

V. O. v. Windsor Hospital

(March 27, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

V. O.

Opinion No. 12-08WC

By: David J. Blythe, Esq.  
Hearing Officer

v.

For: Patricia Moulton Powden  
Commissioner

Windsor Hospital

State File No. T-00023

**FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER**

**I. INTRODUCTION**

Claimant presents three distinct issues in her claim:

- (1) Are Claimant's lower back pain and right leg problems causally related to her workplace injury of June 25, 2002 and thereby compensable in this claim?
- (2) Was Claimant at medical end result between August 20, 2005 and June 4, 2006?
- (3) Is Claimant's massage therapy reasonable and necessary treatment for her compensable injury/ies?

**II. HEARING**

This matter came on for final evidentiary hearing on May 2, 2007 before David J. Blythe, Hearing Officer and designee of the Commissioner of Labor for this case. Claimant was present and was represented by Attorney Christopher J. McVeigh. Defendant Windsor Hospital and its workers' compensation insurer, Royal & Sunalliance Insurance Company ("Carrier") were represented by Attorney Keith J. Kasper. Claimant presented testimony and called the following witnesses (who all appeared and testified telephonically): Mark Bucksbaum, MD, Stephen W. Gordon, Karen Curran and Mark Hamilton, MD. Defendant and Carrier did not present witness testimony at the hearing.

### **III. EVIDENTIARY EXHIBITS; JUDICIAL NOTICE**

- (a) The following Exhibits were admitted by stipulation of the parties:  
Joint Exhibit 1: Medical Records (provided electronically on CD);  
Joint Exhibit 2: Supplemental Medical Records (paper copies);  
Joint Exhibit 3: Letter from Mark Hamilton, MD, dated April 19, 2007;
- Claimant's Exhibit 1: Deposition of Dr. Joseph Phillips, dated March 12, 2007;
- Defense Exhibit A: Letter from Attorney McVeigh relating to Claimant's subsequent earnings; and  
Defense Exhibit B: Deposition of Victor Gennaro, DO, dated April 23, 2007.
- (b) Judicial notice may be taken of all forms filed by any party with the Commissioner of Labor (Commissioner) in connection with this case.

### **IV. FINDINGS OF FACT**

#### *Stipulated Facts*

The parties stipulated to the following facts, which are here FOUND and are here incorporated *verbatim* as presented as paragraphs 1 through 4 in a written Stipulation dated May 9, 2007 and May 11, 2007 by the parties:

1. On June 21, 2002, Claimant suffered a personal injury by accident arising out of and in the course of her employment with Defendant within the meaning of the Vermont Workers Compensation Act (hereinafter, "Act").
2. On June 25, 2002, and at all relevant times thereafter, Claimant has had one dependent within the meaning of the Act.
3. On August 5, 2005, Defendant filed a Form 27, with an effective date of August 20, 2005. This was approved by the Commissioner terminating Claimant's total temporary disability benefits on the basis of Dr. Wing's report finding Claimant had reached medical end result, and Defendant began advancing permanency benefits based upon this determination by Dr. Wing.
4. After Dr. Gennaro found the surgery Dr. Phillips proposed to be reasonable medical treatment, Defendant reinstated temporary disability benefits as of June 4, 2006. On July 13, 2006, Claimant underwent cervical surgery by Dr. Phillips. While initially denying the compensability of Claimant's ongoing massage therapy, Defendant did agree to pay for twice monthly massage therapy sessions.

