penalties and Interest

Penalty Pursuant to 21 V.S.A. § 650(e)

38. Claimant seeks imposition of a penalty pursuant to 21 V.S.A. § 650(e) on the payment of her temporary total disability benefits. Section 650(e) provides that, if weekly compensation benefits are not paid within 21 days pursuant to an order of the Commissioner, or in cases when the overdue benefit is not in dispute, a ten percent penalty shall be added and paid to the employee.

¹² Neither party offered evidence of the amount withheld. This estimate is taken from the Department specialist’s second referral memorandum dated July 25, 2023.

39. In this case, the Commissioner has not previously ordered the payment of any temporary total disability benefits, nor was the payment of such benefits undisputed. Accordingly, Claimant has not established her entitlement to a penalty under this section.

Interest pursuant to 21 V.S.A. § 644

40. Claimant also seeks an award of pre-judgment interest on her indemnity benefits. She contends that an interest award is appropriate because Defendant clearly breached its duty to properly adjust the claim.
41. Section 664 of the workers' compensation statute governs pre-judgment interest. For injuries sustained prior to the 1997 statutory amendment, the Department took into consideration whether there was a clear breach of duty by the employer or carrier in deciding whether to award interest. *See, e.g., Leigh v. Ethan Allen, Inc.*, Opinion No. 49-99WC (December 13, 1999). However, § 664 was amended in 1997 and now provides as follows:

Within 60 days after a hearing is held, the Commissioner shall make an award supported by findings of fact and the applicable law and shall send a copy of the award to the parties. If the employee prevails at the hearing, the Commissioner's findings shall include the date on which the employer's obligation to pay compensation under this chapter began. The award shall include interest at the statutory rate computed from that date on the total amount of unpaid compensation.

42. Accordingly, pursuant to 21 V.S.A. § 664, Claimant is entitled to pre-judgment interest at the statutory rate computed from the date on which Defendant's obligation to pay compensation began. *See, e.g., Paine v. Twin City Subaru*, Opinion No. 17-99WC (April 2, 1999); *Truax v. Pelletier Lumber Corp.*, Opinion No. 21-99WC (April 29, 1999); *O'Connor v. LePage Bakeries*, Opinion No. 36-99WC (August 12, 1999).
43. The statutory interest rate is 12 percent per annum. 9 V.S.A. § 41a.
44. As required by 21 V.S.A. § 664, I find that Defendant's obligation to pay the following benefits began on the following dates:
- (a) Temporary partial disability benefits on December 11, 2019, when Claimant began working reduced hours pursuant to the work restriction issued by NP Smith;
 - (b) Temporary total disability benefits on the date of surgery, March 13, 2020;¹³

¹³ Defendant paid temporary total disability benefits for March 13, 2020 through July 20, 2020, but it did not make this payment until sometime on or after February 10, 2021. Accordingly, interest accrues on this payment from the date benefits were due until the date paid on or after February 10, 2021.

(c) Permanent partial disability benefits on January 25, 2023, when Claimant reached end medical result.¹⁴

ORDER:

Based on the foregoing findings of fact and conclusions of law, I hereby order Defendant to pay:

- 1) Pursuant to 21 V.S.A. § 646, temporary partial disability benefits from December 11, 2019 through March 12, 2020, with interest thereon pursuant to 21 V.S.A. § 664;
- 2) Pursuant to 21 V.S.A. § 642, temporary total disability benefits from March 13, 2020 through the date of end medical result on January 25, 2023, less the amount already paid on a without prejudice basis, with interest thereon pursuant to 21 V.S.A. § 664;
- 3) Pursuant to 21 V.S.A. §§ 640(a) and 640a, medical benefits for the balances due on the medical bills for treatment on November 1, 2019 and November 8, 2019;
- 4) Pursuant to 21 V.S.A. § 648, permanent partial disability benefits based on Dr. White's 16 percent whole person impairment assessment, less the amount already paid, with interest on the portion not paid when due, as provided in 21 V.S.A. § 664;
- 5) Pursuant to 21 V.S.A. § 678, costs and attorney fees in an amount to be determined after the filing of a fee petition within 30 days of this Opinion and Order.
- 6) Defendant's request for an offset pursuant to 21 V.S.A. § 651 is denied.

DATED at Montpelier, Vermont this 17th day of April 2024.

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.

¹⁴ The record before me does not show the amounts already paid for permanent partial disability benefits, nor the dates of those payments. The amount Defendant withheld from Claimant's permanent partial disability benefits as an offset is subject to interest even if the other payments of permanent partial disability benefits were timely.