STATE OF VERMONT
DEPARTMENT OF LABOR

Tony Vohnoutka	Opinion No. 16-17WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
Ronnie's Cycle Sales of Bennington, Inc.	For: Lindsay H. Kurrle Commissioner
	State File No. FF-00938

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
Jennifer Meagher, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant entitled to judgment in its favor as a matter of law on the question whether Claimant is entitled to additional medical or indemnity benefits causally related to his February 22, 2013 compensable cervical spine injury?

EXHIBITS:

Defendant's Exhibit A:	Opinion and Order, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 20-16WC (November 7, 2016)
Defendant's Exhibit B:	Ruling on Defendant's Motion for Summary Judgment, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016)
Defendant's Exhibit C:	Formal Hearing Docket Referral, May 19, 2017
Defendant's Exhibit D:	Medical records, 05/06/2013-09/13/2017
Defendant's Exhibit E:	Correspondence from Paula Liberty, approving *Employer's Notice of Intention to Discontinue Payments*, June 27, 2017
Defendant's Exhibit F:	Correspondence from Attorney Meagher to Administrative Law Judge Phillips, July 13, 2017
Defendant's Exhibit G:	Correspondence from Attorney Meagher to Claimant, July 13, 2017
Defendant's Exhibit H:	Correspondence from Paula Liberty, approving *Employer's Notice of Intention to Discontinue Payments*, October 6, 2017

Department Exhibit 1: Correspondence from Paula Liberty, March 20, 2017

FINDINGS OF FACT:

The findings of fact as stated in the Commissioner's Opinion and Order in *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 20-16 (November 7, 2016) *(Defendant's Exhibit A*) and in the Commissioner's Ruling on Defendant's Motion for Summary Judgment, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016) *(Defendant's Exhibit B)* are hereby incorporated by reference. In addition, considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. The Commissioner previously determined that Claimant suffered a compensable soft-tissue and posterior element cervical spine injury with resulting cervicalgia while working in the course and scope of his employment for Defendant on or about February 22, 2013. Opinion and Order, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 20-16WC (November 7, 2016) *(Defendant's Exhibit A).*

2. In the context of her November 2016 ruling, the Commissioner ordered Defendant to pay for all reasonable medical services and supplies referable to treatment of Claimant's compensable neck injury, in accordance with 21 V.S.A. §640(a). In the event that upon reaching an end medical result, Claimant was determined to have suffered a ratable permanent impairment, the Commissioner further ordered Defendant to pay permanent partial disability benefits in accordance with 21 V.S.A. §648. *Id.*

3. Also in the context of her November 2016 ruling, the Commissioner determined that Claimant had failed to establish his entitlement to temporary disability benefits for any period from December 9, 2014 through November 7, 2016. *Id.* Previously, the Commissioner had determined that Claimant had failed to establish his entitlement to temporary disability benefits for any period from the date of injury until December 9, 2014. Ruling on Defendant's Motion for Summary Judgment, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016) *(Defendant's Exhibit B).* Claimant did not appeal either of these determinations. His entitlement to temporary disability benefits for any period prior to November 8, 2016 has been conclusively determined against him, therefore.

Claimant's Medical Treatment and Work Status after November 7, 2016

4. Claimant resumed treatment with his primary care provider, Nurse Practitioner Melanie Clark, on December 30, 2016. Prior to that, he had not treated for his compensable injury since December 2014. *Defendant's Exhibit D.* Ms. Clark did

not physically examine Claimant on that date; rather, she referred him to an orthopedist for further evaluation. Based solely on his subjective complaints, she determined that his "percentage of temporary impairment" was "100%."[1] Ms. Clark declined to specify any work limitations, stating only, "Due to pain and ongoing workers' comp claim will wait to release to work until seen by orthopedic." *Defendant's Exhibit D.*

5. At Ms. Clark's referral, Claimant underwent an orthopedic evaluation with Dr. Jackson on January 23, 2017. *Defendant's Exhibit D.* Dr. Jackson's medical record reflects the following findings on objective examination:

> Neck is supple . . . No significant tenderness across the cervical paraspinal musculature or across the upper trapezius region. Cervical spine range of motion is intact without limitations at end range. Spurling test is negative.[2] There is no significant limitation in shoulder range of motion.