Additional Findings of Fact

General History; Causal Relationship Between Workplace Injury and Lower Back and Leg Pain

5. In August 1999 (almost three years before the workplace injury), Claimant consulted with Dr. Nancy Bagley, to discuss her chronic cervical neck problems. Dr. Bagley determined that Claimant was suffering from C-7 radiculopathy on the right side. Later, Claimant underwent a C-7 block which provided complete, but only temporary, pain relief. A follow up MRI revealed that Claimant suffered from cervical stenosis (degenerative disk disease) at multiple levels. Joint Medical Exhibit - Report of Dr. Bagley dated May 1, 2001.
6. In January 2000, Claimant consulted with Dr. Kimberly Harbaugh due to neck and right arm pain. Claimant informed Dr. Harbaugh that she had been suffering from neck and arm pain for several years prior to this consultation. In 2000, Claimant underwent physical therapy and took medication in an attempt to reduce the pain. Joint Medical Exhibit - Dr. Harbaugh's notes dated January 27, 2000.
7. In the medical history portion of Dr. Harbaugh's neurosurgical consultation report, Claimant reported having a "history of intermittent right sciatica." At that time, Dr. Harbaugh found that Claimant had "no significant toe response with plantar simulation on either foot." Id.
8. In her neurosurgical consultation report, Dr. Harbaugh concluded that Claimant suffered from cervical stenosis and had posterior disc bulges at C4/5, C5/6 and C6/7. Claimant also had a small central disc bulge at C4/5. Dr. Harbaugh further concluded that Claimant's pain symptoms were consistent with the "rupture of a cervical disc with resultant C7 radiculitis." Dr. Harbaugh, however, did not see significant nerve root compromise at C7 and, thus, she opined that Claimant may be suffering from a "fibrous band in the region of the enlarged C7 costal element." If Claimant had this fibrous band, Dr. Harbaugh concluded that it is likely that Claimant would suffer from lower trunk dysfunction. Id.
9. In a follow up appointment with Dr. Bagley in May 2001, Claimant continued to complain of chronic cervical neck pain. Dr. Bagley reiterated her conclusion that Claimant suffered from degenerative disk disease. Joint Medical Exhibit - Report of Dr. Bagley, dated May 1, 2001.

10. At the time of her injury, Claimant was working as a nurse at Windsor Hospital. When the injury occurred, Claimant was assisting a stroke patient who was on the toilet. When Claimant opened the door to the patient's bathroom, the patient fell forward off the toilet towards Claimant. Claimant testified that she attempted to break the patient's fall and when she did so, the patient landed on her chest and knocked her back into the wall. Claimant's Testimony.
11. As a result of the incident described above, Claimant was in a great deal of pain and was taken to the emergency room. Id.
12. Claimant recalled that she took the brunt of the blow near her left shoulder. Claimant testified that her whole upper body hurt, but that the acute pain was in her neck, left shoulder and left arm. Id.
13. Windsor Hospital emergency room records indicate that Claimant was seen for left shoulder and neck pain. The emergency room assessment was that Claimant suffered a left trapezius strain and that she was to treat it by applying ice and heat. Joint Medical Exhibit - Dr. Mark Bucksbaum, Permanency Evaluation at 2 (October 6, 2005).
14. Claimant testified that approximately one month later, sometime in July of 2002, her right foot began to go numb. Claimant testified that she began stumbling and having difficulty walking due to the numbness in her foot. Claimant's Testimony.
15. In July 2002, Claimant began seeing a chiropractic physician, Dr. Donald Anderson, for treatment of her neck and shoulder. Claimant treated with Dr. Anderson from July 2002 through May 2005. Joint Medical Exhibit - Dr. Donald Anderson's notes generally.
16. In an initial interview with Dr. Anderson on July 10, 2002, Claimant described her pain as being located in her neck, shoulders and arm. At that time, Claimant did not describe any right leg pain. Id. at July 10, 2002 notes.
17. Claimant testified that sometime in the Winter of 2002-2003, she told Dr. Anderson of her right leg pain because he noticed she was limping. Claimant's Testimony.
18. Dr. Anderson noted on February 26, 2003 that Claimant had "no leg complaints." Joint Medical Exhibit - Dr. Anderson's notes at February 26, 2003.
19. Dr. Anderson's notes make no mention of Claimant suffering leg pain until August 30, 2004. Id. generally and at August 30, 2004.

