STATE OF VERMONT
DEPARTMENT OF LABOR

Arnold Griggs

v.

New Generation Communication

Opinion No. 30-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Valerie Rickert
Acting Commissioner

State File No. P-15250

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 30 and June 25, 2010
Record closed on August 30, 2010

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Bonnie Shappy, Esq., for Defendant

ISSUES PRESENTED:

1. To what additional workers' compensation benefits is Claimant entitled as a consequence of his December 1999 work-related injury?

2. What was the amount of Defendant's "holiday" under 21 V.S.A. §624 following Claimant's settlement of the third-party claim that arose out of his December 1999 motor vehicle accident?

3. Is Defendant entitled to an additional "holiday" under 21 V.S.A. §624 as a consequence of Claimant's settlement of the third-party claim that arose out of his May 2003 motor vehicle accident?

4. Is Claimant entitled to penalties and/or interest on any benefits awarded?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: October 8, 2002 letter from Shirley Houghton, with attachments

Claimant's Exhibit 1: September 25, 2007 letter from Attorney McVeigh to Attorney Shappy, with attachments (admitted to show notice only)
Claimant's Exhibit 2: Form 2 Denial of Workers' Compensation Benefits, with attached correspondence
Claimant's Exhibit 3: Carrier's activity log
Claimant's Exhibit 4: May 19, 2006 letter from Attorney McVeigh to Attorney Windish, with attached Form 6
Claimant's Exhibit 5: March 2, 2009 letter from Attorney Shappy to Attorney McVeigh, with attached payment ledger
Claimant's Exhibit 6: Defendant's Responses to Requests to Admit
Claimant's Exhibit 7: Release by Claimant of Lucille Lawes

Defendant's Exhibit A: August 19, 2004 letter from Attorney McVeigh to Richard Bolduc
Defendant's Exhibit C: August 17, 2004 letter from Richard Bolduc to Attorney McVeigh, with attached Release of Workers' Compensation Lien

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Penalties and interest pursuant to 21 V.S.A. §§650(e) and 664
Costs and attorney fees pursuant to 21 V.S.A. §678

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.

3. Defendant's business involved installing communications equipment and fiber optic cable. Claimant was both an owner and the president of the corporation. As such, his job duties were quite varied. They included soliciting new accounts, traveling to job sites to evaluate and quote new jobs and performing installations.

Claimant's Low Back Injuries and Medical Course

4. In March 1999 Claimant suffered an incident of acute low back pain with right-sided radiculopathy while lifting luggage during a work-related business trip. Diagnostic imaging studies revealed a small extruded L5-S1 disc herniation. This was treated with aggressive physical therapy, and by November 1999 Claimant's symptoms had nearly, though not completely, resolved.

5. In December 1999 Claimant was involved in a work-related motor vehicle accident. After that, his low back and right leg pain worsened and became persistent. This time, Claimant's symptoms failed to resolve with conservative therapy. In January 2001 he underwent L5-S1 disc surgery. Thereafter, his right leg symptoms resolved, though he continued to experience occasional low back pain.

6. Claimant reached an end medical result for the injuries referable to his December 1999 motor vehicle accident in May 2002. In October 2002 the Department approved the parties' Agreement for Permanent Partial Disability Compensation (Form 22), pursuant to which Defendant paid permanency benefits equating to an 11.5% whole person impairment.

7. Despite having been declared at end medical result, Claimant's low back and right leg symptoms continued. To address these complaints, he underwent a course of physical therapy from September through December 2002, following which he was given a home exercise program. When his pain started worsening again, in March 2003 Claimant resumed physical therapy.

8. On May 29, 2003, while en route to a physical therapy appointment, Claimant was involved in another motor vehicle accident. The force of the collision was strong enough that the airbags in Claimant's car were deployed.

9. Four days later, at his next scheduled physical therapy visit Claimant reported that he had been experiencing increased low back pain since the accident. Claimant also complained of right-sided sciatica and some left-sided symptoms as well.

10. Claimant continued his course of physical therapy throughout the summer of 2003. As had been the case prior to the May 2003 motor vehicle accident, the treatment notes document waxing and waning symptoms, sometimes precipitated by minor lifting or bending activities, sometimes apparently by nothing at all. On August 20, 2003 the therapist reported that Claimant's left-sided symptoms had resolved, and that he felt his right-sided symptoms had returned to their pre-accident baseline.

11. The medical records reflect that Claimant's low back pain and right-sided radiculopathy continued to worsen, though whether that was due in any way to the May 2003 motor vehicle accident is difficult to ascertain. Some providers, such as Dr. Weinberg, Claimant's primary care physician, appeared to view Claimant's gradually worsening symptoms as reflective of a chronic failed back syndrome causally related to his December 1999 accident and 2001 surgery. Others, such as Dr. Sengupta, a neurosurgeon, reported that Claimant himself had identified the May 2003 accident as a precipitating factor for his worsening pain.