6. Dr. Jackson's diagnostic impression was "status post a work-related injury in 2013 with continued neck pain and upper limb pain." As treatment, he recommended a cervical spine MRI "to rule out the possibility of disc herniation versus spinal stenosis," and physical therapy "to help improve strength and decrease pain and improve range of motion." Regarding Claimant's ability to work, Dr. Jackson responded to the question, "What is the percentage (0-100%) of temporary impairment?" as follows: "100% at this time until studies can be reviewed."[3] *Id.*

7. Defendant approved without prejudice Dr. Jackson's preauthorization request for both a cervical MRI and a six-week course of physical therapy. *Id.* Claimant underwent the MRI, but did not pursue physical therapy. *Defendant's Statement of Undisputed Material Facts,* ¶12.

8. Claimant underwent a cervical spine MRI on March 2, 2017. The study revealed a central disc protrusion at the C5-6 level, with focal extrusion abutting the right C5 nerve root, "age-indeterminate," and disc desiccation at additional levels, "likely chronic in nature." *Defendant's Exhibit D.*

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[1] Ms. Clark's office note appears to have been completed in accordance with New York Workers' Compensation Form C-4, the medical provider's initial report of treatment or evaluation for a claimed work-related injury. Her determination as to the "percentage of temporary impairment" also appears to have been made with reference to New York law; Vermont law does not use percentages to determine the extent of an injured worker's temporary disability, whether total or partial. *See* 21 V.S.A. §§642, 646.

[2] A Spurling test is a medical maneuver used to assess cervical nerve root pain. It is particularly sensitive for diagnosing acute cervical radiculopathy; less so for patients who do not exhibit classic radicular signs. *See* https://en.wikipedia.org/wiki/Spurling%27s_test.

[3] Dr. Jackson's medical record was titled, "Patient Visit Note; New York State Workers' Compensation." As with Ms. Clark, I consider his statement regarding Claimant's work capacity responsive to the requirements of New York's workers' compensation law, not Vermont's.

9. Claimant returned to Dr. Jackson for further evaluation on March 28, 2017. Dr. Jackson commented that his neck and right upper limb pain corresponded with the MRI findings indicative of a C5-6 disc extrusion. As treatment, he again recommended physical therapy "to help improve strength and decrease pain." He also suggested the possibility of an epidural steroid injection, but Claimant "deferred at this time." As for work status, Dr. Jackson rated the "percentage (0-100%) of [Claimant's] temporary impairment" as "50% moderate disability,"[4] stating that "the patient does have chronic symptoms which corresponds [sic] with his MRI." *Defendant's Exhibit D.*

10. As before, although Defendant authorized (without prejudice) a six-week course of physical therapy in accordance with Dr. Jackson's recommendation, *id.*, Claimant failed to pursue treatment. *Defendant's Statement of Undisputed Material Facts,* ¶14.

11. Claimant returned to Dr. Jackson on May 15, 2017. Dr. Jackson's diagnosis, as stated on a June 9, 2017 New York Workers' Compensation Board Progress Report (Form C-4.2) was cervical radiculopathy and cervicalgia. His treatment recommendations included consideration of an epidural steroid injection and/or a surgical consultation, both of which Claimant deferred. Beyond that, Dr. Jackson stated, "I do not know if I have much further to offer [Claimant] at this time. We have tried other medication management. We have tried physical therapy.[5] The patient will call with any questions or change in symptoms." *Defendant's Exhibit D.*

