A. C. v. The Golub Corporation (January 23, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

A. C. Opinion No. 03-07WC

By: Margaret A. Mangan
Hearing Officer

v.

The Golub Corporation For: Patricia Moulton Powden
Commissioner

State File No. R-13259

Hearing held in Montpelier on December 5, 6 and 7, 2006
Record closed on December 29, 2006

APPEARANCES:

Dennis O. Shillen, Esq., for the Claimant
Keith J. Kasper, Esq., and David Berman, Esq., for the Defendant

ISSUES:

Is Claimant permanently and totally disabled as a result of her work-related injury or injuries?

Is a hot tub a compensable medical expense pursuant to the Vermont Workers' Compensation Act and the Department's Rules?

EXHIBITS:

Joint I: Medical Records

Claimant's 1: Chapter 7 from AMA Guides re: Independent Medical Examination
Claimant's 2: DSM IV PTSD

FINDINGS OF FACT:

1. Claimant is a 45 years old intelligent woman who completed 11 ½ years of school. She worked her adult life in the meat business, first in a family business and later at Price Chopper.

2. On November 8, 2000, Claimant injured her back while working as a meat cutter at Price Chopper, a job she had for eight years. She had emergency surgery on November 16, 2000 and later numerous other surgical and medical interventions for herniated discs and cauda equina syndrome. The compensability of hospitalizations and acupuncture treatment was the subject of a 2004 hearing decision in the Claimant's favor. Opinion No. 34-04WC.

3. Claimant's current claim for permanent total disability benefits is based on a combination of physical and psychological problems.

4. Claimant's current treatment includes acupuncture twice a week and medical massage two or three days a week as well as a host of medications.

Physical Condition

5. Joseph Corbett, M.D. is a licensed medical physician specializing in neurosurgery and practicing in Rutland. He first treated Claimant immediately following her work-related injury in November of 2000. Her initial complaints related to Claimant's lower back. An MRI revealed a disc herniation at L4-5 with compression of nerve roots on the left side and centrally.

6. One problem that resulted from her injury was cauda equina syndrome, caused by compression of nerves in the lower spine. Symptoms of cauda equina syndrome Claimant has had are numbness in the perineum; bowel and bladder problems, and foot drop.

7. Despite Claimant's insistence that cauda equina persists, I am not convinced, based on recent medical records and opinions that she has no more than partial perineal numbness as a residual effect.

8. Claimant alleges that her psychological condition is disabling, yet she exhibited phenomenal attention to detail in her testimony and in the responsibilities inherent in her everyday life.

9. Dr. Bucksbaum is board certified in physical medicine and rehabilitation, and certified as an independent medical examiner. He became acquainted with Claimant in March of 2002 for an evaluation of her back pain. Dr. Bucksbaum came to the treat Claimant at the suggestion of Ms. Curran.

10. Mark Bucksbaum, M.D., a treating physician, expects and recommends that Claimant will have the most recently recommended back surgery, a procedure that Claimant understandably has refused to have, given the numerous procedures she has had.

11. Dr. Bucksbaum opined that Claimant was at medical end result as to her physical condition, and that he felt she reached that point in 2004. Dr. Bucksbaum also opined that Claimant will have a future surgery. He has encouraged Claimant to have a fusion surgery in Boston with an "elite team" of doctors, and that such a surgery could stabilize the region in her back. If Claimant does not elect to have the fusion surgery, Dr. Bucksbaum opines that Claimant would be susceptible to an incident which would lead to an emergency situation, and that in that type of situation the surgical team might not be as experienced. Dr. Banco, who is part of the team that Dr. Bucksbaum encourages Claimant to go to for the fusion surgery, has opined that the surgery would improve Claimant's functioning and allow her to return to work.

12. Based on Claimant's current condition, Dr. Bucksbaum determined that she has a 53% whole person impairment for her physical problems, without considering the psychological sequelae.

13. Dr. Bucksbaum found that Claimant's foot drop has improved since 2004, which is when he stated that Claimant reached medical end result for her physical condition.

