

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Laura Samson

Opinion No. 11-18WC

v.

By: Phyllis Phillips, Esq.
Stephen Brown, Esq.
Administrative Law Judges

Gifford Medical Center, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. GG-53632

OPINION AND ORDER

Hearing held in Montpelier on February 21, 2018
Record closed on April 6, 2018

APPEARANCES:

Charles L. Powell, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. Were vocational rehabilitation services properly closed in August 2017?
2. If yes, is Claimant entitled to resume vocational rehabilitation services?

EXHIBITS:

Joint Exhibit 1: Medical records from 2016 to present

Joint Exhibit 2: Vocational rehabilitation records

Joint Exhibit 3: Defendant's vocational rehabilitation records

Joint Exhibit 4: a. Carol Kurimay's *curriculum vitae*
b. Brittany McKenna's report and *curriculum vitae*
c. Email correspondence between Claimant and Carol Kurimay

CLAIMS:

Vocational rehabilitation benefits pursuant to 21 V.S.A. § 641
Costs and attorney fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. This case arises out of an arm fracture that Claimant suffered on September 24, 2014, when she fell while working at Defendant's premises.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Defendant's file relating to this claim.

Claimant's Personal and Professional History

3. Claimant is a 37-year-old woman who lives in Braintree, Vermont. After graduating from high school, she worked in retail and at a bagel company. She later worked as an administrative assistant with an insurance brokerage and as a cashier and service leader at Hannaford Food and Drug.
4. In September 2008, Claimant accepted a patient registration position with Defendant in Randolph, Vermont. About three months later, Defendant promoted her to a medical secretary position. In her secretarial role, she answered telephones, scheduled patients, sorted mail, and corresponded about medical records. Her responsibilities also included opening and closing the office and compiling patient charts. She checked on patients to make sure their needs were met and calmed them when they appeared nervous. She enjoyed the responsibility and independence of this position, including "knowing what needed to be done" and "not having to be babysat."
5. Claimant held her secretarial position until September 24, 2014. At that time, she earned \$13.71 per hour and worked 40 hours per week.

Claimant's Workplace Injury and Resulting Complex Regional Pain Syndrome

6. On September 24, 2014, Claimant fell near the entrance of an elevator at work and broke her arm. Defendant accepted this injury as compensable and paid worker's compensation benefits accordingly.
7. Claimant underwent significant medical treatment for her injury, including physical therapy and surgery. After her surgery, she developed chronic regional pain syndrome (CRPS), a neurological disorder involving persistent neuropathic pain from normally non-painful stimuli.
8. Because of her CRPS, Claimant frequently experiences intense pain in her hands and arms; it feels as if she is "getting stabbed" or has a "horrible sunburn that has sandpaper on it." Her hands and arms cramp, swell, and twitch, and her skin is hypersensitive to touch. She has difficulty sleeping for more than three or four hours per night, cannot drive for more than 30 minutes at a time and must also take breaks while folding laundry or washing dishes. Claimant also suffers from major depressive disorder related to her injury, for which she receives counseling and psychiatric treatment.

9. Despite her CRPS, Claimant remains strongly interested in rejoining the workforce. Unfortunately, she has been unable to do so since her injury.

Initiation of Private Vocational Rehabilitation Services and Development of a Return To Work Plan