12. As for work capacity, Dr. Jackson again stated that Claimant's "percentage (0-100%) of temporary impairment" was "50%." Dr. Jackson offered no explanation as to how he arrived at this percentage, nor did he note any specific functional restrictions that might limit Claimant's ability to work. *Id.*

13. Claimant next treated with Dr. Sullivan-Bol, a chiropractic physician, commencing on July 18, 2017. Upon his initial evaluation, Dr. Sullivan-Bol made the following observations, *id.*:

> Patient affect and effort level was discussed at length today. It is very likely that if [Claimant] presented to other providers with the same flat affect, lack of effort with muscle testing, and heightening of symptoms, his complaint would be minimized or disregarded. In today's office visit, discussion of these factors were [sic]

[4] Again, I consider this statement reflective of New York workers' compensation law regarding the extent of an injured worker's temporary disability, not Vermont's.

[5] This was a misstatement on Dr. Jackson's part. Although he recommended a course of physical therapy at both of his prior office visits (and although Defendant agreed to pay for the treatment on both occasions), the record establishes that Claimant failed to pursue it. *Defendant's Exhibit D; Defendant's Statement of Undisputed Material Facts,* ¶¶12, 14.

> addressed and patient then gave maximal effort. The muscle deficit and wasting along the long thoracic nerve and thoracodorsal nerve is consistent with a C5-7 nerve root impingement or lesion and therefore, if present on MRI evaluation, there is a direct clinical correlation to patient's cervical complaints.

14. At his next office visit, August 8, 2017, Dr. Sullivan-Bol commented as follows, *id.*:

> Following a 60-minute face-to-face report of findings and care planning. [Claimant] was agreeable to initiate care and try to leave his past experience at home and not bring it to the office. We discussed that [vocational rehabilitation] would be a place that he should also seek employment within his restrictions and to get him back into the work force. Discussion that sitting at home and focusing on what he cannot do instead of what he can do is only making his situation worse.
>
> Patient will begin active rehab 2x per week for 4-6 weeks. Strength, postural correction, stability training and conditioning will be the focus as well as centralization of his disc displacement and reduction to resolution of his radicular symptoms.

15. Claimant underwent twice-weekly physical therapy sessions with an occupational therapist in Dr. Sullivan-Bol's practice for a total of four weeks, from August 14, 2017 through September 13, 2017. Treatment notes indicate that he sometimes demonstrated a "sluggish level of effort" and that his progress was "slower than expected" due to non-compliance with his assigned home exercise program. Treatment concluded on September 13, 2017, at which time Dr. Sullivan-Bol commented as follows, *id.*:

> Recommendations: [Home exercise program] as directed and contact [vocational rehabilitation] to be assessed for skill set appropriate job.
>
> Following the behaviors of the patient during his appointment today, it has been determined that this office can no longer provide rehabilitative care. It is our position that a patient has to want to get better. [Claimant] has demonstrated that his complaint of pain and his fatigue continues to stand in the way of him allowing himself to improve. There have been multiple instances where he has not been truthful with his physician and therapist regarding missed appointment [sic] due to transportation as well as his lack of a telephone, which he answers each time the office calls him. His behaviors are that of malingering, and communication is very histrionic in nature. Additionally, he has not followed up with

> [vocational rehabilitation], which was a contingency of continued care with [this practice]. It is therefore our assessment that [Claimant] will not benefit from any additional rehabilitative care with our facility and is formally discharged as of 9/14/17.

16. Based on the record before me, there is no evidence that Claimant has either adhered to his home exercise program or pursued vocational rehabilitation services, as Dr. Sullivan-Bol recommended. Nor is there any evidence that he has requested, sought or undergone any additional treatment or evaluation for his neck pain since Dr. Sullivan-Bol's discharge.