20. Karen Curran became Claimant's medical case manager in February of 2003 and worked with her until July of 2004. Karen Curran's Testimony. As Claimant's case manager, Ms. Curran was responsible for helping Claimant coordinate her medical care and obtain appropriate treatment. Id.
21. Ms. Curran worked closely with Claimant on her case and testified to having significant contact with her - sometimes talking to her more than once a day. The first time Claimant mentioned to Ms. Curran that she (Claimant) was having difficulty with her right foot, such that it was causing her to trip and fall, was July 2003. Id. The first reference in Ms. Curran's medical notes to Claimant tripping due to her right foot was in August 2003. Id.
22. In May 2003, Claimant met with Dr. Hulda Magnadottir to discuss her continuing neck pain. At that time, Dr. Magnadottir noted that Claimant did not have any difficulties with her gait. Joint Medical Exhibit - Neurosurgical Consultation with Dr. Magnadottir dated May 19, 2003; Dr. Phillips' Deposition at 34 (Claimant not complaining of leg pain in May 2003).
23. In May 2003, Claimant also met with Dr. Dennis Coombs to discuss her neck pain. Dr. Coombs examined Claimant and, in pertinent part, found that Claimant had a normal gait. Joint Medical Exhibit - Dr. Coombs' notes dated May 30, 2003.
24. On June 3, 2003, Claimant met with and was examined by Dr. William Abdu to discuss the possibility of having disk fusion surgery. At this initial meeting, Claimant told Dr. Abdu that she suffered from "neck pain with some pain in her arms radiating down to the elbow, with occasional distal pain." Joint Medical Exhibit - Office Notes of Dr. Abdu dated June 3, 2003. Claimant did not relate having any lower extremity pain at that time. During Dr. Abdu's physical examination of Claimant, he found that her gait was normal and that her toe walking and heel walking were normal. Id.
25. On August 25, 2003, Dr. Abdu performed a surgical procedure to fuse Claimant's cervical spine at C4-5. The purpose of this procedure was to alleviate pain in both of Claimant's arms and her neck. Joint Medical Exhibit - Dartmouth Hitchcock Medical Center notes generally and Dr. Abdu's notes of August 1, 2003; Claimant's Testimony.
26. In his notes from a post-surgical examination of Claimant on November 11, 2003, Dr. Abdu noted that Claimant's gait was normal. Joint Medical Exhibit - Dartmouth Hitchcock Medical Center - Dr. Abdu's notes dated November 11, 2003.
27. Mark Hamilton, MD became Claimant's treating physician in October 2003. Although Claimant saw Dr. Hamilton on a regular basis, she apparently did not tell him about her right foot problems until September 9, 2004. Joint Medical Exhibit - Dr. Hamilton's notes dated September 9, 2004.

28. On July 26, 2005, Claimant met with Dr. Daniel Wing for an independent medical evaluation (hereinafter "Wing IME"). During the Wing IME, Claimant told Dr. Wing that her biggest problem was right buttock and right leg pain followed by neck and shoulder pain. Joint Medical Exhibit - report of Dr. Wing dated July 26, 2005. Relying upon his review of her medical records and his examination of Claimant, Dr. Wing concluded that Claimant's right buttock and right leg pain were unrelated to her workplace injury on June 25, 2002. Dr. Wing concluded that Claimant's lower extremity pain was likely caused by her extensive lumbar degenerative disk disease and spinal stenosis. Dr. Wing was influenced in his opinion that the right leg pain was unrelated to the workplace accident by the fact that Claimant did not report any right leg pain for a significant period of time after her workplace accident. Id.
29. On October 6, 2005. Claimant underwent a permanency evaluation with Dr. Mark Bucksbaum. In his report, Dr. Bucksbaum cited extensively to Claimant's medical history and the supporting medical records. In concluding that Claimant's lower back and right leg pain are causally related to the June 25, 2002 workplace accident, Dr. Bucksbaum acknowledged that he relied primarily on Claimant's statements and his physical evaluation of Claimant, which examination took place more than three years after the work-related injury and after her initial surgery. Joint Medical Exhibit - Permanency Evaluation by Dr. Bucksbaum dated October 6, 2005; Dr. Bucksbaum's Testimony.
30. In coming to the conclusion that Claimant's right leg pain and sciatica were causally related to her workplace injury on June 25, 2002, Dr. Bucksbaum testified that he relied in part on the fact that Claimant said she began suffering right foot numbness followed by leg pain close in time to her workplace accident. In particular, Dr. Bucksbaum testified that he relied on Claimant's statements because he "had no reason to dispute them." Dr. Bucksbaum's Testimony.

