

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kyle Ashford

Opinion No. 08-24WC

v.

By: Stephen W. Brown
Administrative Law Judge

PC Construction Company

For: Michael A. Harrington
Commissioner

State File Nos. SS-55928 and SS-62108

OPINION AND ORDER

Hearing held via Microsoft Teams on November 20, 2023 and December 15, 2023
Record closed on January 16, 2024

APPEARANCES:

Heidi Groff, Esq., for Claimant
Jennifer Meagher, Esq., for Defendant and Hartford Insurance Company (“Hartford”)
Jason Ferreira, Esq., for Defendant and Travelers Insurance Company (“Travelers”)

ISSUES PRESENTED:

1. Is Claimant’s L2 compression fracture causally related to his accepted workplace injury of November 28, 2022?
2. If so, is he entitled to temporary total disability benefits, retroactive to May 25, 2023 and ongoing?
3. Is Travelers Insurance Company responsible for Claimant’s workers’ compensation benefits associated with his compression fracture?

EXHIBITS:

Joint Medical Exhibit (“JME”)

Claimant’s Exhibit A: *Curriculum Vitae* of William John Spina, MD

Hartford’s Exhibit A: *Curriculum Vitae* of Nancy Binter, M.D.

Hartford’s Exhibit B: Incident Report dated November 28, 2022

Hartford’s Exhibits C-I: Radiological Scans Showing Claimant’s Lumbar Spine

Hartford’s Exhibit J: Diagram of Schmorl’s Node (admitted for the limited purpose of allowing Hartford’s expert to explain what a Schmorl’s node is)

Travelers' Exhibit A:	<i>Curriculum Vitae</i> of Verne Backus, MD
Travelers' Exhibit B:	Independent Medical Evaluation ("IME") report of Verne Backus, MD
Travelers' Exhibit C:	IME Report of William Spina, MD
Travelers' Exhibit D:	Incident Report dated November 28, 2022
Travelers' Exhibit E:	First Report of Injury (Form 1) following Claimant's November 28, 2022 workplace incident
Travelers' Exhibit F:	First Report of Injury (Form 1) following Claimant's last day working for Defendant (April 24, 2023)
Travelers' Exhibit G:	Denial of Benefits (Form 2) dated May 8, 2023
Travelers' Exhibit H:	Denial of Benefits (Form 2) dated May 31, 2023
Travelers' Exhibit I:	Notice and Application for Hearing (Form 6) dated May 25, 2023

FINDINGS OF FACT:

1. Claimant is a 63-year-old man who resides in Northfield, Vermont. He is a carpenter by trade and has worked in the construction industry for approximately 45 years. He has worked for Defendant for multiple discrete time periods, the most recent of which began in November 2022.
2. Claimant has a history of chronic low back pain that has persisted for many years. He cannot pinpoint a specific date when it began. When he began his most recent period of tenure with Defendant in November 2022, he was experiencing some moderate back pain, but it did not significantly affect his work or activities of daily living.
3. On the morning of November 28, 2022, while working for Defendant at a worksite in Stowe, Vermont, Claimant went into a building to retrieve some fasteners and grinding bits. When he went back outside, he stepped over a wooden beam, and when he put his left foot down, he slipped on ice but caught himself and avoided falling. He felt a pop in his back and severe pain about midway down his spine. He went to his supervisor's trailer to report the incident in accordance with Defendant's policy requiring immediate reporting of all injuries, no matter how minor. After offering Claimant some water, his supervisor sent him to a Concentra urgent care center in Shelburne, Vermont. Claimant needed help getting into a car to travel there.
4. Claimant did not receive any x-rays at Concentra, and he credibly testified that these providers "did not do a lot." They suspected a back strain, provided ibuprofen and a muscle relaxant, referred him to physical therapy, and recommended that Claimant follow up with his primary care provider. (JME 329-42).
5. Claimant attended approximately four physical therapy sessions through the end of 2022. During this treatment, he expressed his desire to return to work quickly. On December 2, 2022, he told a treating physician assistant that he felt ready to resume full duties. (JME 366). The medical record from that date notes that Claimant reported feeling 100 percent improvement; Claimant did not recall saying that but acknowledged that he might have. He testified that he was feeling much better at the time, noting that he had been on pain medicine for several days and had been resting. He also credibly testified that he was

anxious to return to work and did not want to be out on workers' compensation; he had experienced back pain at work before that had gotten better and he expected a similar trajectory on this occasion. Claimant's treating physician assistant's record from Concentra on December 2, 2022 assessed Claimant to be at end medical result at that time without further analysis. (JME 365). This physician assistant did not testify at the formal hearing.