Independent Medical Examination

17. At Defendant's request, Claimant underwent an independent medical examination with Dr. Boucher, a board-certified occupational medicine specialist, on May 12, 2017. Dr. Boucher noted various pain behaviors (grimacing, sighing, moaning, flinching and rubbing) as well as non-physiologic findings (range of motion measurements inconsistent with other observations and inconsistent muscle weakness). Based on Claimant's written response to various pain and disability questionnaires, Dr. Boucher also described the following findings, *id.*:

    - Pain drawing suggestive of symptom magnification;
    - Score on Pain Disability Index indicative of a "very high degree of perceived disability;"
    - Response to McGill Pain Questionnaire indicative of "predominantly exaggerated pain;" and
    - Score on Owestry Function Test indicative of a "perception of severe disability."

18. Dr. Boucher diagnosed Claimant with "malingering." In support of this conclusion, he noted the following, *id.*:

    - Dr. Jackson's January 2017 evaluation had revealed "no physical findings" to explain Claimant's symptoms;
    - Fifty percent of asymptomatic individuals in their 30's have disc bulges similar to the one evident on Claimant's cervical spine MRI;
    - Claimant had failed to pursue physical therapy as Dr. Jackson had recommended;

- The current examination had revealed only subjective complaints and non-reproducible findings;

- There was marked evidence of pain behavior during examination, but not otherwise, as well as evidence of significant symptom magnification; and

- Claimant's allegation of total disability was belied by evidence of good muscle tone, heavy callous on both hands and a YouTube video depicting him driving an off-road vehicle while demonstrating "perfectly normal neck rotation."

19. To a reasonable degree of medical certainty, Dr. Boucher concluded that there was no causal relationship between Claimant's current cervical complaints and his February 23, 2013 work injury. He further concluded that Claimant had reached an end medical result, that there was "no physiologic reason for any work restrictions," and that Claimant had "at least a heavy work capacity." As for treatment, he stated that no further diagnostic testing or consultation was indicated, and that the only appropriate treatment for Claimant's symptoms would be physical therapy, "which [Claimant] has avoided on multiple occasions." He concluded that Claimant "is certainly not a candidate for medications, injections or any other medical treatment." *Id.*

20. As for permanency, with reference to the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)*, Dr. Boucher concluded as follows, *id.*:

> In this case, the subject exhibits decreased cervical motion, but measurements are inconsistent and therefore invalid, and cannot be utilized. He has had bilateral arm pain at times, but has never had true radicular symptoms. He clearly has no evidence of radiculopathy, and has no loss of motion segment integrity. Therefore, his condition falls into [Diagnosis Related Estimates] Cervical Category 1, which imparts 0% whole person impairment.

Procedural History

21. On or about February 27, 2017, Claimant filed correspondence with the Commissioner in which he requested additional benefits referable to his February 22, 2013 work-related cervical injury. Specifically, he sought ongoing temporary total disability compensation beginning on November 8, 2016 (the date when the Commissioner's prior denial of benefits had expired, *see* Finding of Fact No. 3, *supra*), and medical benefits as necessary for treatment of his neck pain. *Correspondence from Paula Liberty, March 20, 2017 (Department Exhibit 1).*

22. At the time of Claimant's filing, Defendant already had authorized, on a without prejudice basis, the medical treatment he was seeking, namely, a cervical MRI

and a six-week course of physical therapy, both as Dr. Jackson had recommended, *Finding of Fact No. 7, supra*.

23. On March 27, 2017, Defendant filed a Denial of Workers' Compensation Benefits (Form 2), in which it denied Claimant's claim for additional temporary disability benefits. As grounds, it asserted that Dr. Jackson's January 23, 2017 treatment note, upon which Claimant had relied, did not provide objective evidence of any current disability causally related to his work injury. Following an informal conference, on May 19, 2017 the Department's Workers' Compensation specialist upheld the denial and referred the matter to the formal hearing docket. *Formal Hearing Docket Referral, May 19, 2017 (Defendant's Exhibit C).*

