

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Karl Riendeau

Opinion No. 08-25WC

v.

By: Beth A. DeBernardi
Stephen W. Brown
Administrative Law Judges

United Parcel Service, Inc.

For: Michael A. Harrington
Commissioner

State File No. YY-50422

OPINION AND ORDER

Hearing held via Microsoft Teams on October 29, 2024

Record closed on December 16, 2024

APPEARANCES:

Nicholas J. Seldon, Esq., for Claimant
James M. O'Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. What injuries did Claimant sustain on July 10, 2023 arising out of and in the course of his employment?
2. Is Claimant entitled to any temporary total disability benefits and/or medical benefits under the Vermont workers' compensation statute for any work-related injuries sustained on July 10, 2023?

EXHIBITS:

Claimant's Exhibit 1:	Emergency department medical records
Claimant's Exhibit 2:	Opinion letter from Dr. Bisson
Claimant's Exhibit 3:	Physical therapy records
Claimant's Exhibit 4:	Primary care provider treatment records
Claimant's Exhibit 5:	Vermont State Police Report

CLAIM:

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

Medical benefits pursuant to 21 V.S.A. § 640(a)

Interest, costs and attorney fees pursuant to 21 V.S.A. §§ 664 and 678

FINDINGS OF FACT:

1. Claimant is a 33-year-old man who lives in Lyndonville, Vermont. He began working for Defendant as a package car driver in November 2010.

The July 10, 2023 Workplace Incident

2. On July 10, 2023, after his driving shift was over, Claimant returned to Defendant's place of business, where he and three other package car drivers began completing some work-related training on their hand-held computers. The other employees were Kelsey O'Donnell, Brian Sanborn, and a new employee. Claimant was sitting on a cart as he completed the training, and Ms. O'Donnell was sitting on the stairway directly in front of him, less than ten feet away. The employees were talking with each other as they worked on the training exercises.
3. As she was sitting on the stairs, Ms. O'Donnell removed one item of footwear and threw it at Claimant. She hit him, but he did not have a clear recollection of where he was struck. Ms. O'Donnell then threw her second item of footwear at Claimant and hit him on the right side of his face.¹ Someone, possibly Claimant, called the Vermont State Police to report an assault, and a state trooper responded to investigate. Claimant has submitted the Police Report into evidence. The Police Report indicates that criminal charges were unlikely to be filed. *See Claimant's Exhibit 5.*
4. Claimant credibly testified that the four employees were talking together during the training, but he did not remember the content of their conversation. Defendant did not offer any testimony from any witnesses at the hearing to establish that Claimant was engaged in any horseplay or other inappropriate conduct at the time of the incident.²
5. Claimant testified that the items of footwear thrown by Ms. O'Donnell were solid, although he could not describe them in more detail at the hearing. The Police Report indicates that Claimant described the footwear at that time as a pair of boots. Another person (whose name was redacted from the Police Report) claimed that the footwear was a pair of flip flop sandals. The Police Report does not make any finding as to the nature of the footwear, nor are there any photographs of the footwear. Defendant did not call any witnesses at the hearing to dispute Claimant's testimony that he was hit by "solid" footwear, not flip flop sandals. Accordingly, I accept Claimant's testimony that he was hit with solid items of footwear, not flip flops.
6. Immediately after the incident, someone reported the assault to the on-site supervisor, Brian DeSantis. Claimant also called his regular supervisor, Phil Parsons, and reported

¹ During his testimony, Claimant pointed to the right side of his jaw as the point of impact.

² A person [whose name was redacted] told the investigating trooper that the employees were "joking around" when someone [name redacted] made an insinuation about a fellow employee, causing that employee to throw her footwear. I am unable to find any facts from this unattributed and redacted statement in the Police Report. *Claimant's Exhibit 5.*

the assault by telephone. According to Claimant's credible and uncontroverted testimony, Defendant subsequently terminated Ms. O'Donnell's employment.