12. Regardless of the cause, Claimant's symptoms became increasingly difficult to control, even with significant dosages of narcotic pain medications.

13. On February 1, 2006 Claimant underwent spinal fusion surgery at L5-S1, the site of his 2001 discectomy. The medical records do not document any specific work restrictions, and therefore it is unclear for how long after the surgery Claimant was disabled from working, either totally or partially. By all accounts Claimant often over-exerted himself and had to be reminded not to do too much too soon. It is likely that by mid-March 2006 he had begun working at least part-time from his home office. Claimant's wife recalled that by May 1, 2006 he had resumed more regular hours.

14. Claimant's salary at the time of his December 1999 injury was $1,500.00 per week, which entitled him to the maximum weekly compensation rate. Claimant's weekly salary for the twelve weeks prior to his February 1, 2006 fusion surgery was $1,200.00, which would have yielded an initial compensation rate of $800.40 per week. The maximum compensation rate at that time was $950.00 per week.

15. Claimant continued to receive his regular weekly salary during the period from February 1, 2006 through May 1, 2006.

Expert Medical Opinions

16. In February 2004 Claimant underwent an independent medical evaluation with Dr. Bucksbaum, a physiatrist. In the context of expressing his opinion on such issues as causation, end medical result and permanency, Dr. Bucksbaum considered all three of Claimant's low back injuries – the March 1999 incident while lifting luggage and the December 1999 and May 2003 motor vehicle accidents.

17. Dr. Bucksbaum concluded that Claimant's ongoing symptoms were causally related to his December 1999 accident. He determined that Claimant had reached an end medical result and assessed a 13% whole person impairment attributable to that injury.

18. As to the impact of Claimant's May 2003 accident, Dr. Bucksbaum concluded that this incident had resulted in a lumbar strain on the opposite (left) side, which had resolved without residual impairment.

19. At Defendant's request, in June 2007 Claimant underwent an independent medical evaluation with Dr. White, a specialist in occupational medicine. As Dr. Bucksbaum had, Dr. White considered all three of Claimant's low back injuries in the context of rendering his opinion on a variety of issues. Based on his evaluation, he reached the following conclusions:

- That the initial luggage lifting incident in March 1999 likely "precipitated, aggravated or brought on the symptoms of [Claimant's] underlying disc herniation;"

- That the December 1999 motor vehicle accident resulted in "an aggravation of the underlying lumbar spine disorder;" and

- That Claimant's symptoms appeared to worsen further as a result of the May 2003 motor vehicle accident, but that this was a "temporary exacerbation," following which Claimant apparently returned to his pre-accident status.

20. When asked to comment specifically as to whether Claimant's 2006 fusion surgery was causally related to a specific injury or condition, Dr. White responded as follows:

> This surgery was treatment for pain related to lumbar degenerative disc disease. It is not related to one specific injury or incident now [sic] as noted above his condition was likely aggravated by the December 1999 motor vehicle accident.

21. As a result of his fusion surgery, Dr. White determined that Claimant's whole person permanent impairment now totaled 30%.[1] In calculating this impairment, Dr. White characterized Claimant's December 1999 injury as a "significant aggravation." He did not attribute any permanency to the May 2003 accident.

22. As for Claimant's ability to work, Dr. White and Dr. Weinberg both agreed that a three-month period of total disability following Claimant's 2006 fusion surgery would have been quite reasonable.

[1] The parties agree that it is appropriate to apportion out from this amount the 11.5% permanency previously paid, *see* Finding of Fact No. 6 *supra*, in accordance with 21 V.S.A. §648(d). The remaining whole person permanent impairment for which Claimant has not yet been compensated, therefore, is 18.5%.

Claimant's Third-Party Recovery for the December 1999 Motor Vehicle Accident

23. At some point after the December 1999 motor vehicle accident Claimant filed suit against Richard Boyden, the driver of the vehicle that had hit him. Defendant was aware of the litigation and through its workers' compensation insurance carrier, Peerless Insurance Co., had asserted its subrogation rights against any third-party recovery pursuant to 21 V.S.A. §624(e).

24. In conjunction with the pending third-party lawsuit, on July 14, 2004 Claimant engaged in a mediation session with Mr. Boyden. In preparation for the session, Claimant's attorney telephoned Peerless and asked that a representative be available, as it was likely that any mediated settlement would involve some compromise of Defendant's workers' compensation lien. As of the date of the mediation, Peerless had paid a total of $88,955.08 in workers' compensation benefits attributable to Claimant's December 1999 accident.