10. In January 2015, Defendant's insurance adjuster referred Claimant for private vocational rehabilitation services with Carol Kurimay, a certified vocational rehabilitation counselor. Ms. Kurimay has been providing vocational rehabilitation services since approximately 1993.
11. Ms. Kurimay first met with Claimant in early February 2015. At that time, she provided a set of written disclosures describing the nature of her services and Claimant's rights and responsibilities. One disclosure stated that Claimant had the right "[t]o refuse services and to be provided with a clear understanding of the implications of such refusal." Another disclosure stated, "Participation in the vocational rehabilitation process is voluntary. Should you choose to decline services, you will need to contact the Vermont Department of Labor to re-initiate vocational rehabilitation services in the future." See Joint Exhibit II.
12. In June 2016, Gregory Morneau, an occupational therapist at Dartmouth Hitchcock Medical Center, performed a functional capacity evaluation ("FCE") to assess Claimant's functional work abilities. Mr. Morneau concluded that she could tolerate full-time employment but recommended that she start with 4 hours per day, 5 days per week. Based in part on this FCE, Ms. Kurimay determined that Claimant was entitled to vocational rehabilitation services.
13. Working together, Claimant and Ms. Kurimay developed a Return to Work Plan in March 2017. The Department approved their final plan early the following month. The plan's stated goal was to place Claimant in an administrative assistant, general clerical or customer service position. It did not contemplate on-the-job or new skill training, academic education, or self-employment. Instead, given that Claimant's pre-injury employer had no available suitable positions, the plan obligated Ms. Kurimay to provide job leads and assist her with honing her interview skills, developing a resume and preparing cover letters. The plan's stated expiration date was August 15, 2017.
14. Because Claimant had only a part-time work capacity, Ms. Kurimay considered that "suitable employment" would require an hourly wage approximating \$27.00, or twice her pre-injury, full-time wage.

“Public” versus “Private” Vocational Rehabilitation Services

15. In March 2017, Ms. Kurimay and Claimant discussed the possibility of collaborating with the State of Vermont’s Division of Vocational Rehabilitation (DVR) as an additional resource for job development services. These services are often referred to as “public” vocational rehabilitation services because they are tax-funded, provided directly by the state and accessible to anyone who needs assistance entering or returning to the workforce on account of a disability, whether work-related or not. In contrast, when the individual’s need for assistance is causally related to a work injury, Vermont’s workers’ compensation law requires that the employer’s workers’ compensation insurance carrier retain a “private” vocational rehabilitation counselor, whose job it is to develop a plan for returning the worker to “suitable employment.”¹ Depending on the injured worker’s transferable skills, an appropriate plan may simply require the counselor to provide job development assistance, such as identifying job leads or helping to write a resume, or it may encompass new skills training or a formal educational program, all at the carrier’s expense.²
16. The services that DVR offers differ in important respects from those that Vermont’s workers’ compensation law obligates a private counselor like Ms. Kurimay to provide. DVR services are primarily focused on finding employment of any kind, irrespective of specific industry or pay level. By contrast, in the workers’ compensation context, the law requires that vocational rehabilitation efforts be directed at returning the injured worker to employment with wages that will approximate his or her pre-injury earnings, at a wage level comparable to his or her pre-injury earnings.³ As a result, DVR generally offers much more basic training and education than what a workers’ compensation-funded Return to Work Plan might encompass. That said, DVR services sometimes include benefits that a workers’ compensation insurance carrier might not approve, such as clothing allowances. DVR also might have access to certain job postings before they become public. For these reasons, to maximize the chances of success it is often advantageous for an injured worker to work with both DVR and private vocational rehabilitation services.
17. Claimant became a DVR client in June 2017. She continued to receive private vocational rehabilitation services from Ms. Kurimay until August 15, 2017.

Claimant’s Efforts to Rejoin the Workforce

18. Throughout her time with Ms. Kurimay, Claimant applied herself diligently to the job search process. She mailed resumes and cover letters, attended job interviews, browsed websites, and contacted leads from both Ms. Kurimay and DVR. Unfortunately, despite her efforts, she has not yet found suitable employment.

¹ 21 V.S.A. § 641(a); *see also* Vocational Rehabilitation Rules 50.0000, 54.0000, 55.1000.

² *See* Vocational Rehabilitation Rules 55.0000–55.8000.

³ *See* Vocational Rehabilitation Rules 51.2700, 55.1000.

