

Terrance Bortell v. Vermont Composites Inc. (March 25, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Terrance Bortell

Opinion No. 37L-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Vermont Composites, Inc.

For: Anne M. Noonan
Commissioner

State File No. X-02179

**RULING ON CLAIMANT'S MOTION TO ORDER LUMP SUM PAYMENT OF
PERMANENT TOTAL DISABILITY BENEFITS AND FOR OTHER RELIEF**

The Commissioner previously decided this claim on December 30, 2010. The opinion determined that Claimant was permanently and totally disabled, and ordered that permanent total disability benefits be paid in accordance with 21 V.S.A. §645 commencing on November 10, 2008 (with credit for any permanent partial disability benefits paid since that date).

Claimant now requests that the minimum amount payable under §645(a) – 330 weeks at the applicable compensation rate – be paid in a lump sum in accordance with 21 V.S.A. §652(b), so that the benefits can be prorated in accordance with 21 V.S.A. §652(c). The purpose of the latter section is to protect a claimant's ongoing entitlement to Social Security benefits by minimizing the offset that otherwise would occur were workers' compensation permanency benefits not prorated over his or her life expectancy.

In keeping with §652(b), Workers' Compensation Rule 19.3000 allows the commissioner to approve a claimant's request for lump sum payment of permanent disability compensation "if it is in the best interests of the claimant." The rule lists four "positive factors" to be considered in evaluating such a request:

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| 19.3010 | The claimant and/or the claimant's household receives a regular source of income aside from any workers' compensation benefit; |
| 19.3011 | The lump sum payment is intended to hasten or improve claimant's prospects of returning to gainful employment; |
| 19.3012 | The lump sum payment is intended to hasten or improve claimant's recovery or rehabilitation; |
| 19.3013 | The claimant presents other evidence that the lump sum award is in their best interests. |

Workers' Compensation Rule 19.5000 states that a lump sum payment shall not be approved if:

- 19.5010 The award was based upon a hearing decision for which an appeal has been filed and the employer or insurer objects to the payment of the lump sum; or
- 19.5011 The claimant is best served by receipt of periodic income benefits; or
- 19.5012 The payment is intended to pay everyday living expenses; or
- 19.5013 The lump sum payment is intended to pay past debts.

It is notable that while the language of Rule 19.5000 is mandatory, prohibiting a lump sum award if any of the four enumerated circumstances exist, the language of Rule 19.3000 is discretionary, in which the four enumerated circumstances are merely "positive factors" to be considered.

In support of his request here, Claimant asserts that since he began receiving permanency compensation his monthly Social Security Disability Income (SSDI) benefit has been reduced. Claimant's SSDI benefit represents a regular source of household income under Rule 19.3010, and it is in his best interests to maximize his income from that source. On those grounds, I conclude that there is good reason to approve the payment of the first 330 weeks of Claimant's permanent total disability award in a lump sum.

I further conclude that there is no basis under Rule 19.5000 for rejecting Claimant's request. Defendant has not appealed the formal hearing decision, and the appeal period has now run. Claimant is better served not by the receipt of periodic income benefits from workers' compensation, but by the maximization of his income from Social Security Disability. The lump sum payment is not intended to pay everyday living expenses, as Claimant's Social Security Disability income will be adequate for that purpose. Last, although Claimant has had to borrow money in order to cover some additional expenses he just recently incurred, these were due to unusual and extenuating circumstances, and I do not consider them to be the type of "past debts" envisioned by the rule.

As a final argument, Defendant claims that it will be prejudiced if it is required to pay benefits in a lump sum. Given that Claimant has admitted in the past to suicidal ideation, Defendant argues that it "may have difficulty" recouping the lump sum payment if Claimant dies. Suffice it to say that nothing in Rule 19 even remotely hints at such reasoning as a valid basis for denying a lump sum request.

I conclude that it is appropriate under the circumstances of this case to award Claimant the first 330 weeks of permanent total disability benefits in a lump sum. Contrary to Claimant's request, however, I will not assess interest or penalties against Defendant for its failure to issue a lump sum payment voluntarily. Absent an order to do so from the Commissioner, Defendant was under no obligation to pay benefits in a lump sum. There is no basis, therefore, for assessing either interest or penalties.

Defendant is reminded, however, that it is its responsibility, not Claimant's, to ensure that all outstanding medical bills causally related to the compensable injury are timely paid. To the extent that this has not occurred, Defendant may be liable for interest as charged by the providers.

Claimant having prevailed on his request for a lump sum award, he is entitled to an award of costs and attorney fees. Claimant has submitted two requests for attorney fees, one in conjunction with his original motion and a cumulative one filed after his reply to Defendant's memorandum in opposition. Considering both submissions together, I conclude that an award of fees totaling \$2,392.50 (16.5 hours at \$145.00 per hour) is appropriate.

As for costs, Claimant shall have 30 days from the date of this Order within which to submit his request for reimbursement.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** as follows:

1. Defendant shall pay as a lump sum 330 weeks of permanent total disability benefits in accordance with 21 V.S.A. §645 commencing on November 10, 2008 (with credit for any permanent partial and/or permanent total disability benefits paid to date);
2. The award of benefits in this case, totaling \$144,332.20, is lump sum compensation for a permanent impairment that will affect Claimant for the rest of his life. Claimant's remaining life expectancy, based on the National Vital Statistics Reports, Vol. 54, No. 14 (April 19, 2006), is 33.1 years, or 397.2 months. Therefore, even though paid in a lump sum, Claimant's net benefit is \$88,950.60 (after the Commissioner's award of \$21,978.92 for attorney fees and deduction of attorney fees of \$55,381.60 from the total award), which shall be prorated pursuant to 21 V.S.A. §652 and considered to be \$223.94 per month beginning on November 10, 2008;
3. Attorney fees totaling \$2,392.50 and costs to be submitted.

DATED at Montpelier, Vermont this 25th day of March 2011.

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.