

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Timothy Martin

Opinion No. 35-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Burlington Public
School District

For: Anne M. Noonan
Commissioner

State File Nos. Z-54128 and W-6342

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Marion Ferguson, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to receive payment of permanent partial disability benefits referable to an injury for which he already has reached an end medical result at the same time that he is receiving temporary disability benefits referable to another injury, arising out of the same accident, for which he has not yet reached an end medical result?

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant suffered a personal injury by accident arising in the course and scope of his employment for Defendant on February 7, 2005.
2. As a result of this accident Claimant suffered a right hip injury, for which he underwent right total hip replacement surgery on November 11, 2006.
3. Defendant accepted Claimant's right hip injury as compensable.
4. Claimant subsequently developed a left hip condition, for which he underwent left total hip replacement surgery on October 28, 2010.
5. Defendant accepted Claimant's left hip injury as compensable.
6. At Defendant's request, Claimant underwent an independent medical examination with Dr. White on March 25, 2011. Dr. White concluded that Claimant had reached an end

medical result for his right hip injury, and assessed him with a 30 percent whole person permanent impairment referable thereto.

7. Dr. White concluded that as of the date of his examination Claimant had not yet reached an end medical result for his left hip injury.
8. Claimant demanded that Defendant commence paying permanent partial disability benefits as compensation for the rated permanency to his right hip. Defendant refused.
9. Claimant is still receiving temporary total disability benefits on account of his left hip injury.

DISCUSSION:

1. Claimant presents a purely legal issue for determination – whether a worker who is receiving temporary disability benefits for one injury related to a work accident can receive permanency benefits for a separate injury arising out of the same accident. As the material facts are not disputed, summary judgment is an appropriate vehicle for resolving this issue. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).
2. Vermont’s workers’ compensation statute mandates the point at which permanency benefits are to be paid to an injured worker, that is, “at the termination of [temporary] total disability.” 21 V.S.A. §648(a). The Vermont Supreme Court has concluded that this language is plain, and clearly evidences the legislature’s intent. *Laumann v. Department of Public Safety*, 2004 VT 60, ¶¶12-14. Simply put, the trigger for paying permanency benefits is the date upon which the injured worker’s entitlement to temporary total disability benefits ends. *Id.*; *Sweetser v. Vermont Country Camper*, Opinion No. 36-09WC (September 24, 2009).
3. Claimant’s attempt to distinguish *Laumann* is unpersuasive. The specific legal issue presented in that case may have been different, but to resolve it the court considered exactly the same statutory language that is at issue here. When that language is plain on its face, there is no need to resort to construction. Rather, the statute must be enforced according to its stated terms. *Id.* at ¶10, citing *Russell v. Armitage*, 166 Vt. 392, 403 (1997).
4. I am similarly unconvinced by Claimant’s argument that he is being deprived of a substantive right, that is, the right to reap the time value of the permanency benefits referable to his right hip injury. First of all, the statute does not grant him the right to be paid permanency benefits at this juncture of his claim, and therefore he cannot be said to have been deprived of anything yet. Beyond that, when his permanency benefits do become payable, it will be at the compensation rate prevailing at the time his temporary benefits end. *See, e.g., Sweetser, supra*. As this rate already will have been adjusted for cost of living increases, Claimant will be adequately compensated from a time value perspective.

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 2nd day of November 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.