

Dolores Drew v. Northeast Kingdom Human Services (August 31, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Dolores Drew

Opinion No. 23-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Northeast Kingdom
Human Services

For: Anne M. Noonan
Commissioner

State File No. U-1564

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 21, 2011

Record closed on May 12, 2011

APPEARANCES:

Steven Robinson, Esq., for Claimant

Eric Johnson, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a result of her May 1, 2003 work-related injury?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Deposition of Charles Alexander, January 28, 2011

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §645

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her 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. Judicial notice also is taken of the Commissioner's prior Opinion and Order in this claim, *D.D. v. Northeast Kingdom Human Services*, Opinion No. 47-06WC (January 9, 2007).

Claimant's Vocational and Medical History

3. Claimant is a high school graduate. Her employment experience is almost exclusively in the personal care field. She has worked as a nurse's aide, in both nursing home and private duty settings. Aside from this hands-on experience, Claimant has had no other vocational training or advanced educational coursework.
4. Claimant's prior medical history is significant for morbid obesity, peripheral edema in her lower extremities and anxiety and depression. She also has a history of low back pain following a fall at work in 1994. Claimant was disabled from working for a time after that injury, but later returned to full-time employment. Aside from some brief episodes of low back pain subsequently, neither this nor any of Claimant's other pre-existing conditions was disabling prior to May 1, 2003.

Claimant's May 2003 Work Injury and Subsequent Medical Course

5. Claimant began working for Defendant as a day services provider in 1998. Her duties included providing daily assistance to the mentally challenged residents of a group home. Claimant helped them with personal care and other daily living activities and also accompanied them on trips within the community.
6. On May 1, 2003 Claimant was helping a co-worker to retrieve some supplies for the night shift. As she was descending a flight of stairs her foot slipped. Claimant slid down the stairs on her backside, landing at the bottom with her right knee tucked up under her left leg.
7. Defendant accepted Claimant's injuries, which it initially characterized as a right knee strain and low back contusion, as compensable and began paying workers' compensation benefits accordingly.
8. For her right knee injury Claimant treated with Dr. Gagnon. Dr. Gagnon diagnosed a knee contusion, which he treated conservatively. Claimant reached an end medical result for this injury on April 14, 2004 and was rated with a 3 percent whole person permanent impairment. Aside from some limitation as to climbing stairs, Claimant's right knee injury does not otherwise restrict her ability to work.

9. For her lower back injury Claimant has treated principally with her primary care provider, Susan Taney, a nurse practitioner. From the beginning, her symptoms have consisted of an aching, burning pain across her lower back, with some muscle spasm but no clear radicular component. She sleeps fitfully and can neither sit nor stand for extended periods of time without having to change position. Her tolerance for walking is extremely limited. Claimant also suffers from depression, at least in part causally related to her chronic pain and physical limitations. She spends most of her day napping, performing very light housework, watching TV and engaging in craft projects.
10. Diagnostic imaging studies have revealed some degenerative disc changes in Claimant's lumbar spine, but no definitive herniations. For that reason, treatment has focused on conservative rather than surgical measures. Neither physical therapy nor injections has provided any long-term symptom relief. For years now, Claimant has relied on narcotic pain medications as her primary means of managing her symptoms. These have been appropriately prescribed and never abused.
11. In July 2004 Claimant began a multi-disciplinary functional restoration program at the Work Enhancement Rehabilitation Center (WERC) in Williston. Programs such as this combine physical therapy, occupational therapy, pain management and psychological counseling in a structured in-patient setting. The goal is to assist patients to develop both the physical capacity and the coping skills necessary to achieve clearly delineated functional goals, be they work-related, domestic or recreational. Claimant had successfully completed the WERC program following her previous low back injury in 1994. Given both her prior success and her current functional limitations, Dr. Cody, who evaluated her for entry into the three-week intensive program, concluded that she was a "perfect candidate."
12. Unfortunately, this time Claimant was unable to complete the WERC program. Shortly after starting it her grandfather was killed in a motor vehicle accident. In addition, while engaged in program activities she experienced an episode of dizziness, which her primary care provider, Ms. Taney, felt warranted further diagnostic work-up before continuing. For these reasons, Claimant left the program after only four days.
13. In September 2004 Claimant was diagnosed with a pituitary tumor, and later with complex migraine headaches. These conditions were successfully treated, and by early 2005 Ms. Taney was once again strongly advocating for Claimant to resume an in-patient functional restoration program.
14. At Defendant's request, in May 2005 Claimant underwent an independent medical examination with Dr. Gennaro. Dr. Gennaro determined that Claimant likely had sustained a low back strain as a result of her work injury, but that her ongoing symptoms were no longer attributable to that event. Instead, Dr. Gennaro pointed to Claimant's morbid obesity and severe deconditioning as the principal impediments to her recovery.
15. As for functional restoration, Dr. Gennaro concluded that such a program was neither necessitated by Claimant's work injury nor likely to change her circumstances, and therefore he would not recommend it. Rather, Dr. Gennaro identified extreme weight loss as the most efficacious way to improve Claimant's condition in the long run.

