Josef Knoff v. Josef Knoff Illuminating (October 15, 2012)

STATE OF VERMONT
DEPARTMENT OF LABOR

Josef Knoff

v.

Josef Knoff Illuminating

Opinion No. 25-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. P-16619

OPINION AND ORDER

Hearing held in Montpelier on August 17, 2012
Record closed on September 19, 2012

APPEARANCES:

Josef Knoff, *pro se*
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Are Claimant's current complaints causally related to his February 2000 compensable work injury?

2. If yes, is Claimant entitled to reinstatement of temporary total disability benefits retroactive to December 17, 2010?

3. If yes, what is the appropriate average weekly wage and compensation rate at which such benefits should be paid?

4. Is Claimant's claim for mileage reimbursement for treatment-related travel barred in whole or in part by the applicable statute of limitations?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Medical statement in support of Social Security Disability, June 15, 2005
Claimant's Exhibit 2:	Physical therapy progress notes, 5/4/11-6/6/11
Defendant's Exhibit A:	Exhibit 2 to Claimant's deposition, April 20, 2005
Defendant's Exhibit C:	*Curriculum vitae,* Fran Plaisted, M.A.
Defendant's Exhibit D:	Vocational Assessment of Earning Capacity, June 4, 2012
Defendant's Exhibit E:	Wage records, 5/21/10-12/17/10
Defendant's Exhibit F:	*Curriculum vitae,* Verne Backus, M.D., M.P.H.

CLAIM:

Temporary total disability benefits retroactive to December 17, 2010 pursuant to 21 V.S.A. §642
Mileage reimbursement pursuant to Workers' Compensation Rule 12.2100

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of the commissioner's previous decisions in *J.K. v. Joe Knoff Illuminating,* Opinion No. 39-05WC (July 12, 2005), *J.K. v. Joe Knoff Illuminating*, Opinion No. 28-06WC (July 7, 2006), and *Josef Knoff v. Josef Knoff Illuminating,* Opinion No. 13-11WC (June 2, 2011), and of the Vermont Supreme Court's entry order in *Josef Knoff v. Josef Knoff Illuminating,* Supreme Court Docket No. 2011-239 (December Term 2011).

3. Claimant was the self-employed owner and manager of Defendant's business for fifteen years prior to February 2000. Operating under the trade name Illuminating Consulting Service and Supply, the business marketed, designed and installed energy efficient lighting systems in commercial, industrial and institutional settings. It was a successful enterprise that generated significant annual revenues.

4. Claimant was in all respects a hands-on owner. He worked both in the office and in the field. The latter duties were physically challenging, often requiring sustained overhead work on ladders or high staging with his neck in a hyper-extended position.

Claimant's 2000 Injury and Subsequent Medical Treatment

5. On February 1, 2000 Claimant was finishing up an installation at a large health care facility in New Hampshire when he suffered the onset of severe neck pain. Diagnostic imaging studies revealed degenerative disc disease at C4-5 and C5-6, a right-sided disc herniation at C5-6 and a small left-sided herniation at C6-7. These findings correlated with Claimant's symptoms, which included pain, stiffness and reduced range of motion in his neck, as well as pain and paresthesias in his arms bilaterally.

6. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

7. Claimant treated his symptoms conservatively, with passive physical therapy modalities and anti-inflammatories. As early as June 2000 his consulting neurosurgeon, Dr. Penar, determined that he was an appropriate candidate for surgical disc excision and fusion at the C5-6 level. Some months later, in December 2000 Dr. Wepsic, another consulting neurosurgeon, also recommended surgery, to include decompressing the nerve roots at both C5-6 and C6-7.

8. Claimant chose not to pursue either of these surgical treatment options. Instead, from November 2000 through January 2001 he underwent a multidisciplinary functional restoration program overseen by Dr. Johansson, an osteopath. Dr. Johansson diagnosed Claimant with cervical disc syndrome and myofascial pain. The program he recommended to address these conditions encompassed both physical and psychological components, and included treatments specifically directed at behavioral medicine and pain management.

9. Claimant successfully completed Dr. Johansson's program. Although his pain was not completely eliminated, his range of motion improved and he reported that he was better able to control and manage his symptoms than he had been previously.