6. Claimant returned to work on December 5, 2022, performing lighter duties such as cleaning rooms for his first few weeks back on the job. However, he was still experiencing significant back pain while performing these tasks and was taking ibuprofen, Aleve, and muscle relaxants.
7. Between December 2022 and April 2023, Claimant's pain continued to worsen, as he continued to add more duties to his work, such as installing stair rails, cutting out 2x4 beams, and performing duct work. Eventually, he engaged in heavier tasks including intermittently chipping concrete and grinding steel. During this period, he found that Aleve relieved his pain more than the other drugs, but its efficacy waned to the point of being unhelpful by February or March 2023.
8. In April 2023, while he was working with safety rails and ductwork for a project that required walking up and down five flights of stairs all day, Claimant's pain became more intense. He mentioned his pain to a coworker, who suggested that Claimant should go to a doctor to see whether he had kidney stones.
9. Following his coworker's advice, Claimant saw his primary care physician on April 4, 2023 with a complaint of sharp low back pain that had developed over about three weeks and a suspicion that he may have a kidney stone. Claimant did not recall any specific new event at work that brought about this pain. (JME 375).
10. His primary care physician ordered an x-ray, which did not show any evidence of a kidney stone but did show a possible compression fracture at the L2 level. (JME 378). A subsequent MRI on April 20, 2023 was strongly suggestive of an acute-on-chronic transverse compression fracture at L2. (JME 384). The radiological report from that MRI noted:

Most of the vertebral body height loss at the inferior endplate appears chronic. However, there is ill-defined edema and non masslike enhancement through the posterior and inferior aspect of the vertebral body with what appears to be a transverse nondisplaced fracture. While it is difficult to exclude an underlying pathologic lesion such as a neoplasm, the presence of enhancement is nonspecific and can often be seen in the setting of fracture alone. There is no evidence of acute disc osteomyelitis.

(Id.).

11. Despite these findings and his ongoing pain, Claimant continued working for Defendant until April 24, 2023, when his pain became untenable after spending a day climbing up

and down a ladder repeatedly. Claimant's then-foreman Kristopher Prescott credibly testified that Claimant complained that his back was hurting that day and that he did not report any new work-related injury at that time.

12. The following day, Claimant again visited his primary care physician, who took him out of work, ordered bone density studies, and referred him to Dartmouth-Hitchcock Medical Center's ("DHMC's") interventional radiology division for treatment of his L2 compression fracture. (JME 385-87). Claimant's bone density studies were within the normal range for his age. (JME 389).
13. Claimant has acknowledged in filings with the Department¹ that Defendant continued to pay his wages for approximately one month after his physician took him out of work; Claimant therefore seeks temporary total disability benefits beginning May 25, 2023.
14. On May 8, 2023, Claimant presented for an initial consultation at DHMC, where his provider performed a physical examination, confirmed that his MRI showed an unhealed compression fracture at L2, and recommended a vertebroplasty procedure, which involves the injection of cement into the vertebral body. (JME 391-93).
15. On May 31, 2023, Claimant underwent a vertebroplasty at L2 performed at DHMC. (JME 399 *et seq.*). This procedure did not relieve Claimant's low back symptoms, and on June 21, 2023, he reported to his primary care physician that he believed the procedure made his back worse. (JME 404-07). He continues to report extreme pain.
16. Some time after this procedure, Claimant spent one partial day attempting to work as an Uber driver, where he earned approximately \$60.00, but he determined that he could not perform this work.
17. In August 2023, Claimant returned to work for a different employer for whom he had briefly worked prior to the onset of the Covid-19 pandemic. With this new employer, he worked as a drywalling supervisor, performing lighter duty work for approximately three weeks. Shortly after beginning that position, however, he had to leave work due to an unrelated oculomotor nerve palsy that made it unsafe for him to drive or work the supervisory job. (JME 423-26). He subsequently recovered from his nerve palsy, and credibly testified at the formal hearing that he expected to return to this job the week after the hearing.
18. Later in August 2023, Claimant underwent an additional MRI of his lumbar spine, which showed a chronic vertebral compression fracture at L2 as well as multilevel degenerative changes. (JME 429-30). The following month, Claimant followed up with Sarah Britton, APRN, at DHMC's Pain and Spine Center. She reviewed Claimant's August 2023 MRI and found no evidence of a spinal infection. She recommended against further surgical