16. Dr. Gennaro concluded that Claimant had reached an end medical result for her work injury and rated her with a 5% whole person permanent impairment. With this opinion as support, in August 2005 Defendant discontinued Claimant's temporary total disability benefits. It also refused to pay for Claimant to resume participation in a functional restoration program.
17. Claimant appealed Defendant's discontinuance. In support of her position she produced evidence from Ms. Taney and other medical providers indicating that she likely would derive great benefit from a functional restoration program, as it would improve her chances of successfully returning to work.
18. Based on the evidence adduced at formal hearing, the Commissioner rejected Dr. Gennaro's end medical result determination, and instead ordered Defendant both to reinstate temporary disability benefits and to fund Claimant's renewed participation in a functional restoration program. *D.D. v. Northeast Kingdom Human Services*, Opinion No. 47-06WC (January 9, 2007). As to the latter issue, the Commissioner stated:

[T]he Defendant's assertion that the Claimant will not benefit from a functional restoration program because of her weight is untenable. "An employer takes each employee as is and is responsible under workers' compensation for an injury which disables one person and not another." *Stoddard v. Northeast Rebuilders*, Opinion No. 28-04WC (2004) (citing *Morrill v. Bianchi*, 107 Vt. 80 (1935)). Before the work injury, the Claimant was fully capable of performing her job as a full time service provider and healthcare attendant at her current weight. Aside from obesity and deconditioning, the Defendant offers no other physical impediment that might bar the Claimant from benefiting from a work hardening program. As such, a functional restoration program designed to increase the Claimant's conditioning and help her cope with her low back pain is an entirely reasonable and necessary treatment.

Id., Conclusion of Law No. 10.

19. Claimant did not re-enter the WERC program following the Commissioner's decision. Instead, she worked with Ben McCormack, a physical therapist who had treated her previously, to fashion a similar program closer to home. Mr. McCormack was able to provide a supervised therapeutic exercise regimen, as well as functional testing and training in body mechanics, positional tolerances and proper lifting techniques. There were no psychological or behavioral components to his program, however, nor was treatment provided in an in-patient setting. For these reasons, I find that the services Claimant received through Mr. McCormack were not truly equivalent to the type of functional restoration program that WERC had offered.

20. Claimant began Mr. McCormack's program in late February 2007. Unfortunately, in early April she developed plantar fasciitis and had to discontinue treatment until that condition resolved. Claimant returned to Mr. McCormack for a single visit in late August 2007, but for reasons that are unclear from the record did not re-engage in therapy thereafter.¹
21. At Defendant's request, in May 2007 Claimant underwent an independent medical examination with Dr. McLellan, an occupational medicine specialist. Dr. McLellan determined that Claimant had reached an end medical result for her work-related back injury and that any further treatment she required was necessitated by her obesity and associated deconditioning. In this respect, Dr. McLellan's opinions were essentially the same as those Dr. Gennaro earlier had expressed, which the Commissioner specifically had rejected in her January 2007 Opinion and Order. Nevertheless, the Department subsequently approved Defendant's discontinuance of temporary total disability benefits effective August 17, 2007 on the grounds that Claimant had reached an end medical result.
22. Aside from narcotic pain medications, since discontinuing Mr. McCormack's program Claimant has not undergone any additional treatment directed specifically at her chronic low back pain. She remains severely deconditioned, particularly from a cardiovascular perspective. She is even more morbidly obese than she was prior to her work injury, having gained approximately 100 pounds since 2003. Her venous insufficiency and resulting peripheral edema have worsened as well.
23. Claimant has experienced two or three acute exacerbations of her low back pain since her initial injury in 2003. One such exacerbation occurred in October 2005, when she rolled over in bed. Another occurred after attending her grandson's football game. I find from the credible medical evidence that these and other minor exacerbations caused only temporary increases in Claimant's pain, following which she returned to her baseline. None of these incidents account for her current and ongoing symptoms.