10. In February 2001 Dr. Johansson determined that Claimant had reached an end medical result. Noting both clinical findings and diagnostic imaging studies indicative of a C5-6 disc herniation with radiculopathy, he rated Claimant with a 15 percent whole person permanent impairment referable to his compensable cervical injury. The Department approved the parties' subsequent agreement to pay permanency benefits in accordance with this rating.

11. As for functional restrictions, Dr. Johansson determined that Claimant had a light to medium work capacity and was capable of full-time sedentary work. He endorsed Claimant's plan to return to work in a computer-oriented office setting, so long as his work station was ergonomically designed and he was able to take frequent stretch breaks.

Medical Treatment from 2003 through 2006

12. As expected with a cervical disc injury such as Claimant's, even after reaching an end medical result he continued to experience periods of waxing and waning symptoms. He did not seek additional focused treatment, however, until May 2003. By that time, his symptoms had worsened to such an extent that they interfered significantly with his functional abilities.

13. In March and April 2005 Claimant participated again in a functional restoration program supervised by Dr. Johansson. When his symptoms failed to improve, Dr. Johansson recommended another surgical consult.

14. In July 2005 Claimant underwent an evaluation with Dr. Phillips, a neurosurgeon. When compared with the MRI taken shortly after his 2000 injury, a new MRI study revealed that the disc herniation previously noted at C5-6 had resolved, but that bone spurs both at that level and at C6-7 had worsened. Given the correlation between these findings and Claimant's worsening symptoms, Dr. Phillips recommended surgery at the C7 level.

15. Defendant disputed its responsibility for Dr. Phillips' proposed surgery on the grounds that it was not causally related to Claimant's compensable injury. As medical support for its position, Defendant offered the opinion of Dr. Levy, a neurologist. According to Dr. Levy's analysis, Claimant's ongoing symptoms were due solely to the natural progression of degenerative disc disease, and were not work related at all.

16. Dr. Phillips disagreed with this analysis. According to his theory of causation, Claimant's work activities in February 2000 had precipitated the left-sided disc herniation at C6-7. The bone spurs that subsequently developed at that level represented the body's natural attempt to prohibit movement and achieve some stability in the area. In that sense, the extent of disc degeneration at C6-7 came about as a direct consequence of the work injury.

17. Following a formal hearing, in a decision dated July 7, 2006 the commissioner rejected Dr. Levy's causation analysis and accepted Dr. Phillips' opinion instead.[1] As a consequence, Defendant was ordered to pay the medical and rehabilitation costs associated with the C7 surgery that Dr. Phillips had recommended.

18. Ironically, after having prevailed on his claim that Dr. Phillips' proposed surgery was causally related to his work injury, Claimant again decided against that treatment option. His symptoms had improved somewhat, and while they still limited his activity he no longer viewed surgery as inevitable. Instead he opted to take a "wait and see" approach, in the hopes that over time his symptoms might abate even more.

[1] *J.K. v. Joe Knoff Illuminating*, Opinion No. 28-06WC (July 7, 2006).

19. Between October 2006 and December 2010 Claimant continued to experience ongoing neck pain and radicular symptoms that significantly limited his activity level. Aside from routine exercises and anti-inflammatories, however, he did not actively treat for his cervical condition.

Medical Treatment since 2010

20. On December 17, 2010 Claimant reported to Dr. Manchester, his primary care physician, that his neck pain and radicular symptoms had worsened. There followed a series of therapies, specialist consults and diagnostic evaluations aimed at addressing this latest downturn. These included:

- Evaluations in early 2011 with Dr. Barnum, an orthopedic surgeon, who concluded that a C5-6 and C6-7 discectomy and fusion likely would alleviate Claimant's symptoms and improve his function;

- MRI studies in March and October 2011, which showed herniated discs at both C5-6 and C6-7, with further calcification at those levels and progression of degenerative disease at the adjacent levels as well;

- Electrodiagnostic studies in April 2011, which documented chronic left C7 radiculopathy but no new radicular deficits;

- An unsuccessful course of physical therapy from April through May 2011;

- An October 2011 evaluation with Dr. Bono, another orthopedic surgeon, who concluded that notwithstanding his MRI findings Claimant likely would not benefit from surgery, and would best be helped by a more structured, physiatrist-directed trial of non-operative care; and

- A December 2011 evaluation with Dr. Flimlin, a physiatrist, followed by a referral to Dr. Naylor, a psychiatrist and specialist in chronic pain management.

