STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Souligny

v.

PB&J, Inc.

Opinion No. 12A-18WC

By: Stephen W. Brown
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. DD-55680

AMENDED RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUE PRESENTED:

Is Claimantôs self-directed use of a swimming pool ñmedical treatmentò for purposes of the mileage reimbursement provisions of WorkersôCompensation Rules 4.1300 and 4.1310?

EXHIBITS:

Claimantôs Exhibit 1: Correspondence from Dr. Shawn McDermott dated January 17, 2018

Defendantôs Statement of Undisputed Material Facts filed June 11, 2018

Defendantôs Exhibit 1: Opinion and Order, *Souligny v. PB&J, Inc.*, 02-17WC-(February 6, 2017)

Defendantôs Exhibit 2: Transcript of Formal Hearing, September 2, 2015

Defendantôs Exhibit 3: Letter from Claimantôs counsel dated October 17, 2017, containing Claimantôs tabulation of pool visits

Defendantôs Exhibit 4: Medical Records from Dr. Shawn McDermott dated January 17, 2014 through November 2, 2016

[1] Claimant has expressed a concern that the portion of Finding of Fact No. 4 following the comma in the original Ruling on Defendantôs Motion for Summary Judgment was not supported by the record and has requested that that portion be stricken. Defendant does not object. The requested amendment does not impact the analysis. Accordingly, that portion of original Finding of Fact No. 4 after the comma is stricken. The original ruling otherwise remains unchanged except for the word ñAmendedò in the title and the renumbering of footnotes.

FINDINGS OF FACT:

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. Claimant injured her back twice while working as a preschool educator at Defendantôs childcare center, once while lifting children in 2008 and once while bending over a table in 2011. Defendantôs Exhibit 1, *Souligny v. PB&J, Inc.*, 02-17WC (February 7, 2017), at 1-2. Defendant accepted both injuries as work-related and paid benefits accordingly. *Id.* Claimant has been out of work since approximately September 2012. *Id.*; Defendantôs Exhibit 2, at 103.

2. Claimant has pursued several treatments for her work injuries, including physical therapy, pain medications, electro-stimulation therapy, and chiropractic manipulations. *See* Defendantôs Exhibit 1, at 2. She has also engaged in self-directed pool use for her injuries. *See id.*

3. When Claimant uses the pool, she walks ñfore and aftò in the water with high leg lifts, performs core muscle exercises, and hangs on a float for spinal traction. Defendantôs Exhibit 1, at 2. No healthcare provider is present while she uses the pool. *See* Defendantôs Statement of Undisputed Facts, No. 4. She does not have a specific pool schedule, nor are there formal medical records of her pool sessions. *See id.*

4. The Department previously found that Claimant has consulted with her physical therapist to improve her strength-building pool exercises. *See* Defendantôs Exhibit 1, at 3.

5. Medical records from Dr. Shawn McDermott, Claimantôs treating chiropractor, show that he made multiple, specific recommendations about the frequency of her pool use as a method for stabilizing her back. *See* Defendantôs Exhibit 4. For instance, he ñencouraged her to increase her pool therapy schedule to twice per week to facilitate further stabilization of her [lower sacroiliac] joint/region.ò *Id.*, at Bates Number 000574; *accord, id.* at 000579 (ñI encouraged her to return to the pool twice per week as she should be able to handle it.ò). His notes indicate that ñ[t]he more [Claimant] is in the pool the more stable her lumbosacral region will remain[.]ò *Id.*, at Bates Number 000577. His records also show that he repeatedly followed up with her about her pool use, noted weeks that she did not swim, and recorded variations in her tolerance for the exercises and their effectiveness in relieving her pain. *See id.*, at Bates Numbers 000573-000576, 000578-000580, 000591 and 000594; unnumbered notes dated August 5, 2016. He also identified the continuation of her self-directed ñpool therapyò as a ñlong range goal.ò *Id.*, all unnumbered notes dated between August 5, 2016 and November 2, 2016.

