STATE OF VERMONT
DEPARTMENT OF LABOR

Jeffrey Houle

v.

Verizon Communications Inc.

Opinion No. 02-20WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Interim Commissioner

State File No. R-117

OPINION AND ORDER

Hearing held in Montpelier on November 4, 2019
Record closed on December 6, 2019

APPEARANCES:

Mark H. Kolter, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUE PRESENTED:

Does Claimant's current regimen of prescription opioid medications constitute reasonable medical treatment for his June 27, 2000 compensable work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 2:	*Curriculum Vitae* of Anne Vitaletti-Coughlin, MD
Claimant's Exhibit 3:	McGill Pain Index graphs
Claimant's Exhibit 4:	Agreement for Permanent Total Disability Compensation (Form 22) dated May 2, 2004 with cover letter dated July 19, 2006
Claimant's Exhibit 5:	Vermont Department of Health Rule Governing the Prescribing of Opioids for Pain, effective July 1, 2017
Claimant's Exhibit 9:	July 25, 2019 Vermont Prescription Monitoring Program Prescriber Report for Dr. Vitaletti-Coughlin
Claimant's Exhibit 11:	Complex Regional Pain Syndrome Fact Sheet published by the National Institute of Neurological Disorders and Stroke
Claimant's Exhibit 12:	October 30, 2017 letter from Philip Kiely, MD
Defendant's Exhibit A:	*Curriculum Vitae* of Verne Backus, MD

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640(a)
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 his employer as those terms are defined in the Vermont Workers' Compensation Act.

2. I take judicial notice of all forms and correspondence in the Department's file relating to this claim.

Claimant's June 2000 Work Injury and Diagnosis

3. Claimant is a 53-year-old man who lives in Hyde Park, Vermont. He worked for Defendant as a lineman for three years.

4. On June 27, 2000, Claimant was working with a co-employee in East Calais. He was on the ground, and his partner was up in the bucket truck working on overhead telephone lines. A piece of overhead equipment fell and struck Claimant's right shoulder, knocking him to the ground. He sustained a right shoulder injury in the accident.

5. In December 2000 Claimant was diagnosed with complex regional pain syndrome (CRPS) in his right upper extremity. CRPS is a serious neurologic derangement characterized by severe pain, sensory and motor dysfunction, and autonomic dysfunction. Defendant does not dispute Claimant's CRPS diagnosis.

Claimant's Claim for Benefits

6. Claimant has not worked since June 27, 2000. Defendant accepted his injury as compensable and began paying workers' compensation benefits accordingly.

7. In November 2002 Claimant underwent a functional capacity evaluation at Fletcher Allen Health Care that concluded he had no capacity to sustain work activities on an uninterrupted basis. *Joint Exhibit I*, at 129-33. In December 2002 physiatrist Mark Bucksbaum, MD, performed an independent medical examination of Claimant at his request. *Joint Exhibit I*, at 153-94. Dr. Bucksbaum found that Claimant had reached an end medical result for his work-related injury and that he was permanently and totally disabled. *Id.* at 193.

8. In April 2004 the parties agreed that Claimant was permanently and totally disabled, and they entered into an Agreement for Permanent Total Disability Benefits (Form 22) in May. *Claimant's Exhibit 4*.

9. With the Department's approval, Defendant discontinued Claimant's temporary total disability benefits and began paying permanent total disability benefits. Defendant also pays for Claimant's medical treatment, including his opioid medications.

10. In September 2018 Defendant filed a Notice of Intention to Discontinue Payments (Form 27) related to Claimant's opioid medications. The Department approved the discontinuance, and Claimant filed a Notice and Application for Hearing (Form 6). Defendant continues to pay for the medications pending the resolution of this issue.

Claimant's Severe Pain and Subsequent Medical Course

(a) Claimant's Severe Pain

11. Claimant suffers from prolonged, severe pain in his right upper extremity associated with CRPS. His treating anesthesiologist, Anne Vitaletti-Coughlin, MD, repeatedly described his CRPS as severe and refractory, meaning resistant to treatment. She identified his CRPS symptoms as including unrelenting intense burning pain and extreme skin sensitivity. Dr. Vitaletti-Coughlin credibly testified that CRPS is the most painful condition she has treated in her 25-year career and that Claimant's CRPS is among the worst she has seen.