14. Dr. Bucksbaum determined that Claimant is unable to return to reliable, uninterrupted, vocationally relevant work. He based that opinion on Claimant's chronic pain, bowel and bladder problems, need for narcotics, carpal tunnel syndrome, loss of concentration, safety concerns, and diminished persistence and patience.

15. Dr. William Boucher's primary area of specialty is occupational medicine, and he is board certified. He evaluated Claimant on two occasions, in 2004 and 2006.

16. In 2006, Dr. Boucher considered Claimant to have a part-time sedentary work capacity. He stated that this meant she was capable of working four hours per day during a five-day week.

17. Dr. Boucher also stated that Claimant's depression, which he considers to be her primary psychological problem, was only partially treated and that Claimant was not at medical end result regarding her psychological condition. Dr. Grubman concurred with Dr. Boucher for more aggressive treatment for Claimant's depression. With such treatment, Dr. Boucher opined that Claimant's functional abilities could also improve, as the depression plays a large role on those abilities.

18. Dr. Boucher questioned the results of the functional capacity evaluations because of Claimant's depression and her tendency to self-limit. She likely never gave full effort.

19. Dr. Boucher opined that Claimant's cauda equina had resolved and that he did not feel Claimant had any clinical findings consistent with ongoing cauda equina at this point. As to Claimant's bladder incontinence, Dr. Boucher stated that she may have some stress incontinence, and that Claimant's bowel problem was more likely constipation from her numerous medications rather than bowel incontinence from cauda equina syndrome.

Claimant's Psychological Condition

20. Sandy Lasky, MSW, diplomat of the American Psychotherapy Association, is a licensed clinical social worker and certified in clinical social work. She has provided supportive counseling to Claimant since May of 2001 for anxiety and depression. Claimant has seen Ms Lasky weekly for five years.

21. Ms. Lansky determined that Claimant has a low tolerance for any kind for physical or mental activity.

22. Ms. Lasky diagnosed Claimant with post-traumatic stress disorder based on Claimant's symptoms, including shortness of breath, chest pain, sweating, dizziness, difficulty breathing, because these indicated a general sense of panic.

23. Ms. Lasky does not conduct her own psychological testing, but refers such testing out to other professionals. In this case, she relied on testing done by Dr. Mann and Dr. Grubman. Ms. Lasky's diagnosis was rejected by Dr. Grubman, an expert with a Masters Degree in Pharmacology from the University of Michigan and a PhD from the University of Vermont. Dr. Grubman did his own testing on Claimant, and ruled out post-traumatic stress disorder for several reasons.

24. To have PTSD, Claimant would have had to witness, experience, or be confronted with actual death or injury to herself or others, and that Claimant must have experienced intense fear or horror during the event. This claimant did not have such an experience.

25. Claimant has not missed many appointments over her five years of treatment with Ms. Lasky. Claimant follows through on suggestions, understands and participates in her treatment. Despite these noted abilities of Claimant, Ms. Lasky's opinion is that Claimant does not have the ability to return to work solely from a psychological perspective, based primarily on her inability to concentrate.

26. Dr. James Grubman specializes in clinical and behavioral medicine relating to treatment of people with a variety of medical and health disorders, including chronic pain management and disability. He has worked in the field of neuropsychology, involving work with people with brain injuries, dementia, and other developmental and acquired brain disorders. He also focuses on pain management.

27. Dr. Grubman evaluated Claimant on two occasions and issued three reports in this case. Dr. Grubman administered the Minnesota Multiphasic Personality Inventory II (MMPI II) test as well as the Millon Behavioral Medicine Diagnostic (MBMD) test. Tests look at Claimant's personality and emotional functioning. When Dr. Grubman began showing Claimant a variety of the tests he wanted her to do, she balked at the process because she disagreed with the relevance of the testing.

28. At the time Dr. Grubman evaluated her, Claimant was physically able to sit and do the testing that took approximately three hours. She was able to understand his questions and respond appropriately during the interview portion. Claimant worked consistently on the testing, and declined several offers for breaks and water. Claimant reported to Dr. Grubman that her pain was manageable and that nothing about the testing was problematic or dangerous to her.