25. It so happened that the adjuster assigned to Claimant's claim was on vacation, so Richard Bolduc, Peerless' assistant claims manager, responded in her place and represented Defendant's lien interests on the day of the mediation. As the negotiations proceeded, Mr. Bolduc made the following claim activity log entry:

> Received call from [Claimant's attorney]. They are in the mediation this morning. Other side has a $35K offer on the table. [Claimant's attorney] has a demand of $195K. Based on mediation direction this morning, other side confident in their value, indicating they do not dispute the liability, however, they question/challenge medical causation. Feel that, based on meds, the MVA did not cause all of Claimant's problems, that he has a pre-existing condition that is a more significant causal factor for Claimant's problems. [Claimant's attorney] wants to know if we would be willing to "significantly" compromise our lien, i.e. by 80%.[2]

26. After much give and take, ultimately the mediation proved successful and a negotiated settlement was reached. Mr. Boyden, the third-party motor vehicle driver, agreed to pay Claimant $82,500.00. From that amount, Peerless agreed to accept $10,000.00 in satisfaction of Defendant's workers' compensation lien. In addition, in accordance with the applicable statute, 21 V.S.A. §624(e), Claimant and Defendant agreed that until Claimant's share of the third-party proceeds (after deducting costs and attorney fees) had been exhausted Defendant would receive a credit, or "holiday," for any future workers' compensation benefits it otherwise would be obligated to pay.

[2] It is unclear exactly which "pre-existing condition" the "other side" was referring to as the basis for limiting its exposure. It might have been a reference to the L5-S1 disc herniation that had become apparent following Claimant's luggage lifting incident in March 1999, but there is no evidence to either confirm or refute that interpretation.

27. In accordance with these terms, on August 17, 2004 Mr. Bolduc executed a "Release of Workers' Compensation Lien" on Peerless' behalf. In a cover letter to Claimant's attorney enclosing the signed release, Mr. Bolduc stated:

> I look forward to receipt of the $10,000 check, representing satisfaction of our lien. I would also ask that, once all attorney fees and costs are deducted from Mr. Griggs' final settlement, along with the $10,000 representing our lien, you advise the final amount going to your client. This will assist us in tracking our "holiday" from future payments, until such time as Mr. Griggs is able to produce documentation confirming he has exhausted his settlement proceeds.

28. Claimant's attorney responded to Mr. Bolduc's letter on August 19, 2004, stating:

> Once the deductions are made from the settlement check, the distribution to Mr. Griggs will be $41,725.14. Since I believe under the applicable law that the holiday is subject to an attorney fee as well, I think the applicable holiday would be $27,816.76. This is the amount Mr. Griggs must incur before Peerless becomes responsible for benefits related to his low back injury.

29. Claimant's attorney used a two-step process to calculate the amount of Defendant's "holiday." First, he determined the deductions applicable to Defendant's "current" credit:

Total recovery from third party	$ 82,500.00
Less expenses of recovery[3]	(30,774.86)
Less satisfaction of Peerless lien	(10,000.00)
Distribution to Claimant	= $ 41,725.14

Next he deducted an additional one-third as Defendant's share of the attorney fees attributable to its "future" credit:

Amount of Defendant's "future" credit	$ 41,725.14
Less one-third attorney fees	(13,908.38)
Total amount of Defendant's "holiday"	= $ 27,816.76

[3] In his proposed findings and conclusions, filed after the formal hearing was concluded, Claimant asserted that his recovery expenses consisted of $3,274.86 in litigation costs and an attorney fee representing one-third of the total recovery, or $27,500.00. In December 2008 the Department had ordered that Claimant provide this information in order that the amount of Defendant's "holiday" could be calculated accurately, but Claimant never complied.

30. Mr. Bolduc never responded to Claimant's attorney's letter, either to endorse his calculation of Defendant's "holiday" from future workers' compensation benefits or to dispute it.

31. Mr. Bolduc testified that after the third-party action was settled, Peerless would have placed Claimant's workers' compensation claim on hold until such time as Claimant produced evidence documenting that he had exhausted the future credit and that Defendant's "holiday" had ended. Consistent with that practice, in June 2005 Peerless' adjuster denied payment for physical therapy services prescribed by Claimant's physician in part because Claimant had not provided proof that he had "spent down his settlement." The adjuster's claim activity log entry for that date stated the amount of Defendant's "holiday" as $27,816.76, the amount Claimant's attorney previously had advised according to the above calculations.