Departmental Forms and Interim Order

7. Defendant filed an Employer's First Report of Injury (Form 1) on July 14, 2023. The form lists the injury as stemming from a "robbery or criminal assault," with the employee stating that "another employee threw a sandal striking him in the chin." *See Form 1*. On August 19, 2023, Defendant filed a Denial (Form 2) of the entire claim based on a "questionable causal relationship of additional injuries and disability" and "questionable mechanism of injury." *See Form 2*.
8. In October 2023, at an informal conference, the Department's specialist found that some of Claimant's alleged injuries were causally related to his employment and therefore compensable. The specific injuries that she found causally related were his right jaw, face (not including teeth), and neck. The specialist issued an amended interim order on November 1, 2023 ordering Defendant to pay temporary total disability benefits from July 26, 2023 to August 1, 2023, and medical benefits for these injuries.
9. On January 8, 2024, Claimant presented additional medical evidence to the specialist to support his claim for work-related paresthesia and vertigo stemming from the assault. On March 20, 2024, the specialist referred his claim to the formal docket on the causal relationship between Claimant's paresthesia and vertigo and the July 10, 2023 assault.

Claimant's Medical Course and Absences from Work

10. Claimant went to the emergency department at Northeastern Vermont Regional Hospital the same day as the incident, July 10, 2023, reporting neck and jaw pain from a workplace assault. A head CT scan found no evidence of facial or jaw bone fracture, and a cervical spine CT scan found no evidence of acute injury. *See Claimant's Exhibit 1*. A physician assistant diagnosed him with a jaw contusion and cervicalgia (neck pain). She prescribed a muscle relaxant and advised him not to drive for eight hours after taking that medication. *Claimant's Exhibit 1*.
11. Claimant worked for two days after the assault, but then he stopped working because he felt he could not continue. Accordingly, he started to lose time from work on July 13, 2023, although no medical provider took him out of work at that time.
12. At Defendant's request, Claimant saw Physician Assistant Mallory Walsh at Convenient MD on July 14, 2023. He complained of pain in his jaw, neck and upper back, all on his right side, as well as dental pain. PA Walsh diagnosed him with arthralgia (joint pain) of the temporomandibular joint and prescribed a non-steroidal anti-inflammatory drug called diclofenac sodium. Examination of Claimant's mouth found no discolored or loose teeth. PA Walsh wrote that Claimant could return to full duty, although he did not do so at that time. *Claimant's Exhibit 4*.

13. Claimant saw his primary care physician, Linda Bisson, MD, on July 26, 2023. At that visit, Claimant told Dr. Bisson about the recent workplace assault and reported some paresthesia (numbness) in his hands. Dr. Bisson thought that a pinched nerve in Claimant's neck was causing his paresthesia, and she referred him to physical therapy for this condition. She took him out of work from July 26, 2023 to August 2, 2023. *Claimant's Exhibit 4.*
14. Claimant began a two-month course of physical therapy on August 1, 2023, at which he reported neck pain, bilateral paresthesia, and vertigo. The physical therapist attributed his paresthesia and vertigo to the condition of his neck. *Claimant's Exhibit 3.*
15. Claimant returned to Dr. Bisson on August 7, 2023 and obtained another out-of-work note; this one took him out of work through August 28, 2023. *Claimant's Exhibit 4.*
16. Claimant saw Dr. Bisson again on August 28, 2023. At that time, she extended his out-of-work note through September 11, 2023, as he continued with his physical therapy. *Claimant's Exhibit 4.*
17. Claimant returned to Dr. Bisson on September 13, 2023. Dr. Bisson noted that the physical therapist shared her concern that a pinched nerve in Claimant's neck was causing his upper extremity paresthesia. Dr. Bisson referred Claimant for a cervical spine MRI and extended his out-of-work status for another three weeks, until October 4, 2023. Claimant did not undergo the recommended MRI because Defendant declined to authorize payment for the procedure. *Claimant's Exhibit 4.*
18. On October 4, 2023, Dr. Bisson noted that Claimant's vertigo had improved, but he continued to struggle with upper extremity paresthesia. She recommended additional physical therapy for paresthesia and extended his out-of-work note through November 1, 2023. *Claimant's Exhibit 4.* No medical records after that date are available.
19. On January 8, 2024, Dr. Bisson wrote an opinion letter at Claimant's request. Her letter attributes Claimant's paresthesia and vertigo to the workplace assault. She further opined that Claimant's missed time from work and his physical therapy were both products of the workplace assault. *Claimant's Exhibit 2.*
20. At the hearing, Claimant credibly testified that all his work-related medical conditions have fully resolved except for occasional neck pain and stiffness.