21. From mid-April through mid-June 2012 Claimant participated in an 11-week pain management program offered by Dr. Naylor's Mind-Body Clinic. The focus of this program is to teach copings skills for managing chronic pain through cognitive restructuring, relaxation training, visual imagery, education and group discussion. I find it likely that Claimant previously learned at least some of these skills in the context of Dr. Johansson's November 2000 multidisciplinary rehabilitation program.

22. In conjunction with the Mind-Body Clinic program, Dr. Naylor also suggested that Claimant participate in a "physician-managed graded exercise program" to help him improve his overall physical conditioning. She recommended that he re-enroll in Dr. Johansson's functional restoration program for this purpose.

23. At the time of the formal hearing, Claimant had completed Dr. Naylor's Mind-Body Clinic program, and was two-thirds of the way through Dr. Johansson's program. I find from Claimant's own testimony that the benefits he has reaped from these programs are essentially the same as those he reported the first time he underwent multidisciplinary rehabilitation, namely, an improved ability to manage and control his chronic pain symptoms and somewhat increased cervical range of motion. His radicular symptoms remain unchanged.

Claimant's Vocational Rehabilitation Efforts and Subsequent Employment Efforts

24. Claimant's functional restrictions following his February 2000 injury precluded him from returning to his pre-injury job. He subsequently was found entitled to vocational rehabilitation services, and a counselor was assigned to assist him in formulating an appropriate return to work plan. As Claimant had been a very high wage earner, the particular vocational rehabilitation challenge he faced was to identify a path to re-employment that would approximate his pre-injury wages, which averaged almost $3,800.00 per week.

25. After some research, Claimant and his counselor determined that the two avenues most likely to lead to suitable re-employment were either to enroll in a master's level college program or to undertake another self-employed business venture. Claimant was concerned that pursuing a master's degree would take several years, and in the meantime it would be difficult for him to support his family financially. For that reason, and also considering his successful track record as the owner and manager of Defendant's business, he favored the second option.

26. Claimant's vocational rehabilitation counselor estimated the cost of a master's level degree program to be in the $15,000-$20,000 range at the University of Vermont, and in the $30,000-$50,000 range elsewhere.

27. After much research, Claimant developed a self-employment business plan that he estimated would generate personal income at or near his pre-injury wages within three years. The plan involved designing and developing a website to market natural foods, personal care products and other "environmentally friendly" goods directly to consumers. Claimant estimated the start-up costs to adequately finance this e-commerce venture at approximately $200,000. According to his business plan, most of these monies ($170,000) would be used to outsource custom website development and on-line marketing to a company with experience in hosting natural products websites.

28. Claimant's vocational rehabilitation counselor supported his self-employment plan, despite the potential risks associated with any such venture. However, Defendant refused to sign off on the proposal, for reasons that are not clear from the record. Thereafter, Defendant agreed to pay $100,000 in return for a full and final settlement of its obligation to provide further vocational rehabilitation services. Claimant accepted this offer, and in May 2001 the Department approved the settlement.

29. Notwithstanding that the vocational rehabilitation settlement left his business plan 50 percent underfunded, Claimant opted to proceed anyway. Subsequent decisions placed the start-up in an even more precarious financial position. First, Claimant diverted a sizeable portion of the settlement monies to personal expenses, including his child's college tuition, his mortgage and car payments. Later, he lost some funds to what he described as a "well-orchestrated scam." Claimant was able to raise some capital on his own, including a $25,000-$30,000 investment from his primary care physician, Dr. Manchester. He also modified his business plan on the expense side, by identifying less costly ways to market and deliver the products he intended to distribute.

30. Despite his best efforts, Claimant's e-commerce business never approached the level of success he had envisioned for it. After years in development, the website was operational for a brief period of time in 2005-2006, but made only minimal sales. By 2007 it was defunct.

