

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Stacey Bowen

Opinion No. 16-19WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

Novartis Pharmaceuticals
Corporation

For: Michael A. Harrington
Interim Commissioner

State File No. GG-63655

OPINION AND ORDER

Hearing held in Montpelier on June 24, 2019
Record closed on July 26, 2019

APPEARANCES:

Michele B. Patton, Esq., for Claimant
Glenn S. Morgan, Esq. and Elijah T. LaChance, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to additional vocational rehabilitation services, when it is undisputed that she cannot return to her pre-injury average weekly wage?
2. If so, is the proposed February 28, 2018 return to work plan, as amended May 24, 2019, reasonably necessary to restore her to suitable employment?

EXHIBITS:

Joint Exhibit I: Vocational rehabilitation records
Joint Exhibit II: Medical records

CLAIM:

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. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in the Vermont Workers' Compensation Act.
2. I take judicial notice of all relevant forms contained in the Department's file relating to this claim.

Claimant's Educational and Professional Background

3. Claimant is a 45-year-old woman who resides in North Clarendon, Vermont. She graduated from Castleton State College in 1996 with an associate degree in nursing and obtained her registered nurse (RN) license in 2001. She is licensed to work in Vermont, New York and New Hampshire and holds medical-surgical and multiple sclerosis nursing certifications.
4. Claimant started her career at the Rutland Regional Medical Center, where she provided patient care. In 2008 she left the hospital to work as a traveling nurse, accepting assignments first in Arizona and then at the Dartmouth-Hitchcock Medical Center in New Hampshire. At Dartmouth-Hitchcock, she worked as a clinic nurse for the multiple sclerosis program.

Claimant's Employment with Defendant and Work-Related Injury

5. In 2011 Claimant left Dartmouth-Hitchcock to work for Defendant as a patient services liaison. She traveled for work throughout upstate New York, coordinating services between medical providers and multiple sclerosis patients who were receiving Defendant's medications. The position required a Bachelor of Science in Nursing (BSN) degree, but Defendant waived that requirement when it hired her.
6. On May 14, 2015, Claimant was rear ended in an interstate construction zone as she was driving to a work-related luncheon. She sustained compensable injuries in the accident and has not worked since that date.
7. Claimant's average weekly wage for the 26 weeks prior to her injury was \$2,689.02.

Claimant's Medical Treatment, Work Restrictions and Separation from Employment

8. After the accident, Claimant went to a nearby emergency department for neck pain and was discharged the same day. She has been diagnosed with a cervical strain or whiplash injury and post-concussive syndrome¹ affecting her memory, focus and ability to multi-task. She suffers from headaches, fatigue and neck pain that sometimes radiates into her shoulder.
9. Claimant has undergone a variety of treatments for her injuries, including physical therapy, occupational therapy, chiropractic and osteopathic manipulation, acupuncture, massage, brain wave optimization, hyperbaric oxygen therapy and injection therapy.
10. Claimant contacted Defendant in December 2015 about returning to her patient services liaison position on a limited basis. At that time, both of her primary care providers, orthopedist Matthew Gammons, MD, and osteopath Craig Goldberg, DO, released her to return to work from home beginning January 1, 2016, with limited hours and restrictions on driving. Defendant was not able to return Claimant to her

¹ Not every medical provider who examined Claimant agrees that she has post-concussive syndrome, but this diagnosis was not disputed at the hearing.

previous position with these restrictions, and Claimant separated from employment with Defendant in February 2016.

Vocational Rehabilitation Efforts and Return to Work Plans

11. Claimant was found entitled to vocational rehabilitation services in March 2016, and she began working with vocational rehabilitation counselor Fran Plaisted in May 2016. Claimant reported the following symptoms to Ms. Plaisted:

[I]ssues with executive functioning in that it takes her longer to complete tasks and she is unable to “multitask,” sensitivity to light and noises, difficulty with focus and attention when distractions are present, fatigue, memory difficulty (mostly short term), along with headaches. She also has neck pain with pain in her left shoulder and arm.

Joint Exhibit I, Tab 2, Progress Report dated May 26, 2016.