31. In March 2006 on behalf of Defendants, Victor Gennaro, D.O., conducted a physical examination of Claimant (hereinafter, "Gennaro IME"). Joint Medical Exhibit - Dr. Gennaro's IME Report dated March 14, 2006. In addition to the physical exam, Dr. Gennaro reviewed Claimant's medical records and some (but apparently not all) of the MRIs taken of Claimant at various times. Joint Medical Exhibit - Dr. Gennaro's IME Report dated March 14, 2006. Dr. Gennaro concluded there was no causal relationship between Claimant's workplace accident in June 2002 and her right foot and leg problems. Joint Medical Exhibit - Deposition Testimony of Dr. Gennaro dated April 23, 2007, at 12. Dr. Gennaro did not believe the two were related as he did not "see any evidence [in the record] that [Claimant's right leg problems] were occurring at the time of her injury or even in close proximity." *Id.* Dr. Gennaro testified that in his opinion, if Claimant's workplace injury had been sufficient to cause "either myelopathy or issues with her cervical spine" that resulted in lower extremity problems, he would expect to see the onset of these problems immediately following the accident. *Id.* at 13. Dr. Gennaro concluded that there was no evidence that Claimant was significantly myelopathic. Significant myelopathy would cause compression of her spinal cord at the level of her neck and could result in lower extremity problems. *Id.*
32. Moreover, Dr. Gennaro concluded that if Claimant's right leg problems were caused by significant spinal cord compression as a result of the workplace accident, he would expect to see on the MRI changes within the substance of her spinal cord in her neck. Dr. Gennaro found no such changes in his review of Claimant's MRIs. *Id.* at 12. Dr. Gennaro concluded that Claimant's current right leg problems are more likely a logical progression of the degenerative disk disease which existed prior to her workplace accident. *Id.* at 13; see also Findings 5-9 *supra*.
33. In September 2005, Dr. Joseph Phillips recommended an additional surgical procedure to alleviate pain in Claimant's arms and neck. Joint Medical Exhibit - Dr. Phillips' Deposition dated March 12, 2007, at 19-20.
34. Claimant underwent the second surgical procedure on July 13, 2006. Joint Medical Exhibit - Dr. Phillips' Deposition, at 21.
35. As a result of the July 13, 2006 surgery, Claimant obtained significant relief from the pain and limited mobility in her arms and neck. Joint Medical Exhibit - Dr. Phillips' Deposition, at 25; Claimant's Testimony.