31. Claimant attributed at least part of the business' demise to his inability, as a result of his neck pain and radicular symptoms, to spend as much of his own time working on the project as he originally had anticipated. His business plan called for him to devote ten to twelve hours daily on the venture, but as time went on he was able to spend only one or two hours per day on it. Claimant asserted that had he been able to work more closely on designing and fine tuning the website, his outsourcing expenses would have been lower, with the result that it would have been easier for the business to become profitable.

32. Claimant's assertion is belied by his own business plan, however. As noted above, Finding of Fact No. 27 *supra*, from the beginning the outsourcing expenses anticipated in that plan were substantial. They accounted for 85 percent of Claimant's original funding request, and perhaps more importantly, they exceeded the start-up monies he actually received by 70 percent, *see* Finding of Fact No. 28 *supra*. With those facts in mind, I find it likely that Claimant's e-commerce venture failed not because he was physically unable to devote sufficient time to it, but rather because for the duration of its existence it was significantly undercapitalized.

33. Between 2006 and 2009 Claimant neither sought nor engaged in remunerative employment. In 2005 he applied for and was granted social security disability benefits, retroactive to April 2003. In 2009 he passed the licensing exam to become an automobile damage appraiser, but soon realized that the work was too challenging physically for him to sustain.

34. In early 2010 Claimant began working as a substitute teacher for the Enosburgh Town School District, where he resides. His wife had worked as a substitute teacher in the same school district, and within a year had been offered full-time employment. Claimant hoped his employment would progress similarly. He expected that teaching would accommodate his physical restrictions well in terms of maintaining his neck in a neutral posture and being able to move around as necessary.

35. Claimant was paid on a per diem basis for his substitute teaching assignments, at the initial rate of $70.00 per day. Notwithstanding Defendant's assertion to the contrary, it is clear from the paystubs admitted into evidence that payroll taxes, including both FICA and Medicare, were deducted. In addition, Claimant testified that the school district issued him a W-2 earnings statement covering these wages at the end of the year, an assertion I have no reason to doubt. Considering this evidence, I find that Claimant was at all relevant times a school district employee, not an independent contractor.[2]

36. Claimant's paystubs document substitute teacher earnings from April 19, 2010 through May 27, 2010, a total of $280.00 in gross wages for four full-time equivalent days. During the ensuing school summer vacation, from July 9, 2010 through September 16, 2010 Claimant worked as a security guard at a summer camping area. For the most part, his duties involved canvassing the property in a golf cart, for which he was paid at the rate of $8.25 hourly. Claimant's gross wages in this employment totaled $1,023.00. Thereafter, Claimant returned to substitute teaching assignments for the Enosburgh Town School District, this time at a per diem rate of $80.00 per day. From September 8, 2010 through December 9, 2010 he earned a total of $1,080.00 in gross wages for 13.5 full-time equivalent days.

37. Claimant has not worked since December 9, 2010. As noted above, Finding of Fact No. 20 *supra*, on December 17, 2010 he resumed treatment for his neck pain and radicular symptoms with Dr. Manchester, who determined that he was totally disabled from working.

38. Claimant has been minimally active in the years since Dr. Manchester took him out of work. He testified that on a typical day, he drives his wife to work, returns home, feeds the dog, eats breakfast, spends 30 to 45 minutes on the computer, and then naps for one to two hours. He estimated that he might spend another 30 to 45 minutes on the computer in the afternoon before driving to pick up his wife. Occasionally he attends his daughter's sporting events. He sleeps approximately six hours nightly, but wakes up frequently in pain.

39. While I do not doubt that Claimant is minimally active physically, I find that he likely has underestimated the amount of time he spends at his computer. Considering just the manner in which he has represented himself through the various legal proceedings associated with his workers' compensation claim, which have encompassed three formal hearing decisions and one Supreme Court appeal in addition to the pending dispute, it is apparent that he is able to focus on complex issues, compose legal memoranda and respond promptly and at length to emails and other correspondence. These activities are at odds with a person who is unable to work at a computer for more than one and a half hours daily.

[2] Given what I presume to be the nature of the school district's business, which is the true test of employee status, *see In re Chatham Woods Holdings, LLC*, 2008 VT 70 ¶10 (May 16, 2008), it is unlikely that I would have classified Claimant as an independent contractor even had the school district not withheld his payroll taxes appropriately.