Claimant's Third-Party Recovery for the May 2003 Motor Vehicle Accident

32. As noted in Finding of Fact No. 8 above, on May 29, 2003 Claimant was en route to a physical therapy appointment when he was involved in another motor vehicle accident. Defendant was aware of this accident at least as of May 25, 2004. On that date, Peerless' adjuster made the following entry in the claim activity log relating to Claimant's December 1999 claim:

> This [injured worker] was first involved in MVA creating this claim, then he was involved in a 2nd MVA, unrelated to work however causing injury so now due to this complication [Claimant's attorney] is stuck in litigation over the two. At this time we are still holding out for recovery of our lien.

33. Similarly, on July 9, 2004 the adjuster made the following claim activity log entry:

> Reviewed file on diary. This file open for subro issue only, . . . , this [injured worker] suffered injury from MVA/work related then had another MVA/not related to this claim and suffered separate incidents and injuries. [Claimant's attorney] is aware of our lien and will keep [defense] counsel and myself updated.

34. It is unclear from the record to what extent the adjuster was aware of the specific circumstances surrounding the May 2003 motor vehicle accident, particularly the fact that it occurred while Claimant was en route to a physical therapy appointment necessitated by his December 1999 work-related injury.[4]

[4] This fact is critically important. It is well settled that an injury that occurs while a claimant is en route to or from a medical appointment necessitated by a compensable work-related injury is itself compensable. *See* 1 *Larson's Workers' Compensation Law* §10.07 and cases cited therein.

35. Claimant did not make any formal claim for workers' compensation benefits causally related to the May 2003 accident, and Defendant did not pay any.[5]

36. At some point Claimant filed suit against Lucille Lawes, the driver of the other vehicle involved in the May 2003 collision. Claimant did not notify Defendant that he had done so.

37. In April 2008 Claimant settled his claim against Ms. Lawes for $15,000.00. Claimant did not invite Defendant to participate in settlement negotiations and did not notify Defendant of either the fact or the amount of the settlement.

Claimant's Demand for Additional Workers' Compensation Benefits

38. On May 19, 2006 Claimant notified Defendant of his claim for workers' compensation benefits causally related to his February 2006 fusion surgery. Claimant asserted that the surgery was necessitated by the injuries he had sustained in the December 1999 work-related motor vehicle accident.

39. On June 29, 2006 Defendant denied Claimant's claim, citing two grounds as its basis for doing so. First, it asserted that Claimant had not demonstrated that he had "spent down" the proceeds of his third-party settlement, such that Defendant's statutory "holiday" arguably was still in effect.

40. As a second ground for its denial, Defendant asserted the following:

> Upon information and belief, [Claimant] accepted a compromised resolution of the third-party claim against the driver involved in his second work-related accident based on a defense by the driver that not all damages suffered by [Claimant] were causally related. In particular, [Claimant] suffered from an underlying back condition which may be the driving force behind his present need for surgery. As such, it is not clear that [Claimant] is entitled to further benefits.

41. In August 2006 Claimant presented an alternative legal argument, to both Defendant and to the Department, justifying his entitlement to additional workers' compensation benefits. Given that he had been en route to physical therapy for his December 1999 injuries at the time of the May 2003 motor vehicle accident, Claimant asserted that his fusion surgery was compensable regardless of whether it was necessitated by the former or by the latter.[6]

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[5] Although Defendant asserted in response to Claimant's Requests to Admit that it had made payments totaling $1,006.92 for physical therapy treatments causally related to the May 2003 accident, the evidence admitted at hearing shows otherwise. Specifically, Peerless' payment ledger documents payments *issued* to the physical therapist during the summer of 2003, but none for dates of service *incurred* during that time frame.

[6] As noted above, *see* footnote 4 *supra*, this argument is consistent with established legal doctrine.

42. In response to Defendant's request for documentation that Claimant had "spent down" the proceeds of the third-party settlement from his December 1999 motor vehicle accident, in September 2007 his attorney provided Defendant's attorney with a demand letter detailing the additional workers' compensation benefits he alleged were due. The letter contained information both as to Claimant's average weekly wage for the twelve weeks prior to his February 2006 fusion surgery and as to various medical charges that either he or his group health insurance carrier allegedly had paid as a consequence of his compensable injuries.

43. On July 28, 2009 the Department issued an Interim Order directing Defendant to pay Claimant $15,572.75 in additional permanency benefits. The Order also directed Defendant to pay Claimant's medical providers for the reasonable and necessary treatment they had provided for his December 1999 work injury, including the 2006 fusion surgery, in accordance with the workers' compensation medical fee schedule.

CONCLUSIONS OF LAW:

1. In this claim, Claimant asserts entitlement to additional temporary total and permanent partial disability benefits stemming from his 2006 fusion surgery. Defendant claims a credit, against whatever benefits are determined to be due, in consideration of Claimant's third-party settlements.