### Massage Therapy

36. Claimant has been blind in her right eye since the age of three years. Claimant's Testimony.
37. Claimant has been receiving massage therapy from Steve Gordon and Heidi Smertz since June 2004. Joint Medical Exhibit - notes of Steve Gordon; Joint Medical Exhibit - notes of Heidi Smertz.
38. Currently, Claimant receives massage therapy on a bi-weekly basis. She usually alternates between seeing Steve Gordon and Heidi Smertz. Claimant's Testimony.
39. Claimant began massage therapy treatment in June 2004 based on the advice of her medical case manager, Karen Curran. Karen Curran's Testimony.
40. Ms. Curran testified that she recommended massage therapy for Claimant to help reduce her muscle spasms. Id.
41. Ms. Curran further testified that she believes physical therapy and massage therapy work as complementary treatments for Claimant. However, Ms. Curran acknowledged that she has not been involved in Claimant's case for nearly three years and does not know Claimant's current medical status. Id.
42. Claimant's treating physician, Dr. Mark Hamilton, recommended that Claimant receive massage therapy in part because Claimant reported that the massage therapy helped reduce her muscle spasms and overall pain. Although Dr. Hamilton specifically testified that the massage therapy is useful treatment for Claimant's present condition, he did not offer a specific expert opinion that it is a necessary complement to the physical therapy Claimant receives or is independently medically necessary. Dr. Hamilton's Testimony.
43. Steve Gordon is a licensed massage therapist in the State of New Hampshire. Steven Gordon's Testimony.
44. Mr. Gordon is not licensed in Vermont, as Vermont does not license massage therapists. Id.
45. Claimant testified that she receives considerable relief from discomfort and increased range of motion in her neck as a result of regular massage therapy. Claimant's Testimony.
46. Claimant also testified that because she is blind in one eye, maximizing the range of motion in her neck is especially important for both professional and personal activities. Id.



47. In the Gennaro IME report, Dr. Gennaro opined that massage therapy would not have any medical benefit for Claimant's condition. Dr. Gennaro testified that under certain circumstances he uses massage therapy in his clinical practice, but that Claimant's condition is not one of those circumstances. Dr. Gennaro testified that in his opinion massage therapy is not medically necessary as it is unlikely to change Claimant's clinical condition over time. Joint Medical Exhibit - Deposition Testimony of Dr. Gennaro at 10.

Medical Endpoint - August 20, 2005 to June 4, 2006

48. In a follow up appointment with Dr. Abdu on March 1, 2004, Claimant reported that she was doing reasonably well, but was beginning to have some pain again in her right shoulder and right paraspinal region. Claimant also had some numbness in her upper right arm. Joint Medical Exhibit - Dr. Abdu's notes dated March 1, 2004.
49. Claimant testified credibly that beginning in April 2004 and continuing into 2005, the pain and numbness in her neck, shoulders, arms and right leg began to increase substantially. Claimant's Testimony.
50. Claimant met with Dr. Phillips in November 2004 to discuss medical options to relieve her neck and arm pain. Dr. Phillips advised that one option was to have an additional disk surgery. He also advised that more conservative therapies (specifically physical therapy and massage therapy) were reasonable under the circumstances. Joint Medical Exhibit - Dr. Phillips' Deposition Testimony at 12 and at 16-17.
51. Dr. Phillips said that this proposed surgery was not imperative and, in fact, he could not be sure it would effectively relieve Claimant's symptoms unless she was first willing to undergo a diagnostic nerve block. Id at 12-13.
52. Claimant told Dr. Phillips that she was "very, very uninterested in surgery" and did not undergo the nerve block. Id. at 14, 29.
53. On July 26, 2005, at Defendant's request Claimant underwent an independent medical examination with Dr. Daniel Wing. Dr. Wing reviewed Claimant's medical records and conducted a physical exam of her. Following his examination, Dr. Wing concluded that Claimant was at medical end result. Joint Medical Exhibit - Independent Medical Examination of Dr. Daniel Wing dated July 26, 2005.