Expert Opinions

40. The parties each presented expert evidence as to (a) the causal relationship between Claimant's current cervical complaints and his compensable February 2000 work injury; (b) whether his treatment since December 2010 has been curative or palliative; and (c) to what extent, if any, he has been capable of working since that time. In addition, Defendant presented expert testimony as to the impact that Claimant's past vocational choices has had on his current earning capacity.

(a) Causal Relationship

41. As to the causal relationship between Claimant's current cervical condition and his February 2000 injury, the expert opinions that each party offered were essentially the same as those presented in the context of Claimant's 2006 formal hearing, *see* Finding of Fact Nos. 15-17 *supra*. Briefly, Claimant's primary care provider, Dr. Manchester, concurred with Dr. Phillips' causation analysis – that the February 2000 work injury precipitated a left-sided disc herniation at C6-7, which in turn accelerated the growth of bone spurs and degenerative disease at adjacent levels as well. Thus, according to Dr. Manchester the same work-related injury process that accounted for Claimant's worsening symptoms and need for treatment in 2003 likewise accounts for his current symptoms and need for treatment.

42. In contrast, Defendant's expert, Dr. Backus, acknowledged that his causation opinion was in many respects the same as that offered by Dr. Levy in 2003 – that Claimant's worsening symptoms, both in 2003 and in 2010, were not causally related to his work injury in any respect, but rather represented the natural progression of degenerative disc disease in his cervical spine. That disease process probably had already begun as of the time of Claimant's February 2000 work injury. According to Dr. Backus' analysis, while the injury likely resulted in a soft tissue strain and inflammatory response in the area, it did not cause or accelerate any changes to the underlying structures themselves. Thus, in his opinion, at least by 2003 and certainly by 2010 any worsening symptoms were likely due solely to the ongoing progression of the disc disease itself.

(b) Curative versus Palliative Treatment

43. Claimant offered expert opinion evidence from Drs. Manchester, Bono, Naylor and Johansson to the effect that the treatments he has undergone since December 2010 have been curative rather than palliative in nature. In particular, according to these providers, both Dr. Naylor's Mind-Body Clinic program and Dr. Johansson's functional restoration program offer treatments that are reasonably likely to result in significant further improvement in his ability to manage his symptoms and return to the level of function he enjoyed previously.

44. Upon careful review, I find that none of Claimant's providers have adequately explained why the specific treatments Drs. Naylor and Johansson have offered recently are likely to result in lasting improvement when what appear to be very similar programs failed to do so in the past. For that reason, I find the objective support for their opinions lacking.

45. Dr. Backus acknowledged that Dr. Naylor's program represented a reasonable treatment, one that likely would increase Claimant's ability to manage his chronic pain independently. He also supported as reasonable Claimant's participation in a limited graded exercise program supervised by Dr. Johansson, as a means of guiding him back to an effective home exercise regimen. According to Dr. Backus, however, because Claimant suffers from a chronic, progressively deteriorating condition, neither of these programs is curative; the most either can offer is palliative symptom relief. I accept this reasoning as persuasive.

(c) *Claimant's Work Capacity Since December 2010*

46. As noted above, Finding of Fact No. 11 *supra*, upon completing Dr. Johansson's functional restoration program in 2001 Claimant had a light to medium work capacity and was capable of full-time sedentary work in a computer-oriented office setting.

47. The medical statement that Dr. Manchester filed in conjunction with Claimant's 2005 application for social security disability benefits described a far more limited work capacity. As of June 2005 Dr. Manchester estimated that Claimant could neither sit nor stand for more than two hours daily, and was incapable of full-time employment.

48. Notwithstanding this assessment, Claimant was able to resume at least part-time employment in 2010. Although his work as a substitute teacher was sporadic, when he was called in he was able to complete a full day. Similarly, Claimant demonstrated the ability to work regular part-time hours at his summer security guard job. Claimant did not present any credible evidence establishing that prior to December 17, 2010 his inability to work more hours at either job was due to any injury-related disability. It is equally possible that his hours were limited simply because his employers had no more to offer.