2. To resolve the disputed issues, I first must determine to what additional benefits Claimant has proven his entitlement. Next, I must decide the amount of the "holiday" Defendant should have enjoyed as a result of either or both of Claimant's third-party settlements. Then I must determine the extent to which Claimant "spent down" his third-party proceeds. Last, I must address Claimant's claim for penalties and interest.

Claimant's Entitlement to Additional Benefits

3. Claimant's claim for temporary total disability benefits is for the three months following his fusion surgery, from February 1, 2006 until May 1, 2006. Although there was expert medical testimony establishing that such a period of disability would have been "reasonable," the contemporaneous medical records fail to document that in actuality Claimant was totally restricted from working during that time frame. To the contrary, the credible evidence established that by mid-March 2006 Claimant had begun to resume certain work activities on at least a part-time basis.

4. Under the particular circumstances of this claim, I find it appropriate to award Claimant temporary total disability benefits for the period from February 1, 2006 through March 15, 2006, a total of 6.1 weeks.

5. Defendant argues that even if the evidence is sufficient to establish a period of total disability following the February 2006 fusion surgery, Claimant should be disqualified from receiving benefits because he continued to receive his full salary during his recovery. I disagree. Defendant has presented no evidence to establish that the wages Claimant received were intended to be in lieu of compensation as opposed to sick pay, vacation pay or some other entitlement arising under his employment contract. Without such evidence, there is no basis for disallowing Claimant's award. *See* 4 *Larson's Workers' Compensation Law* §82.06[3].

6. As for permanency, the parties do not dispute Dr. White's post-fusion impairment rating of 30% whole person. Subtracting out the 11.5% previously paid following Claimant's December 1999 injury leaves a balance owing of 18.5%, a total of 101.75 weeks.

7. It remains to determine the compensation rate at which Claimant's benefits should have been paid. Claimant asserts that he was entitled to the maximum compensation rate, as was the case at the time of his December 1999 injury when his weekly salary was $1,500.00. During the twelve weeks prior to his February 2006 disability, however, Claimant's salary was substantially lower, only $1,200.00 per week. This would have yielded a lower initial compensation rate as well, $800.40 per week.

8. 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).

9. This interpretation makes sense when the work injury itself accounts for the reduction in earnings. An injured worker should not be penalized, for example, if the functional restrictions imposed as a result of a work injury now preclude overtime hours that he or she was well able to work before. In that circumstance, calculating the compensation rate on the basis of the earlier (higher) wages 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).

10. Fairness also requires, however, that a claimant not receive a windfall when the reduction in earnings is due to circumstances completely unrelated to the work injury. For example, when a claimant opts for a new and different, though lower paying, job for reasons that are entirely personal, there is no justification for paying compensation for a subsequent period of disability at a wage rate that is no longer relevant. *See D.P., Jr. v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008). To do so would amount to wage enhancement, not wage replacement.

11. Here, Claimant has failed to produce any evidence from which I can conclude that the decrease in his weekly salary from 1999 to 2006 was due to injury-related factors. The decrease could just as plausibly have been due to personal or economic factors.[7] Claimant bears the burden of proof on this issue, and he has failed to sustain it.

12. I conclude, therefore, that Claimant has established his entitlement to temporary total disability benefits from February 1, 2006 through March 15, 2006, a total of 6.1 weeks payable at the rate of $800.40 weekly, or $4,882.44. In accordance with 21 V.S.A. §648(a), Claimant's entitlement to permanent partial disability benefits, a total of 101.75 weeks, would have begun to accrue at the end of this period of total disability. *Laumann v. Department of Public Safety*, 2004 VT 60. These benefits would have been payable at the initial compensation rate of $800.40 weekly through June 30, 2006, a total of 15.3 weeks, or $12,246.12. As of July 1, 2006 Claimant's compensation rate would have increased to $820.41, with 52 weeks of benefits at that rate totaling $42,661.32. As of July 1, 2007 the remaining 34.45 weeks of permanency benefits would have been payable at the rate of $853.23 weekly, or $29,393.77. The total of all benefits to which Claimant has proven his entitlement, therefore, is $89,183.65.

Defendant's "Holiday" Following Claimant's First Third-Party Settlement

13. Where a work-related injury is caused under circumstances creating a legal liability in some third party, Vermont's workers' compensation law provides a framework for determining both the employee's and the employer's rights of recovery. The employee has a right to recover tort damages from the responsible third party. 21 V.S.A. §624(a). To prevent double recovery, however, from the proceeds of any such recovery the employee must repay the employer, or more typically its workers' compensation insurance carrier, for any workers' compensation benefits it has become obligated to pay on account of the injury's work-related nature. Specifically, §624(e) provides:

> Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee . . . and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

[7] I am mindful of the fact that as president of the corporation for which he worked, Claimant likely exercised some control over how the business' revenues were allocated, as either wages or profits.