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). He or she 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 the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

Claimant's Work-Related Medical Conditions

2. Claimant has alleged several medical conditions related to the July 10, 2023 work incident, including injuries to his neck and jaw. Claimant's contemporaneous medical records from July 10, 2023 and July 14, 2023, document these complaints.
3. On July 26, 2023, Claimant reported bilateral paresthesia to Dr. Bisson. On August 1, 2023, when he began physical therapy for that condition, Claimant also reported vertigo to the physical therapist. Dr. Bisson has attributed these additional symptoms to the neck injury that Claimant sustained in the workplace assault, which she suspects is a pinched nerve. Defendant has offered no medical opinions to the contrary.
4. Based on Claimant's credible and uncontroverted testimony, his medical records, and the opinion letter from Dr. Bisson, I conclude that Claimant has met his burden of proof to establish that his work-related medical conditions are his neck pain, jaw pain, bilateral upper extremity paresthesia and vertigo.

Temporary Total Disability Benefits

5. Under the Vermont workers' compensation statute, an injured worker is entitled to temporary total disability benefits when a compensable work injury causes total disability from work. 21 V.S.A. § 642(a)(1).
6. Claimant seeks temporary total disability benefits "from July 2023 through October of 2023," on the grounds that his work-related injuries prevented him from performing his job as a package car driver during that time. *Claimant's Proposed Findings*, at 4.
7. Claimant's primary care physician first took him out of work on July 26, 2023. Thereafter, she extended his out-of-work status periodically, keeping him out of work continuously until November 1, 2023. Accordingly, I conclude that Claimant is entitled to temporary total disability benefits from July 26, 2023 through November 1, 2023.
8. Claimant's Proposed Findings do not specify an exact start date in July 2023 for his claim for temporary total disability. He worked for two days after the incident and then took himself out of work; but there is no out-of-work note from a medical provider until July 26, 2023. In Vermont, "it has long been settled that a claimant cannot disable him- or herself; rather, expert medical testimony is required to establish the extent, if any, to which an injured worker is incapable of working." *Maluk v. Plastic Technologies of Vermont*, Opinion No. 06-13WC (February 5, 2013), citing *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001). In the absence of an out-of-work note or opinion from a medical provider, Claimant has not met his burden of proof on any claim for temporary total disability benefits prior to July 26, 2023.

Medical Benefits

9. The Vermont workers' compensation statute provides that the employer must furnish "reasonable" medical treatment to the injured worker. 21 V.S.A. § 640(a). Treatment is reasonable when it is both medically necessary and causally related to the compensable work injury. Workers' Compensation Rule 2.3800.
10. Claimant's primary care physician relates his medical conditions, as listed in Conclusion of Law No. 4, to the workplace assault. She has also offered her opinion that his treatment was medically reasonable. Defendant has offered no evidence to the contrary.
11. I therefore conclude that the treatment rendered to Claimant from July 2023 through October 2023 for his jaw pain, neck pain, bilateral upper extremity paresthesia, and vertigo has been reasonable, as set forth in 21 V.S.A. § 640(a). Accordingly, Defendant is responsible for the cost of such treatment.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby ORDERED to pay the following benefits:

- 1) Temporary total disability benefits from July 26, 2023 through November 1, 2023, less any amount already paid pursuant to the Interim Order, with interest thereon as set forth in 21 V.S.A. § 664;
- 2) Medical benefits for Claimant's compensable injuries from July 2023 through October 2023; and
- 3) Costs and attorney fees in amounts to be determined.

DATED at Montpelier, Vermont this 1st day of July 2025.

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.