

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Scott Reed

Opinion No. 21-19WC

v.

By: Stephen W. Brown
Administrative Law Judge

Craftsbury Academy

For: Michael A. Harrington
Interim Commissioner

State File No. LL-716

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Scott Reed, *pro se*
David A. Berman, Esq., for Defendant

ISSUE PRESENTED:

Can Claimant establish that any of his mental health conditions are work-related?

EXHIBITS:

Defendant's Statement of Undisputed Facts ("DSUF")

Defendant's Exhibit 1:	Claimant's Notice of Injury and Claim for Compensation (Form 5) dated March 15, 2019
Defendant's Exhibit 2:	Referral to Formal Hearing Docket dated June 19, 2019
Defendant's Exhibit 3:	Medical Records dated May 3, 2012
Defendant's Exhibit 4:	Medical Records dated September 4, 2012
Defendant's Exhibit 5:	Medical Records dated February 4, 2013
Defendant's Exhibit 6:	Medical Records dated March 9, 2017
Defendant's Exhibit 7:	Request for Leave dated July 29, 2018
Defendant's Exhibit 8:	Medical Records dated September 6, 2018
Defendant's Exhibit 9:	Medical Form dated August 16, 2018
Defendant's Exhibit 10:	Resignation Letter dated September 29, 2018
Defendant's Exhibit 11:	Medical Records dated October 2, 2018
Defendant's Exhibit 12:	Medical records from October 2018 through May 2019

Claimant's Statement of Undisputed Facts ("CSUF")

Affidavit of Medical and Billing Records Certification, executed October 11, 2019
Affidavit of Gretchen E. Lewis, LCMHC, executed October 15, 2019

BACKGROUND:

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 was employed as a custodian at Defendant's school for several decades¹ until his resignation in September 2018. (Defendant's Exhibit 10). Approximately five months after his resignation, he filed a workers' compensation claim alleging that he had sustained mental health injuries as a result of "systemic abuse through power and control manipulation, threats and eroding of self-esteem and values." (DSUF 1-3; Defendant's Exhibit 1). His claim identifies the date of injury as "2011-2018." (*Id.*).
2. Defendant has denied this claim and moved for summary judgment on the grounds that Claimant has an extensive history of preexisting mental health conditions related entirely to non-work-related causes.
3. In May 2012, Claimant's treating physician diagnosed him with generalized anxiety and depression, and suspected bipolar disorder. (DSUF 5; Defendant's Exhibit 3). In September of that year, his psychiatrist noted certain chronic symptoms of post-traumatic stress disorder ("PTSD"), including flashbacks and nightmares. His psychiatrist remarked that Claimant was abused by an older sibling as a child, that his marriage ended after his ex-wife attacked him with a knife and verbally abused him in the 1990s, and that he had recently suffered a re-aggravation of his PTSD after confronting one of his childhood perpetrators. (DSUF 6; Defendant's Exhibit 4).
4. In February 2013, Claimant's treating nurse practitioner took him out of work for one week because he was "mentally and physically exhausted." (DSUF 7; Defendant's Exhibit 5).
5. In March 2017, Claimant treated at Copley Hospital for depression related to the death of his father, and in July of that year, he requested three months' unpaid leave from Defendant to "regroup after the death of his father." (DSUF 8-10; Defendant's Exhibits 6-8). Defendant denied this leave request but requested a medical evaluation to ensure that Claimant was mentally and physically able to perform his work duties. His treating nurse practitioner completed the requested evaluation and stated that while Claimant suffered from "back pain – 2014" and "Mixed Anxiety/Depression – 1996," he was able to work a full regular schedule with no restrictions. (DSUF 11, Defendant's Exhibit 9).
6. Claimant worked briefly during the beginning of the 2018-2019 school year, but he resigned effective September 29, 2018. (DSUF 12, Defendant's Exhibit 10). After resigning, he told his nurse practitioner that he was "profoundly depressed and

¹ The exact duration of Claimant's employment with Defendant is not stipulated; however, one of the medical records in evidence refers to Claimant being distressed about "leaving his job of 30 yrs [*sic*] suddenly." (Defendant's Exhibit 11).

somewhat anxious” after leaving his job of thirty years because of bullying. (Defendant’s Exhibit 11). He also described a “systemic pattern of abuse” at Defendant’s school, accused Defendant of “targeting older workers,” and said that he was “done with that place.” (*Id.*). This is the earliest reference in the medical records provided to the Department related to Claimant’s alleged workplace bullying. (*See* DSUF 13).

7. Defendant asserts that the medical records since that time are “bereft of any objective medical opinion that Claimant has suffered PTSD as a result of any work-related activities, bullying or otherwise.” (DSUF 14, citing Defendant’s Exhibit 12).
8. Claimant responded to Defendant’s motion by timely filing the Affidavit of Licensed Clinical Mental Health Counselor Gretchen Lewis, one of his treating mental healthcare providers. Ms. Lewis stated that “[i]t is [her] clinical opinion that Scott Reed’s current health issues are a direct result of years of intimidation, bullying and vicious attacks by principal, Merri Greenia at the Craftsbury Academy School.” (*See* Lewis Affidavit at 1). She noted that Claimant demonstrated an extreme fear of Ms. Greenia and exhibited symptoms such as hypervigilance, sleeplessness, and depression. (*Id.* at 1-2).
9. She also stated that Claimant had experienced a “breakthrough memory” during one of his treatment sessions of having to build an enclosure with no lights or windows for a misbehaving student. She stated that Claimant felt horrible about what he had done and what the child must have endured. By February 2019, she stated that Claimant was “constantly thinking about this enclosure[.]” (*Id.* at 2).
10. Ms. Lewis’s affidavit references some of the diagnostic criteria for PTSD but does not systematically assess each criterion under the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”).² Notably, her affidavit does not assess whether building the alleged enclosure or enduring verbal harassment from the school principal would satisfy Criterion A of a PTSD diagnosis under the most recent edition of the DSM-5. It also does not mention any of

² “Criterion A” for a PTSD diagnosis in adults is in material part as follows:

- A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:
 1. Directly experiencing the traumatic event(s).
 2. Witnessing, in person, the event(s) as it occurred to others.
 3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
 4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (*e.g.*, first responders collecting human remains; police officers repeatedly exposed to details of child abuse).

