STATE OF VERMONT
DEPARTMENT OF LABOR

Sherri Armstrong

v.

Norwich University

Opinion No. 07-20WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Interim Commissioner

State File No. KK-60020

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Ronald A. Fox, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant effectively initiate vocational rehabilitation ("V.R.") services by filing a Notice of Intent to Change Vocational Rehabilitation Counselor (Form V.R.-8) without undergoing the V.R. screening process required by the Workers' Compensation Act and the Vocational Rehabilitation Rules?

2. If Claimant did not effectively initiate V.R. services, is Defendant liable for the V.R. services Claimant has received to date?

3. If Claimant did not effectively initiate V.R. services, should V.R. services be discontinued?

4. If Claimant did not effectively initiate V.R. services, is Defendant entitled to replace Claimant's V.R. counselor with another counselor of its choice?

EXHIBITS:

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

Claimant's Exhibit 1	Employee's Claim and Employer's First Report of Injury (Form 1), received February 15, 2018
Claimant's Exhibit 2	Compromise Agreement (Form 16) relating to temporary disability benefits for the period between February 18, 2018 and March 16, 2019, approved November 7, 2019
Claimant's Exhibit 3	Agreement for Temporary Compensation (Form 32), approved November 7, 2019
Claimant's Exhibit 4	Work Capabilities Form (Form 20) releasing Claimant back to work with restrictions on January 15, 2019

Claimant's Exhibit 5	Medical Records from Daniel Woodcock, DC
Claimant's Exhibit 6	Medical Records from Matthew Sullivan, MD
Claimant's Exhibit 7	Notice of Intent to Change Vocational Rehabilitation Counselor (Form V.R.-8)
Claimant's Exhibit 8	Correspondence from Defendant's Counsel to Department of Labor, dated June 3, 2019
Claimant's Exhibit 9	Email from Claimant's Counsel to Department of Labor, dated June 9, 2019
Claimant's Exhibit 10	Fax from Matthew Sullivan, MD, dated June 11, 2019
Claimant's Exhibit 11	Medical Records from Dr. Daniel Woodcock
Claimant's Exhibit 12	Disability Certificate signed by Dr. Daniel Woodcock on June 27, 2019
Claimant's Exhibit 13	Vocational Rehabilitation Progress Report by Tammy Parker, dated August 20, 2019
Claimant's Exhibit 14	Interim Order from Department of Labor, relating to Temporary Disability Benefits, dated September 11, 2019

Defendant's Response to CSUF ("DRCSUF")

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

Defendant's Exhibit A	Affidavit of Gloria J. Marceau, signed August 16, 2019
Defendant's Exhibit B	Medical Records
Defendant's Exhibit C	Email Correspondence Between Counsel, dated May 29, 2019
Defendant's Exhibit D	Correspondence from Defendant's Counsel to Department of Labor, dated June 3, 2019
Defendant's Exhibit E	Vocational Rehabilitation Progress Report and Invoice dated June 10, 2019 by Tammy Parker
Defendant's Exhibit F	Email Correspondence Between Tammy Parker and Defendant's Counsel dated June 10, 2019
Defendant's Exhibit G	Email Correspondence Between Defendant's Counsel, Tammy Parker, and Department of Labor, dated June 24-25, 2019
Defendant's Exhibit H	Correspondence from Department of Labor to Defendant's Counsel, dated July 9, 2019
Defendant's Exhibit I	Vocational Rehabilitation Progress Reports and Invoices by Tammy Parker, dated July 31, 2019; August 20, 2019; and November 27, 2019

Email Correspondence from Claimant's Counsel, dated March 6, 2020, treated as Claimant's Response to Defendant's Statement of Undisputed Facts ("CRDSUF")

BACKGROUND:

The following material facts are undisputed:

1. This case arises out of an accepted back injury that Claimant sustained on February 9, 2018 while employed as a custodian for Defendant. (*See* CSUF 1-4; DRCSUF 1-4).

2. The central dispute in the present cross-motions concerns Defendant's liability for certain V.R. services that Claimant received between May and November 2019 over Defendant's objection, where Claimant never underwent the required V.R. screening process.