14. To aid in determining the extent to which the expenses of recovery should be shared, §624(f) provides:

> Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting the recovery. . . . The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of recovery.

(a) *Jurisdiction to Apportion the Expenses of Recovery*

15. As a preliminary matter, Defendant asserts that because the expenses of Claimant's third-party recovery were not apportioned by a court in accordance with §624(f), there is no basis for the Commissioner to apportion them now. I disagree.

16. The Vermont Supreme Court consistently has acknowledged the Commissioner's jurisdiction to hear and decide disputes that arise in the context of administering the Workers' Compensation Act. *Travelers Indemnity Co. v. Wallis*, 2003 VT 103; *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259 (1934). That jurisdiction derives generally from 21 V.S.A. §606:

> Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of the commissioner, shall be determined, except as otherwise provided, by the commissioner.

17. Here, apportioning the expenses of Claimant's third-party recovery is a necessary first step to determining the extent of Defendant's "holiday," and thereby Claimant's entitlement to additional workers' compensation benefits. The question of apportionment, therefore, is one that arises under the Act. *LaBrie v. LBJ's Grocery*, Opinion No. 29-02WC (July 10, 2002). And while the language of §624(f) directs a court to make the apportionment determination, it would be impractical to apply that provision where, as here, the third-party claim has been settled rather than litigated to a conclusion. It is more in keeping with both the Act's liberal construction, *King v. Snide*, 144 Vt. 395, 404 (1984), and with the Department's interest in providing a speedy and inexpensive process for resolving disputes, *Workers' Compensation Rule* 7.1000, to retain jurisdiction in this forum.

18. For his part, Claimant argues that because Defendant previously acquiesced to his apportionment calculations at the time the third-party settlement was negotiated in 2004, it has waived its right to challenge the question now. Again, I disagree. The facts are insufficient to establish the "voluntary relinquishment of a known right," which is an essential component of any waiver. *J.C. v. Richburg Builders*, Opinion No. 37R-06WC (October 9, 2006).

19. I conclude, therefore, that jurisdiction properly rests with me to determine how best to apportion the expenses of Claimant's third-party recovery.

(b) *The "Barney" Apportionment Formula*

20. In *Barney v. Paper Corporation of America*, 1988 WL221243 (D.Vt.), the U.S. District Court had occasion to interpret the provisions of Vermont's workers' compensation law so as to apportion appropriately the expenses of a third-party recovery between the injured worker and his employer. The court first described the three-step statutory scheme mandated by 21 V.S.A. §624(e):

- First, the expenses of recovery are deducted from the amount of recovery;
- Second, the employer is reimbursed for any benefits paid or payable to the date of recovery; and
- Third, the balance is paid to the employee, with the employer receiving credit (the so-called "holiday") towards any future workers' compensation benefits the employer otherwise would be obligated to pay.

Id. at *2.

21. Next the court considered how best to allocate the expenses of recovery in accordance with 21 V.S.A. §624(f). It did so on a straight *pro rata* basis, with each party bearing the same share of the third-party litigation expenses as its share of the third-party recovery represented in relation to the whole. Thus, the employer in *Barney*, whose reimbursement for the workers' compensation benefits it already had paid amounted to 15% of the total recovered from the third party, was obligated initially to pay 15% of the expenses. *Id.* at *6.

22. The court recognized, however, that the employer's *pro rata* interest in the employee's third-party recovery encompassed not only the workers' compensation benefits it already had paid, but also those that it would not have to pay in the future. As those benefits came due, the court reasoned, the employer's *pro rata* interest in the third-party recovery would increase accordingly. In keeping with the statutory mandate, so would its share of the expenses. *Id.* at *3.

(c) *"Barney" Applied*

23. Applying the *Barney* calculation process to the current claim, Defendant's initial workers' compensation "holiday" was $41,725.14, the amount Claimant received from his third-party action after first paying the expenses of recovery and then satisfying Defendant's workers' compensation lien. *See* Finding of Fact No. 29 *supra*.

24. Defendant's initial share of that recovery, $10,000.00, represented 12% of the $82,500.00 paid by the third party, and therefore initially Defendant would have owed 12% of the total expenses incurred.[8]

25. Thereafter, Claimant's entitlement to additional workers' compensation benefits continued to accrue, to the point where his third-party proceeds were entirely exhausted.[9] At that point, Defendant's interest in that recovery totaled $51,725.14 – the $10,000.00 it had received in satisfaction of its original lien, plus the $41,725.14 in future benefits it had been excused from paying as a consequence of its "holiday". As a result, its *pro rata* share of the third-party recovery increased from 12% to 63%.[10]

26. Defendant's share of the original third-party recovery having increased to 63% of the total, its corresponding share of the expenses of recovery should have increased to 63% as well. Applying this multiplier to the total expenses incurred ($30,774.86 times 63%), Defendant's share ultimately should have totaled $19,388.16. Defendant having already been debited for $3,692.98 in recovery expenses (*see* footnote 8 *supra*), the balance it should have been assessed was $15,695.18.