12. In July 2016 Ms. Plaisted reviewed Claimant’s recent neuropsychological evaluation and concluded that she was not likely to return to her prior employment. She also concluded that providing patient care on a hospital floor was likely beyond Claimant’s capacity to focus, multi-task and quickly use her executive functioning skills. Ms. Plaisted thus devised a first return to work plan (RTWP) with a stated goal of exploring other options in the nursing field that would return Claimant to suitable employment. Initially focusing on the careers of nurse case manager or nurse educator, she wrote: “Both of these positions *require* additional training beyond her existing Associate’s Degree as a Registered Nurse.” *Joint Exhibit I, Tab 2, July 22, 2016 RTWP* (emphasis added). The expected completion date for the first plan was December 31, 2016. Defendant accepted the plan, and the parties carried it out.
13. On February 28, 2018, Ms. Plaisted completed a second RTWP. The stated goal of the second plan was returning to work as a nurse case manager. Ms. Plaisted wrote that the job “requires” a BSN degree and thus the plan provided for Claimant to obtain that degree in a two-year program at Southern Vermont College. The plan included funding for Claimant to maintain her current nursing certifications and provided that she would obtain part-time employment at a non-suitable wage while attending school. The estimated completion date for this plan was May 31, 2020 and the stated cost was \$37,349.40.
14. Defendant did not accept the second RTWP, but it agreed to fund two classes at the Community College of Vermont in the fall of 2018. When Claimant successfully completed those classes, Defendant agreed to pay for two classes at Southern Vermont College in the spring of 2019.
15. In March 2019 Southern Vermont College announced that it was going out of business. Therefore, on May 24, 2019, Ms. Plaisted amended the second RTWP to provide for Claimant to obtain her BSN degree at Castleton University. The estimated plan completion date was now May 31, 2022 and the stated cost was \$35,131.00.

16. When she changed the college set forth in the plan, Ms. Plaisted also amended the stated goal as follows: “Medical and Health Service Manager/Nurse Case Manager . . . and if this does not restore her to suitable wages, amend RTWP to fund nurse practitioner.” *Joint Exhibit I, Tab 2, RTWP dated May 24, 2019* (emphasis added). She explained that, even with a BSN degree, Claimant’s average weekly wage would still be “substantially lower” than her pre-injury wage. Thus, returning her to a suitable wage would require additional training, beyond the BSN degree, to enable her to return to work as a nurse practitioner. Further, the cost of the nurse practitioner training would be in addition to the cost stated in the plan. *Id.* at 2.

Claimant’s Work Search Activities Since her May 2015 Injury

17. Claimant has not applied for any jobs since her accident in May 2015, nor has she ever updated her resume.
18. From September 2016 through July 2018 she maintained a job search log documenting that she looked at online job listings and the Rutland Regional Medical Center bulletin board. For each log entry, she wrote that there were no jobs listed within her work restrictions and qualifications. She did not submit any applications or resumes, nor did she contact any employers to find out whether they could accommodate her work restrictions.
19. For the past year, Claimant has volunteered about 20 hours per week with her local 4-H Club.

Expert Opinions as to Work Capacity

(a) Gregory Morneau

20. Claimant presented testimony from Gregory Morneau as to her work capacity. Mr. Morneau has a bachelor’s degree in occupational therapy. He is a certified work capacity evaluator with eleven years’ experience performing cognitive functional capacity evaluations. He performed such an evaluation of Claimant, at the request of her primary care provider, in January 2017. Prior to conducting his evaluation, Mr. Morneau met with Ms. Plaisted, who wanted to know whether Claimant could work as a nurse case manager. Accordingly, Mr. Morneau tailored his evaluation toward answering that question.
21. Mr. Morneau found that Claimant physically performed at a light demand level. Based on his understanding that a nurse case manager position requires a sedentary to light physical demand level, he found that she meets the physical demands for employment in that occupation. I find this testimony well supported and credible.
22. On the cognitive function testing, Mr. Morneau found that Claimant exhibited some deficits for tasks requiring visuomotor organization and spatial ability, but these abilities are not an essential requirement for nurse case managers. He also noted mild deficits in selective and shifting attention, but those deficits did not interfere with her successful test performance. Mr. Morneau concluded that Claimant meets the

cognitive demands for employment as a nurse case manager. I find his testimony on this issue well supported and credible.

23. Overall, Claimant maintained her satisfactory performance level for the full five and one-half hours of testing. However, Mr. Morneau reported that, towards the end, he observed her looking pale and mildly sweaty. Based solely on these observations, he concluded that she is limited to four hours per day of cognitive tolerance for nurse case manager work. At the hearing, he acknowledged that he did not know the cause of Claimant's pale complexion or minor sweating, and he conceded that she might have just been tired that day or not feeling well. I therefore find Mr. Morneau's four-hour per day work restriction not well supported.