49. As noted above, Finding of Fact No. 37 *supra*, when Claimant's symptoms worsened in December 2010 Dr. Manchester determined that he was totally disabled from working, an opinion he reiterated shortly before the formal hearing.

50. The evidence does not reveal the specific basis for Dr. Manchester's opinion as to Claimant's work capacity, either in 2005, 2010 or currently. It is largely at odds with the capacity he himself demonstrated in the months prior to December 2010. Claimant has not undergone any formal functional capacity testing since completing Dr. Johansson's program in 2001, more than ten years ago. Lacking objective data as support, I must question Dr. Manchester's conclusions.

51. Based both on his January 2012 independent medical examination and on Claimant's description of his daily living activities, Dr. Backus determined that he is capable of sustaining full-time sedentary to light work. As with Dr. Manchester's opinion, I would have more confidence in Dr. Backus' conclusions were they supported by formal functional capacity testing. Nevertheless, based both on Dr. Backus' analysis and on my own observations of Claimant as a *pro se* litigant, I find it likely that he currently has at least a part-time sedentary work capacity.

(d) Claimant's Earning Capacity

52. Fran Plaisted, a certified vocational rehabilitation counselor, offered her expert opinion as to Claimant's earning capacity in the years since his February 2000 work injury. Ms. Plaisted is a fellow of the American Board of Vocational Experts. In formulating her opinion, she interviewed Claimant and reviewed his medical and vocational history.

53. Ms. Plaisted's analysis focused primarily on what Claimant's vocational rehabilitation options might have been had he not chosen to pursue self-employment. Generally, she explored two alternative paths – one using his existing skills, training and experience, the other assuming some level of academic retraining. In both instances, she assumed a full-time sedentary to light work capacity, in accordance with Dr. Backus' opinion.

54. In Ms. Plaisted's opinion, as a successful business owner for more than 15 years prior to his injury, Claimant has extensive experience in sales and management. These transferable skills qualify him for employment as a sales representative or manager, with an average annual salary in northern Vermont in the $55,000 to $75,000 range.

55. Alternatively, Claimant could have combined his undergraduate focus on engineering with his extensive experience in electrical installation to seek either a bachelor's or master's degree in electrical engineering. The costs associated with this plan would have been largely covered by the $100,000 vocational rehabilitation settlement he received, and would have yielded a current earning capacity ranging from $71,000 to $95,000 annually.

56. With these vocational alternatives in mind, Ms. Plaisted concluded that neither of the jobs Claimant held in 2010 accurately reflected his actual earning capacity. Notwithstanding his injury-related physical limitations, in her opinion Claimant was underemployed as both a substitute teacher and as a summer security guard. Even assuming that Claimant might be capable of only part-time as opposed to full-time sedentary work, I find this analysis credible.

Mileage Reimbursement

57. By letter dated January 12, 2012 Claimant provided a detailed accounting of his claim for mileage reimbursement to both the Department and to Defendant. For travel to and from doctor's appointments and in accordance with Workers' Compensation Rule 12.2100, Claimant claimed a total of $464.92 in mileage charges incurred between March and September 2005, a total of $159.76 in charges incurred between August 29, 2006 and October 17, 2006, and a total of $402.14 in charges incurred from December 17, 2010 through December 14, 2011.

58. Defendant has objected to the 2005 and 2006 charges on the grounds that they are barred by the applicable statute of limitations.

CONCLUSIONS OF LAW:

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 as well as the causal connection between the injury and the employment. *Egbert v. The Book Press,* 144 Vt. 367 (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 v. Holden Lumber Co.,* 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Causal Relationship

2. The first disputed issue in this claim is whether Claimant's cervical symptoms and need for treatment since December 2010 are causally related to his compensable February 2000 work injury. This is a medical question, upon which the parties presented conflicting expert opinions. In such situations, 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. I conclude here that Dr. Manchester's opinion as to the causal relationship between Claimant's original injury and the ongoing disc degeneration in his cervical spine is more credible than Dr. Backus'. As his primary care provider for many years, Dr. Manchester has been well positioned to observe the progression of Claimant's cervical condition over time. His causation theory – that the work injury caused a C6-7 disc herniation, which in turn accelerated the growth of bone spurs and degeneration at adjacent levels – is essentially the same one that Dr. Phillips previously espoused as the explanation for Claimant's worsening symptoms in 2003. For the same reasons that led the commissioner to accept Dr. Phillips' analysis as objectively supported and credible in 2006, I accept Dr. Manchester's opinion as persuasive here.