54. Additionally, Dr. Wing concluded that as of that time, the therapies she was receiving (massage therapy, acupuncture, and chiropractic therapy) were for palliative and maintenance purposes only and would not lead to a significant improvement in her medical condition. *Id.* at 61. Additionally, Dr. Wing concluded that because in his opinion Claimant's lower back and right leg problems were not causally related to her June 25, 2002 workplace injury, these pain issues did not factor into his finding that Claimant was at medical end result. *Id.*
55. Based upon Dr. Wing's IME report, the Defendant filed a Form 27 alleging medical end result as of August 20, 2005.
56. Claimant met with Dr. Phillips again in September 2005. Dr. Phillips testified that during this appointment Claimant described having pain in both her right and left arm. Dr. Phillips decided to order an MRI to determine the cause of this pain. Joint Medical Exhibit - Deposition of Dr. Phillips at 18.
57. In March 2006, Dr. Gennaro concluded that Claimant was at medical end result. In defining medical end result, Dr. Gennaro explained that in his opinion, medical end result means that the patient's condition has stabilized and that it is unlikely to change in the foreseeable future regardless of any additional medical treatment. Joint Medical Exhibit - Deposition of Dr. Gennaro at pg. 7. Dr. Gennaro said that a finding of medical end result does not mean that a patient's condition will not change or that other medical care can never be appropriate. It simply means that for the foreseeable future, the patient's condition has plateaued. *Id.*
58. Under this definition, Dr. Gennaro concluded that Claimant had reached medical end result. *Id.*
59. Although Dr. Gennaro was aware of Dr. Phillips' recommendation that further surgery was an option, this fact did not change his opinion regarding medical end result because the surgery was not imperative and there was no guaranty that it would be effective. Moreover, at that point in time, all indications were that Claimant had no interest in further surgery. Therefore, Dr. Gennaro concluded that Claimant was at medical end result in March 2006 and the fact that she subsequently underwent surgery in July 2006 does not change his opinion. *Id.* at pg. 7-9.
60. Claimant underwent a permanency evaluation with Dr. Bucksbaum on October 6, 2005. Dr. Bucksbaum issued his report from this evaluation in March 2006, in which he concluded that Claimant was at medical end result Joint Medical Exhibit - Permanency Evaluation by Dr. Bucksbaum; Dr. Bucksbaum's testimony.
61. Significantly, Dr. Bucksbaum further testified that at the time he issued his March 2006 report he did not have all of Dr. Phillips records from 2006, and that if he had had those

records he would not have found Claimant to be at medical end result. Dr. Bucksbaum's Testimony. Dr. Bucksbaum testified that these more recent medical records clearly demonstrated that Dr. Phillips was actively treating Claimant and considering further surgery. *Id.*

62. In January 2006, Claimant met with Dr. Phillips to review an MRI. Dr. Phillips again recommended surgery. This surgery called for a two-level decompression spanning from the C5/6 and C6/7 area. Joint Medical Exhibit - Deposition of Dr. Phillips at 20-21.
63. Dr. Phillips performed the second disk surgery on Claimant on July 13, 2006, after which Claimant's condition significantly improved. *Id.* at 21.

### **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); Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161, 166 (1962); Nutbrown v. Roadway Express, Opinion No. 2-93, at 4 (June 7, 1993).
2. In this case, the issue of causation is a complicated one. Under these circumstances, Vermont law requires the use of expert medical evidence. It is well established that the trier of fact may not speculate as to an obscure injury which is beyond the ken of laymen. Laird v. State Highway, Dep't., 110 Vt. 981 (1938). Where the Claimant's injury is obscure, and the layman could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award for both compensability issues as well as the extent of the award sought. Lapan v. Berno's Inc., 137 Vt. 393 (1979); Jacquish v. Bechtel Corp., Opinion No. 30-92WC (Dec. 29, 1992).
3. Expert medical testimony is required to make the causal connection between employment, an injury and the resulting benefits sought. Martin v. Woodridge, Opinion No. 11-97WC (June 13, 1997); Cushing v. Just Good Builders, Opinion No. 68-96 WC (Nov. 25, 1996). A party who bears the burden of proof cannot meet that burden without providing such evidence, and possibility, suspicion or surmise are insufficient to carry that burden. *Id.*
4. 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); see also Morse v. John E. Russell Corp., Opinion No. 40-92WC (May 7, 1993).
5. In cases where the Department must choose among conflicting medical opinions with regard to Claimant's condition, the following factors are considered: 1) the nature of treatment and 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. See Geiger v. Hawk Mountain Inn, Opinion No. 37-03WC (Sept. 17, 2003).