6. On January 17, 2018, Dr. McDermott composed an unsworn letter addressed ñ[t]o whom it may concernò regarding his recommendations for Claimantôs pool use. *See* Claimantôs Exhibit 1. That letter does not purport to be a part of any medical record. It is dated more than a year after the last date of any of the medical records submitted by the parties, and it is unclear to what extent its contents were ever communicated to Claimant during her chiropractic visits. As such, I do not consider this letter for the purposes of this Motion.[2]

7. Claimant asserts that she has been using Vermont Technical Collegeôs lap pool since January 2013. She seeks $5,986.02 in mileage reimbursement based on her roundtrip travel distances between her home and that pool. *See* Defendantôs Exhibit 3. She supports her request with a handwritten chart tabulating the number of days that she went to the pool for each month between 2013 and 2017. This tabulation notes that she had no records for her 2015 pool visits, but states that the number of visits that year was ñabout the same.ò She does not specify what that yearôs use was the same as. *See id.*

CONCLUSIONS OF LAW:

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to 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, 48 (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, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party of the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15. In determining whether there is a genuine issue as to any material fact, the Department must ñaccept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by admissible evidence.ò *Fritzeen v. Gravel*, 2003 VT 54, ¶ 7.

[2] In considering a motion for summary judgment, the Department ñwill accept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by *admissible evidence*.ò *Fritzeen v. Gravel*, 2003 VT 54, ¶ 7 (emphasis added). Dr. McDermottôs unsworn letter is facially hearsay, and it is not accompanied by any affidavit or certification stating the reasons or circumstances for its composition, such as might render its contents admissible under V.R.E. 803(6). I therefore disregard the letter for the purposes of this Motion. *See Lexington Ins. Co. v. Rounds*, 349 F. Supp.2d 861, 869 (D. Vt. 2004) (ñIt is well settled that a district court should disregard an unsworn letter in ruling on a summary judgment motion.ò); *accord Foley v. United States*, 294 F. Supp.3d 83, 98ï 99 (W.D.N.Y. 2018) (ñé unsworn letters from physicians generally are inadmissible hearsay that are an insufficient basis for opposing a motion for summary judgment. Therefore, the submission of unsworn letters is an inappropriate response to a summary judgment motion, and factual assertions made in such letters are properly disregarded by the court.ò) (cites & punctuation omitted).

2. The Workersô Compensation Rules provide that ñ[w]hen an injured worker is required to travel for medical treatmenté , the employer or insurance carrier shall provideé [m]ileage reimbursement at the current U.S. General Services Administration rate for authorized use of a privately owned vehicle[.]ò Workersô Compensation Rules 4.1300 and 4.1310.

3. At issue here is whether Claimantôs unsupervised swimming pool exercises constitute ñmedical treatmentò for purposes of those rules. Neither the workersô compensation statute[3] nor the Rules[4] define ñmedical treatmentò for the purposes of the mileage reimbursement provision.

4. Defendant contends that the Commissionerôs decision in *Dain v. AIHRS*, 85-95WC, 1995 WL 932147 (November 17, 1995) stands for the proposition that Workersô Compensation Rules 4.1300 and 4.1310 only cover travel to ñactual treatment appointmentsò and not ñsecondary or peripheral travel.ò If *Dain* supported that distinction, it would not be obvious how that distinction might apply to the instant case. However, *Dain* does not articulate this distinction, and I decline to adopt it. *Dain* held only that the rules as they existed in 1995 did not allow for mileage reimbursement for traveling to a pharmacy for prescription medications. It did not articulate any general proposition and provided no analytic framework to address whether unsupervised pool use constitutes medical treatment. Further, under the rules in effect in 1995, mileage for treatment was only reimbursable to the extent that it was ñbeyond the distance normally travelled to the workplace[.]ò *See* Vermont Department of Labor & Industry, Workersô Compensation and Occupational Disease Rules effective April 1, 1995, Rule 12(b)(1). Since the claimant in *Dain* lived 55 miles from his workplace and sought mileage reimbursement for nine-mile pharmacy trips, he would not have been entitled to mileage reimbursement anyway, rendering the decisionôs exclusion of his pharmacy visits *dicta*. Therefore, I do not find *Dain*ôs disallowance of mileage reimbursements for pharmacy visits in 1995 instructive to my analysis of Claimantôs present claim for mileage reimbursement under the current rules, which do not condition mileage compensability on a claimantôs ordinary commute distance.

