

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Karen Kendrick

Opinion No. 07-16WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

LSI Cleaning Service, Inc.

For: Anne M. Noonan
Commissioner

State File No. DD-51585

OPINION AND ORDER

Hearing held in Montpelier on September 14, 2015

Record closed on October 30, 2015

APPEARANCES:

Robert Mabey, Esq., for Claimant

Jennifer Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Had Claimant reached an end medical result for her July 26, 2011 compensable work injury as of September 26, 2014, the date on which Defendant discontinued temporary disability benefits?
2. If not, on what later date did Claimant reach an end medical result for her July 26, 2011 compensable work injury?
3. What is the appropriate permanent impairment rating referable to Claimant's July 26, 2011 compensable work injury?
4. Is Defendant responsible for paying the charges referable to Dr. Ensalada's June 2, 2015 evaluation?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, Adam Pearson, M.D.

Claimant's Exhibit 2: *Curriculum vitae*, Leon Ensalada, M.D.

Claimant's Exhibit 3: Permanent impairment evaluation, June 2, 2015

Claimant's Exhibit 4: Dr. Ensalada invoice, August 17, 2015
Claimant's Exhibit 5: Agreement for Permanent Partial or Permanent Total Disability Compensation (Form 22), 2/1/13

Defendant's Exhibit A: *Curriculum vitae*, William Boucher, M.D.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640(a)
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.

Claimant's July 2011 Work Injury and Subsequent Medical Course

3. Claimant worked as a cleaner for Defendant's cleaning service company. On July 26, 2011 she sought medical treatment for neck and left shoulder pain causally related to wearing a vacuum pack and performing other heavy lifting activities necessitated by her job duties. Defendant accepted her injury as compensable and began paying workers' compensation benefits accordingly.
4. Initially Claimant treated conservatively for her injury, which was diagnosed as probable cervical radiculopathy. She began a course of physical therapy, but could not tolerate it. Her symptoms at the time included left shoulder and neck pain and paresthesias down her left arm and into her fingers.
5. Claimant failed to improve with conservative therapy. An October 2011 MRI scan revealed a large, left-sided disc herniation at C6-7. As treatment, in December 2011 she underwent fusion surgery with Dr. Pearson, a specialist in orthopedic spine surgery.
6. Claimant enjoyed complete relief of her left upper extremity symptoms post-surgery, but her neck pain continued. At a February 2012 independent medical examination with Dr. Backus, an occupational medicine specialist, she reported "significant complaints," including constant aching pain in her neck, upper back and shoulders. She reiterated these complaints to her treating provider in New

Mexico, where she had relocated, in April 2012. As treatment, the provider strongly recommended physical therapy and progressive rehabilitation.

7. Claimant underwent a course of physical therapy (her second since her initial injury) while in New Mexico – a total of nine visits between May 30th and September 4th, 2012. At formal hearing, she described the treatment as “not at all helpful.”
8. At Defendant’s request, in October 2012 Claimant underwent an independent medical examination with Dr. Chen. She continued to report constant, aching pain in her neck and shoulders, with general weakness in her left arm and intermittent numbness and tingling radiating down into her fingers. Dr. Chen anticipated that she would reach an end medical result one year post-surgery, or December 2012, with an estimated 25 percent whole person permanent impairment.
9. Based on the extent to which Claimant’s activities of daily living were impacted by the continued limitations she reported – difficulty sleeping, lifting more than 15 or 20 pounds or sitting or standing for extended periods, for example – Dr. Backus rated a somewhat higher permanent impairment – 27 percent whole person – than Dr. Chen had. With the Department’s approval, Defendant compromised the two ratings, and paid permanent partial disability benefits in accordance with a 26 percent whole person impairment rating.
10. Having returned from New Mexico, Claimant next sought treatment for her neck pain and upper extremity paresthesias in July 2013, again with Dr. Pearson. At Dr. Pearson’s referral, from mid-August through mid-September 2013 she underwent a third course of physical therapy. Unlike the therapy she had undergone in 2012, which consisted primarily of passive modalities, this course was exercise-based. Unfortunately, however, this treatment as well failed to yield significant improvement. In all, Claimant attended eight of fourteen scheduled sessions, during which she reported increased symptoms.
11. Claimant returned to Dr. Pearson in October 2013. Electrodiagnostic studies suggested longstanding radiculopathy in the C7 nerve root distribution, and an MRI scan demonstrated adjacent segment degeneration at C5-6, the level above the solid fusion at C6-7. Dr. Pearson recommended a second surgical fusion, this time at C5-6, which Claimant underwent in November 2013. Defendant accepted this procedure as causally related to her original injury, and paid benefits accordingly.
12. Claimant continued to complain of persistent axial neck pain following her second surgery. As treatment, Dr. Pearson again referred her for physical therapy (her fourth course). Between March and April 2014 Claimant attended five of ten scheduled sessions, during which she reported that the exercises exacerbated rather than relieved her symptoms.