29. Claimant showed tremendous somatization on the clinical scales in the MMPI testing, which still indicated that the profile was valid. As far as diagnostic criteria, Dr. Grubman focused on Claimant's psychological diagnoses. She qualified for diagnoses of major depression, major depressive disorder, pain disorder with psychological and medical factors, and for a diagnosis of dependence on narcotics.

30. Dr. Grubman ruled out the diagnosis of post-traumatic stress disorder, a conclusion I accept.

31. Dr. Grubman found that Claimant had personality disorder features in a general mixed or other category, and primarily histrionic features as well. Based on his testing, Dr. Grubman opined that Claimant has a variety of difficulties in relation to her personality and how she approaches problems that she has. These conditions predated her work injury. He based this opinion on the information from her behavior and assessment in the chronic pain program she was in with Dr. Mann in 2001.

32. Dr. Grubman's diagnosis of histrionic features relates to internal mental processes, not overt behaviors. It means that one is not accepting responsibility, but is looking to external factors to fix things. Such a diagnosis does not necessarily lead to melodramatic or hysterical behavior in a person, qualities that many lay persons may equate with the term. Further, Dr. Grubman noted that Claimant exhibited symptom magnification on testing.

33. Based on Claimant's progress to date, Dr. Grubman concluded that Claimant needed a therapy with a different approach than what Claimant has been receiving. He recommended tapering Ms. Lasky's treatment and advised that Claimant should treat with a clinician with expertise in the features that to date have been recalcitrant to treatment.

34. Claimant is not at medical end result with regard to her psychological condition. According to credible expert testimony, Claimant's psychological condition has not reached a substantial plateau, and further improvement could be expected with more aggressive treatment.

35. Dr. Grubman concluded that he could not establish a connection between Claimant' work injury and her psychological issues. This was based on her personality disorder features, her prior history of depression, which can have a set of recurrences, and a significant overlay of Claimant's narcotic dependence. Dr. Grubman opined that none of Claimant's disorders were of sufficient severity that they would preclude her from having at least part-time employment.

36. Dr. Grubman suggested a dual diagnosis chronic pain program, where experts could work with Claimant to look at her general medical treatment regimen, including a consideration of her medications, and could potentially work with her using behavioral techniques to reduce the sedation medications. Dr. Grubman testified that Ms. Lasky was not effectively working with Claimant in this manner.

37. The convincing evidence is that Claimant can concentrate her protestations to the contrary notwithstanding.

38. Ms. Lasky defined success of her treatment in this case as Claimant's not using the hospital emergency room as often as she would have without the counseling. More definable improvement in Claimant's condition would have to be established before I can find that she reached medical end result for her psychological condition.

39. Dr. Bucksbaum does not believe that Claimant had reached medical end result for her psychological condition as of March of 2004.

40. Dr. Grubman opined that Claimant's condition could improve with better psychological treatment, and questioned Ms. Lasky's treatment. Thus, based on the testimony at the formal hearing, Claimant is not at medical end result for her psychological condition.

41. Dr. Boucher disagreed with Ms. Lasky's diagnosis of post-traumatic stress disorder. He stated that Claimant has never mentioned nightmares involving her injury, or any flashbacks. Dr. Bucksbaum, Claimant's own treating professional, also did not diagnose Claimant with post-traumatic stress disorder.

42. A finding that she is permanently and totally disabled is inappropriate where there are still significant opportunities to improve Claimant's condition.

Vocational Rehabilitation

43. Greg LeRoy is a rehabilitation counselor, and provided a vocational rehabilitation assessment for Claimant. Mr. LeRoy acknowledged that where appropriate based on a person's condition, a self-employment plan is a viable option. However, Mr. LeRoy did not consider or pursue this avenue for Claimant. In fact, he determined that no further VR services are warranted in this case because of Claimant's disability.

44. Contrarily, Ms. Fran Plaisted, a certified vocational rehabilitation counselor, supports further vocational testing. Based on evidence of Claimant's cognitive abilities, she determined that Ms. Lasky's attempt to prevent such testing based on Claimant's inability to concentrate is illogical.

45. Mr. LeRoy relied on other medical experts as to Claimant's physical and psychological capabilities. He focused, as a vocational rehabilitation counselor, on a Claimant's temperament. Thus, he stated that if there is evidence someone does not have the temperament to do a job, he must determine whether a person can still do the job.