#### Causal Connection - Lower Back and Leg Pain

6. In this case, Claimant has not met her burden of proving that there is a causal link between her current right leg pain and her June 2002 workplace accident. Claimant's statements regarding her leg pain and its connection to her workplace accident are not supported by the medical documents in this case. Moreover, Claimant's medical expert, Dr. Mark Bucksbaum, relied largely on Claimant's statements regarding her accident and subsequent right leg pain in conjunction with his evaluation in October 2005 in concluding that there was a causal connection between the two. In so doing, Dr. Bucksbaum did not fully consider the medical documents in this case that contradicted Claimant's statements and provided other plausible explanations for Claimant's current right leg pain. Therefore, Dr. Bucksbaum's expert opinion in this regard must be given limited weight because he failed to consider all of the evidence in the case. *Id.*
7. Because Claimant has failed to meet her burden of demonstrating a causal connection between her June 2002 workplace injury and her lower back and leg pain, the Commissioner does not reach or address Defendants' argument that this aspect of the claim is contractually barred.

### Compensability of Massage Therapy

8. 21 VSA §640(a) provides, in pertinent part, that in connection with a compensable claim under the Act an employer is required to provide “reasonable surgical, medical, and nursing services to an injured employee. 21 VSA §640(a). Reasonable medical treatment is what competent medical evidence proves will relieve symptoms from a work-related injury or restore a claimant’s functioning capacity. Morrisseau v. Vermont Agency of Transportation, Opinion No. 19-04WC (May 27, 2004). Most of the expert witnesses, including those offered by Defendants, agreed that massage therapy was helpful for Claimant in this particular case. Dr. Hamilton testified that massage therapy was beneficial to Claimant. However, he did not offer any specific opinion or evidence that massage therapy is medically necessary either as a complementary therapy with physical therapy or as an independent therapy. Reasonable (and therefore, compensable) treatment is typically that which is necessary for a particular claimant. Raymond v. Grand Union Stores of Vermont, Opinion No. 13-99 (March 24, 1999). In light of the statute, Morrisseau and Raymond, Defendant offered the only specific expert testimony on the issue of whether or not massage therapy is both reasonable and medically necessary. That evidence, from Dr. Gennaro, compels the conclusion that Claimant has not established that weekly massage therapy is reasonable and compensable.
  
9. Although the massage therapy is not compensable, the Commissioner nonetheless addresses Defendants’ argument that because the massage therapists providing therapy to Claimant are not licensed in the State of Vermont, citing WC Rule 40 and Miller v. IBM (III), Opinion No. 53-95WC (August 18, 1995), services provided by massage therapists are not compensable. Vermont does not license or certify massage therapists. If Defendant’s view were law, then only health care providers actually licensed in this state would be able to provide compensable care. Steve Gordon is licensed in the State of New Hampshire, which unlike Vermont does require licensure for massage therapists. There has been no allegation that by practicing massage therapy in Vermont, Mr. Gordon is engaging in any illegal or unethical conduct. For the purposes of the Act, a “health care provider” is “a person, partnership, corporation, facility or institution, licensed or certified or authorized by law, to provide professional health care services in this state to an individual during that individual’s medical care, treatment, or confinement.” WC Rule 40.012(F); 18 VSA §9432(8) (emphasis supplied). The Vermont General Assembly has not required licensure or certification for the practice of massage therapy in this State. Neither is there any evidence that providing massage therapy in Vermont is contrary to law. Therefore, the provision of massage therapy by persons not affirmatively shown to be incapable of so doing is authorized by law within the meaning of the Act when that therapy is part of compensable medical treatment.