¹ The parties stipulated that the only issue regarding functional restoration that was to be addressed at the current hearing was whether such a program constitutes reasonable, necessary and causally related treatment for Claimant's work injury. By stipulation, no evidence was introduced as to whether Claimant refused to participate in a functional restoration program after 2007 and/or whether Defendant refused to pay for her to do so.

Medical Opinions as to Functional Restoration

24. The medical evidence is conflicting as to whether Claimant still might benefit from participation in a structured functional restoration program. Specifically:
- Ms. Taney continues to believe that a structured in-patient functional restoration program likely will improve Claimant's condition both physically and psychologically, though perhaps not to the point necessary to enable her to return to gainful employment.
 - Based both on his initial 2005 evaluation and on subsequent examinations conducted in 2006 and 2011, Dr. Gennaro continues to believe that the primary cause of Claimant's disability, and the chief impediment to her recovery, is her morbid obesity. Although he acknowledges that weight loss and aerobic conditioning would be very beneficial in terms of improving Claimant's level of function, given her obesity-related health issues he does not believe that she is an appropriate candidate for a WERC-type functional restoration program.
25. There is an alternative to the WERC program, one that is less physically intensive and more psychologically based, at least to start. This program, run through the Occupational Disability Management Center (ODMC) in Rutland, offers interdisciplinary treatments such as behavioral counseling, pain management education and gentle movement-oriented therapies. The goal is to reframe a patient's disability perception, reduce the fear of re-injury and use exercise activity to stimulate natural pain-relieving endorphins. This type of program differs from the more traditional work-hardening model employed at WERC by its ability to accommodate patients who are perhaps less healthy and more burdened by psychosocial issues.
26. Upon reviewing Claimant's medical records, Dr. Mann, the licensed psychologist/doctorate who both owns and manages the ODMC program, has concluded that she is a good candidate, and that her participation likely will increase her level of functioning and improve her overall health. Even Dr. Gennaro conceded that Claimant likely would fare better in a more behaviorally-based program such as ODMC's than she would in a WERC-type program.

Medical Opinions as to Claimant's Functional Capacity and Ability to Work

27. Claimant has not worked since her May 2003 accident. The medical opinions as to her functional capacity and ability to work have varied over time:

- In June 2005 the results of a functional capacity evaluation indicated that Claimant was capable of working three hours per day in a light capacity, and likely more in a sedentary capacity provided she was allowed positional changes;
- In July 2005 Ms. Taney released Claimant to part-time (five hours per day) light capacity work, with restrictions against lifting and prolonged driving;
- Following his May 2007 independent medical examination, Dr. McLellan concluded that considering only Claimant's work-related low back injury she was capable of sedentary work, but the combination of her non-work-related conditions (obesity, peripheral edema, plantar fasciitis, complex migraines and depression) rendered her totally disabled;
- A repeat functional capacity evaluation in November 2007 determined that Claimant was capable of sustaining sedentary level work for an eight-hour day, again provided that she was allowed to change positions frequently;
- In May 2008 Ms. Taney released Claimant to part-time (four hours per day, three days per week) work, gradually increasing her hours to tolerance and with restrictions against heavy lifting and prolonged standing or sitting;
- A third functional capacity evaluation in May 2010 determined that Claimant had a part-time (four hours per day, five days per week) sedentary work capacity, and was limited from doing more primarily because of her poor cardiovascular conditioning and endurance level;
- Consistent with his January 2011 independent medical examination, Dr. Gennaro testified at the formal hearing that Claimant currently has a part-time (20 hours per week) sedentary work capacity;
- Ms. Taney testified at hearing that she no longer believes that Claimant can sustain even part-time sedentary employment on a regular basis.