46. Ms. Plaisted encourages further vocational programs for Claimant in an attempt to get her a GED and computer training courses.

47. Mr. LeRoy met with Claimant once. Claimant was able to complete the requisite paperwork and to stay focused during the interview.

48. Mr. LeRoy completed a transferable skills analysis, breaking down Claimant's work history into traits involved in doing her work. He stated that he attempted to transfer the skills Claimant obtained as a meat cutter to other jobs. He also stated that Claimant would need additional training to return to other types of work beyond unskilled jobs.

49. Dr. Bucksbaum had noted carpal tunnel syndrome in his records. However, the first notation of carpal tunnel syndrome as a limiting factor regarding Claimant's vocational rehabilitation efforts was made after Ms. Plaisted encouraged Claimant to pursue computer classes. Even assuming the validity of Dr. Bucksbaum's reliance on carpal tunnel syndrome as a limiting factor, he conceded that there are options to work around the condition and still work on a computer, such as a voice recognition program.

50. Mr. LeRoy considered the possibility of Claimant looking into training for computer skills, but rejected that direction after reviewing records that suggested Claimant has carpal tunnel syndrome (CTS). Mr. LeRoy stated that based on the reports of Dr. Bucksbaum and Ms. Lasky, he is not in favor of Claimant pursuing such computer training.

51. Indeed the medical records are devoid of any mention of CTS until after the suggestion of computer training by Ms. Plaisted.

52. Tammy Parker works as a vocational rehabilitation counselor, and does entitlement assessments to determine if people are eligible for services and to help them get back to work.

53. Ms. Parker testified that in 2003 she had been working on setting up Claimant in a business involving internet sales of antiques, an area of interest for Claimant. Such a position would have required Claimant to use a computer. Ms. Parker did not recall any complaints by Claimant as to her physical abilities to use a computer at the time, nor could she recall any complaints as to her cognitive abilities. At the time she was considering computer work for Claimant. Ms Parker did not have an FCE, and did not feel that it was necessary.

54. Ms. Parker closed vocational rehabilitation on July 26, 2004, and that she entered the code "07 - Disability Too Severe." See Vocational Rehabilitation Discontinuance Report, dated 7/26/04. Ms. Parker conceded that at the time of the closure, she was not concluding that Claimant was permanently and totally disabled, and that she did not want to close the door permanently on Claimant. She based the closure on medical reports available at that time.

55. When Ms. Parker met with Claimant, they generally met out in public. Claimant arrived alone and was able to get to the meetings without a problem.

56. Dr. Corbett defers to other experts with regard to a claimant's ability to return to work. He is not a vocational expert. However, in 2002, he opined that Claimant had a work capacity for a sedentary position in response to questioning proposed by Ms. Parker.

57. Karen Curran is a telephonic case manager who was assigned to facilitate Claimant's rehabilitation process through contact with Claimant, her vocational rehabilitation counselors, and her doctors.

58. Ms. Curran opined that Claimant could not maintain gainful employment based on her mental and physical restrictions. However, she acknowledged that in her deposition she had testified that she could not offer an opinion as to whether Claimant was permanently and totally disabled. Ms. Curran acknowledged that she had not seen Claimant between May of 2006, the time of her deposition, and the formal hearing, and that nothing had occurred to change her opinion as to the ultimate issue of whether Claimant was permanently and totally disabled.

59. Ms. Curran has not seen the Claimant in years; she has merely served as the telephonic case manager. Through this work, Ms. Curran believes that Claimant has understood treatment recommendations and has coordinated her care by herself. She also stated that Claimant drives to her own medical appointments most of the time, and that includes several appointments every week.

60. A January 23, 2004 functional capacity evaluation (FCE) by Ginni Reeves concluded that Claimant might be able to work four hours a day at a sedentary level. In 2006, she concluded that Claimant did not have a part time work capacity because she could not sit long enough to keep a sedentary job.

61. Ms. Plaisted met with Claimant in October of 2005. Her desire to continue vocational rehabilitation would focus on home-based self-employment as one option.