13. Claimant next saw Dr. Pearson in mid-May 2014. As before, she reported pain at the base of her cervical spine, radiating into her trapezius muscles bilaterally. Dr. Pearson prescribed Tramadol, a narcotic pain medication, and advised her to return in six months for a follow-up visit.
14. Claimant credibly testified that during this period her symptoms significantly limited her functional abilities. She stopped driving her car, because manipulating the standard shift caused pain in her arm and shoulder, and the limited range of motion in her neck made her feel unsafe. She was unable to grocery shop, vacuum, perform yard work, carry laundry or pick up a gallon of milk. She had difficulty washing her hair and could not tolerate working on a computer for more than 30 minutes at a time. She did not go camping or fishing during the summer, both recreational activities she had enjoyed previously.
15. At Defendant's request, in August 2014 Claimant underwent an independent medical examination with Dr. Boucher, an occupational medicine specialist. Based on his physical examination and review of the pertinent medical records, Dr. Boucher concluded that Claimant had reached an end medical result. In his opinion, the treatment she had received to date had been reasonable, though he voiced concern about the use of Tramadol for long-term relief of chronic pain. Instead, he recommended a combination of non-steroidal anti-inflammatories and tricyclic medications.
16. As for permanency, Dr. Boucher rated Claimant with a 24 percent whole person permanent impairment, the details of which are discussed *infra*, Conclusion of Law Nos. 34-39. He described her overall prognosis as only "fair."
17. Following Dr. Boucher's examination, in September 2014 Claimant telephoned Dr. Pearson's office to request a follow-up visit, notwithstanding that she was still two months shy of the six-month timeframe he had suggested at her last appointment in mid-May. She acknowledged at formal hearing that she understood the financial ramifications of Dr. Boucher's end medical result determination – specifically, that it likely would prompt Defendant to discontinue her temporary disability benefits – but credibly denied that her motivation for contacting Dr. Pearson was solely to preclude it from doing so. Rather, her primary goal was to discuss her remaining treatment options, if any.
18. Dr. Pearson examined Claimant on September 30, 2014. Since his May evaluation, her right-sided radicular symptoms had subsided, but she still complained of significant axial neck pain radiating into her left trapezius, with intermittent numbness into her left upper extremity. Dr. Pearson determined that further surgery was not appropriate, and instead suggested non-surgical treatment options – medial branch blocks, radiofrequency ablation or another course of physical therapy. Claimant chose physical therapy, and Dr. Pearson made the referral.