(b) Verne Backus, MD

24. Verne Backus, MD, is a board-certified occupational medicine physician. He graduated from Dartmouth Medical School and completed an occupational and environmental medicine residency at the Harvard School of Public Health. As an occupational medicine physician, Dr. Backus has substantial knowledge and training in work injuries and work capacity.
25. At Defendant's request, Dr. Backus performed independent medical examinations of Claimant in April 2016 and February 2017. His process included interviewing her, performing cervical spine and neurological examinations, and reviewing her medical records, diagnostic studies and other professional assessments. He also reviewed more recent records and supplemented his report in April 2018.
26. At the April 2016 examination, Dr. Backus diagnosed Claimant with whiplash associated disorder and a mild traumatic brain injury. He issued work restrictions limiting her to light-duty, part-time work in an office or clinic environment, with no more than half days to start. He wrote that she might slowly advance to full hours in a light capacity and that she might be able to work up to a moderate capacity with time. *Joint Exhibit II, Tab 7, Dr. Backus' April 28, 2016 report*, at 56-57.
27. Dr. Backus performed a second independent medical examination in February 2017. Between the date of his first and second examinations, Claimant underwent a neuropsychological evaluation with Laura Flashman, PhD² and a behavioral medicine evaluation with Steven Mann, PhD.³ Based on their reports and his own repeat examination, Dr. Backus changed his diagnosis of mild traumatic brain injury to somatic symptom disorder. He also revised his opinion of Claimant's work capacity. In his revised opinion, psychological factors are driving Claimant's perception that she

² Dr. Flashman is a neuropsychologist at Dartmouth Medical School. Dr. Backus' February 2017 report summarizes the neuropsychological examination performed under Dr. Flashman's supervision on May 26, 2016. *See Joint Exhibit II, Tab 7, Dr. Backus' February 2017 report*, at 45-47, 65.

³ Dr. Mann is a Vermont clinical psychologist. In January 2017, he performed a behavioral medicine evaluation of Claimant and diagnosed her with a mild somatic symptom disorder. *See Joint Exhibit II, Tab 7, Dr. Backus' February 2017 report*, at 55-56, 65.

does not have the physical endurance to work more than part time. In his opinion, she can work full time in a light to moderate capacity, including driving and nursing. *See Joint Exhibit II, Tab 7, Dr. Backus' February 14, 2017 report, at 65.*

28. In April 2018 Dr. Backus reviewed additional medical records and updated his report. In his opinion, based on the updated medical records and his prior independent medical examinations, Claimant has the capacity to work as a nurse case manager now, gradually increasing her hours to full time over one to three months to maximize the success of her work return. As an occupational medicine physician, Dr. Backus has substantial education and training concerning work capacity, and his experience and training provide a sound basis for him to evaluate Claimant. I find his opinion as to her work capacity to be clear, helpful and well-founded.
29. Both Mr. Morneau and Dr. Backus agree that Claimant has the physical and cognitive abilities to work as a nurse case manager. Mr. Morneau would limit her to four hours per day, while Dr. Backus would have her increase her hours to full time over one to three months. As Mr. Morneau's four-hour limitation is based solely on his observation of mild symptoms that did not affect Claimant's test performance, I find Dr. Backus' opinion that she can gradually increase her hours to full-time employment to be the more persuasive.

Vocational Rehabilitation Counselor Expert Opinions

(a) Fran Plaisted, MA, CRC

30. Fran Plaisted is a certified rehabilitation counselor who has worked with Claimant since May 2016. She has a master's degree in rehabilitation counseling and 30 years' experience in the field. Ms. Plaisted testified at the hearing on Claimant's behalf.
31. From the beginning, Ms. Plaisted focused on Claimant's high average weekly wage of \$2,689.02 as the "big issue." Citing the U.S. Bureau of Labor Statistics, Ms. Plaisted testified that a nurse case manager earns \$46 per hour or \$1,840.00 per week. Although this wage would not return Claimant to her pre-injury earnings of \$65 per hour or \$2,689.02 per week, Ms. Plaisted considered it a reasonable goal and Claimant agreed.
32. From her first contact with Claimant, Ms. Plaisted assumed that she would need a bachelor's degree to return to a suitable wage. *See* Finding of Fact No. 12 *supra*. Ms. Plaisted testified that wages are higher for a nurse case manager who has a bachelor's degree than for one who has an associate degree. However, she did not specify what that wage differential was. Further, she conceded that it is difficult to "triangulate" the Bureau of Labor Statistics' wage data to specific occupations. In particular, the Bureau does not provide statistics on nurse case manager wages, so Ms. Plaisted relied on their statistics for the wages of general "case managers" and "social workers" grouped together. She did not explain whether the \$46 per hour wage for nurse case managers was an average for all nurse case managers or just those who have a BSN degree, nor do I see how she would be able to glean that information from wage statistics for social workers. I therefore find Ms. Plaisted's opinion that wages are

significantly higher for a nurse case manager with a BSN degree to be unclear and not well supported.