12. Claimant described three types of pain that he experiences daily. First, his skin surface hurts like a severe sunburn. Showering, wearing certain clothes and sleeping on some bedsheets all increase this pain. Second, he has a constant tingling pain in his right upper extremity. Third, he experiences "bone pain" that feels like his arm is being broken; he described this pain as the worst of all. Claimant also has frequent headaches from the back of his head to his right eye that are sensitive to light and noise. He credibly described his pain condition as "consuming," explaining that "it eats you up totally."

13. Claimant's chronic pain causes other symptoms in turn, including a serious sleep disturbance, depression, and trouble with memory and focus. At times, he has also experienced suicidal ideation.

(b) Claimant's Medical Course

14. In June 2000 Claimant's shoulder injury was treated with hydrocodone and physical therapy. In October 2000 he underwent surgery. In December 2000 he was diagnosed with CRPS and began treating with Dr. Vitaletti-Coughlin. She referred him to the Dartmouth-Hitchcock Medical Center for a series of stellate ganglion blocks, but unfortunately, the blocks did not provide any lasting relief.

15. In 2001 Claimant underwent the implantation of a spinal column stimulator. The stimulator provides him with more pain relief than any other treatment. It is not a panacea, however, and it causes undesirable side effects, including a constant electric-fence-type tingling. The battery implanted in his lower back causes discomfort when he lies down. Further, turning the device up too high tightens his muscles and

increases his headaches. On balance, though, Claimant finds "immense" relief from his spinal column stimulator.

16. Claimant's treatment through the years has also included massage therapy, home exercise, biofeedback and cognitive behavioral therapy. Even with these treatments, his pain is severe. Accordingly, Dr. Vitaletti-Coughlin prescribes opioid medications for him, as well as Gabapentin, Ambien and Lidoderm patches.

17. From January 2017 through November 2018, Claimant's prescription opioid regimen included a 25-mcg fentanyl patch every three days, a 12-mcg fentanyl patch every three days, and 2 mg of oral hydromorphone as needed for breakthrough pain.

18. Claimant has irritable bowel syndrome unrelated to his work injury that causes abdominal pain and other gastrointestinal symptoms. Many oral medications, including most opioids, worsen this condition. Claimant's fentanyl patch bypasses his gastrointestinal tract and does not exacerbate his irritable bowel.

(c) Recent Opioid Tapering Efforts

19. Beginning in May 2018, Dr. Vitaletti-Coughlin has been tapering Claimant's opioid dosage. She reduced, and then eliminated, his oral hydromorphone pills. She also eliminated his 12-mcg fentanyl patch. To address this significant reduction in his opioid regimen, she increased the frequency of his 25-mcg fentanyl patch from every 72 hours to every 48 hours.

20. In June 2019 Dr. Vitaletti-Coughlin further tapered Claimant's opioid medications by prescribing his 25-mcg fentanyl patch every 51 hours, rather than every 48 hours. Claimant's pain levels increased as a result of that change, but he was able to manage, and by September 2019, he was tolerating the reduced dose.

21. Claimant's wife, Celeste Houle, credibly testified that he does not appear to have increased pain on the lower dose, nor has he reduced his activity level. She has also observed him exhibiting more mental clarity on the lower dose.

22. Dr. Vitaletti-Coughlin is considering a further taper of Claimant's dose by extending the time between his fentanyl patches to 55 hours next spring or summer, when his pain is generally less severe.

Claimant's Current Status on Opioid Medications

23. Claimant credibly testified that his opioid medications manage his pain, improve his function, and allow him to have presence of mind. On a good day, he participates in family life, exercises on a treadmill, does some chores and studies the Bible. He may also putter in the garage or walk the family's dogs on their ten-acre parcel of land. Occasionally, he plays board games with his three young grandchildren.

24. Not every day is a good day, however. On bad days, Claimant turns out the lights and lies in the sauna, or soaks in the hot tub, for most of the day. Occasionally, he has suicidal ideation from chronic pain, but he knows he has a lot to live for and does not intend to act on those thoughts. Whether he is having a good or bad day, Claimant leads a reclusive lifestyle.