19. Unlike her four prior attempts at physical therapy, this time Claimant made excellent progress. As of late December 2014 her therapist reported that she no longer guarded her neck movements, demonstrated full active range of motion (within the limits of her fusions) and showed good upper extremity strength. Dr. Pearson confirmed these results in his January 2015 follow-up examination, noting in particular a ten-degree improvement in neck extension, which is considered significant.
20. As of December 26, 2014 Claimant's physical therapist anticipated that she would require only one to three additional sessions prior to discharge. Thereafter, Claimant cancelled her next scheduled session on January 5, 2015, and did not resume therapy until March 13, 2015. At hearing, she testified that she had been ill during some of the intervening weeks, but otherwise did not offer any explanation for the delay.
21. After resuming therapy, Claimant underwent six additional sessions, and then was discharged to a self-directed gym and/or home exercise program on April 30, 2015. According to the physical therapist's report, by that date she had "met and surpassed" all therapy goals.
22. In her formal hearing testimony, Claimant credibly described the manner in which her most recent course of physical therapy differed from those she had attempted in the past. Beginning with massages and light exercises and then progressing to more strenuous work in the gym allowed her gradually to build strength and improve her range of motion without also increasing her pain. As a consequence, her function improved as well. Over time, she regained the ability to lift a gallon of milk, go grocery shopping, perform normal household chores, wash her own hair, sit for longer periods at her computer and turn her head enough to drive safely. She also reduced her use of Tramadol. In all, to her the program seemed more attuned to her abilities than the previous ones had.
23. Claimant credibly testified that although she has lost some of the gains she realized while actively engaged in physical therapy, her functional abilities today remain much improved over what they were a year ago. She has been unable to maintain a gym membership, as both Dr. Pearson and the physical therapist recommended, but continues to do her home exercises on a daily basis. With better range of motion in her neck, she is still able to drive safely, grocery shop and perform most activities of daily living.

Expert End Medical Result Opinions

(a) Dr. Boucher

24. With Dr. Boucher's end medical result opinion as support, Finding of Fact No. 15 *supra*, Defendant discontinued Claimant's temporary total disability benefits effective September 26, 2014.
25. At formal hearing, Dr. Boucher testified that Dr. Pearson's subsequent referral for an additional course of physical therapy did not alter his August 2014 end medical result determination in any respect. Based on his review of Claimant's medical records, her cervical condition had already stabilized, such that additional therapy likely would not have resulted in substantial improvement. To his eye, furthermore, the increased range of motion in her neck was relatively insignificant, and with home exercise the functional gains she reported could just as easily have been realized a year earlier.
26. Dr. Boucher acknowledged that he did not question Claimant closely during his examination about her functional abilities, and also that he did not review the records relating to her final course of physical therapy in any detail. I find that these omissions significantly weaken his conclusions as to end medical result.

(b) Dr. Pearson

27. On the basis of his September 30, 2014 physical therapy referral, Finding of Fact No. 18 *supra*, and contrary to Dr. Boucher's opinion on the issue, Dr. Pearson concluded that Claimant had not yet reached a plateau in her recovery process by that date, and therefore that she was not yet at an end medical result for her work injury. Noting that at the time of Dr. Boucher's evaluation she was only nine months post-surgery, in his opinion any end medical result determination was on its face premature. In his experience, the standard is at least one year post-surgery, particularly in cases involving fusions, because it takes that long to ensure that the vertebrae have solidly fused.
28. Of greater import, Dr. Pearson believed that with additional physical therapy Claimant still might realize decreased neck pain, increased cervical range of motion and upper extremity strength, and improved function overall. It is not uncommon for a patient to respond positively to physical therapy even after having failed to do so previously, as Claimant had. Different therapists employ different techniques, and patients often tolerate different modalities in different ways at different times. Thus, while Dr. Pearson admitted that his physical therapy referral would not "cure" Claimant's chronic neck pain, he fully expected that it would result in substantial improvement. That according to both his clinical examination and Claimant's subjective report this is in fact what occurred corroborates his opinion, which I find credible in all respects.

29. As for Dr. Boucher's characterization of the cervical range of motion gains Dr. Pearson measured in January 2015 as insignificant, again Dr. Pearson disagreed. Range of motion measurements suffer from very poor inter-rater reliability, meaning that two doctors examining the same patient are unlikely to record the same measurements. Thus, to the extent that Dr. Boucher based his conclusions on a comparison between Dr. Pearson's measurements and his own, this was a faulty analysis.
30. Dr. Pearson credibly testified that Claimant's recovery process had not yet plateaued as of the last time he examined her, January 7, 2015, because her cervical condition was still improving and in his opinion probably would continue to do so. He acknowledged that without personally evaluating her, he could not determine at what point she likely reached an end medical result.