27. Subtracting this sum ($15,695.18) from the amount of Claimant's original distribution ($41,725.14) reduces Defendant's "holiday" to $26,029.96. This, I conclude, is the amount of the future credit Defendant should have enjoyed following Claimant's settlement of the third-party claim arising out of his December 1999 motor vehicle accident.

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[8] By this equation, Defendant's initial share of the recovery expenses would have totaled $3,692.98 (12% of $30,774.86). Although the parties did not characterize it as such, essentially this amount was debited from Defendant and credited to Claimant in calculating the amount of Defendant's initial "holiday" of $41,725.14.

[9] As noted above, *see* Conclusion of Law No. 12, Claimant has established his entitlement to more than $89,000.00 in indemnity benefits alone causally related to his December 1999 work injury, well more than the amount he was required to "spend down" in order to exhaust Defendant's "holiday."

[10] $51,725.14 (Defendant's total interest in Claimant's third-party recovery) divided by $82,500.00 (the total of the third-party recovery) equals .63, or 63%.

Defendant's "Holiday" Following Claimant's Second Third-Party Settlement

28. Defendant also claims a "holiday" on account of Claimant's settlement of the third-party claim arising out of his May 2003 motor vehicle accident. The issues raised in this context involve first, whether Claimant was obligated to notify Defendant of this claim and second, whether he should have obtained Defendant's consent to any settlement he reached with the responsible third party.

(a) Defendant's Right to Notice

29. In order to ensure that each party – injured worker, employer and/or workers' compensation carrier – has an opportunity to protect its particular interests should a third-party suit be filed, *Dubie v. Cass-Warner Corp.*, 125 Vt. 476, 479 (1966), Vermont's workers' compensation statute imposes a notice requirement. At least 30 days prior to commencing litigation, the party filing suit must give registered-mail notice of its intention to do so, to both the other interested parties and to the commissioner as well. 21 V.S.A. §624(a).

30. There is no question here but that Claimant failed to give the required notice, to either the commissioner or to Defendant, prior to commencing litigation against the third party responsible for his May 2003 motor vehicle accident. Claimant justifies his failure to do so on the grounds that he never made any claim for workers' compensation benefits arising out of the incident, nor did Defendant pay any. Defendant having paid nothing on account of the accident, Claimant reasons, it had neither a lien nor subrogation rights relative to the litigation that arose from it.

31. Claimant's logic ignores the plain language of the statute. The notice requirement of §624(a) is triggered whenever an injury "for which compensation is payable under the provisions of this chapter" was caused under circumstances creating a third party's legal liability. The determinative factor is not whether the injured worker has yet sought workers' compensation benefits, nor whether the employer has yet paid any. It is simply whether the injury has occurred under circumstances that make it work-related and therefore compensable.

32. Contrary to Claimant's assertion, furthermore, the fact is that he *did* make a claim for workers' compensation benefits arising out of the May 2003 accident. How else to characterize Claimant's argument before the Department in August 2006 that Defendant was responsible for his fusion surgery either as a consequence of the May 2003 accident or as a result of the December 1999 accident? Claimant clearly acknowledged in that context that both events were sufficiently work-related so as to support a claim for additional benefits, and in fact, that is what he asserted.

33. It may be true that whatever injury Claimant suffered as a result of the May 2003 motor vehicle accident was relatively minor, and therefore probably was not a contributing factor leading to his 2006 fusion surgery. That issue goes to the question of damages, however, not to compensability. It likely would have affected the strength of Defendant's bargaining position in any third-party settlement discussion. It did not affect Defendant's statutory right to be informed in any way.

34. I conclude, therefore, that Claimant was obligated under 21 V.S.A. §624(a) to give notice to Defendant prior to commencing any third-party litigation arising from his May 2003 motor vehicle accident, and that he failed to do so.

(b) *Defendant's Right to Consent*

35. In addition to requiring that notice be given to all interested parties prior to commencing third-party litigation, the statute also mandates that the employer and/or its workers' compensation carrier must consent to any third-party settlement the injured worker negotiates "if the amount of the settlement . . . is less than the compensation benefits which would have been payable in the future but for the provisions of this section." 21 V.S.A. §624(b). Given that one important consequence of a third-party settlement is the employer's right to a future credit, by this provision the statute clearly recognizes the employer's need to be involved so as to ensure that its interests are adequately protected. *See* 6 *Larson's Workers' Compensation Law* §116.07[1]. Were the rule otherwise, a claimant might be persuaded to accept a smaller third-party settlement in return for a smaller "spend down" and shorter workers' compensation "holiday."