24. On June 14, 2017, Defendant filed an Employer's Notice of Intention to Discontinue Payments (Form 27), in which it sought to discontinue all medical benefits except for the six-week course of physical therapy it previously had authorized on a without prejudice basis, *Finding of Fact Nos. 7 and 10, supra*. As support, it referenced Dr. Boucher's May 12, 2017 independent medical evaluation, *Finding of Fact No. 19, supra*. The Department approved the discontinuance (effective June 21, 2017) on June 27, 2017. *Correspondence from Paula Liberty, approving Employer's Notice of Intention to Discontinue Payments, June 27, 2017 (Defendant's Exhibit E).*

25. Also on June 27, 2017, in the context of the Department specialist's May 19th formal hearing docket referral, the Administrative Law Judge convened a telephone pretrial conference with the parties. Aside from the medical records already on file, during the conference Claimant did not identify any additional evidence or witnesses that he intended to introduce at hearing in support of his claim for benefits. *Defendant's Statement of Undisputed Material Facts,* ¶18.

26. By correspondence dated July 13, 2017, Defendant agreed to assign a nurse case manager to Claimant's file, to assist him in scheduling an evaluation with Dr. Sullivan-Bol and any prescribed physical therapy visits thereafter. Defendant also agreed to provide transportation to and from these appointments. *Correspondence from Attorney Meagher to Administrative Law Judge Phillips, July 13, 2017 (Defendant's Exhibit F).*

27. Also on July 13, 2017, Defendant notified Claimant that because both Dr. Boucher and Dr. Jackson had released him to return to work in some capacity, he was obligated to search for suitable work. With the letter, Defendant enclosed a work search form, with instructions to complete and forward it to Defendant's attorney on a weekly basis. *Correspondence from Attorney Meagher to Claimant, July 13, 2017 (Defendant's Exhibit G).*

28. On August 30, 2017, the Administrative Law Judge convened a telephone status conference with the parties. As before, aside from the medical records already on file, Claimant did not identify any additional evidence or witnesses that he

intended to introduce at hearing in support of his claim for benefits. He also acknowledged that he had failed either to search for work or to submit any work search forms to Defendant's attorney since having been notified of his obligation to do so. *Defendant's Statement of Undisputed Material Facts,* ¶25.

29. On September 28, 2017, Defendant filed an Employer's Notice of Intention to Discontinue Payments (Form 27), in which it sought to discontinue further physical therapy treatments. As support, it cited Dr. Sullivan-Bol's decision to discharge Claimant for non-compliance, *Finding of Fact No. 15, supra*. The Department's specialist approved the discontinuance effective October 6, 2017. *Correspondence from Paula Liberty, approving Employer's Notice of Intention to Discontinue Payments, October 6, 2017 (Defendant's Exhibit H).*

30. On October 25, 2017, the Administrative Law Judge convened a telephone status conference with the parties. As before, aside from the medical records already on file, Claimant failed to identify any additional evidence or witnesses that he intended to introduce at hearing in support of his claim for benefits.

31. Defendant filed the pending Motion for Summary Judgment on November 2, 2017. Claimant filed a pleading entitled "Notice of Appeal" on November 3, 2017.

DISCUSSION:

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. To prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the

likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15.

3. A defendant who moves for summary judgment satisfies its legal burden when it presents at least one legally sufficient defense that would bar the opposing party's claim. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981). Once a properly supported summary judgment motion has been made, the non-moving party may not rest on mere allegations in its pleadings. *Pierce v. Riggs*, 149 Vt. 136, 139-140 (1987). Rather, it must respond with sufficient evidence to support a *prima facie* case. If an essential element of the non-movant's case cannot be established, summary judgment is appropriate. *State v. G.S. Blodgett Co.*, 163 Vt. 175, 180 (1995).