(c) Dr. Ensalada

31. At her attorney's referral, in June 2015 Claimant underwent an independent medical examination with Dr. Ensalada. Dr. Ensalada is board certified in both pain management and as an independent medical examiner. The primary purpose of his evaluation was to rate the extent of the permanent impairment referable to Claimant's work injury in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed.)* ("AMA Guides"). The *AMA Guides* require that a patient must first have reached an end medical result before his or her permanency can be rated, and for that reason Dr. Ensalada addressed that issue as well in his subsequent report.
32. As Dr. Pearson had, Dr. Ensalada disputed Dr. Boucher's August 2014 end medical result determination. In his opinion, it was appropriate for Dr. Pearson to recommend additional physical therapy in September 2014, and in fact, the treatment resulted in further improvement in her condition, thus negating any finding that her recovery process had plateaued. For that reason, in Dr. Ensalada's opinion Claimant did not reach an end medical result until the date she was discharged from physical therapy, April 30, 2015.
33. In support of his opinion, Dr. Ensalada referenced the *Occupational Disability Guidelines* ("ODG"), a publication of evidence-based treatment protocols for various injuries and conditions arising in the workers' compensation context. According to the *ODG*, and specifically with regard to cervical spine fusion surgeries, the evidence supports as many as 24 physical therapy sessions, spread over 16 weeks after graft maturity, as reasonable and necessary. In comparison, for a soft tissue sprain or strain, the *ODG* recommends only ten sessions, spread over eight weeks. But in Claimant's case, following her November 2013 fusion surgery she had been able to tolerate just five sessions, in March and April 2014. Viewed from this perspective, Dr. Pearson's September 2014 referral for an additional course of therapy fit well within the *ODG* guidelines and was therefore entirely appropriate. I find this analysis credible.

Expert Permanent Impairment Ratings

(a) Dr. Boucher

34. With reference to the *AMA Guides*, Dr. Boucher rated Claimant with a 24 percent whole person impairment referable to her work injury. In cases such as Claimant's, where the patient has undergone surgeries at different levels in the same spinal region, the *AMA Guides* (§15.2 at pp. 379-380) require that the range of motion model be used to calculate impairment. Under that model, the evaluator must assess three separate elements: (1) the impaired spinal region's range of motion; (2) the accompanying diagnosis; and (3) any spinal nerve deficit. *AMA Guides* §15.8 at p. 398.
35. In Claimant's case, Dr. Boucher assessed eleven percent impairment on account of cervical range of motion deficits, thirteen percent impairment for the diagnostic component and zero percent for nerve deficits. From this, he derived a total whole person impairment rating of 24 percent.
36. The methodology Dr. Boucher used to calculate Claimant's range of motion-related impairment deviated in significant respects from that required by the *AMA Guides*. Specifically:
 - The *AMA Guides* require that the impairment rating for cervical flexion/extension, lateral bending and rotation be based on "a valid set of three consecutive measurements," *AMA Guides* §15.11 at pp. 417-420. Dr. Boucher took only two measurements in each plane.
 - The *AMA Guides* require use of the two-inclinometer technique for flexion/extension and lateral bending measurements, *id.* Dr. Boucher used only a single inclinometer.
 - To measure cervical rotation, the *AMA Guides* require use of an inclinometer while the patient is in a supine position on the examining table, *id.* Dr. Boucher used a goniometer instead, and took his measurements while Claimant was seated rather than lying down on her back.
 - The *AMA Guides* require that the range of motion impairments for each plane (flexion/extension, lateral bending and rotation) be *added* together to derive the total cervical range of motion impairment, *id.* §15.8d at p. 403 and Figure 15-18 at p. 422, and then *combined* (using the Combined Values chart, *id.* at pp. 604-605) with the diagnosis and nerve deficit impairments to determine a single whole person impairment referable to the cervical spine, *id.* at p. 403. Dr. Boucher *combined* all of his ratings, including not only the 13-percent diagnosis-based rating but also the

range of motion measurements for each individual plane. Had he followed the *Guides*' procedure correctly, the result would have been 23 percent whole person impairment, not 24 percent.