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[3] The closest the statute comes to defining ñmedical treatmentò is 21 V.S.A. § 601(27)ôs definition of ñmedically necessary care,ò but that definition starts with the phrase ñhealth care services for which an employer is otherwise liable,ò and focuses on determining what subset of such services are medically necessary. Here, Defendant has challenged the status of unsupervised swimming as ñmedical treatmentò generally, and not its necessity in Claimantôs case.

[4] Similarly, the Rules define ñ*reasonable* medical treatment,ò but that definition begins with the word ñtreatmentò and focuses on determining whether treatment is ñreasonable.ò *See* Workersô Compensation Rule 2.3800. Since Defendant only challenges the status of Claimantôs pool use as ñmedical treatment,ò and not its reasonableness, this definition is not instructive to the present issue.

5. Under Vermont law, undefined terms ñare given their plain and ordinary meaning, which may be obtained by resorting to dictionary definitions.ò *Khamnei v. Burlington Pub. Works Comm'n*, 2018 VT 19, ¶ 14. The Oxford English Dictionary defines ñtreatmentò as ñ[m]edical care given to a patient for an illness or injury.ò *See* https://en.oxforddictionaries.com/definition/treatment/ (definition 2). It defines ñcare,ò in turn, as ñ[t]he provision of what is necessary for the health, welfare, maintenance, and protection of someone or something.ò *See* https://en.oxforddictionaries.com/definition/care (definition 1). I find these definitions persuasive.

6. In construing ñtreatment,ò I am also mindful that Vermontôs workersô compensation statute is ñremedialò and must ñbe construed broadly to further its purpose of making employees injured on the job whole.ò *Hodgeman v. Jard Co.*, 157 Vt. 461, 464, (1991). At the same time, the statute is designed to ñprovide employers a liability which is limited and determinate.ò *Fotinopoulos v. Dep't of Corr.*, 174 Vt. 510, 511 (2002).

7. In prior factual findings, the Commissioner has characterized swimming pool exercises as part of certain healthcare providersô treatment recommendations. For instance, in *Burnah v. Carolina Freight Carriers*, Opinion No. 37-98WC, 1998 WL 414490, at *4 (June 22, 1998), the Commissioner noted that ñDr. Johannson testified that his recommendation for claimant's further *treatment* would include working out in a *swimming pool* and exercise to maintain flexibility.ò *Id.* (emphasis added); *see also Brodeur v. Energizer Battery Manufacturing, Inc.*, Opinion No. 06-14WC (April 2, 2014) (ñConsistent with the *treatment* approach to which she adhered over the years with her own patients, she recommended that Claimant é . restart her *home exercise program with a pool* and gym membership é .ò) (emphasis added).[5]

8. Other states have also found unsupervised exercise and pool use to be compensable treatment. For instance, in *Long Island Lighting Co.*, Case No. 28729551, 1990 WL 372352, at *1 (N.Y. Work. Comp. Bd. Dec. 28, 1990), the New York Workersô Compensation Board ordered payment for a claimantôs pool membership based on his physicianôs suggestion of ñswimming as a modality or treatment for the claimantôs ongoing complaint of back pain.ò Similarly, in *Firestone Tire & Rubber Co. v. Vaughn*, 381 So.2d 740, 741ï 42 (Fla. Dist. Ct. App. 1980), a Florida appellate court required an employer to install a swimming pool at the claimantôs residence and pay for maintenance costs so he could exercise in it to gain palliative pain relief, where his treating physicians testified that driving to a pool undermined the benefits of swimming. *See also Appeal of Levesque*, 136 N.H. 211, 213, 612 A.2d 1333, 1334 (1992) (ñé Mr.