62. After Claimant had decided not to undergo the fusion surgery with Dr. Banco, Ms. Plaisted developed an Individual Written Rehabilitation Plan (IWRP) because Claimant had not obtained a GED or high school diploma, and that this was essential for Claimant to obtain if she were to return to work.

63. Once she had received an FCE indicating that Claimant had a less than sedentary work capacity, she drafted another IWRP looking into options for Claimant as a buyer, or other types of home-based employment.

64. Ms. Plaisted has not closed out vocational rehabilitation for Claimant. She would like to follow up with Dr. Bucksbaum to look into accommodations, particularly with regard to typing. While Dr. Bucksbaum was quick to simply dismiss the keyboarding options such as voice activation, Ms. Plaisted would like to fully explore the options.

65. Ms. Plaisted considered the alleged bowel and bladder problems in stating that home-based employment would provide Claimant with the flexibility that she needs. Ms. Plaisted testified that she disagrees with Mr. LeRoy's criticisms of the potential for home-based employment, and that there are options available to be researched and considered.

66. This demonstrates Ms. Plaisted's work as a certified vocational rehabilitation counselor to thoroughly consider all of the options for returning a person to work, including a proper consideration of the Claimant's abilities.

67. Further vocational rehabilitation efforts would benefit Claimant if they do not result in a job. Ms. Plaisted explained her role to work with disabled individuals to help them maximize their potential and to provide them with interests and activities to lead as fulfilling a life as possible.

68. Ms. Plaisted could not give an opinion as to whether Claimant can secure gainful employment at this time. Her reasoning was that she has not worked enough with Claimant nor pursued several options. Ms. Plaisted is not simply ready to dismiss several options that exist for Claimant in order to conclude on an incomplete record that Claimant can not obtain this type of employment.

69. Dr. Corbett defers to other experts with regard to a claimant's ability to return to work. He is not a vocational expert. However, in 2002, he opined that Claimant had a work capacity for a sedentary position in response to questioning proposed by Ms. Parker.

Hot tub

70. With regard to the hot tub issue, Dr. Bucksbaum stated that an indoor tub, or at least a tub within an enclosure, would be preferable for Claimant. The burden of proof is on Claimant to establish the reasonableness of the installation of the hot tub. 21 V.S.A. § 640(a).

71. Dr. Boucher opined that a hot tub could have a temporary psychological benefit, but that it would not affect Claimant's physical condition one way or the other. He opined that it would not improve Claimant's baseline pain or functioning, and would be of no value as a medical treatment. Rather, the most effective treatment, according to Dr. Boucher, would be more aggressive treatment of Claimant's depression.

72. Claimant determined that a pool or hot tub in a public place is not an option for her because of her bowel and bladder issues.

73. The unlikelihood that a hot tub would provide more that temporary relief together with the psychological testing in this case and Department precedent, lead me to conclude that Claimant has not met her burden of proving the reasonableness of the treatment.

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).

2. There must be created in the mind of the trier of fact something more than 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).

3. 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).

4. Expert medical testimony is required to make the causal connection between employment, an injury and the resulting benefits sought. *Martin v. Woodridge*, Op. No. 11-97WC (1997); *Cushing v. Just Good Builders*, Op. No. 68-96WC (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.*

Permanent Total Disability

5. Claimant bears the burden of proof in showing that she is permanently and totally disabled from any and all regular gainful employment. See *Ratta-Roberts v. Benchmark Assisted Living*, Op. No. 46-05WC (2005).

6. Claimant seeks permanent total disability benefits pursuant to 21 V.S.A. § 644(b) which was amended in 1999 and became effective July 1, 2000. Claimant's work-related injury occurred on November 8, 2000. The amendment codifies the Odd-Lot Doctrine, which is stated in Workers' Compensation Rule 11.3100:

    - A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

    - A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

7. The standard for succeeding in a permanent total disability claim is further articulated in 21 V.S.A. § 645(a), which states that one must have "no reasonable prospect of finding regular employment." Regular employment means work that is not casual and sporadic, whereby the hiring is not charitable and the person earns wages. *Rider v. Orange East Supervisory Union*, et. al. Opinion No. 14-03WC (2003).