Dr. Vitaletti-Coughlin's Compliance with the Vermont Health Department Rule

25. In 2015 the Vermont Department of Health (VDOH) promulgated its first rule governing the prescribing of opioids for chronic pain.[1] Effective July 1, 2017, the rule was amended to encompass both acute and chronic pain.[2] *Claimant's Exhibit 5*.

26. Dr. Vitaletti-Coughlin testified that she has complied with all applicable sections of the amended rule in her prescribing of opioids for Claimant's chronic pain:

- She complied with Section 6 of the VDOH Rule by, among other steps, performing a risk assessment[3] and evaluating the relative risks and benefits of opioid treatment for Claimant. She also considered non-opioid alternatives and entered into a Controlled Substance Treatment Agreement with him. She queried the Vermont Prescription Monitoring System and undertook urine screens and pill counts. She sees Claimant monthly to re-evaluate his medications and has also referred him for consultations with the regional specialist in CRPS treatment, Gilbert Fanciullo, MD, at Dartmouth-Hitchcock Medical Center.[4]

- She complied with Section 7 of the VDOH Rule by prescribing Naloxone for Claimant. Naloxone is used to combat the effects of an overdose. Claimant's wife has access to Naloxone and has been instructed to use it if she ever finds her husband unresponsive.

- Dr. Vitaletti-Coughlin has never prescribed extended-release hydrocodone or oxycodone for Claimant. Thus, Section 8 of the VDOH Rule does not apply.

27. Based on her credible testimony and the corroborating medical records, I find that Dr. Vitaletti-Coughlin has complied with all applicable provisions of the VDOH *Rule Governing the Prescribing of Opioids for Pain*.

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[1] *Rule Governing the Prescribing of Opioids for Chronic Pain,* Code of Vermont Rules 13-140-076.

[2] *Rule Governing the Prescribing of Opioids for Pain*, Code of Vermont Rules 13-140-076.

[3] Dr. Vitaletti-Coughlin used the risk assessment tool for opioid use disorder found in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition.

[4] Dr. Fanciullo considered Claimant's treatment options and concluded that opioid medications were his only "real option." *Joint Exhibit I*, at 424. In November 2007 he prescribed Claimant's first fentanyl patch to avoid exacerbating his irritable bowel syndrome with oral medications. *Id.*

Expert Medical Opinions as to the Reasonableness of Claimant's Opioid Medications

(a) Anne Vitaletti-Coughlin, MD

28. Dr. Vitaletti-Coughlin is Claimant's treating pain management physician. She completed her residency in anesthesiology at the SUNY Health Science Center in 1994 and has been practicing interventional pain management for 25 years. She also serves as the Director of Copley Hospital's interventional pain management program.

29. Dr. Vitaletti-Coughlin credibly testified that opioids are a mainstream medication in an anesthesiologist's arsenal of tools. The appropriate prescribing of opioids is therefore embedded in her training and routine in her day-to-day practice. Opioids are rarely her first line of treatment, but she believes they may safely be used for select patients who achieve functional improvement with manageable side effects.

30. Dr. Vitaletti-Coughlin treats 1,500 acute and chronic pain patients every year but prescribes opioids on an ongoing basis for only two. Both of those patients, including Claimant, have severe, refractory CRPS.

31. The Vermont Prescription Monitoring System reports on physicians who prescribe opioids. Dr. Vitaletti-Coughlin's recent report documents that she prescribed opioids to two patients per month, on average, during the first six months of 2019, compared with the average pain management physician, who prescribed them to 50 patients on average, per month. *See Claimant's Exhibit 9.* Dr. Vitaletti-Coughlin credibly testified that she prescribes opioid medications to fewer patients than other physicians because she is "cautious and conservative."

32. In Dr. Vitaletti-Coughlin's opinion, opioid medications are an appropriate treatment for Claimant's CRPS because they mitigate his pain and improve his function. Opioids, in conjunction with his other medications and treatments, allow him to participate in family life, exercise, perform chores and have presence of mind. Without the medications, he would not be able to engage in those activities.

33. Dr. Vitaletti-Coughlin has reviewed the opinion of Defendant's expert, Verne Backus, M.D., that opioid medications have not improved Claimant's function because he has not returned to work. (*See* Finding of Fact No. 41 *infra*). She disagrees with Dr. Backus' reliance on return to work as the sole measure of improved function, as that is not standard practice in pain management.