37. Dr. Boucher offered various justifications for deviating from the *AMA Guides*' methodology. These ranged from asserting that his examination methods produced equally valid results to theorizing that the *Guides*' instructions with respect to adding versus combining impairment ratings were erroneous and likely had been misprinted. None of these explanations was even remotely credible.
38. Dr. Boucher acknowledged that his final impairment rating – 24 percent – was less than either of the two impairment ratings Claimant had obtained following her first fusion surgery in December 2011, *see* Finding of Fact Nos. 8 and 9 *supra*. He agreed that this was an unfair result, given that Claimant has now undergone a second fusion surgery. The first rating was derived under the diagnosis-related estimate method, however, which does not always correlate exactly to one based on the range of motion method. I find this analysis credible.
39. Dr. Boucher did not assess any additional permanent impairment on account of pain in formulating his rating. The *AMA Guides* allow an evaluator to rate as much as three percent additional impairment when a person with a verifiable medical condition experiences pain in excess of what the primary impairment rating already has captured. *AMA Guides* §18.3 at p. 570. Phrased alternatively, the *Guides* allow for an additional rating in situations “in which the pain itself is a major cause of suffering, dysfunction or medical intervention,” *id.* at p. 566. Here, Dr. Boucher concluded that the range of motion impairments incorporated into his 24 percent whole person rating adequately reflected Claimant's pain experience; therefore, no additional impairment was justified. I find this analysis credible.

(b) Dr. Ensalada

40. In Dr. Ensalada's opinion, Claimant has suffered a 30 percent whole person permanent impairment referable to her work injury – eighteen percent on account of cervical range of motion deficits, twelve percent for the diagnostic component, zero percent for nerve deficits and three percent for pain.
41. Dr. Ensalada adhered scrupulously to the *AMA Guides*' methodology to calculate his cervical range of motion-related impairment. He took at least three measurements in each plane. To do so, he used an inclinometer, because it measures smaller angles of the spine with greater accuracy than a goniometer. Last, he appropriately *added* the individual range of motion ratings, and then *combined* the result with the other component ratings to derive the final whole person impairment rating. I find that his close attention to the procedures articulated in the *Guides* adds significant credibility to his calculations.

42. Although grounded in the same section of the *AMA Guides* (Table 15-7 at p. 404) that Dr. Boucher had utilized, Dr. Ensalada's interpretation yielded a slightly lower diagnosis-related impairment – twelve percent, as opposed to Dr. Boucher's thirteen percent. Neither evaluator specifically addressed the discrepancy in their formal hearing testimony. Again, given Dr. Ensalada's demonstrated familiarity with, and close adherence to, the *Guides'* rating system, I find his application of Table 15-7 is likely more accurate than Dr. Boucher's.
43. As noted above, Conclusion of Law No. 39 *supra*, the *AMA Guides* permit an evaluator to assess an additional pain-related impairment if he or she determines that the body system impairment already rated has failed to adequately incorporate it. Dr. Ensalada acknowledged that the impairment he derived under the *Guides'* range of motion methodology included some consideration of Claimant's pain. Nevertheless, in his view she still deserved the maximum allowable pain-related rating, three percent.
44. As support for his opinion, Dr. Ensalada referenced various pain-related limitations on daily living activities that Claimant had reported to her physical therapist on April 23, 2014. As documented in the therapist's report, Claimant rated her pain at that time as "6-7/10 constantly." By the time of Dr. Ensalada's examination, however, and with the benefit of the physical therapy she had undergone more recently, Conclusion of Law Nos. 19-23 *supra*, Claimant was reporting both significantly decreased pain levels – ranging from three to six out of ten – and an increased ability to perform daily living activities. Indeed, it was exactly *because* of the gains she realized with this latest round of physical therapy that Dr. Ensalada characterized the sessions as both medically appropriate and successful, *see* Conclusion of Law No. 32 *supra*. With that in mind, I find it difficult to accept his opinion that Claimant's current condition merits the maximum allowable pain-related impairment rating.
45. Dr. Ensalada billed a total of \$1,750.00 for the time spent interviewing and examining Claimant, reviewing her medical records and preparing his independent medical examination report.