Claimant's Claim for Medical Benefits

4. Even considering the evidence here in the light most favorable to Claimant, I conclude that he has failed to establish a *prima facie* case to support his claim for medical benefits. I note, first of all, that Defendant has voluntarily paid for all treatment to date on a without prejudice basis. *Finding of Fact Nos. 7, 10, 26 and 29, supra*. As for ongoing treatment, Drs. Jackson and Sullivan-Bol, both treating physicians, consistently recommended physical therapy as treatment for Claimant's work injury, *Finding of Fact Nos. 6, 9 and 14, supra*. Just as consistently, Claimant refused to commit to this type of care. He also refused to consider either epidural steroid injections or a surgical consult, *Finding of Fact No. 11, supra*. As a result, both physicians have now concluded that they have no further treatment options to suggest. *Finding of Fact Nos. 11 and 15, supra*. Defendant's independent medical examiner, Dr. Boucher, as well has concluded that no further diagnostic testing or consultation is indicated as treatment for Claimant's neck pain, *Finding of Fact No. 19, supra*.

5. I acknowledge that both Dr. Sullivan-Bol and Dr. Boucher have now diagnosed Claimant's behavior as malingering. Without further testimony as to what each intended by that characterization, I am unwilling to consider this an absolute bar to future treatment. For now, there being no additional treatment avenues currently under consideration by any medical provider, there is no legal basis for ordering Defendant to pay medical benefits. On this issue, Defendant is entitled to judgment in its favor as a matter of law, therefore.

Claimant's Claim for Temporary Total Disability Benefits

6. Claimant claims entitlement to temporary total disability benefits from November 8, 2016 forward. To survive summary judgment against him, he must at least proffer sufficient evidence to establish a *prima facie* claim for such benefits. I conclude that he has failed to do so.

(a) Non-Compliance with Medical Treatment as Basis for Limiting Entitlement to Temporary Total Disability Benefits

7. I note, first, that Claimant's own treating physician, Dr. Sullivan-Bol, discharged him from treatment for non-compliance on September 13, 2017. *Finding of Fact No. 15, supra*. By that point he had rejected all other possible treatment options, *Finding of Fact No. 11, supra*. By his actions, Claimant effectively put himself at end medical result as of that date, therefore. At least until he demonstrates a willingness to comply, he has disqualified himself as a matter of law from receiving temporary total disability benefits. *See* Workers' Compensation Rule 12.1410 (permitting temporary disability benefits to be discontinued for injured worker's failure or refusal to comply with medical treatment recommendations).

(b) Medical Evidence of Temporary Total Disability

8. As to the period from November 8, 2016 through September 12, 2017, the only evidence in Claimant's favor derives from Ms. Clark's and Dr. Jackson's cursory references to his "percentage of temporary impairment," on the New York workers' compensation Form C-4. *Finding of Fact Nos. 4, 6, 9 and 12, supra*. Ms. Clark did not conduct a physical examination; her "100%" determination was based solely on Claimant's subjective report of disabling pain, with no objective findings whatsoever. *Finding of Fact No. 4, supra*. Even considering this evidence in the light most favorable to Claimant, I conclude that it is so incomplete as to be of no probative value.

9. Dr. Jackson's determination was similarly deficient. Notwithstanding predominantly negative findings on his initial examination, he first described the extent of Claimant's "temporary impairment" as "100%." *Finding of Fact No. 6, supra.* However, in his next evaluation, with no report of improved symptoms or other explanation, he decreased his rating to "50% moderate disability." *Finding of Fact No. 9, supra*. Nor did he clarify the reduction with reference to any specific functional limitations or work restrictions.

10. As noted above, *Finding of Fact Nos. 6, n.3 and 9, n.4*, because Dr. Jackson's determinations were made in the context of New York's workers' compensation law, without further explanation (which Claimant has not offered and does not intend to introduce) it would be inappropriate simply to insert them into Vermont's legal framework. The fact that Dr. Jackson conflated the concept of "impairment" with that of "disability" in his second evaluation is particularly troublesome. Vermont's workers' compensation statute clearly distinguishes between the "disability" required to support a claim for temporary benefits and the "impairment" upon which a claim for permanency benefits is based. 21 V.S.A. §§642, 648; *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982). To say that the "extent of [an injured worker's] impairment" equates with a "moderate disability" is meaningless under our law.