[5] The Commissioner has also characterized ñhome exercise programsò more generally as ñtreatment,ò further suggesting that the physical presence of the health care provider is not necessary. *See Grover v. Crescent Manor Nursing Home*, Opinion No. 32-95WC, 1995 WL 932134, at *3 (August 2, 1995) (referring to ñhome exercise programsò as part of a claimantôs ñtreatmentò); *see also Galbicsek v. Experian Information Solutions*, Opinion No. 30-04WC (September 1, 2004) (ñThe treatment includes é home exerciseé .ò); *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, 20-16WC (November 7, 2016) (ñAs treatment for Claimant's symptoms, Dr. Robbins recommended home exercisesé .ò).

Levesque continued to receive *medical treatment* from his physicians, including an *unsupervised exercise program*.ò) (emphasis added).

9. Facing facts similar to this case, the Virginia Court of Appeals affirmed an award of mileage reimbursement for a claimantôs unsupervised ñindependent pool therapyò where it was part of a ñcontinuing course of treatmentò for a work-related injury. *American Armoured Foundation, Inc. v. Lettery*, No. 1968-11-2, 2012 WL 1499604, at *2 (Va. Ct. App. May 1, 2012). That Court rejected the employerôs argument that the claimantôs pool use was not compensable because it was not ñmedically supervised,ò and emphasized that the claimant had introduced both a prescription for his pool use and his treating physicianôs office notes which urged continuation of the same. *Id.* I find this case particularly persuasive.

10. While neither this Departmentôs prior factual findings nor other statesô legal holdings control the issue here, both sources inform the outer bounds of the phrase ñmedical treatmentò as ordinarily used within the workersô compensation context. I conclude from these sources that the ordinary meaning of that phrase in this context may include at least some unsupervised swimming activities. This accords with the goal of making injured workers whole by absolving them of the cost of complying with their healthcare providersô instructions. Therefore, I do not find the presence or absence of a healthcare provider during a claimantôs performance of an exercise dispositive in determining whether the exercise constitutes ñmedical treatment.ò

11. Since a healthcare providerôs physical presence of is not a prerequisite for an exercise to constitute ñmedical treatment,ò *see* Conclusion of Law No. 10 *supra*, it follows that formal medical records of each exercise session are also unnecessary. While medical records may certainly be relevant to the issue, their absence is not dispositive.

12. Defendant contends that considering unsupervised pool use with no supporting medical records as ñmedical treatmentò would present unnecessary difficulty in verifying the precise number of pool trips Claimant made. Workersô Compensation Rule 4.1340 provides that ñ[t]he injured worker shall be responsible for providing *reasonable documentation* for any reimbursement request submitted to the employer or insurance carrier.ò *Id.* (emphasis added). However, requiring records of exercise sessions to be in a particular form or from a particular source before considering them ñmedical treatmentò would conflate the questions of whether a given activity is treatment and whether a given treatment is reasonably documented. It would also impose a greater documentation obligation than Rule 4.1340ôs ñreasonable documentationò standard. While Defendantôs concern is certainly legitimate, it only goes to the adequacy of documentation, and not the status of pool use as medical treatment. Since the only legal question Defendantôs motion presents is whether Claimantôs pool use constitutes ñmedical treatmentò under Rules 4.1300 and 4.1310, I do not address whether she has provided ñreasonable documentationò under Rule 4.1340.