Medical End Result- August 20, 2005 - June 4, 2006

10. Under the Act, medical end result means “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.” WC Rule 21.2100. See also Sargent v. Town of Randolph, Opinion No. 37-02WC (November 5, 2002).
11. The "fact that some treatment, such as physical or drug therapy, continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition." Coburn v. Frank Dodge & Sons, 165 Vt. 529, 533 (1996). However, "the proper test is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Id.*
12. Defendant argues that Claimant was at medical end result between August 20, 2005 and June 4, 2006 because her condition had stabilized and she was not interested in pursuing further surgery. Defendants rely on the IME opinions of Drs. Gennaro, Wing and Bucksbaum. However, Dr. Bucksbaum revised his opinion in this regard, and his explanation for his revised opinion was credible. Significantly, Dr. Phillips, who was Claimant’s treating surgeon during this period and to whose opinion considerable weight is given, testified that as of November 2004 and thereafter, he discussed the possibility of surgery with Claimant who declined to undergo surgery at that time because, based upon Dr. Phillips’ advice, non-surgical alternative, conservative treatment was appropriate. Dr. Phillips again discussed surgery as a treatment option with Claimant in January 2006, and Claimant again declined surgery, preferring to continue with conservative treatment in the form of massage and physical therapy. Dr. Phillips specifically testified credibly that in January 2006 Claimant was not at medical end result because there existed both surgical and conservative treatment options. The second surgery, performed in July 2006, resulted in significant relief for Claimant.
13. In effect, Defendant argues that because Claimant did not choose to have the surgery when it was proposed as a treatment option in November 2004 and in January 2006, she declined appropriate treatment and therefore placed herself at medical end result. However, the credible evidence is that the specific surgery which was performed in July 2006 was, in the months preceding, not the only reasonable treatment available. The fact that in retrospect it proved to be effective does not necessarily lead to the conclusion that it was the only reasonable option between the effective date of the Form 27 (August 20, 2005) and the point of election for the surgery (June 4, 2006). Because in the months which preceded the July 2006 surgical procedure Claimant was actively treating with conservative treatment consistent with the advice of her physicians, and because she continued to at least keep open the possibility of surgery, she had not, as a matter of law, reached medical end result as of the date of the Form 27.

### Attorney's Fees and Costs

14. Under WC Rule 10 and 21 VSA §678(a), the Commissioner, in her discretion, may award reasonable attorney's fees to the prevailing party. Claimant's attorney has submitted an itemized statement of services rendered showing 172.9 hours of professional services and costs of \$2,819.73. Under WC Rule 10.1210, the award for services rendered on an hourly basis is limited to \$90.00 per hour. At the allowed rate, the fees for professional services would be \$15,561.00. Claimant's total request for attorney's fees and costs is therefore \$18,380.73.
  
15. However, Claimant has prevailed on only one of the three claims. Because the body of medical and other evidence is, in large part, common to all three issues, it is reasonable, and within the Commissioner's discretion, to conclude that Claimant is entitled to recover attorney's fees based upon the efforts of counsel to the extent that those efforts may be allocated among the issues. Such allocation is entirely within the Commissioner's discretion. In this case, the Commissioner concludes that an award of one-half of the hourly fees is warranted. Therefore, Claimant is awarded one-half of the requested attorney's fees, in the amount of \$7,780.50. Claimant's request for costs in the amount of \$2,819.73, is granted in full.

## **ORDER**

Based upon the foregoing, it is hereby ORDERED as follows:

1. Claimant's claim for benefits related to her lower back and leg pain is denied.
2. Claimant's claim for weekly massage therapy treatments is denied.
3. Claimant had not achieved medical end result as of August 20, 2005 or at any time relevant to this claim. Defendant is ordered to re-characterize benefits paid between August 20, 2005 and June 4, 2006 as temporary, rather than permanency, benefits.
4. Claimant, having substantially prevailed on one of her three claims, is entitled to an award of attorney's fees in the amount of \$7,780.50 and of costs in the amount of \$2,819.73, both of which are reasonable.

Dated at Montpelier, Vermont this 27<sup>th</sup> day of March 2008.

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Patricia Moulton Powden  
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.