

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Joshua Alden

Opinion No. 18-24WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Crow Chevrolet, State File No. PP-51322

For: Miachael A. Harrington
Commissioner

Joshua Alden

v.

S & A Trombley Corporation
d/b/a LWI Metalworks, State File No. SS-59477

**RULING ON DEFENDANT S & A TROMBLEY CORPORATION'S MOTION TO
DISMISS WITH PREJUDICE AND/OR FOR SUMMARY JUDGMENT**

APPEARANCES:

David A. Berman, Esq., for Claimant
William J. Blake, Esq., for Defendant S & A Trombley Corporation and Berkshire Hathaway
Elijah T. LaChance, Esq., for Defendant Crow Chevrolet and Broadspire

ISSUE PRESENTED:

Is Defendant S & A Trombley Corporation d/b/a LWI Metalworks entitled to dismissal with prejudice, or judgment as a matter of law, as to any and all claims against it?

EXHIBITS:

Defendant's Exhibit A: Interim Order of Benefits dated June 9, 2023
Defendant's Exhibit B: Independent Medical Examination Report of Verne Backus, MD, dated November 27, 2023
Defendant's Exhibit C: Independent Medical Examination Report of Douglas Kirkpatrick, MD, dated December 13, 2023
Defendant's Exhibit D: Revised Independent Medical Examination Report of Douglas Kirkpatrick, MD, dated September 16, 2024

BACKGROUND:

On November 6, 2024, Defendant S & A Trombley Corporation d/b/a LWI Metalworks presented the following statement of undisputed material facts:

1. Claimant initially filed this claim for a work-related shoulder injury with Defendant Crow Chevrolet, its workers' compensation carrier Employers Preferred Insurance Company, and its TPA Broadspire Services ("Broadspire"). (Exhibit A).

2. Defendant Crow Chevrolet/Broadspire initially accepted the claim as compensable. (Exhibit A).
3. On or about December 14, 2022, Claimant filed a Notice and Application for Hearing (Form 6), requesting further temporary total disability benefits beginning November 9, 2022, and medical benefits. (Exhibit A).
4. On January 3, 2023, Broadspire filed a Form 2 Denial of the request for indemnity benefits on the basis that there was no evidence that Claimant was no longer at end medical result or that his current disability was causally related to the accepted August 4, 2020, work injury. (Exhibit A).
5. Pursuant to an informal conference on January 12, 2023, Defendant S & A Trombley Corporation d/b/a LWI Metalworks (“LWI Metalworks”) and its workers’ compensation insurance carrier, Berkshire Hathaway Homestate Companies (“Berkshire Hathaway”) were put on notice of potential liability on the grounds that there may have been a new injury or “aggravation” after Claimant started working for LWI Metalworks. (Exhibit A).
6. Berkshire Hathaway denied liability for a new injury or aggravation, relying upon the opinion of Verne Backus, MD, who saw Claimant for an Independent Medical Examination on September 1, 2023. In Dr. Backus’ opinion, there was no evidence of any new injury sustained at LWI Metalworks. He opined that Claimant’s ongoing symptoms were causally related to a continuation of his injury with Crow Chevrolet. (Exhibit B).
7. On June 9, 2023, the Department of Labor entered an interim order upholding Berkshire Hathaway’s denial and ordering Crow Chevrolet/Broadspire to continue to pay benefits. (Exhibit A).
8. Crow Chevrolet/Broadspire subsequently obtained an independent medical examination of Claimant with Douglas Kirkpatrick, MD, on December 13, 2023. In Dr. Kirkpatrick’s opinion, Claimant’s employment at LWI Metalworks produced a change in his shoulder condition including labral tearing and biceps anchor involvement. (Exhibit C).
9. On September 16, 2024, however, Dr. Kirkpatrick issued a report reversing his prior opinion. (Exhibit D). Specifically, Dr. Kirkpatrick wrote on page 3 of his report:

I previously opined that the claimant had reached maximum medical improvement and th[en] sustained additional injuries working as a metal fabricator at LWI. However, in the setting of noting a longstanding, chronic infection in the shoulder, it is more likely than not that his ongoing symptomatology around that time would relate to the infection. Unless there is clear and convincing evidence that the claimant sustained additional injury working at LWI, it is more likely than not that his ongoing symptomatology and the treatment required by Dr. Austin relates to his initial injury and, ultimately, development of infection.

For this reason, I have reversed my opinion on causality.

Treatment to his left shoulder has been reasonable and medically necessary, relating to his injury of 2020. There is no clear evidence he suffered a distinct work condition after his initial treatment for the injury of 2020.

10. Upon information and belief, co-defendant Crow Chevrolet/Broadspire does not object to the present motion to dismiss and will continue to adjust this claim for workers' compensation benefits.

11. Upon information and belief, Claimant does not object to the present motion to dismiss.

On November 6, 2024, Claimant's counsel confirmed that he does not oppose Defendant LWI Metalworks' motion. On November 7, 2024, counsel for Crow Chevrolet and Broadshire confirmed that they do not object to, or oppose, the motion.

DISCUSSION:

1. Defendant LWI Metalworks seeks dismissal of the workers' compensation claim filed against it with prejudice. In the alternative, it seeks summary judgment in its favor.
2. Vermont Rule of Civil Procedure 41 governs dismissal of actions. V.R.Civ.P. 41(a)(2) provides for dismissal where all the parties agree. This rule authorizes the dismissal that the parties here have agreed to.
3. Further, the motion to which all parties agree seeks dismissal of the claims against Defendant LWI Metalworks with prejudice. Based on the parties' agreement, the dismissal here shall be with prejudice.

ORDER:

Defendant S & A Trombley Corporation d/b/a LWI Metalworks' Motion to Dismiss with Prejudice is hereby **GRANTED**, and Claimant's claim against Defendant S & A Trombley Corporation d/b/a LWI Metalworks for workers' compensation benefits is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this 11 day of November 2024.

Michael A. Harrington
Commissioner