19. After some time, Defendant's insurance adjuster, Melissa Roberge, voiced concerns to Ms. Kurimay about Claimant's lack of success. On one occasion during the summer of 2017, Ms. Roberge telephoned Claimant directly and suggested that she was not interested in either seeking suitable employment or returning to work. Claimant denied that this was true and asserted instead that she was fully invested in her work search efforts.
20. In the weeks preceding August 15, 2017, when Claimant's Return to Work Plan was set to expire, Ms. Roberge asked Ms. Kurimay whether it would be appropriate to terminate vocational rehabilitation services. Ms. Kurimay responded that it was not. Ms. Kurimay's email to Ms. Roberge stated in material part:

í Per the Vermont Department of Labor's rules, ***we are obligated to provide vocational rehabilitation services to [Claimant] until she has been returned to suitable employment (as defined by physical capacities and wage).***

I completely understand your frustration with this case and the lack of success in [Claimant] returning to suitable employment. However, ***she has been following through on all tasks and job search requirements*** that have been asked of her. ***She has made all the contacts that have been provided to her and has engaged in several interviews.*** As such, I cannot ask for file closure based on non-compliance.

...

I am certain that Ms. Trudy Smith at the [Department of Labor] would agree with me and not approve any closure request that is not based on [Claimant's] successful return to work or by her request. You, on the other hand can file a DOL form 227 denial/discontinue [*sic*] of Vocational Rehabilitation by Employer or Carrier with the [Department].

...

Alternatively, I can ask [Claimant] if she would like to request file closure and by her doing so, I can then close my file.

Joint Exhibit III (emphasis added).

21. On August 7, 2017, Ms. Kurimay met with Claimant shortly before a scheduled meeting with DVR. Ms. Kurimay inquired whether Claimant wanted to continue working with both her and with DVR, or whether she might prefer to terminate private vocational rehabilitation services and work exclusively with DVR. Claimant responded that she wanted to continue with both her assigned DVR counselor and with Ms. Kurimay.

22. Immediately after the meeting, and at least twice within the next eight days, Ms. Kurimay again asked Claimant whether she wanted to continue working with both public and private vocational rehabilitation providers. Claimant again reiterated that she wished to do so.
23. Ms. Kurimay raised the issue again during a telephone conversation with Claimant on August 15, 2017, just before a scheduled conference call with Ms. Roberge. Given their past interactions, Claimant was somewhat anxious about speaking with Ms. Roberge. When Ms. Kurimay indicated that if she opted to terminate private vocational rehabilitation services the conference call could be cancelled, Claimant finally acquiesced. Ms. Kurimay immediately cancelled the call.
24. Later that same day, Claimant and Ms. Kurimay met at a local McDonald's restaurant so that Claimant could memorialize her decision to terminate private vocational rehabilitation services in writing. At Ms. Kurimay's direction, Claimant handwrote a note to that effect, which Ms. Kurimay filed with the Department on August 17, 2017. The Department approved the termination that same day.
25. Approximately three weeks later, on September 9, 2017, Claimant filed a request to rescind her termination with the Department. As grounds for her request, she indicated that she had not understood the difference between the vocational rehabilitation services that DVR could provide as compared to those that Defendant was obligated to provide. The Department's vocational rehabilitation specialist denied the request, whereupon Claimant appealed.
26. Claimant and Ms. Kurimay offered conflicting testimony as to whether Ms. Kurimay adequately described the difference between the services that DVR might offer and those that Defendant was obligated to provide. Claimant recalled Ms. Kurimay advising her that the DVR counselor was essentially duplicating Ms. Kurimay's efforts, and therefore there was no need to work with both counselors. Ms. Kurimay disputed that account and recalled that she fully explained how the two services might complement each other. I find it likely that neither witness's recollection is entirely accurate. Their testimony on this issue is not dispositive, however. Notwithstanding what Ms. Kurimay might or might not have said, I find that Claimant did not fully comprehend the consequences of her decision to terminate private vocational rehabilitation services.
27. Even after terminating private vocational rehabilitation services, Claimant has made diligent efforts to find employment using DVR's services and her own resources.

Expert Vocational Rehabilitation Opinions

28. Claimant relied on the testimony of certified rehabilitation counselor Brittany McKenna. Ms. McKenna has experience helping individuals transition into the workforce after completing high school, leaving correctional institutions, and suffering work-related injuries. She reviewed Claimant's medical and vocational rehabilitation records and interviewed her twice.