Claimant's January 2019 Limited Work Release and Reassignment to Administrative Duties

3. In January 2019, Claimant's primary care provider, Matthew Sullivan, MD, released her to limited duty work. He restricted her from bending, squatting, climbing, twisting, or reaching above the shoulder, lifting more than five pounds, working more than eight hours per day, or performing repetitive activities for more than twenty minutes. (CSUF 5; DRCSUF 5; Claimant's Exhibit 4).

4. The following month, Defendant reassigned Claimant to an administrative position as a temporary accommodation for those restrictions. (DSUF 1).

5. Claimant's treating chiropractor, Daniel Woodcock, DC, opined that Claimant probably could not tolerate a work hardening program and that he expected her pain to return if she went back to her original custodial job. However, he was not concerned with the potential for flare-ups in her administrative position. (*See* DSUF 4; Defendant's Exhibit B; CSUF 7, DRCSUF 7; Claimant's Exhibit 6).

6. In or around April 2019, Claimant told her medical providers that she was considering looking for alternative employment. (*See* DSUF 4; Defendant's Exhibit B).

7. That month, Dr. Woodcock left a message for Defendant to discuss permanently modifying the nature of Claimant's job. He stated that her job included "some very rigorous, labor intensive requirements," although he acknowledged that at that time, she was performing part-time "office work" such as filing. (*See* CSUF 8; CRCSUF 8; Claimant's Exhibit 5).

8. Claimant's temporary administrative job was set to conclude by June 2019 with the end of the academic year. In May 2019, Defendant began searching for other suitable work for her, to be coordinated with a work hardening program that it still anticipated she might complete in the future.[1] (DSUF 5-6; Defendant's Exhibits B and C).

[1] The record reflects some disagreement between Claimant's healthcare providers as to her ability to tolerate a work hardening program. (*See* DSUF 5-6; Defendant's Exhibit B). However, her capacity for such a program need not be resolved for the purposes of the present cross-motions.

Claimant's Initiation of V.R. Services Without Undergoing V.R. Screening

9. On May 8, 2019, Claimant filed a Notice of Intent to Change Vocational Rehabilitation Provider (Form V.R.-8) naming Tammy Parker as the "New V.R. Provider," and leaving blank all fields under the heading "First V.R. Provider." (*See* CSUF 9; DRCSUF 9; Claimant's Exhibit 7).

10. Prior to filing that form, Claimant had never been screened for V.R. services, Defendant had not filed a referral for V.R. services, and Claimant had not received any V.R. services. (DSUF 7; Defendant's Exhibit E). However, unbeknownst to Defendant, Ms. Parker began providing V.R. services to Claimant and began billing Defendant for her time without ever having contacted Defendant, its insurance adjuster, or its counsel. (*See id.*).

11. Unaware that Ms. Parker had already begun providing V.R. services, Defendant continued to seek solutions to keep Claimant employed. On May 29, 2019, Defendant's counsel emailed Claimant's counsel indicating that Defendant had been investigating other modified duty positions for Claimant and seeking to coordinate this with Claimant's subsequent treatments and potential work hardening programs. (DSUF 6; Defendant's Exhibit C).

Defendant's Objections to V.R. Services

12. On June 3, 2019, Defendant filed a Denial/Discontinuance of Vocational Rehabilitation by Employer or Carrier (Form V.R.-227), based in part on Claimant's failure to undergo the V.R. screening process before beginning V.R. services. (*See* CSUF 10; DRCSUF 10; DSUF 7; Claimant's Exhibit 8).

13. On June 9, 2019, Claimant's counsel responded to Defendant's Form V.R.-227 by providing a Work Capabilities Form (Form 20) that Dr. Sullivan had executed the previous month, summarizing Claimant's then-present work restrictions. (CSUF 11; DRCSUF 11; Claimant's Exhibit 9).

14. On June 10, 2019, Ms. Parker filed a V.R. Progress Report, which stated that Claimant's counsel had referred her for a V.R. entitlement assessment on May 7, 2019. Attached to this initial Progress Report was an invoice addressed to Defendant's insurance adjuster for $1,243.16, covering services that she provided between May 8 and June 10, 2019. (*See* DSUF 7; Defendant's Exhibit E).