33. Ms. Plaisted testified that the trend among major employers of nurses is towards either requiring or preferring a BSN degree. She cited Rutland Regional Medical Center, Dartmouth-Hitchcock Medical Center, and Fletcher Allen⁴ as employers whose preferred candidate for a nursing position has a BSN degree. The only employer she identified who *requires* a BSN degree is Defendant; however, Defendant waived that requirement when it hired Claimant as a patient services liaison. Moreover, Ms. Plaisted did not differentiate between nurses at these institutions who provide patient care and those who work in case management, nor did she address any trends in employment for nurses who work for case management companies. Overall, I find her testimony on this issue to be conclusory and not well developed.
34. Turning to how she crafted the RTWP, Ms. Plaisted explained that Claimant could not return to work for Defendant in the same job she had when she was injured because Defendant was unable to accommodate her work restrictions. However, she never asked Defendant whether it had other jobs within the company that Claimant could do.
35. Ms. Plaisted did not work with Claimant on job development, leaving her to undertake a job search entirely on her own. Due to her lack of involvement, Ms. Plaisted believed that Claimant conducted a thorough job search without success. She did not know until the formal hearing that Claimant never prepared a resume or applied for any jobs following her work-related accident.
36. Ms. Plaisted credibly testified that Claimant's time away from the workforce may act as a barrier to employment and that a newly obtained academic degree could bridge the gap in a potential employer's eyes. However, she did not consider whether some new skills training or re-training might be a way to freshen up a job seeker's resume short of a full-fledged academic program, nor did she address other ways to overcome an employment gap. I therefore find that Ms. Plaisted's opinion that a bachelor's degree is necessary to overcome an employment gap is not well supported.
37. Finally, in Ms. Plaisted's opinion, if work as a nurse case manager does not restore Claimant to a suitable wage, she could continue her studies and become a nurse practitioner. A nurse practitioner earns wages up to \$62 to \$63 per hour, approximating Claimant's pre-injury wage. However, Ms. Plaisted credibly testified that earning the qualifications for a nurse practitioner would require an additional two years of training and another \$50,000 to \$70,000 in vocational rehabilitation costs beyond the BSN degree. Moreover, she did not address the physical and cognitive requirements for nurse practitioners, nor explain why she believes that Claimant can provide patient care as a nurse practitioner if she cannot provide care as a nurse. These omissions significantly undermine her opinion.

⁴ Fletcher Allen is now the University of Vermont Medical Center.

(b) Donna Curtin, MS, CRC

38. Donna Curtin is a certified rehabilitation counselor. She obtained her master's degree in rehabilitation counseling in 1997 and has worked for various organizations assisting injured workers to return to suitable employment. At present, she is a vocational rehabilitation consultant with the Anchor Group and a field services manager for the State of Vermont's Division of Vocational Rehabilitation.
39. At Defendant's request, Ms. Curtin reviewed the vocational rehabilitation records in this case, as well as Dr. Backus' reports, and offered her opinions at the hearing.
40. In Ms. Curtin's opinion, Claimant is employable as a nurse case manager right now, without a BSN degree. She testified that the major credential sought by employers of nurse case managers is licensure as an RN, not a bachelor's degree.
41. Ms. Curtin's opinion on this issue is based not just on her education and experience as a certified rehabilitation counselor, but also on her real-world experience in hiring nurse case managers. Ms. Curtin was until recently a co-owner of the largest workers' compensation case management company in Vermont. In that role, she hired and supervised many nurse case managers. The majority of the nurse case managers she hired have an associate level degree, not a BSN. Thus, in her opinion, Claimant is already a "serious candidate" for a nurse case manager position.
42. Ms. Curtin has not seen any statewide trend towards employers requiring a BSN degree for nursing with the exception of the UVM Medical Center. Even in the case of that employer, its practice is to hire nurses without a BSN degree and offer them the training they need to obtain that credential.
43. Ms. Curtin also testified about the wages earned by nurse case managers. In her experience, a registered nurse with a BSN degree does not necessarily command a higher wage than one with an associate degree. Instead, the main factors affecting salary are work history and specialty area.
44. I find Ms. Curtin's testimony about the credentials that employers seek when hiring nurse case managers, as well as her testimony about the factors that affect their wages, to be clear and well supported, not just by her training and experience as a vocational rehabilitation counselor but also by her recent real-world experience in hiring nurse case managers.
45. Ms. Curtin also testified about the vocational rehabilitation services that would have been appropriate to provide to Claimant. In her opinion, those services should have included ongoing communication with Defendant to determine whether it might have other positions available that she could handle. Services should also have included job development to help her find work with another employer. In Ms. Curtin's opinion, Claimant's counselor should have developed job leads over the past three years and assisted Claimant to customize her resume and cover letter to make her a strong candidate for those positions. I find Ms. Curtin's opinion here to be persuasive.