¹ *E.g.*, Claimant's Proposed Findings of Fact and Conclusions of Law, p. 1. *See also* Amended Formal Hearing Docket Referral dated July 23, 2023, framing the issue concerning temporary disability benefits as: "... is TTD due retroactive to May 25, 2023 (employer paid 4 weeks of TTD) and ongoing." At the beginning of the formal hearing, the administrative law judge confirmed without objection that this issue was limited in scope to TTD benefits retroactive to May 25, 2023.

intervention but noted that Claimant may be a candidate for medial branch block injections and radiofrequency ablation. (JME 507).

Change in Defendant's Insurance Carrier

19. On or about January 1, 2023, Defendant changed its workers' compensation insurer from Hartford to Travelers. Thus, Travelers was on the risk when Claimant's primary care physician took him out of work in April 2023, but Hartford was on the risk at the time of Claimant's original symptom onset following the workplace incident in November 2022.
20. After Claimant's primary care physician took him out of work in April 2023, Hartford filed a denial of responsibility for ongoing coverage, asserting that there had been a new workplace injury for which Travelers should be responsible.
21. There is no persuasive evidence supporting an inference that Claimant suffered any new workplace injury after January 1, 2023. Although Claimant's condition generally worsened from November 2022 through April 2023 while he continued to work, Claimant credibly testified that there was no specific incident, and if he had sustained a new injury, he would have reported it as such. He understood that Defendant's policy required employees to report all injuries immediately, no matter how minor. Defendant's foreman Kristopher Prescott and safety specialist Steve Nutting both credibly corroborated Defendant's policies in this regard.

Medical Expert Testimony

William Spina, MD

22. William Spina, MD, is a board-certified orthopedic surgeon. On August 2, 2023, at Claimant's counsel's request, he performed an independent medical examination ("IME") of Claimant. He personally examined Claimant and reviewed his relevant medical records, including the diagnostic images related to this claim.
23. In Dr. Spina's opinion, Claimant suffered a compression fracture at L2 when he slipped and caught himself at work on November 28, 2022. He explained that Claimant's slip and catch would supply a sufficient force to cause a compression fracture and noted that Claimant had reported feeling a pop in his back at the time of the incident. Dr. Spina described this as a typical compression fracture presentation.
24. In forming his opinion, Dr. Spina also compared the findings from an unrelated 2021 CT scan with the findings of Claimant's April 2023 MRI. He testified that the 2021 abdominal CT scan showed the relevant region of Claimant's spine from before the incident (JME 271), with no evidence of a fracture.² In contrast, the April 2023 MRI showed a compression fracture at L2. The fact that Claimant sustained a compression

² Dr. Spina also testified that the positioning of a patient for an abdominal or lumbar CT scan is substantially identical, that he had personally reviewed the 2021 scan, and that he was very confident that Claimant did not have a lumbar compression fracture at the time of that scan.

fracture at some point between these scans, the fact that he reported a pop, and the absence of any other known explanation or event that would cause a compression fracture, in Dr. Spina's opinion, all suggest that the November 2022 incident was the causal origin of this fracture.