Vocational Rehabilitation Efforts

28. Claimant initially was found entitled to vocational rehabilitation services in 2005. She worked with Defendant's assigned vocational rehabilitation counselor, Melanie Hamilton, to develop a suitable return to work plan. The goal was to find employment in the personal care field, for example as a care attendant or companion, within the parameters of Ms. Taney's July 2005 work release.
29. In September 2005 Claimant was hired to work as a night-duty personal care attendant for an elderly woman. Unfortunately, on the day she was to start she suffered a severe bout of edema in her legs. As a result, Ms. Taney disabled her from working for at least a month. By the time Claimant recovered, the job was no longer available.
30. In January 2006 Claimant decided to change vocational rehabilitation counselors. Her new counselor, George Fotinopoulos, proposed a plan to return Claimant to work as an elderly companion. However, due to what Mr. Fotinopoulos characterized as a "lack of cooperation" from Defendant, the Department or the parties' attorneys, this plan was neither endorsed nor approved.
31. In February 2008 Claimant began working with yet another vocational rehabilitation counselor, William O'Neill. Mr. O'Neill's return to work plan had as its goal work as a human services paraprofessional. Given Claimant's extended period of time out of work, Mr. O'Neill suggested that she consider volunteer as well as paid opportunities within that field.
32. To that end, in December 2008 Claimant began volunteering as a companion to a friend of hers who was in the advancing stages of ALS. Although the friend lived just four trailers down – a distance of only five or six hundred feet – Claimant was unable to manage the walk, and instead had to drive. Once there, she helped the friend to eat, drink and take medications, watched TV with her and occasionally ran brief errands. Claimant did not prepare meals, assist with toileting or engage in any other more strenuous activities.
33. Claimant's friend died in May 2009. At that point Mr. O'Neill anticipated that Claimant would devote her efforts to transitioning from volunteer work to paid employment, but this did not occur. Instead, Claimant voiced concern that she was not physically capable of performing full-time work. In August 2009 she requested that vocational rehabilitation services be suspended while she sought Defendant's approval for an updated functional capacity evaluation.
34. As noted above, *see* Finding of Fact No. 27, the May 2010 functional capacity evaluation determined that Claimant was capable of working at only a part-time sedentary level. With this limited capacity, Mr. O'Neill concluded that vocational rehabilitation services were unlikely to restore her to employment that would approximate her pre-injury wages. For that reason, he closed his file.

35. Mr. O'Neill testified at hearing that despite having closed Claimant's file he still believes that vocational rehabilitation services would assist her to return to work. Claimant has a pleasing personality and is a very caring individual, both traits that make her a good match for work in her chosen field. I find this testimony to be credible.
36. Claimant has been receiving social security disability benefits since 2006. In the eight years since her May 2003 work injury she has formally applied for only fifteen jobs. Although I find credible Claimant's stated desire to return to work, I also find that in at least some respects – for example, her ability to sit, stand or walk for more than the briefest period of time – she perceives herself to be more disabled than is actually established by her measured limitations.

Expert Vocational Rehabilitation Opinions

37. Each party presented its own expert testimony as to whether Claimant has any reasonable prospect of finding and sustaining regular employment, either with or without vocational rehabilitation assistance. Testifying on Claimant's behalf, Greg LeRoy concluded that she does not. Testifying for Defendant, John May concluded that she does. Both Mr. LeRoy and Mr. May are certified vocational rehabilitation counselors who are well qualified to provide opinions as to Claimant's vocational prospects.

(a) Mr. LeRoy

38. The starting point for Mr. LeRoy's opinion was his assumption that Claimant is unlikely to achieve any further improvement in her work capacity beyond the part-time sedentary level indicated by her 2010 functional capacity evaluation. Given Claimant's narrow work history, her lack of advanced formal training and her limited physical capabilities, Mr. LeRoy concluded that the selection of jobs for which she might still qualify – as a personal care attendant, for example, but with no hands-on care, cooking or housecleaning required – was very limited. The competition for job vacancies in Claimant's area would be keen, furthermore, and in Mr. LeRoy's opinion she would not compare favorably to other applicants. For these reasons, in Mr. LeRoy's opinion Claimant likely is unemployable.
39. Mr. LeRoy acknowledged that the primary means of changing Claimant's vocational prognosis and restoring her to gainful employment would be to improve her level of functioning. He conceded that the question whether a multidisciplinary functional restoration program might help her achieve this result was a medical one, and therefore beyond his area of expertise.
40. Mr. LeRoy also conceded that past efforts at vocational rehabilitation never proceeded beyond encouraging Claimant to seek jobs that matched her current skill level and educational background. In that sense, the more advanced steps in the vocational rehabilitation hierarchy – new skill training and/or education, for example – still have not been exhausted.