46. Finally, in Ms. Curtin’s opinion, the current RTWP is not reasonably necessary to return Claimant to suitable employment for two reasons. First, the plan did not appropriately move through the hierarchy of vocational options set forth in the Vocational Rehabilitation Rules. Second, obtaining another academic degree is not likely to increase Claimant’s chances of returning to work at a suitable wage. She is already an RN, which is a “highly sought after” credential. Further, Vermont has a very low unemployment rate, making now an “optimal time” to be a job seeker. In Ms. Curtin’s opinion, therefore, suitable employers are regularly seeking qualified employees and are “willing to be creative” to fulfill their needs.
47. Overall, I find Ms. Curtin’s opinions concerning the RTWP under consideration, and the services provided to Claimant by her rehabilitation counselor, to be clear, well-grounded in her training and experience as a vocational rehabilitation professional, and persuasive.

CONCLUSIONS OF LAW:

1. In workers’ compensation cases, the injured worker has the burden of proving entitlement to vocational rehabilitation services, as well as the reasonableness and necessity of a return to work plan. If the employer or insurer agrees that the injured worker is entitled to services, or if it accepts a return to work plan, then it shall have the burden of proving that the injured worker is no longer entitled to services or that a return to work plan is not reasonably necessary to return the injured worker to suitable employment. Vocational Rehabilitation Rule 56.4000. See *L.S. v. Charles River Lab*, Opinion No. 21-07WC (August 2, 2007), citing *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999).

Claimant’s Entitlement to Additional Vocational Rehabilitation Services

2. Claimant asserts that she is entitled to additional vocational rehabilitation services to help her return to suitable employment. Defendant counters that, as additional services will not return her to her pre-injury wage, she is not entitled to them.
3. Under Vermont law, when an employee sustains 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).
4. Workers’ Compensation Rule 51.2600 defines “suitable employment” as follows:

“Suitable Employment” means employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;

51.2601 Located where the employee customarily worked, or within reasonable commuting distance of the employee’s residence;

51.2602 Which pays or would average on a year-round basis a suitable wage; AND

51.2603 Which is regular full-time work. Temporary work is suitable if the employee's job at injury was temporary and it can be shown that the temporary job will duplicate his or her annual income from the job at injury.

5. Finally, Workers' Compensation Rule 51.2700 defines a "suitable wage" as "a wage as close as possible to 100 percent of the average weekly wage. . . . If the goal of 100% of the [average weekly wage] is not reasonably attainable then the closest reasonably attainable wage to 100% may be considered suitable."
6. A nurse case manager's wages are significantly less than Claimant's pre-injury average weekly wage. However, that does not mean that those wages are unsuitable. Workers' Compensation Rule 51.2700 specifically provides that if the injured worker's pre-injury wage is not attainable, then the "closest reasonably attainable wage" may be considered suitable. In *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011), the claimant was entitled to additional vocational rehabilitation services even though such services were not likely to restore her to 100 percent of her pre-injury wage. The Commissioner wrote: "Consistent with the spirit of Vermont's vocational rehabilitation program, so long as the 'closest reasonably attainable wage to 100%' still qualifies as regular, gainful employment, services ought to continue." *Id.* at Conclusion of Law No. 15.
7. Claimant wishes to return to work as a nurse case manager. Nurse case managers earn about \$46 per hour or \$1840.00 per week. Both vocational rehabilitation counselors credibly testified that she can return to work as a nurse case manager and attain these wages. Moreover, the parties offered no credible evidence that a higher wage is reasonably attainable. I therefore conclude that the wages of a nurse case manager are the closest reasonably attainable wage to 100 percent of Claimant's pre-injury wage and are therefore "suitable" under Vocational Rehabilitation Rule 51.2700.
8. I conclude that Defendant has failed to meet its burden of proving that services should be discontinued, as set forth in Vocational Rehabilitation Rule 56.4000. Claimant is therefore entitled to additional services under 21 V.S.A. § 641(a).