25. In Dr. Spina's opinion, when Claimant went back to work in December 2022, just a few days after this incident, it would have been possible for him to work through his injury, but doing so was ill-advised. Specifically, Dr. Spina believes that when Claimant initially went back to work, his fracture was non-displaced, and that he should have been placed in a brace to maintain the non-displacement.
26. Working through the injury likely worsened it and caused it to become displaced, in Dr. Spina's opinion. He noted his impression that Claimant returned to work because of a strong desire to work and a strong work ethic. He also credibly testified that Claimant admitted to him that he minimized his symptoms to his providers in the days shortly after his injury. This is consistent with Claimant's credible testimony that he was highly motivated to return to work.
27. In Dr. Spina's opinion, Claimant's symptom minimization likely contributed to the worsening of his condition by prompting his providers to release him to work before it was appropriate to do so. However, Dr. Spina also noted that in December 2022, shortly after the injury, Claimant's pain was likely less severe than it became later in the progression of his injury, as he was still on pain medication and the fracture had not yet been aggravated by performing work without wearing a back brace.
28. Dr. Spina cited several specific characteristics of Claimant's April 2023 radiographic images in support of these opinions. Specifically, he noted a widened disc base and edema at the L2-L3 level, which to him suggested ongoing inflammation; such inflammation would be typical around the time the fracture was sustained, but its continuation several months later was not a typical presentation. He believes that this persistent inflammation likely resulted from Claimant's continuing to work through his pain and not allowing his injury to heal.
29. Dr. Spina opined that Claimant was totally disabled from working construction between April 25, 2023, when his primary care physician took him out of work, until he saw him on August 2, 2023. However, in his opinion, Claimant could perform purely supervisory work as a foreman at a job site.
30. Dr. Spina testified that Claimant is not at end medical result, as he remains in significant pain and his compression fracture could contribute to other medical risks such as infections or tumors. As such, Dr. Spina noted in his IME report that Claimant should be evaluated by a spine specialist as soon as possible, noting that Claimant's fracture was unusual in appearance. Regarding future medical treatment, Dr. Spina noted that it would be difficult to assess specific treatments until after a spinal consultation had taken place, but that if he were treating Claimant, he would order a percutaneous biopsy to include cultures, and depending on the results, Claimant may need additional treatments including a surgical debridement or fusion. (JME 418).

31. I find Dr. Spina's analysis credible, persuasive, and well-supported in all regards as it relates to the causal relationship between Claimant's November 28, 2022 workplace injury and his L2 compression fracture, as well as Claimant's disability from work.
32. I am persuaded by Dr. Spina's opinion that Claimant was not at end medical result at the time of his August 2, 2023 IME, as he determined that Claimant needed additional spine workup at that time. However, after that IME, Claimant consulted with Sarah Britton, APRN, at DHMC's Pain and Spine Center; she reviewed additional images and found no evidence of an infectious process and did not recommend surgery. It is unclear whether this workup satisfies Dr. Spina's concerns about Claimant's potential need for prospective care. As such, I cannot determine whether Claimant may have reached end medical result after August 2, 2023.

Verne Backus, MD

33. Verne Backus, MD, is a board-certified occupational and environmental medicine physician who is also a certified independent medical examiner. At Travelers' counsel's request, Dr. Backus performed an IME of Claimant on September 13, 2023. Like Dr. Spina, he physically examined Claimant and reviewed his relevant medical records including diagnostic imaging.
34. Like Dr. Spina, Dr. Backus concluded that Claimant's November 2022 workplace incident caused a spinal compression fracture at L2. In Dr. Backus's opinion, Claimant had a preexisting Schmorl's node, or bulge in the intervertebral soft tissue, at his L2/3 level. Dr. Backus explained that Schmorl's nodes are relatively common degenerative findings that are often asymptomatic. He believes that Claimant's Schmorl's node weakened his vertebral bone tissue around the node. In his opinion, Claimant's workplace incident compressed this soft tissue node into the endplate of his L2 vertebral body, leading to the compression fracture shown on Claimant's x-ray and MRI studies from April 2023. In support of this opinion, he cited the April 4, 2023 x-ray that showed a widened disc space consistent with this mechanism. Dr. Backus also confirmed that Claimant's April 2023 x-ray and MRI scan showed a compression fracture at L2, and that he could see Claimant's Schmorl's node in those images.
35. Like Dr. Spina, Dr. Backus testified that Claimant's description of the pop or tweak was consistent with a compression fracture. He also testified that the force associated with Claimant slipping and then catching himself would exert more axial loading force in this location than Claimant would have experienced had he fallen.
36. Dr. Backus testified further that in his opinion, Claimant's chronology suggested that he worked through pain for four or five months after his injury, after which time his pain medications lost some efficacy and his condition progressed to a point where he was no longer able to work through the pain, thus prompting him to seek additional treatment in April 2023.
37. In Dr. Backus's opinion, Claimant's condition was not stable between December 2022 and April 2023, but was progressing and worsening through this time. He found no basis