29. Ms. McKenna credibly testified that when a Return to Work Plan is unsuccessful, the usual practice is to create an amendment to address the resources necessary to make progress toward suitable employment. She explained the differences between public and private vocational rehabilitation services in detail, and credibly testified that it is highly advantageous for a client to access both services.
30. In Ms. McKenna's opinion, vocational rehabilitation services were not fully utilized in this case, and Claimant would benefit from additional career exploration and training. In her view, Claimant needs to gain additional skills, potentially including certifications or degrees, to be eligible for a job that will pay \$27.00 per hour. She believes Claimant is entitled to continued private vocational rehabilitation services based on her skill set, work capacity, and local labor market conditions. I find these opinions persuasive.

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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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, supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Under Vermont law, when an employee suffers an injury covered by the workers' compensation statute and the employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to suitable employment. 21 V.S.A. § 641(a).
3. The purpose of vocational rehabilitation is to provide those services including retraining, necessary to allow a return to suitable employment. The benefits provided under the statute are specifically tied to restoration of earning skills. Vocational Rehabilitation Rule 50.0000, citing *Bishop v. Town of Barre*, 140 Vt. 564 (1982). The workers' compensation statute envisions a collaborative process between a worker and the employer/insurer to develop and implement an appropriate plan. *Id.*

Claimant's Private Vocational Rehabilitation Services Were Properly Closed in August 2017.

4. Generally, vocational rehabilitation services terminate on the projected completion date indicated in the agreed-upon Return to Work Plan unless an amendment is filed and agreed to by all parties prior to the completion date. Vocational Rehabilitation Rules 55.6000-55.6300.

5. Vocational rehabilitation services may also be suspended or terminated under the following circumstances:

Upon successful completion of an approved Return to Work Plan, documented by the claimant's successful return to suitable employment, not including any on-the-job training period, for at least 60 days.

When it becomes apparent because of a change in the employee's current medical condition that the provision of further vocational rehabilitation services would serve no useful purpose at this time.

When it becomes apparent the employee is unable to participate in [vocational rehabilitation] because circumstances are such that the provision of further [vocational rehabilitation] services would serve no useful purpose at this time.

Upon the employee's return to suitable employment that is not contingent upon successful completion of the plan.

When it becomes apparent the employee is refusing to cooperate with the [vocational rehabilitation] process.

See Vocational Rehabilitation Rules 56.1000-56.1150.

6. Prior to suspending or terminating vocational rehabilitation services, a Vocational Rehabilitation Closure Report must be filed with the Department, with a copy to the employee. The Commissioner may either approve or deny the closure. Vocational Rehabilitation Rule 56.3000.
7. Here, the parties followed the proper procedure for closing Claimant's vocational rehabilitation services. The day her Return to Work Plan was set to expire, Claimant wrote a note expressing her desire to terminate private vocational rehabilitation services. Ms. Kurimay filed the note and the appropriate form with the Department, which approved the closure.
8. "Participation in vocational rehabilitation services is voluntary[.]" *Gintof v. Husky Injection Molding*, 2005 VT 8, ¶ 9, 177 Vt. 638, 640, (2005). Terminating services when a recipient chooses to decline them is inherent in the nature of voluntary services. Although the vocational rehabilitation rules do not specifically identify voluntary resignation as a ground for terminating services, I conclude that this necessarily must be the case.

9. I further conclude that Claimant's decision to terminate private vocational rehabilitation services was voluntary. Neither Ms. Kurimay's persistent questioning nor Claimant's failure to understand what she was giving up rendered her decision involuntary. Ms. Kurimay repeatedly told Claimant that it was her decision whether to use both services or only one. Claimant credibly admitted that she wrote the letter requesting termination of her own free will.
10. I thus conclude that Claimant's private vocational rehabilitation services were properly closed in August 2017.

Claimant Is Entitled to Resume Vocational Rehabilitation Services.