Reasonableness of the Return to Work Plan

9. The parties offered conflicting expert testimony as to whether the RTWP under consideration, which provides for Claimant to obtain a BSN degree, is reasonably necessary to return her to work as a nurse case manager. Claimant's expert testified in support of the plan. Defendant's expert testified that Claimant is employable as a nurse case manager without a BSN degree and that the RTWP did not follow the hierarchy set forth in Vocational Rehabilitation Rule 55.2000. In her opinion, therefore, the RTWP is not reasonable.

10. Vocational Rehabilitation Rule 55.2000 sets forth a hierarchy of options that a counselor should follow in crafting an appropriate return to work plan. The rule provides as follows:

The department shall assume a higher likelihood of successful return to work based on the following hierarchy of vocational options, which are listed in descending order of preference.

55.2100 Return to the same employer in a modified job or a different job;

55.2200 Return to a different employer in a modified job or different job;

55.2300 On-the-Job Training;

55.2400 New Skill Training or Retraining;

55.2500 Educational / Academic Program;

55.2600 Self-Employment.

11. Not only should vocational rehabilitation counselors follow this hierarchy of options, but each option must be found not to be feasible before a claimant may proceed to the next, lesser preferred option. *See Benware v. Vermont Asbestos Group*, Opinion No. 09-97WC (June 30, 1997).
12. Claimant's counselor did not contact Defendant to see whether it had other jobs available that Claimant could do, as would be necessary to satisfy step one of the hierarchy. Finding of Fact No. 34 *supra*. Nor did the counselor engage in any job development to help Claimant find a job with a different employer, as would be necessary to satisfy step two. Finding of Fact No. 35 *supra*. Some employers offer on-the-job training to their nurses to obtain additional credentials, but Claimant's counselor did not explore that possibility, as would be necessary to satisfy step three of the hierarchy, either. Finding of Fact No. 42 *supra*. Finally, the counselor did not consider whether some new skills training might be sufficient to freshen up Claimant's resume, as contemplated in step four of the hierarchy. Finding of Fact No. 36 *supra*. In short, as was evident back in July 2016, the counselor's starting point here was the hierarchy's fifth step, an educational or academic program for a BSN degree. *See* Finding of Fact No. 12 *supra*.
13. I recognize that in some situations, careful consideration of each rung of the hierarchy might not be necessary. *See Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011) (hierarchy to be followed unless it is self-evident that pursuing certain options is likely to be fruitless). In this case, however, Claimant is employable as a nurse case manager now, and a counselor working with her on job development is likely to find her suitable employment without a BSN degree. Thus, seeking to return Claimant to suitable employment at a lower rung of the hierarchy is the appropriate way to proceed. *See L. S. v. Charles River Lab*, Opinion No. 21-07WC (August 2, 2007).

14. The RTWP here totally disregards the hierarchy of vocational options established by Vocational Rehabilitation Rule 55.2000. It is therefore not reasonably necessary to restore Claimant to suitable employment. *See Parker v. McDermott's, Inc.*, Opinion No. 31-08WC (July 23, 2008) (return to work plan must conform to the hierarchy); *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011) (hierarchy to be followed unless justification is provided for not considering other options); *G. C. v. The Fonda Group Inc.*, Opinion No. 37-07WC (January 8, 2008) (an educational or academic program may be recommended only after a determination that four other preferred options are not feasible).
15. I therefore conclude that Claimant has failed to meet her burden of proving that the RTWP under consideration here is reasonably necessary to return her to suitable employment under 21 V.S.A. § 641(a).

Attorney Fees

16. As Claimant has only partially prevailed on her claims, she is entitled to an award of costs and attorney fees commensurate with her success. *See Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991).

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law:

1. Claimant's claim for additional vocational rehabilitation services is **GRANTED**.
2. The Return to Work Plan, as amended on May 24, 2019, is **DENIED**.
3. Claimant is entitled to an award of costs and attorney fees commensurate with her success. 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.

DATED at Montpelier, Vermont this 9th day of September 2019.

Michael A. Harrington
Interim 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.