to believe that Claimant suffered any new injury between these times. Instead, he considers it most likely that Claimant's original November 2022 injury simply progressed until Claimant again sought treatment in April 2023. As such, he attributes all of Claimant's symptoms in this case to the original November 2022 workplace injury and not to any subsequent event that would have constituted a new injury.

38. Dr. Backus's opinions are substantially in alignment with those of Dr. Spina with respect to the central question of causation in this case. As with Dr. Spina, I find Dr. Backus's testimony credible, persuasive, and well-supported in all regards.

Nancy Binter, MD

39. Nancy Binter, MD, is a board-certified neurosurgeon and certified independent medical examiner. At Hartford's counsel's request, she performed an IME of Claimant on October 16, 2023. She also supplemented her IME with a review of additional medical records.
40. Like Drs. Spina and Backus, she physically examined him and reviewed his pertinent medical records. At the time of her IME, she had not reviewed the actual images of Claimant's radiological studies and had relied solely on the radiologists' reports. However, she subsequently reviewed those radiological films, and they did not change her opinions.
41. In Dr. Binter's opinion, Claimant did not suffer an L2 compression fracture as a result of his November 28, 2022 slip without a fall. In fact, she could not confirm that Claimant sustained a compression fracture at any time. She acknowledged that there was some abnormal process present at his L2 level, but she could not say whether it was a compression fracture.
42. Dr. Binter did not dispute that Claimant suffered an injury from his slip at work on November 28, 2022. However, in her opinion, this incident did not supply enough axial force to cause a compression fracture in a normal spine, and bone density studies in Claimant's medical records showed that his bone density was normal with no concern for osteoporosis.
43. Additionally, she testified that Claimant's medical chronology, including his ability to carry out strenuous tasks in physical therapy in the days following that event, was not consistent with a compression fracture. In her opinion, a compression fracture would have caused Claimant to experience severe pain and would not have improved enough for him to present with a largely normal follow-up exam within less than a week. Additionally, she opined in her IME report that given the physical nature of his job, if he had sustained an acute compression fracture from his November 2022 workplace injury, he "would have experienced immediate and severe pain that would have prevented him from further activities." (JME 536).
44. She also testified that if Claimant had suffered a traumatic compression fracture, she would have expected the vertebroplasty treatment that he underwent in May 2023 to have

immediately relieved his pain, since it would have shored up the weak areas in his spine. Since Claimant continued to experience significant pain after that treatment, she found it unlikely that his pain generator was a compression fracture.