41. Last, Mr. LeRoy expressed some frustration with the fact that according to his interpretation of Vermont law Claimant might not be entitled to further vocational rehabilitation services, because her part-time sedentary work capacity is unlikely to lead to employment that will approximate her pre-injury wages. His own professional preference would be to allow her continued access to vocational rehabilitation assistance in the hopes of capitalizing on whatever work capacity she has.

(b) Mr. May

42. In Mr. May's opinion, it is as yet premature to conclude that Claimant has no reasonable prospect of gainful employment and is therefore permanently and totally disabled. He cited numerous vocational rehabilitation resources that likely would increase Claimant's employability, such as proactive assistance with job search activities, new skill training, job modification and home employment options.

43. Mr. May acknowledged that there are numerous hurdles to Claimant's successful return to regular gainful work, including her chronic pain, her obesity and other co-morbid medical conditions and her overall deconditioning. In his opinion, Claimant's vocational prospects would be significantly enhanced were she to participate successfully in a multidisciplinary functional restoration program. Even without such a program, however, in Mr. May's experience claimants who return to work on a graduated schedule often demonstrate improved endurance, conditioning and function over time. Were Claimant to return to work initially at a part-time sedentary job, she likely would be able to increase her hours over time. I find this testimony to be credible.

44. Mr. May conducted a cursory labor market survey, from which he concluded that jobs consistent with Claimant's abilities likely exist in her labor market area. According to his limited research, the patient companion field is a high growth occupation, and not all of these jobs require walking or lifting beyond Claimant's current limitations.

CONCLUSIONS OF LAW:

1. Claimant seeks permanent total disability benefits. She alleges that the combination of her compensable work injury, her pre-existing and co-morbid medical conditions and her functional restrictions so limit her vocational options as to render her incapable of sustaining regular, gainful work.
2. Defendant asserts in response that both medical treatment and vocational rehabilitation options exist that, if successfully pursued, will decrease Claimant's functional restrictions and enhance her ability to find and sustain suitable employment. It is premature, therefore, to declare her permanently and totally disabled.

3. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

4. The workers' compensation rules provide further guidance. Rule 11.3100 states:

Permanent Total Disability – Odd Lot Doctrine

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 the 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.

5. As the name suggests, there are two separate prongs to the permanent total disability determination. First, the disability under consideration must be permanent, as opposed to temporary. Second, it must be total, as opposed to partial.
6. Conflicting medical evidence was offered as to the permanent nature of Claimant's disability, specifically whether her condition is likely to improve should she agree to participate in an ODMC-type functional restoration program. I conclude that it is.

7. As ODMC's owner/manager, Dr. Mann's testimony as to Claimant's suitability for that program is somewhat tainted by his financial interest in having her as a client. Even Defendant's expert acknowledged, however, that with its heightened focus on removing behavioral and psychological barriers to increased function, a program such as ODMC's is better suited to treating a person with Claimant's current limitations than a more physically-based program would be. And Claimant's primary care provider, Ms. Taney, who has followed her progress for many years and is intimately familiar with her many medical issues, also believes that Claimant likely will realize functional gains through a multidisciplinary treatment approach. There is, of course, no guarantee of success, but on the basis of these medical opinions I conclude that there is sufficient justification at least to attempt it should Claimant be willing to do so.
8. As for the second prong of the permanent total disability determination, the May 2010 functional capacity evaluation rated Claimant with a part-time sedentary work capacity. I conclude that that is a more accurate estimate of her current physical capabilities than Ms. Taney's summary testimony to the contrary. The question still remains, however, whether that work capacity, when considered in conjunction with Claimant's transferable skills, education and other odd lot factors, translates into viable vocational options for regular, gainful employment.
9. I am persuaded by Mr. May's testimony on this issue that it is as yet premature to conclude that Claimant is permanently unemployable, even at her current work capacity. Vocational rehabilitation resources exist that, if properly explored, still might lead to suitable gainful employment.
10. Vermont's vocational rehabilitation rules specifically delineate the hierarchy of options that a counselor should consider in devising an appropriate return to work plan, from job development to new skill training to advanced education to self-employment. *Workers' Compensation Rule 55.2000*. Certainly in some cases it may be self-evident that pursuing the more advanced vocational options is likely to be fruitless, *see, e.g., Prescott v. Suburban Propane*, Opinion No. 42-09WC (November 2, 2009), but I do not consider that to be the case here. Here, Mr. LeRoy acknowledged that the vocational assistance Claimant received never proceeded beyond job development, but gave no justification at all for why other options were not considered.
11. I conclude that Claimant has not sustained her burden of proving that she has no reasonable prospect of finding and sustaining regular, gainful employment. She is not entitled to permanent total disability benefits, therefore.
12. Having concluded that Claimant is neither permanently nor totally disabled, it remains to consider whether she is entitled to additional temporary total disability and/or vocational rehabilitation benefits.