8. Much of the testimony in support of this claim was based on the belief that Claimant could not longer cut meat, work she was doing at the time of her work related injury. However, her inability to return to her prior type of employment is irrelevant to the issue of whether she is permanently and totally disabled. Instead, the relevant inquiry is whether Claimant's physical and mental impairments foreclose her from being gainfully employed in *any* type of occupation.

9. It is Claimant's burden to prove that she is incapable of any and all regular gainful employment. The test is quite simple; the injured employee must have no reasonable prospect of obtaining regular, gainful employment. See *Fleury v. Kessel/Duff Constr. Co.*, 148 Vt. 415 (1987).

10. Dr. Boucher and Dr. Grubman opined that Claimant does have a work capacity. Dr. Boucher stated that he felt Claimant was capable of working four hours per day during a five-day week. Even assuming Claimant could not return to work on a full-time basis, her lack of full-time work capacity is not determinative of permanent total disability. *See Arnold v. Central Vermont Hospital*, Op. No. 20-06WC (2006) ("Section 644 does not require that one have a full time work capacity to be capable of regular gainful employment.").

11. There are contradictory expert opinions as to whether Claimant has a work capacity, particularly concerning her psychological issues. Ms. Lasky opined that Claimant does not have a work capacity for regular gainful employment. However, Ms. Lasky's opinion loses persuasiveness when considering that her diagnosis of post-traumatic stress disorder is inconsistent with the medical record and has not been corroborated by any other expert opinion. Further, Dr. Grubman stated explicitly that the factors considered by Ms. Lasky in diagnosing post-traumatic stress disorder, including shortness of breath and chest pain, are insufficient for such a diagnosis. Dr. Grubman is highly qualified to render opinions as to Claimant's psychological conditions, and demonstrated a clear and thorough analysis based on his examination and review of the medical records. See *Geiger v. Hawk Mountain Inn*, Op. No. 37-03WC (2003) (discussing factors considered by Department in evaluating and choosing between conflicting medical opinions).

12. Claimant also cannot be considered to be at PTD, because she is not yet at medical end result. In order for a condition to be considered permanent, one must be at medical end result. In order to qualify for permanent total disability, a Claimant's condition must be permanent. In order for the medical condition to be permanent, the Claimant must be at medical end result. Therefore, in order to satisfy the determination of permanent total disability, one must be at medical end result. Therefore, Claimant cannot satisfy the criteria of permanent total disability in this matter as she has not achieved medical end result.

Medical End Result

13. Medical end result means the point at which one has reached a "substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." WC Rule 2.1200.

14. Claimant has alleged that she is permanently and totally disabled based on her psychological and physical injuries and conditions. The evidence demonstrates that Claimant is not at medical end result for either her psychological condition or her physical condition, thereby barring this PTD claim.

15. Dr. Boucher and Dr. Grubman both opined that Claimant was not at medical end result with regard to her psychological condition. Depression, her primary psychological problem, has only been partially treated. More aggressive treatment will likely improve her depression and her functional abilities.

16. Dr. Bucksbaum opined that Claimant was at medical end result with regard to her physical condition, an opinion that is supported by the record in this case and Department precedent. See *Bertrand v. McKernon Group*, Opinion No. 20-03WC (2003), even though Claimant may have the recommended fusion surgery in the future.

17. Based on Dr. Banco's opinion, should Claimant opt for the surgery, her functioning should improve even further. More aggressive treatment for Claimant's depression might also provide beneficial effects to Claimant's functional abilities as a whole.

Vocational Rehabilitation

18. Vocational rehabilitation benefits are available when a work injury prevents an employee from performing work for which she had previous training and experience. See *Wentworth v. Crawford and Company*, 174 Vt. 118 (2002). The purpose of such benefits is "to restore the employee to suitable employment." *Id.* at 354, citing 21 V.S.A. § 641(b). The statute does not "impose a duty on the employer or its insurer to develop a rehabilitation plan for [an injured employee]," but, rather, it "contemplates that the parties will cooperate in the development and implementation of the plan." *Wroten v. Lamphere*, 147 Vt. 606, 612 (1987).