45. Instead, in Dr. Binter's opinion, Claimant suffered a lumbar strain in November 2022 that caused back pain for approximately four days, after which it resolved. She based this opinion in large part on Claimant's presentation at his follow-up appointments shortly after the incident, where Claimant reported significant symptom improvement and demonstrated normal sensations, reflexes, and range of motion.
46. Dr. Binter acknowledged that some compression fractures can result in minimal pain and clinical findings, but she testified those instances are generally associated with osteoporotic patients, not individuals experiencing a compression fracture from trauma.
47. Although she acknowledged in her IME report that Claimant's April 4, 2023 lumbar spine x-ray showed a slight loss of L2 vertebral body height "consistent" with a compression fracture of intermediate age (JME 536), she testified at the formal hearing that in her opinion, Claimant did not have a traumatic compression fracture. She declined to comment with greater specificity as to the diagnosis of Claimant's condition.
48. Dr. Binter also noted in an addendum to her report that Claimant had significant non-work-related comorbidities that could cause or contribute to an L2 compression fracture, such as a pulmonary lesion, poorly controlled diabetes, and a family history of cancer. (JME 550). She noted during the formal hearing that Claimant had experienced lower back pain for years, citing medical records from 2013 and 2017 that referenced pain in Claimant's lower back. She testified that she reviewed the radiological findings that Drs. Spina and Backus referenced, and in her opinion, the radiological findings were not consistent with Claimant suffering a compression fracture on November 28, 2022.
49. With respect to Schmorl's nodes, Dr. Binter testified that such nodes are generally asymptomatic and are an "incidental finding." She would not expect them to cause a weakness in the outer walls of Claimant's vertebral bodies.
50. I find Dr. Binter's opinion that Claimant never suffered a traumatic compression fracture to be broadly at odds with the weight of other medical evidence in the record, and she has not provided a convincing explanation of the radiological findings that by substantially all other accounts suggest that injury.
51. Dr. Binter has also not convincingly accounted for the variability of human pain tolerance or Claimant's strong motivation to return to work in the days after his injury. In particular, her opinion that the pain from a traumatic compression fracture would have prevented Claimant from presenting with a normal exam the following week or tolerating his work activities after his return to work does not convincingly address the credible evidence that Claimant minimized his symptoms in order to be released to work, or that he was taking pain medicine in the days immediately following his injury. I also do not find that she has convincingly rebutted Dr. Spina's opinion that a non-displaced

compression fracture like Claimant's could be tolerable with work activity at first but worsen over time after a premature return to work.

52. Similarly, I am unconvinced by Dr. Binter's opinion that if Claimant's pain generator was a compression fracture, then his vertebroplasty should have provided rapid relief, as it does not adequately account for the wide variation in individual response to medical treatments, even those with high overall efficacy rates.
53. For these reasons, I find Dr. Binter's opinion that Claimant did not suffer a compression fracture as a result of his November 2022 workplace incident unpersuasive.

CONCLUSIONS OF LAW:

1. Claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He 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, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. The parties presented conflicting expert medical testimony regarding the causal relationship between Claimant's back condition and his November 27, 2021 workplace incident. 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).
3. In this case, the first, second, fourth, and fifth factors weigh equally between Drs. Spina, Backus, and Binter. None had a treating relationship with Claimant, all are well-credentialed and highly qualified, and there is no reason to doubt the thoroughness of their physical examinations. Further, all these experts reviewed all the relevant medical records.
4. The third factor, as in many cases, is the most important here. Drs. Spina's and Backus's opinions that Claimant sustained a compression fracture as a result of his November 28, 2022 slip without a fall at work are more consistent with the medical record than Dr. Binter's opinion that Claimant never suffered a compression fracture. Both Drs. Spina and Backus convincingly explained that the mechanism of the fall would supply sufficient axial force to cause such a fracture, and Dr. Backus's analysis of the Schmorl's node weakening Claimant's vertebral body convincingly explains why Claimant would

be susceptible to this injury. Additionally, I find that Dr. Spina's impression of Claimant as highly motivated to return to work and having minimized his symptoms to be supported by Claimant's own credible testimony.