13. In the earlier decision involving this claim, the Commissioner determined that a functional restoration program offered at least the prospect of further improvement in the medical recovery process, which is sufficient under our rules to negate a finding of end medical result. *Workers' Compensation Rule 2.1200*; *D.D. v. Northeast Kingdom Human Services*, Opinion No. 47-06WC (January 9, 2007); *see also, Cochran v. Northeast Kingdom Human Services*, Opinion No. 31-09WC (August 12, 2009). Should Claimant choose to participate in either the ODMC or a similar in-patient program, she will be entitled to temporary total disability benefits at least as of the date such treatment begins.
14. I cannot determine from the evidence before me whether Claimant also might be entitled to temporary total disability benefits from the time when these were discontinued in August 2007 forward. Her entitlement to such benefits may depend at least in part on whether her failure to pursue functional restoration was because she was not interested in doing so or because Defendant refused to pay. The parties having stipulated not to address this issue at hearing, I cannot yet decide it.
15. Last, I conclude that Claimant is entitled to additional vocational rehabilitation services geared towards accomplishing the goal of returning her to regular, gainful work. I agree with Mr. LeRoy that the purpose of vocational rehabilitation assistance should be to capitalize on whatever work capacity Claimant has. The fact that even with such assistance she still may not find employment that approaches 100% of her pre-injury wages does not disqualify her. Consistent with the spirit of Vermont's vocational rehabilitation program, so long as the "closest reasonably attainable wage to 100%" still qualifies as regular, gainful employment, services ought to continue. *Workers' Compensation Rule 51.2700*.
16. Claimant seeks an award of costs totaling \$10,959.98 and attorney fees totaling \$34,491.50.² Ordinarily, a claimant is entitled to an award of only those costs that relate directly to the claims upon which he or she has prevailed. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997).
17. Here, Claimant failed to prevail on her claim for permanent total disability benefits, but she did succeed in establishing her right to additional temporary total, medical and vocational rehabilitation benefits. Considering her costs in this light, Mr. LeRoy's fees must be disallowed, as their purpose was primarily to establish her unsuccessful claim. Subtracting these from the total, Claimant is awarded costs of \$2,394.92.

² Claimant's fee request is based on a billing rate of \$90.00 per hour for work performed prior to June 15, 2010. Work performed after that date is based on a rate of \$145.00 per hour, in accordance with amended Workers' Compensation Rule 10.1210. *See Erickson v. Kennedy Brothers, Inc.*, Opinion No. 36A-10WC (March 25, 2011).

18. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. The dollar value of Claimant's recovery here is substantially less than what she would have received had she prevailed on her permanent total disability claim, but there is value nonetheless in the temporary disability, medical and vocational rehabilitation benefits she has been awarded. Under these circumstances I find it appropriate to award Claimant 30 percent of her claimed fees, or \$10,347.45.

ORDER:

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

1. Medical benefits in conjunction with Claimant's participation in an ODMC or similar in-patient functional restoration program, pursuant to 21 V.S.A. §640;
2. Temporary total disability benefits for the period of time during which Claimant is enrolled in such a program, pursuant to 21 V.S.A. §642;
3. Vocational rehabilitation benefits pursuant to 21 V.S.A. §641;
4. Costs totaling \$2,394.92 and attorney fees totaling \$10,347.45.

DATED at Montpelier, Vermont this 31st day of August 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.