See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 5th ed., Arlington, VA, 2013.

Claimant's other stressors reflected elsewhere in his medical records such as childhood abuse, domestic violence, or deaths in his family. As such, it does not assess how those factors might affect his current psychological condition.

11. Additionally, Ms. Lewis's affidavit does not specifically state whether the conclusions therein are offered to a reasonable degree of medical certainty or probability. However, her statements concerning causation are clear, declarative statements, and contain no terms suggesting speculation or uncertainty. Moreover, she prefaces her substantive opinion that "The following statement is a true and accurate opinion of this writer." (Lewis Affidavit at 1).

CONCLUSIONS OF LAW:

Summary Judgment Standard

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 or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
2. In determining whether there is a genuine issue as to any material fact, the Department must accept as true "the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 45.

Ms. Lewis's Affidavit Creates a Genuine Issue of Material Fact as to Causation

3. Vermont law recognizes the compensability of certain work-related psychological injuries that do not involve a physical component. *Bergeron v. City of Burlington*, Opinion No. 14-18WC (October 15, 2018). The standard for evaluating such claims depends on whether the psychological injury occurred before, on, or after July 1, 2017, the effective date of a substantive statutory amendment. *See generally id.*; 2017 Vermont Laws No. 80 (S. 56), 21 V.S.A. § 601(11)(J)(i).
4. However, under either the pre- or post-amendment standard of compensability, a claimant must prove that his psychological injury arose out of and was incurred in the course of his employment. *See* 21 V.S.A. § 618(a)(1). Since Defendant's core contention is that Claimant cannot establish that his psychological complaints are work-related, and the question of causation is common to both standards of

compensability, it is not necessary to determine which standard applies in order to resolve the present motion.

5. Because Claimant filed Ms. Lewis's affidavit, the issue for this summary judgment motion is whether her affidavit creates a genuine issue of material fact as to the work-relatedness of Claimant's present mental health condition.
6. For an expert affidavit to defeat a motion for summary judgment, it must present "specific facts demonstrating a genuine issue for trial." *Morais v. Yee*, 162 Vt. 366, 371–72 (1994) (holding that conclusory expert affidavit that was "unsupported by specific facts or any indication of how the opinion was formulated" was not sufficient to defeat a motion for summary judgment). While an expert affidavit will not defeat summary judgment if it presents "nothing but conclusions[.]" *see id.*, it need not provide an elaborate analysis. *See Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115 (reversing trial court's grant of summary judgment in a medical malpractice case where plaintiff's expert's affidavit stated that physician had deviated from the standard of care, proximately causing the plaintiff's injury; "[w]hile the affidavit provide[d] little explicit reasoning, it articulate[d] a theory of the case sufficient to withstand summary judgment.").
7. Here, Ms. Lewis has offered an expert opinion that Claimant's mental health conditions were caused by employment-related stressors including verbal bullying and building a windowless disciplinary enclosure for a student. Her affidavit is admittedly quite light on detail, and it does not assess any of the alternative potential sources of Claimant's present psychological difficulties that Defendant asserts as being relevant in this case. *See generally* Findings of Fact Nos. 8-10.³ However, it contains enough factual matter regarding Claimant's specific symptoms, concerns, and experiences that it would not be fair to characterize it as "nothing but conclusions." *Cf. Morais, supra*, 162 Vt. at 371–72.
8. Her affidavit also expresses her causation opinions with sufficient certainty.⁴ While it does not contain the customary magic language, "to a reasonable degree of medical certainty," she makes her causal claims in affirmative language with no linguistic indicators of doubt or speculation. Her affidavit also contains prefatory language affirming the genuineness of the opinions stated therein. *See* Finding of Fact No. 11; *cf. Huang v. Progressive Plastics, Inc.*, Opinion No. 17-18WC (December 21, 2018), Conclusion of Law No. 22, *aff'd* Supreme Court Docket No. 2019-042, 2019 WL 3544070 (July 12, 2019) (holding that notation in medical record that neck symptoms "certainly could have occurred after the heavy lifting incident" at work was

³ Defendant also argues that to the extent Claimant's claim relates to PTSD, there is no evidence that Claimant has experienced exposure to actual or threatened death, serious injury, or sexual violence as required by Criterion A of the DSM-V. (Defendant's Brief at 5). Because Ms. Lewis has described Claimant as having PTSD, she will have the opportunity to explain the bases for that opinion at a formal hearing.

⁴ *See Everett v. Town of Bristol*, 164 Vt. 638, 639 (1996) ("Expert testimony must meet a standard of reasonable probability or a reasonable degree of medical certainty. Thus, speculative expert testimony is irrelevant and is not admissible.") (cits. & punct. omitted).

insufficient to withstand summary judgment; nothing in the record affirmatively asserted a causal connection).

9. I find that Ms. Lewis's affidavit articulates a theory of the case sufficient to withstand summary judgment and creates a genuine issue of material fact as to whether Claimant's current mental health conditions are causally related to his workplace stressors at Defendant's school. As such, summary judgment is not warranted.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 20 day of November 2019.

Michael A. Harrington
Interim Commissioner