36. Defendant argues that because Claimant failed to seek its consent to the settlement he negotiated with the third party responsible for his May 2003 accident, it should be credited with the full amount of his $15,000.00 recovery. Claimant argues that because the amount of the settlement was for far more than the benefits "which would have been payable in the future" on account of that event, Defendant's consent was not necessary.

37. Claimant is correct. Defendant failed to produce any evidence from which I reasonably can conclude that as a result of the May 2003 motor vehicle accident it likely will owe additional workers' compensation benefits in the future. To the contrary, Defendant's own medical expert, Dr. White, asserted that that incident caused only a temporary exacerbation of Claimant's symptoms, following which Claimant returned to his previous baseline. Dr. White did not attribute any need for ongoing treatment to the May 2003 accident and did not ascribe any permanent impairment to it. Based on the medical evidence as it now stands, therefore, there is no reason to believe that any future benefits will become payable on account of that event.

38. Should this circumstance change, such that at some point Defendant does become liable for additional benefits causally related to the May 2003 accident, the statute provides adequate protection. According to 21 V.S.A. §624(e), in the event that an injured worker settles a third-party claim before workers' compensation benefits are paid, "any moneys so recovered shall be applied" as directed in §624(e). In this way, Claimant continues to be precluded from obtaining a double recovery, and Defendant continues to retain its right to a future credit.

39. I conclude, therefore, that as the evidence now stands Defendant is not entitled to any future credit on account of Claimant's settlement of the third-party claim arising out of his May 2003 motor vehicle accident.

Claimant's "Spend-Down"

40. Having concluded that Defendant's workers' compensation "holiday" totaled $26,029.96, *see* Conclusion of Law No. 27 *supra*, all that remains is to determine whether Claimant has "spent down" at least that amount in benefits that otherwise would have been payable. Clearly he has.

41. As noted in Conclusion of Law No. 12 *supra*, Claimant has established his entitlement to indemnity benefits totaling $89,183.65. In addition, Claimant has incurred medical expenses causally related to treatment for his compensable injury.[11] Together these amounts well exceed the amount of Defendant's "holiday."

42. With credit for Defendant's "holiday," following his 2006 fusion surgery Claimant should have been paid a total of $63,153.69 in indemnity benefits. Pursuant to the Department's July 28, 2009 interim order, Defendant paid $15,572.75. The balance still owing, therefore, is $47,580.94.

Penalties and Interest

43. As a final matter, Claimant claims entitlement to both penalties and interest as a consequence of Defendant's alleged failure to pay indemnity benefits when due.

[11] Defendant argues that to the extent that Claimant's group health insurer paid some part of his medical expenses, they should not be considered as part of Claimant's "spend-down." The statute clearly provides otherwise. Section 624(g) states that the "compensation benefits" to be considered in calculating the employer's "holiday" "shall in each instance include" medical expenses incurred under §640.

44. Although the statute provides for a 10% late payment penalty in instances where an employer fails to pay weekly benefits promptly, 21 V.S.A. §650(e), the circumstances here do not warrant it. Here, Defendant seasonably responded to Claimant's claim for additional benefits, properly raised the question whether its "holiday" had yet been exhausted and appropriately requested documentation to establish if it had. That documentation would have included information as to Claimant's wages for the twelve weeks prior to his February 2006 fusion surgery, which Claimant did not provide until September 2007. It also would have included information as to the costs and attorney fees attributable to Claimant's settlement of the third-party claim arising out of his December 1999 motor vehicle accident, which despite the Department's December 2008 order Claimant only just recently provided. Claimant himself contributed to Defendant's inability to adjust his claim properly and determine what benefits were due, therefore. To penalize Defendant would be unfair.

45. The same circumstances preclude an award of interest. The statute mandates interest on any benefits awarded, calculated from the date "on which the employer's obligation to pay compensation" began. 21 V.S.A. §664. Again, until it was provided with sufficient documentation from which to determine both the amount of its "holiday" and the extent to which it had been exhausted, Defendant could not have known when its obligation to pay additional benefits began. There is no basis, therefore, for assessing interest.

ORDER:

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

1. Indemnity benefits totaling $89,183.65 in accordance with Conclusion of Law No. 12 above, less credits totaling $41,602.71 in accordance with Conclusions of Law Nos. 27 and 42 above, for a total now due of $47,580.94;

2. Costs and attorney fees commensurate with the extent to which Claimant has prevailed. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

DATED at Montpelier, Vermont this 1st day of October 2010.

_____
Valerie Rickert
Acting 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.