19. Claimant cannot establish that she is totally disabled for gainful employment, particularly where vocational rehabilitation has not been exhausted.

20. Ms. Plaisted is a certified vocational rehabilitation counselor who drafted an IWRP which planned to work toward Claimant's obtaining a GED or high school diploma. Ms. Plaisted also encouraged a pursuit of home-based employment options, including the use of computers as was initially developed by Ms. Parker. Ms. Parker had testified that at the time she was developing her IWRP for home-based employment for Claimant, that Claimant did not have any complaints as to either her physical or cognitive abilities.

21. Ms. Plaisted's pursuit of further vocational rehabilitation was quashed by the suggestion Claimant had carpal tunnel syndrome that limited her vocational rehabilitation after Ms. Plaisted had suggested computer work. Ms. Plaisted seeks to consider certain accommodations, particularly with regard to typing, including voice-activation, which to date have been rejected.

22. Ms. Plaisted opined that vocational rehabilitation efforts should not be closed. She advocates the pursuit of accommodations based on Claimant's condition and full vocational testing. Ms. Plaisted also considered Claimant's alleged bowel and bladder problems in considering options for home-based employment. Mr. LeRoy simply criticized the potential for home-based employment rather than pursuing a plan to fully explore certain options.

Hot Tub

23. Palliative care is compensable under the Act even after a claimant has reached medical end result if it is reasonable and necessary and causally related to the work-related injury. 21 V.S.A. § 640(a); *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996); *Whetstone Log Homes*, Opinion No.: 70-96WC (1986).

24. "In determining what is reasonable under § 640(a), the decisive factor is not what the claimant desires or what she believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's back symptoms and maintain her functional abilities." *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (2000).

25. Claimant seeks, and Defendant denies, a hot tub for her home to ease the discomfort from her work related injury. Claimant rejects as impractical the suggestion that she use a hot tub in a public place because of her bowel problems.

26. The Department has denied coverage for hot tub therapy based on the opinion of a doctor who performed an IME on a claimant and stated that the relaxation of the muscle from a hot tub could only provide symptomatic relief, and would not treat Claimant's underlying conditions. See *Pickering v. Brattleboro Memorial Hospital*, Opinion No. 12-96WC (1986) (hot tub no better than a bath).

27. In this case, Dr. Boucher opined that the use of a hot tub would only provide a short-term beneficial effect, mostly psychological, and that it would not provide any long-term physical beneficial effects.

28. Such a request with the minimal, if any relief, and probability that her home would have to be modified to accommodate the hot tub is not a reasonable treatment under § 640(a).

29. Furthermore, the problem she graphically described at hearing (constipation) would create no risk of contamination of a hot tub shared by others. Although she insists on the need for the hot tub, the evidence does not support her position that this will relieve her symptoms except for the briefest of periods. Nor is there convincing evidence that it will help her maintain her functional abilities.

Conclusion

30. The facts and objective evidence of this case clearly demonstrate that Claimant is not permanently and totally disabled as a result of her work-related injury. Claimant is not at medical end result for her psychological condition and improvement in her physical symptoms is likely if her depression is successfully treated. There exist opportunities for more aggressive and better psychological treatment that could benefit Claimant psychologically as well as her physical functioning.

31. The evidence and testimony establish that the installation of a hot tub in Claimant's home would not serve to improve Claimant's condition, the Claimant has not established that the installation would even be plausible, and any accommodations required to install the hot tub on Claimant's home would not be covered pursuant to the prevailing statute at the time of her work-related injury.

32. Finally, it has been established that vocational rehabilitation has not been fully pursued, and that other options exist for Claimant to work toward a return to work. These options should be fully explored and should not be summarily dismissed.

33. Finally, contrary to Dr. Grubman's opinion, I find that Claimant's psychological condition is causally related to the work related injury that set in motion a cascade of events. It is Black letter law that aggravation or acceleration of a preexisting condition is compensable. *Marsigli Estate v. Granite City Sales*, 124. Vt. 95, 103 (1964).

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for permanent total disability and the hot tub is DENIED.

Dated at Montpelier, Vermont this 23rd day of January 2007.

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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.