11. I conclude as a matter of law that neither Dr. Clark's nor Dr. Jackson's cursory statements as to the extent of Claimant's "temporary impairment" are sufficient to establish a *prima facie* claim for temporary total disability benefits.

(c) Application of the "Andrew" Exception

12. Defendant correctly cites another basis for rejecting Claimant's claim for temporary total disability benefits as a matter of law. Because Claimant was terminated from his employment for reasons unrelated to his injury, *see Ruling on Defendant's Motion for Summary Judgment, Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc., Opinion No. 01-16WC (January 25, 2016) at Finding of Fact No. 10 (Defendant's Exhibit B)*, to establish a *prima facie* claim for temporary total disability benefits he must demonstrate not only (a) that he suffered a work-related injury; but also (b) that he made a reasonably diligent attempt to return to the work force thereafter; and (c) that his inability to do so was causally related to his work injury and not to other factors. *Britton v. Laidlaw Transit,* Opinion No. 47-03WC (August 27, 2007), citing *Andrew v. Johnson Controls*, Opinion No. 3-93WC (June 13, 1993).

13. Known as the *Andrew* exception, this rule mitigates the harsh consequences that would otherwise result if an employee who either quit or was fired after suffering a work injury were forever disqualified from claiming temporary disability benefits thereafter. *D.P. v. G.E. Transportation*, Opinion No. 03-08WC (January 17, 2008). Instead, the three-prong test provides a means by which the causal link between the worker's injury-related disability and his or her lost wages can be reestablished.

14. The Commissioner previously concluded that Claimant suffered a compensable neck injury as a consequence of his February 22, 2013 work-related accident. *Finding of Fact No. 1, supra*. However, Claimant has failed to proffer sufficient evidence from which I might conclude either that he has made a reasonably diligent attempt to return to the work force, or that his inability to do so has been causally related to that injury. Claimant himself has acknowledged that he failed to undertake a search for suitable work even after Dr. Jackson determined that he had only a "moderate disability." *Finding of Fact No. 28, supra*. Whether his failure is due to malingering, as Drs. Boucher and Sullivan-Bol have concluded, *Finding of Fact Nos. 15 and 18, supra*, or to some honestly held perception of his functional limitations does not matter. Claimant cannot disable himself. *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001). Lacking medical evidence to justify his refusal to attempt returning to the work force, his circumstances do not fit within the parameters of the *Andrew* exception.

(d) Summary

15. To survive summary judgment on his claim for temporary total disability benefits, Claimant needed to proffer "credible medical evidence" establishing his disability

from working "in any capacity." Workers' Compensation Rules 9.1100 and 9.1300. I conclude that the evidence he has produced is insufficient even to make out a *prima facie* case. Defendant is entitled to judgment in its favor as a matter of law, therefore.

16. Claimant has now tried – and failed – to establish a claim for temporary total disability benefits arising out of his February 22, 2013 cervical spine injury on three separate occasions. Given the passage of time, and considering the factors that have resulted in adjudications against him in the past, I anticipate that it will be even more difficult for him to establish a future claim for temporary disability benefits referable to the same injury. With that in mind, I encourage Claimant, in the strongest possible terms, to focus his energies instead on returning to work.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for medical benefits referable to treatment of his compensable cervical spine injury up to the present date is hereby **DENIED**. Claimant's claim for temporary total disability benefits from November 8, 2016 up to the present date is also **DENIED**.

DATED at Montpelier, Vermont this _____ day of _____, 2017.

_____
Lindsay H. Kurrle
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.