15. Later that same day, Defendant's counsel emailed Ms. Parker to advise that Defendant was

> … not authorizing the initiation of VR services on this claim at this time. I am waiting on the [office visit] note, but we understand that injections and/or work hardening were recommended by orthopedics back in February. I've asked [Claimant's counsel] to encourage [Claimant] to pursue the recommended

> treatment. Given the probability of improvement and the employer's willingness to accommodate restrictions, VR services seem premature to us.

(*See* DSUF 8; Defendant's Exhibit F).

16. Ms. Parker responded that "V.R. will continue until/unless it is halted per a DOL directive following an informal or formal conference." (DSUF 8; Defendant's Exhibit G).

17. On June 11, 2019, Dr. Sullivan sent a fax to Claimant's counsel noting that "[g]iven the duration of recovery, the response to several returns to different levels of duty make me feel it may not be possible for [Claimant] to return to the full duties of the job of injury without recurrence again." (CSUF 12; DRCSUF 12; Claimant's Exhibit 10).

18. On June 25, 2019, Defendant's counsel wrote to the Department in support of its already-pending request to discontinue V.R. services, accurately noting that the Department's V.R. Rules

> …require claimants to follow a process to request V.R. services; they aren't entitled to that benefits [*sic*] as a matter of course. Parties can't just assume that the screening criteria will be satisfied, generally, and most certainly it shouldn't have been assumed of the facts of this case given that no one ever contacted the employer to question the availability of suitable work.
>
> And, counselors can't just start working on V.R. files in response to a claimant's V.R.-8 and then bill their time to the employer/carrier, without regard to a procedural process that requires screening and the employer's opportunity to be heard.

(DSUF 9; Defendant's Exhibit G).

19. After the 2018-2019 academic year ended, Defendant reassigned Claimant to its custodial department, where she performed light cleaning duties such as dusting. She performed these duties for approximately three days in late June 2019 and did not complain to her employer during that time. (DSUF 10; Defendant's Exhibit A). However, she reported to Dr. Woodcock that she had been instructed to clean dormitories, which Defendant disputes. (*See id.*; DSUF 11).

20. Dr. Woodcock initially advised Claimant to use her judgment in terms of work requirements. Shortly afterward, Claimant told him that she experienced a "setback" after working for two days upon her return to custodial duties. On June 27, 2019, Dr. Woodcock took her out of work until further notice. (CSUF 13-14; DRCSUF 13-14; Claimant's Exhibits 11-12). That same day, Claimant advised Defendant that she would be out of work for six months. (DSUF 11; Defendant's Exhibit A).

Departmental Proceedings Relevant to the Instant V.R. Dispute

21. On July 11, 2019, the Department ruled that Defendant's request to discontinue V.R. services was not reasonably supported because Defendant had not provided documentation to support its contention that Claimant could return to her pre-injury employment. (DSUF 13; Defendant's Exhibit H). However, the Department did not expressly consider Defendant's procedural objections that the commencement of V.R. services was not in compliance with the Department's rules and that Ms. Parker had begun to bill for her time without any advance notice to Defendant. (*See id.*).

22. Approximately two months later, in September 2019, the Department issued an interim order for temporary disability benefits, with a beginning date of June 27, 2019. Pursuant to that order, Claimant has received more than ninety days of temporary total disability ("TTD") benefits. (CSUF 17-18; DRCSUF 17-18; Claimant's Exhibit 14).

23. Ms. Parker continued to provide V.R. services to Claimant and file progress reports and invoices through November 2019, even though Claimant has never undergone V.R. screening. (CSUF 15-16, 19; DRCSUF 15-16, 19; DSUF 14; Claimant's Exhibit 13; Defendant's Exhibit I).

24. On November 27, 2019, V.R. services were suspended due to a lack of evidence of Claimant's physical capacity. (DSUF 14; Defendant's Exhibit I).

Relief Sought by the Parties

25. Claimant seeks an order that, as a matter of law, Defendant must pay for her to receive a vocational entitlement assessment based upon her filing of a Form V.R.-8 naming Ms. Parker as her V.R. counselor.

26. Defendant opposes that request. It seeks an order that (1) reverses the Department's July 11, 2019 rejection of its discontinuance of V.R. services (Form V.R.-227); (2) absolves Defendant of financial responsibility for the V.R. services Ms. Parker rendered without Defendant's authorization; (3) removes Ms. Parker as Claimant's V.R. counselor for failure to comply with the Workers' Compensation Act and Rules; (4) approves the current suspension of V.R.; and (5) permits Defendant to appoint a replacement counselor.