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). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. The primary disputed issues here revolve around end medical result and permanency. Claimant asserts that the physical therapy she underwent from October 2014 until April 2015 substantially improved her condition, and thus negated Dr. Boucher's previous end medical result determination. She further contends that Dr. Ensalada's permanency opinion, which includes an additional rating for pain-related impairment, more accurately reflects her current condition than Dr. Boucher's does.

End Medical Result

3. Vermont's workers' compensation rules define end medical result as "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." Workers' Compensation Rule 2.2000. The date of end medical result marks an important turning point in an injured worker's progress, both medically and legally. Medically, it signals a shift in treatment from curative interventions, the goal of which is to "diagnose, heal or permanently alleviate or eliminate a medical condition," to palliative ones, which aim instead to "reduce or moderate temporarily the intensity of an otherwise stable medical condition." Workers' Compensation Rule 2.3400.
4. Legally, because temporary disability benefits are only payable "for so long as the medical recovery process is ongoing," once an injured worker reaches an end medical result his or her entitlement to temporary indemnity benefits ends, and the focus shifts instead to consideration of permanent disability. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).
5. The Vermont Supreme Court has defined the proper test for determining end medical result as "whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Brace v. Vergennes Auto, Inc.*, 2009 VT 49 at ¶11, citing *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996). In *Brace*, the Court approved the trial court's determination that the claimant had not yet reached an end medical result because her referral to a rehabilitation and pain management clinic had the potential to improve her overall function, and in fact did so, in terms of both range of motion and ability to engage in activities and tasks. *Id.* at ¶13.
6. In cases decided since *Brace*, the Commissioner has ruled that a defined course of treatment that (a) offers long-term symptom relief rather than just a temporary reprieve; and (b) is reasonably expected to provide significant functional improvement can, in appropriate circumstances, negate a finding of end medical result. *Marsh v. Koffee Kup Bakery, Inc.*, Opinion No. 15-15WC (July 6, 2015) (pain management treatment); *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010) (trial implantation of spinal cord stimulator); *Cochran v. Northeast Kingdom Human Services*, Opinion No. 31-09WC (August 12, 2009)

(participation in functional restoration program). Interpreting the concept of the “medical recovery process,” *Bishop, supra*, in this way is in keeping with the benevolent objectives and remedial nature of Vermont’s workers’ compensation law. *Luff, supra*, citing *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983).

7. The parties here proffered conflicting expert testimony regarding whether Claimant’s most recent course of physical therapy could reasonably have been expected to significantly improve her condition. In such cases, the Commissioner traditionally uses a five-part test to determine which expert’s opinion is the most persuasive: (1) the nature of treatment and the 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. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
8. I conclude here that the opinions offered by Drs. Pearson and Ensalada are the most credible. As the treating physician, Dr. Pearson was best positioned to compare Claimant’s condition both before and after her most recent course of physical therapy. His clinical observations and range of motion measurements documented significant improvement, and thus provided objective support for his conclusion that at least as of the last time he examined her, January 7, 2015, she had not yet reached an end medical result. In addition, his clinical experience with patients like Claimant, who showed significant improvement despite having failed at previous attempts, and also with physical therapists that employ different techniques to achieve successful rehabilitation, was compelling.
9. Dr. Ensalada provided further support for Dr. Pearson’s opinion. His reliance on the *Occupational Disability Guidelines*, which established that an additional course of physical therapy fit well within the treatment parameters for a patient with Claimant’s medical history, was persuasive.
10. In contrast, Dr. Boucher’s end medical result opinion was premised primarily on his assertion that Claimant’s cervical condition had already stabilized, and that whatever further gains she realized thereafter were insignificant. As noted above, however, Finding of Fact No. 29 *supra*, his comparison of Dr. Pearson’s range of motion measurements with his own was faulty. He was unfamiliar with the *Occupational Disability Guidelines*, and offered no objective support for his claim that Claimant could have achieved the same results with a home exercise program that she did with a final course of physical therapy. Last, he admitted that he neither questioned Claimant closely about her functional abilities, nor reviewed her physical therapy records in any detail, Finding of Fact No. 26 *supra*. Considered together, these omissions render his opinion unpersuasive.
11. I conclude from Dr. Pearson’s credible testimony that Claimant had not yet reached an end medical result for her July 26, 2011 compensable work injury as