34. Based on her status as Claimant's treating provider for 19 years, her conservative and cautious approach to opioid prescribing, and her training and experience in anesthesiology, I find Dr. Vitaletti-Coughlin's opinions well supported and persuasive.

(b) Philip Kiely, MD

35. Philip Kiely, MD, is a Morrisville, Vermont physician. He graduated from Tufts University Medical School in 1987 and is board certified in both family medicine and

palliative medicine. Dr. Kiely explained that palliative medicine focuses on improving patients' quality of life by providing long-term relief from their pain and suffering. As Claimant's primary care physician for 15 years, he is familiar with Claimant's general health and his work injury.

36. Dr. Kiely testified that opioid medications are a reasonable treatment for Claimant's CRPS because they make him more functional with family life, activities of daily living and religious participation. Further, Claimant has received long-standing care from a single provider who knows both him and the subject matter well. In Dr. Kiely's opinion, these circumstances point to a well thought out treatment plan under which the prescription of opioid medications is appropriate to treat Claimant's severe chronic pain.

37. More broadly, Dr. Kiely acknowledged that the widespread prescription of opioids has caused societal problems. Nevertheless, in his opinion, physicians must look at individual patients to identify their treatment needs, considering not only the scientific research but also their own experience. Prescribing physicians must therefore assess the effectiveness of each individual's treatment plan and mitigate risk on an individual basis.

38. Based on his role as Claimant's primary care physician and his board certification and experience in palliative medicine, I find Dr. Kiely's opinions well-founded and persuasive.

(c) Verne Backus, MD

39. Verne Backus, MD, is a board-certified occupational medicine physician who completed his occupational and environmental medicine residency at the Harvard School of Public Health. His current practice focuses on independent medical examinations. He has treated just a "handful" of patients in the past five years and has not prescribed any opioid medications during that time. At Defendant's request, Dr. Backus performed an independent medical examination of Claimant in February 2018.

40. Dr. Backus credibly testified that opioid medications cause dependence, impede function, and carry a risk of respiratory depression and death. Thus, they are appropriate for only select patients for whom the benefits outweigh these risks.

41. In Dr. Backus' opinion, the benefits of opioid medications for Claimant do not outweigh the risks. Specifically, he testified that opioid medications have not improved Claimant's function, as evidenced by his failure to return to work in any capacity. He further testified that Claimant could possibly return to work if he discontinued his opioid medications. Therefore, in Dr. Backus' opinion, opioids are not a reasonable medical treatment and Claimant should wean off them following a sound taper plan.[5]

[5] Dr. Backus also expressed concern about Claimant's use of Ambien, a hypnotic sleep medication, in conjunction with his opioid medications, as these drugs in combination significantly increase his risk of respiratory depression and death. He testified that Ambien is not effective for long term use and should be

42. As an occupational medicine physician, Dr. Backus is knowledgeable about pain management and its effect on function. He is also well informed about the serious risks associated with opioid pain medications, including the risks of dependence, respiratory depression and death. I therefore find his opinion as to the general benefits and risks of opioid medications to be well supported and credible.

43. However, I find Dr. Backus' analysis concerning the reasonableness of Claimant's opioid prescription less persuasive than Dr. Vitaletti-Coughlin's. Dr. Backus cited Claimant's failure to return to work as the sole basis for his conclusion that opioids do not improve his function. However, the parties agreed that Claimant was permanently and totally disabled in April 2004, when he was using a low dose of Demerol "very sporadically." *Joint Exhibit I*, at 250, 255; *see* Finding of Fact No. 8 *supra*; *Claimant's Exhibit 4*. Dr. Backus' opinion that Claimant might be able to work if he tapered off opioids is therefore lacking a firm foundation. Moreover, he did not address the severity of CRPS relative to other pain conditions,[6] nor did he consider the effect of irritable bowel syndrome on Claimant's treatment options. These factors weaken Dr. Backus' opinion about the reasonableness of opioid medications for Claimant.

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). Once a claim is accepted and benefits are paid, however, the burden shifts to the employer to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).