27. Claimant has not filed a response in opposition to Defendant's Motion. However, through counsel, she sent an email on March 6, 2020 disagreeing with Defendant's characterization of certain medical records. *See generally* CRDSUF.

CONCLUSIONS OF LAW:

Summary Judgment

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.[2] The party opposing the motion is entitled to the benefit of all reasonable doubts and inferences.[3]

Statutory Provisions

2. The Workers' Compensation Act provides for the availability of V.R. services as follows:

> When as a result of an injury covered by this chapter, an 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.[4]

3. The Act requires the Department to adopt rules to ensure "that a worker who requests [V.R.] services or who has been out of work for more than 90 days is timely and cost-effectively screened" for such services.[5] Such rules must carry out the following mandates:

> (A) Provide that all vocational rehabilitation work, except for initial screenings, be performed by a Vermont-certified vocational rehabilitation counselor, including counselors currently certified pursuant to the rules of the Department. Initial screenings shall be performed by an individual with sufficient knowledge or experience to perform adequately the vocational rehabilitation screening functions.
>
> (B) Provide for an initial screening to determine whether a full assessment is appropriate. An injured worker who is determined to be eligible for a full assessment shall be timely assessed and offered appropriate vocational rehabilitation services.
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> (C) Provide a mechanism for a periodic and timely screening of injured workers who are initially found not to be ready or eligible for a full assessment to determine whether a full assessment has become appropriate.

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[2] *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

[3] *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990).

[4] 21 V.S.A. § 641(a).

[5] 21 V.S.A. § 641(a)(3).

(D) Protect against potential conflicts of interest in the assignment and performance of initial screenings.

(E) Ensure the injured worker has a choice of a vocational rehabilitation counselor.[6]

4. Although the Act does not define "initial screening" or "full assessment," it clearly contemplates them as two separate stages of a process for determining whether workers who are ***potentially*** eligible for V.R. services are ***actually*** eligible to receive them. *See generally id.*

Rules Governing the Request, Screening, and Entitlement Assessment for V.R. Services

5. In carrying out the statutory mandates above, the Department adopted V.R. Rules 52 through 54 to establish a procedure for initiating, screening, and assessing entitlement to V.R. services.

6. It is undisputed that Claimant did not follow the procedure set forth in those rules before Ms. Parker began performing and billing for V.R. services. However, the parties dispute what ramifications follow from that noncompliance. To contextualize this dispute, it is useful to survey the procedure that the V.R. Rules require claimants to use when seeking V.R. services.

Initiation of V.R. Services

7. The V.R. Rules provide three methods for requesting or initiating V.R. services:

(A) The employer/insurer may voluntarily initiate V.R. services at any time by filing a V.R. referral for the employee. The referral shall be filed with the department, the employee, and the selected V.R. counselor.[7]

(B) The employee may request V.R. services at any time by filing a written request with the department and indicating a reason for the request. After filing the request, the employee shall be screened as described below.[8]

(C) In the event an employer/insurer has not voluntarily made a V.R. referral and/or the employee has not requested V.R. services, any employee who has received TTD benefits for ninety days shall be screened as provided below.[9]

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[6] *Id*. The Act also provides more generally that the Department "may adopt rules necessary to carry out the purpose of this section." 21 V.S.A. § 641(d).

[7] V.R. Rule 52.1000.

[8] V.R. Rule 52.2000.

[9] V.R. Rule 52.3000.

8. Here, Claimant filed a Notice of Intent to Change Vocational Rehabilitation Counselor (Form V.R.-8) naming Ms. Parker as her "new" V.R. counselor at a time when V.R. services had not commenced and therefore there was no old V.R. counselor.[10] Although the Rules do not contemplate a Form V.R.-8 being filed until after screening or other V.R. services are already under way,[11] it is reasonable under the circumstances of this case to treat that form as her request to initiate V.R. services, *i.e.*, option "B" above. Therefore, the next step should have been for her to undergo V.R. screening.[12]