13. Of course, it does not follow that *all* unsupervised exercise is ñmedical treatment.ò Inherent in the concept of ñmedical treatmentò is a certain level of involvement by a healthcare provider, even when the provider is not physically present. Thus, the extent of a healthcare providerôs continued involvement is a critical factor in this assessment, as is the strength of the providerôs adviceð *i.e.*, whether the exercise is a mandatory instruction, a mere suggestion, or somewhere in between. For instance, if a medical provider gives an injured worker a prescription for specific exercises and regularly follows up on the workerôs compliance and progress, that would weigh heavily in favor of the exercise being medical treatment. Conversely, a one-off suggestion of a purely voluntary exercise with no subsequent follow-up would most likely not be ñmedical treatment.ò Between these extremes, assessing the level of a providerôs involvement requires a fact-sensitive inquiry in which all indicia of provider involvement are relevant. Such indicia may include the specificity of any instructions, the mandatory or permissive nature of those instructions, the frequency of follow-up concerning the exercise, the modification of treatment recommendations based on such follow-up, and any other similar factors. The fundamental question in weighing such evidence is whether the unsupervised exercise could reasonably be described as part of a healthcare providerôs ñcontinuing course of treatmentò for a work-related injury. *See Lettery*, 2012 WL 1499604, at *2.

14. Defendant also expresses a slippery-slope concern that considering Claimantôs use of a pool as ñmedical treatmentò would open the door to unlimited mileage reimbursement for any activity that might benefit anyone experiencing pain or simply trying to live a healthy lifestyle. However, for an activity to be ñmedical treatmentò at all, it must be ñ*for* an illness or injury.ò[6] Moreover, any treatmentð be it surgery, injections, or unsupervised pool exerciseð is only compensable to the extent that its recommendation arises ñout of and in the course of employment.ò *See* 21 V.S.A. § 618(a)(1); *accord P. H. v. Green Mountain Log Homes*, 03-09WC (January 21, 2009) (defendant not responsible for claimantôs surgery where claimant had failed to demonstrate a causal relationship between her work injury and that surgery). As such, where a healthcare provider would recommend an exercise even without the precipitating workplace injury, it would not arise out of the claimantôs employment, and mileage would not be reimbursable. Contrary to Defendantôs suggestion, a physicianôs recommendation of cardiovascular exercise for its generalized health benefits would not turn every hiking trip into reimbursable travel because that exercise would lack the requisite causal nexus to a workplace injury.

[6] *See* Oxford English Dictionary, definition of ñtreatment,ò at Conclusion of Law No. 4, *supra* (emphasis added).

15. Here, Dr. McDermottôs records demonstrate a continuous involvement with Claimantôs pool use. His records show that he repeatedly checked on her progress and tolerance of pool exercises, made specific recommendations concerning their frequency, and identified ñself-directed pool therapyò as a ñlong-range goal.ò *See* Finding of Fact No. 5, *supra*. The precise strength of his advice on the mandatory-to-permissive continuum is less clear. On one hand, his notes use the permissive verb ñencourageò at least twice, indicating that Claimant could potentially remain compliant with her plan of care even if she stopped exercising at the pool. *See* Finding of Fact No. 5 *supra.* Additionally, unlike the claimant in *Lettery*, *supra*, Claimant has not introduced a prescription for her pool visits. On the other hand, the specificity of his recommendations, the frequency of his status checks, and his specific identification of this exercise as a long-range goal all suggest a level of oversight atypical of mere encouragement. *See* Finding of Fact No. 5 *supra.* Resolving all doubts and inferences in Claimantôs favor, I conclude that these records create a genuine issue of material fact as to whether her unsupervised pool use was part of a continuing course of Dr. McDermottôs treatment.

16. With respect to work-relatedness, both of Claimantôs work injuries involved her back. *See* Finding of Fact No. 1 *supra*. Dr. McDermottôs notes state that ñ[t]he more she is in the pool the more stable her lumbosacral region will remain.ò Finding of Fact No. 5 *supra*. He also specifically recommended an increase in her pool schedule ñto facilitate further stabilization of her [lower sacroiliac] joint/region.ò *Id.* Construed in the light most favorable to Claimant, this is enough to create a genuine issue of material fact as to whether of Dr. McDermottôs recommendations for Claimantôs pool use are treatment for her work-related back injuries.

17. Therefore, genuine issues of material fact preclude summary judgment on the question of whether Claimantôs pool use in this case constitutes ñmedical treatmentò under WorkersôCompensation Rules 4.1300 and 4.1310, which require mileage reimbursement when an injured worker is required to travel for medical treatment.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendantôs Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 27th day of September 2018.

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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.