5. Dr. Spina's explanation of the progression of Claimant's fracture also convincingly accounts for Dr. Binter's concerns about the progression of his injury, given that Claimant was on pain medication during his initial appointments following his injury and would have been able to move and work despite the fracture at first as the fracture was non-displaced. His analysis of Claimant's premature return to work without bracing and eventual worsening of the fracture also helps to explain why Claimant was able to work initially, and why his pain eventually prompted him to seek additional treatment several months later.
6. Perhaps most importantly, Drs. Spina and Backus persuasively testified that radiographic images show a lack of compression fracture in 2021 and the presence of a compression fracture in 2023, with no evidence of any candidate for a causative incident other than Claimant's November 2022 slip without a fall at work. This supports the conclusion that this event caused Claimant to suffer a compression fracture at work on that date.
7. Dr. Binter's opinion that Claimant did not suffer a traumatic compression fracture at any time is simply too far at odds with the rest of the medical record to credit factually, and her opinion that Claimant suffered only a lumbar strain does not shed light on why his back pain progressed through the first quarter of 2023, or why an MRI in April of that year confirmed a compression fracture, or why Claimant's providers would perform a vertebroplasty procedure on his spine. The third factor therefore favors Drs. Spina's and Backus's causation opinions over Dr. Binter's.
8. While it is true that both Drs. Backus's and Spina's theories rely in large part upon the credibility of Claimant's testimony concerning his symptom progression, I find no reason to doubt his reports.
9. I conclude that Claimant suffered an L2 compression fracture at work on November 28, 2022. There is no convincing evidence that that fracture happened later, or that any subsequent event at work instigated Claimant's disability from work or need for medical care. As such, Defendant and its carrier Hartford, which was on the risk on November 28, 2022, are responsible for Claimant's compression fracture.

Temporary Disability Benefits

10. When an injured worker is unable to work because of a work-related injury, he 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).
11. I credit Dr. Spina's opinion that Claimant was totally disabled from working construction between April 25, 2023 and the time he saw him for an IME on August 2, 2023, although Claimant would be able to work in a purely supervisory role. Because Claimant was paid

for approximately one month after being taken out of work, he only seeks these benefits from May 25 forward. I conclude that Claimant has sustained his burden of proof to establish that he is entitled to temporary total disability benefits beginning May 25, 2023.

12. As for the end date of these benefits, however, I do not have sufficient evidence before me to determine when, if at all, Claimant reached end medical result or successfully returned to work.
13. End medical result refers to “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.
14. As an initial matter, I do not credit Claimant’s treating physician assistant’s note from December 2022 that he had reached end medical result at that time. Claimant had not yet been diagnosed with a compression fracture and had not yet even considered undergoing a vertebroplasty.
15. Although I credit Dr. Spina’s opinion that Claimant was not at end medical result at the time of his August 2023 IME, a significant concern underlying that opinion was that Claimant should see a spine specialist for additional diagnostic studies, which might justify additional medical treatments depending on their results. At least some spinal workup with Nurse Britton occurred after Dr. Spina’s IME, and the record is not clear whether that workup satisfies Dr. Spina’s concerns. As such, there is insufficient evidence in the record for me to determine whether, and if so when, Claimant reached end medical result after August 2, 2023. As such, I make no conclusion as to whether Claimant reached end medical result after that date.

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

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

Worker’s Compensation Rule 2.4100.

17. As with end medical result, there is insufficient evidence for me to determine whether, and if so when, Claimant successfully returned to work. Although Claimant worked one day for Uber and earned approximately \$60.00, that cannot be characterized as a successful return to work. Claimant eventually returned to work with a new employer in August 2023, but soon thereafter had to depart for medical reasons unrelated to the injury giving rise to this claim. At the time of the formal hearing in this case, Claimant expected to return to that position in earnest and believed that his duties in that role would be within his physical capabilities, but that had not yet happened when he testified. As such, there is not enough evidence for me to determine whether that return to work was successful, and I make no conclusion in this regard.

18. Claimant is entitled to receive temporary total disability benefits retroactive to May 25, 2023 and ongoing until the earlier of the date he reached, or reaches, end medical result and the date when he successfully returned, or returns, to work.

ORDER:

For the reasons detailed above, Defendant and its insurer Hartford shall adjust Claimant's claim for his L2 compression fracture injury as compensable under 21 V.S.A. § 618, and shall pay the following benefits accordingly, in addition to any future benefits to which Claimant becomes entitled:

- 1) Temporary total disability benefits beginning May 25, 2023 and continuing until the earlier of the date when he reaches end medical result or successfully returns to work, pursuant to 21 V.S.A. § 642, with interest thereon as provided in 21 V.S.A. § 664;
- 2) Medical benefits pursuant to 21 V.S.A. § 640 for services related to his compensable work injury; and
- 3) Attorneys' fees and costs in amounts to be proven, pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 10 of June 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.