11. Although it was proper to close Claimant's vocational rehabilitation services upon her voluntary request, it does not follow that these services should remain closed forever.
12. Vermont's workers' compensation laws are "remedial in nature and must be liberally construed to provide injured employees with benefits unless the law is clear to the contrary." *Perrault v. Chittenden County Transportation Auth.*, 2018 VT 58, ¶ 7. The workers' compensation system "embraces successful return to work as the ultimate goal," and recognizes vocational rehabilitation as a "critical tool for achieving" that goal. *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011).
13. Vermont's vocational rehabilitation rules do not specifically contemplate an injured worker who seeks to rescind a prior decision to terminate services. I therefore consider the totality of the circumstances in assessing whether to allow Claimant to do so here.
14. Claimant's diligence in seeking suitable employment both before and after she terminated private vocational rehabilitation services strongly favors reinstatement. Her demonstrated commitment to the process distinguishes this case from *Jarvis v. Montgomery Dev. Corp.*, Opinion No. 73-96WC (Nov. 25, 1996), on which Defendant relies. The claimant in *Jarvis* failed to respond to his counselor's letters, missed appointments, and did not follow his counselor's advice. By contrast, Claimant here did everything Ms. Kurimay asked of her, and followed her advice in every respect. Notably, furthermore, even after terminating private services, she actively continued her job search with DVR. I applaud the proactive approach she exhibited in doing so.
15. The closeness in time between Claimant's termination of services and her request to reinstate them distinguishes this case from *Gillock v. Package IT Systems, Inc.*, Opinion No. 57-03WC (2003), on which Defendant also relies. The claimant in *Gillock* gained employment after receiving vocational rehabilitation services but lost that job several years later during an economic downturn. He then sought reinstatement. The Commissioner held that reinstating benefits in those circumstances would "deny employers the limited and determinate aspects of the Workers' Compensation Act" and would "eliminate the crucial causation aspect of the law." *Id.*

16. The *Gillock* court raised valid concerns, but the circumstances here do not justify the same result. Claimant's request to resume vocational rehabilitation services here came only three weeks after she initially requested to terminate them. And having failed to secure employment in the intervening weeks, the causal link between her work-related injury and her ongoing unemployment remained intact.⁴
17. Denying reinstatement to a claimant who strictly complied with her obligations and sought reinstatement less than a month after terminating them would be fundamentally unjust. It would contravene the remedial purposes of the workers' compensation statute. *See, e.g., Perrault, supra*, 2018 VT 58, ¶ 7. Absent clear evidence of resulting prejudice to Defendant, which is entirely lacking here, I will not abide such a harsh result.
18. Claimant's counsel artfully captured the need for, and spirit of, employer-paid vocational rehabilitation services in his poem, entitled "To Laura, who is Eligible for Vocational Rehabilitation." It reads in part:

O sudden, O unexpected, O unlucky fall
O loss of health, O loss of peace, O loss of job, and all

You're sleepless, anxious, upset and alone
Which road leads you from this disability zone?

Not to worry, you're insured, you're protected from loss
A vocational counselor will come at no cost

Like health that improves with the right prescribed pill,
VR prescribes substance to emotional will.

VR offers training, advantage and skill.
VR gives you bootstraps to climb up the hill.

19. I add the following final stanza:

Voc rehab is hard, it takes lots of grit
Injured workers need help, and not just a bit.

If you stray from the path, you can find your way back
Act quick, and I'll make sure you get right back on track.

⁴ Recently proposed amendments to the Vocational Rehabilitation Rules signal the Commissioner's intent to safeguard the rights of injured workers who, like Claimant, may come to regret their decision to terminate services, while at the same time imposing a reasonable timeframe within which they must do so, so as not to unduly prejudice employers. Under Proposed Vocational Rehabilitation Rule 57.1500, an injured worker who has previously requested closure can rescind the action within six months and resume access to vocational rehabilitation assistance. <http://labor.vermont.gov/wordpress/wp-content/uploads/ProposedRuleFiled5-30-18.pdf>.

20. Because Claimant rescinded her prior request to terminate vocational rehabilitation services in a timely manner and with no resulting prejudice to Defendant, I conclude that she is entitled to resume them.

Attorney Fees and Costs

21. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), she 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. Vocational rehabilitation benefits pursuant to 21 V.S.A. § 641; and
2. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 5th day of July 2018.

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.