of September 26, 2014, the date on which Defendant discontinued her temporary disability benefits. I further conclude from Dr. Ensalada's credible testimony that she did not do so until April 30, 2015, the date on which she was discharged from her final course of physical therapy.

12. Although Claimant is thus owed additional temporary total disability benefits, she has failed to establish her entitlement for the period from January 5, 2015 to March 13, 2015. Her hiatus from therapy during this time was largely unexplained, Finding of Fact No. 20 *supra*. Had it not occurred, presumably treatment would have concluded sooner and she would have reached an end medical result earlier. Claimant offered no credible justification for the delay, and for that reason I cannot require Defendant to pay disability benefits while it persisted.
13. I conclude that Claimant is owed temporary total disability benefits for the periods from September 26, 2014 through January 5, 2015 and from March 13, 2015 through April 30, 2015.

Permanency

14. As for the extent of Claimant's permanent partial impairment, again, the parties offered conflicting expert medical evidence. As noted above, Finding of Fact No. 36 *supra*, the methods Dr. Boucher used to calculate permanency deviated from the *AMA Guides*' requirements in important respects, whereas Dr. Ensalada's rating complied in every detail.
15. The primary purpose of the *AMA Guides* is to provide a "standardized, objective approach to evaluating medical impairments," *id.* at p. 1, quoted in *Brown v. W.T. Martin Plumbing & Heating, Inc.*, 2013 VT 38, ¶16. It is with that in mind that Vermont's workers' compensation statute directs that the *Guides* are determinative with respect to "the existence and degree of permanent partial impairment" associated with a work injury. *Id.* at ¶21.
16. I conclude that Dr. Boucher's failure to adhere to the *AMA Guides*' procedures for determining permanent impairment renders his rating unpersuasive.
17. While I accept Dr. Ensalada's 28 percent range of motion-determined rating as consistent with the *AMA Guides* and therefore credible, I cannot accept the basis for his pain-related impairment. Claimant's credible testimony itself belies his assertion that her functional abilities remain impaired to such an extent as to merit the maximum three percent additional impairment for pain. For that reason, I must reject this component of his permanency rating.
18. I conclude from the credible expert evidence that Claimant has suffered a 28 percent whole person permanent impairment referable to her July 26, 2011 compensable work injury. Having already been paid permanency benefits for a

26 percent whole person impairment in 2013, Finding of Fact No. 9 *supra*, she is now owed benefits for an additional two percent whole person impairment, pursuant to 21 V.S.A. §648(d).

19. As Claimant has substantially prevailed on her claim for benefits, she is entitled to an award of costs¹ and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

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

1. Temporary total disability benefits from September 26, 2014 through January 5, 2015 and from March 13, 2015 through April 30, 2015, in accordance with 21 V.S.A. §642, with interest as calculated in accordance with 21 V.S.A. §664;
2. Permanent partial disability benefits in accordance with a two percent whole person impairment referable to the spine, a total of eleven weeks commencing on May 1, 2015, as calculated in accordance with 21 V.S.A. §648, with interest as calculated in accordance with 21 V.S.A. §664; and
3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this ____ day of _____, 2016.

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.

¹ Claimant having substantially prevailed, the cost of Dr. Ensalada's independent medical examination and permanent impairment rating is recoverable as a litigation expense. Therefore, I need not address the extent to which it would have qualified in any event as a permanent impairment rating "from a physician of [Claimant's] choosing," which Defendant would have been obligated to pay for under Workers' Compensation Rule 10.1210.