4. Had Dr. Backus propounded a causation theory that effectively distinguished Claimant's current condition without denying either the injury Defendant accepted in 2001 or the one the commissioner found compensable in 2006, I might view his opinion more favorably. Instead, his analysis relies at its core on the assumption that Claimant's February 2000 work injury was a soft tissue strain that neither caused nor accelerated any disc herniation or disease. This assumption is at odds with Defendant's own conduct dating back at least to 2001, when it paid permanency benefits for what Dr. Johansson diagnosed as a work-related cervical disc herniation. It also is at odds with the commissioner's determination in 2006 that the work injury had accelerated Claimant's degenerative disc disease. The time has long since passed for Defendant to proffer an entirely new explanation for what is now a twelve-year-old injury. *See, e.g., Coronis v. Granger Northern, Inc.*, Opinion No. 16-10WC (April 27, 2010). For that reason, I reject Dr. Backus' opinion as unpersuasive.

5. I conclude that Claimant has sustained his burden of proving that, as was the case in 2003, his worsened cervical condition in 2010 was caused or accelerated at least in part by his February 2000 work injury and is therefore compensable.

Temporary Total Disability

6. Having concluded that Claimant's worsened cervical symptoms since December 17, 2010 are causally related to his original injury, I next consider his claim for temporary total disability benefits.

7. Temporary disability benefits are only payable for so long as the medical recovery process is ongoing. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982). Once an injured worker reaches an end medical result, his or her entitlement to temporary disability benefits ends, and the focus shifts instead to consideration of permanent disability. *Id.*

8. End medical result is defined as "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 2.1200. The fact that some treatments, such as pain medications, physical therapy or chiropractic manipulations, may continue to provide palliative symptom relief does not negate a finding of end medical result so long as the underlying condition itself remains unlikely to improve. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996). This is particularly true in cases involving chronic pain, where the injury itself has become stable even though the pain it precipitates may continue to wax and wane over time. *See* 4 Lex K. Larson, *Larson's Workers' Compensation* §80.03[3] (Matthew Bender, Rev. Ed.), cited with approval in *Coburn, supra*; *see also* Workers' Compensation Rule 2.1310 (defining palliative care). Were the rule otherwise, an end medical result might never be possible in such cases.

9. Considering these concepts in the context of the current claim, the question is whether the treatment Claimant has received since December 2010 is properly characterized as palliative or curative. If the latter, then he cannot be deemed to be at end medical result until he completes his current course of treatment, and in the meantime temporary disability benefits must be reinstated. If the former, then he remains at end medical result and is therefore not entitled to additional temporary disability benefits. *Coburn, supra* at 532.

10. Aside from a brief course of physical therapy, the goal of the treatments at issue here were first, to re-evaluate Claimant's surgical options, and second, to restore some degree of lost function through multidisciplinary rehabilitation. As to the first, I conclude that for two new surgeons to essentially reiterate the same risk-benefit analysis that numerous equally qualified surgeons had stated before does not rise to the level of curative treatment necessary to negate end medical result.

11. As for multidisciplinary rehabilitation, I am aware of other cases in which treatments directed at improving a claimant's function have been held to negate a finding of end medical result, even though the underlying medical condition itself may have become stable. *See, e.g., Cochran v. Northeast Kingdom Human Services,* Opinion No. 31-09WC (August 12, 2009). Were this Claimant's first course of such treatment, I might view his situation in the same light. But the fact is Claimant has traveled this road before, and realized only temporarily increased function as a result. Under these particular circumstances, I conclude that for him to undergo another course of functional restoration-type treatment represents palliative, not curative, care.

12. I conclude that notwithstanding the treatments he has undergone since December 17, 2010 Claimant has remained at end medical result. Therefore, he is not entitled to temporary disability benefits for any period of time since that date.