2. Vermont's workers' compensation statute obligates an employer to furnish "reasonable" medical services and supplies to an employee who has suffered a compensable work-related injury. 21 V.S.A. § 640(a). When an employer seeks to discontinue payment for a medical benefit, it has the burden of proving that the treatment at issue is no longer reasonable. *Nelson v. Federal Express Freight*, Opinion No. 19-16WC (November 1, 2016), citing *Richards v. Mack Molding*, Opinion No. 34-07WC (December 11, 2007); *see also* Workers' Compensation Rule 12.1710. A treatment may be unreasonable either because it is not medically necessary or because it is not related to the compensable condition or injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010); *Brodeur v. Energizer Battery Mfg, Inc.*, Opinion No. 06-14WC (April 2, 2014).

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discontinued here. The reasonableness of Claimant's Ambien prescription is not before me, however, and I decline to make any findings pertaining to it.

[6] *See* the McGill Pain Index graphs, *Claimant's Exhibit 3*. Dr. Vitaletti-Coughlin credibly testified that the McGill Pain Index is the "gold standard" for comparing pain because it is valid, reliable and consistent.

Application of the Vermont Department of Health's Opioid Rule

3. In 2015 the VDOH published its first *Rule Governing the Prescribing of Opioids for Chronic Pain*. *See* Finding of Fact No. 25 *supra*. The VDOH Rule established various "best practices" for opioid prescribers, including those discussed in Finding of Fact No. 26 *supra*.

4. In keeping with the legislative directive to adopt rules governing "claim adjudication for patients prescribed opioids for chronic pain," 21 V.S.A. § 640c(b), in 2016 this Department incorporated the VDOH Rule, as amended from time to time, as its best practices guideline for determining the reasonableness of treatment in the workers' compensation context. The Workers' Compensation Rules now create a rebuttable presumption that opioid medications as prescribed are not reasonable medical treatment if the prescribing physician has failed to comply with the VDOH Rule. In such cases, the injured worker shall have the burden of proving that the treatment is reasonable notwithstanding the prescribing provider's failure to comply. *See* Workers' Compensation Rules 11.1400 and 12.1730.

5. Claimant here was injured in June 2000, well before the adoption of the amended Workers' Compensation Rules. Accordingly, if the amendments are deemed substantive rather than procedural, arguably they should not apply to Claimant's claim. *Sanz v. Douglas Collins Construction*, 2006 VT 102. Under the circumstances of this claim, however, I need not decide this question, as I have already found that Dr. Vitaletti-Coughlin complied with the VDOH Rule. Finding of Fact No. 27 *supra*; *see Darby v. W.E. Aubuchon Co., Inc*., Opinion No. 03-18WC (February 13, 2018). Accordingly, Defendant retains the burden of proof on the discontinuance of Claimant's opioid medications.

Reasonableness of Prescription Opioid Medications as Treatment for Claimant's Work Injury

6. The parties offered conflicting expert medical opinions as to the reasonableness of prescription opioid medications for treatment of Claimant's work injury. In such cases, the commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

7. Relying primarily on the first and third factors, I find Dr. Vitaletti-Coughlin's opinion the most persuasive. As Claimant's long-term treating provider, she weighed the benefits of continuing him on opioid medications – improved function and pain relief – against the risks – potential for abuse and the risk of respiratory depression and death – and determined that it was appropriate to continue his medications. As an anesthesiologist and Claimant's treating physician for 19 years, Dr. Vitaletti-Coughlin is in the best position to strike the right balance, and I accept her opinion. I therefore

conclude that Claimant's current opioid medication regimen is reasonable medical treatment for his June 2000 compensable work injury.

8. My conclusion does not discount Dr. Backus' legitimate concerns about the long-term effectiveness of opioid medications for chronic pain and the serious risks they pose. However, in this instance, Dr. Vitaletti-Coughlin's opinion more closely considered the specific factors relevant to Claimant's situation and was therefore more persuasive.

Costs and Attorney Fees

9. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. § 678(e), he shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant is hereby **ORDERED** to pay:

1. Medical benefits associated with Claimant's prescribed opioid pain medications, in accordance with 21 V.S.A. § 640(a); and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 16th day of January 2020.

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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.