Average Weekly Wage for Subsequent Periods of Disability

13. It is possible that Claimant might become entitled to temporary total disability benefits at some future date, for example, if ultimately he elects to undergo surgery necessitated by his original injury. For that reason, I next consider how his average weekly wage for a subsequent period of disability should be calculated.

14. According to 21 V.S.A. §650(c), when an injured worker's temporary disability occurs in separate intervals rather than as one continuous period, the applicable compensation rate must be adjusted "to reflect any increases in wages or benefits prevailing at that time." Historically the Department has interpreted this language to mandate that a claimant's compensation rate can only be adjusted *upward*, that is, when his or her wages have *increased* since a prior period of disability, but never *downward*, that is, to reflect a *decrease* in wages during the intervening period. *See, e.g., Bollhardt v. Mace Security International, Inc.*, Opinion No. 51-04WC (December 17, 2004).

15. More recently, the commissioner has differentiated between situations where a claimant's decreased wages are shown to have resulted from his or her work injury and those where they are due instead to personal choices or economic factors. *See, e.g., Plante v. State of Vermont Agency of Transportation,* Opinion No. 24-12WC (September 14, 2012); *Griggs v. New Generation Communications,* Opinion No. 30-10WC (October 1, 2010). Where the work injury itself accounts for a subsequent reduction in earnings, the average weekly wage for a subsequent period of disability should reflect the earlier, higher wages. *Id*. This is in keeping with the spirit of workers' compensation – to provide wage replacement benefits that compensate fully for an injured worker's diminished earning capacity. *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962). But where the reduced earnings are due to other, unrelated circumstances, using the earlier wages would amount to wage enhancement, not wage replacement, and a windfall not envisioned by the statute.

16. I acknowledge here that as a result of his original injury Claimant was unable to resume his prior work activities, for which he had been highly compensated. He asserts that it is because of his injury-related functional limitations that he has been unable to find and maintain similarly lucrative employment since then. I disagree. Claimant himself chose the career path upon which he embarked following his injury, one that his treating physician declared him physically capable of performing. That the e-commerce venture he pursued ultimately failed was a consequence of business and financial limitations, not physical or functional ones. Thus, I conclude that the diminution in Claimant's wages during the time that he was pursuing his e-commerce business was due to non-injury-related factors.

17. It is mostly pointless to engage in a game of "what might have been" had Claimant either availed himself of different vocational rehabilitation resources or applied his settlement monies differently. Suffice it to say, by taking the path that he did, from an average weekly wage perspective I conclude that Claimant has severed the causal link between his current earning capacity and his work injury, such that his pre-injury wages are no longer relevant to his average weekly wage calculation.

Mileage Reimbursement

18. Last, I consider Claimant's claim for mileage reimbursement. At the time of Claimant's injury, the applicable statute of limitations was six years. 21 V.S.A. §660(a).[3] As Claimant first specified his mileage reimbursement claim on January 12, 2012, any mileage expenses that were incurred more than six years prior to that date are now time barred.

19. I conclude that the mileage expenses Claimant incurred in 2005 are now time barred. Those incurred in 2006 and 2010, totaling $561.90, should be applied against the credit Defendant previously was awarded in *Knoff v. Josef Knoff Illuminating*, Opinion No. 13-11WC (June 2, 2011), *affirmed, Knoff v. Josef Knoff Illuminating*, Supreme Court Docket No. 2011-239 (December Term, 2011).

[3] The statute was amended in 2004 to reduce the limitations period to three years. As a substantive amendment, the new limitations period cannot be applied to already pending injury claims. *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). Beyond that, by its own terms the amended statute mandated that the shorter limitations period "not be construed to limit subsequent claims for benefits stemming from a timely filed work-related injury claim." For these reasons, I conclude that the limitations period applicable to Claimant's mileage claim is six years, as dictated by the pre-amendment statute.

ORDER:

Based on the foregoing findings of fact and conclusions of law:

1. Claimant's claim for temporary total disability benefits retroactive to December 17, 2010 is hereby **DENIED**;

2. Defendant is hereby **ORDERED** to offset its previously awarded credit by a total of $561.90 in mileage expenses incurred through December 14, 2011.

DATED at Montpelier, Vermont this 15th day of October 2012.

_____
Anne M. Noonan
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.