The V.R. Screening and Counselor Selection Process

9. At the beginning of the screening phase, the Department provides the employee with a notice of certain procedural rights and a "response form" asking whether he or she is interested in receiving V.R. services.[13]

10. The screening itself is then performed by a separate state agency, namely the Vermont Department of Aging and Independent Living's Division of Vocational Rehabilitation (D.V.R.).[14] The D.V.R.'s Screening Coordinator selects a qualified professional based on geographic proximity to both the worker and the employer.[15] To minimize the risk of a screener's conflict of interest, the V.R. screener may not provide any other V.R. services to persons he or she has screened. Additionally, any party who believes that an assigned screener has a conflict of interest may petition for a new screener.[16]

11. Once assigned, the screener obtains the injured worker's response form and his or her entire workers' compensation file. He or she must also consult with both the injured worker and the employer. Based on all these sources, the screener provides a recommendation concerning the worker's eligibility for a V.R. entitlement assessment. The screener must consider three questions:

    (A) Whether the employee has been medically released to return to work;

    (B) Whether evidence indicates that the employee will eventually be able to return to his or her job; and

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[10] *See* Findings of Fact Nos. 9−10, *supra.*

[11] *See* Conclusion of Law No. 14, *infra*.

[12] V.R. Rule 52.2000.

[13] V.R. Rule 53.1320.

[14] V.R. Rule 53.1200.

[15] V.R. Rule 53.1310.

[16] V.R. Rule 53.4000.

(C) Whether the employer has suitable work available for the employee.[17]

12. If the answers to two or more of those questions are "no," then the injured worker must receive an entitlement assessment.[18] If an entitlement assessment is recommended, the employer must then file a V.R. referral for an entitlement assessment and send a copy to the employee.[19]

13. Importantly, either party may contest a screener's recommendation for or against an entitlement assessment. An employer who contests a screener's recommendation must file a denial with supporting materials within twenty-one days.[20]

14. If an employer does not designate a V.R. counselor within fifteen days of receiving the screener's report, the employee may choose a counselor by filing a Form V.R.-8.[21] The employee may also file that form if he or she is unsatisfied with the counselor chosen by the employer.[22] However, nothing in the Rules contemplates an employee filing that form before screening or other V.R. services have commenced.

15. The Department may also change a claimant's V.R. counselor if presented with evidence that the current counselor is not complying with the law or the rules, does not hold current certification, and/or claimant and counselor are unable to engage in an effective working relationship.[23]

V.R. Entitlement Assessment

16. Within thirty days of the filing of the V.R. referral (*i.e.*, the output of a positive screening when initiated by the employee's request),[24] the assigned V.R. counselor must file an assessment as to the injured worker's entitlement[25] to receive V.R. services with the Department. In conducting an entitlement assessment, the V.R. counselor must contact the employer and the employee to discuss the possibility of the employee's potential for return to work with the employer, including discussion of any

[17] *See* V.R. Rule 53.1400−53.1430.

[18] V.R. Rule 53.1400.

[19] V.R. Rule 53.1440.

[20] V.R. Rule 53.2000. The process for an injured worker to contest a screener's recommendation is set forth in V.R. Rule 53.3000.

[21] V.R. Rule 53.5100.

[22] V.R. Rule 53.5200.

[23] V.R. Rule 53.5400.

[24] *See* Conclusions of Law Nos. 7(B) and 12, *supra*; V.R. Rule 53.1440. Of course, a V.R. referral may occur automatically if it is the employer who initiates the request for V.R. services. *See* V.R. Rule 52.1000.

[25] V.R. Rule 54.0000.

opportunity for light duty work, job modifications or any other possibility of return to suitable employment.[26]

17. If a worker undergoes an entitlement assessment and is found not entitled to vocational rehabilitation services, then the employer bears no responsibility for payment or provision of further V.R. benefits.[27] As with the screening, either party may contest the findings of an entitlement assessment.[28]

Application to this Case

18. Claimant's Form V.R.-8 effectively served as her request to initiate V.R. services.[29] That request triggered her right to a screening. Depending on the outcome of a screening, Defendant ***may*** have been required to file a referral and Claimant ***may*** have been eligible for an entitlement assessment.[30]

19. However, no screening took place in this case. Further, the employer never filed, and was never required to file, a referral for the initiation of V.R. services. Therefore, nothing ever triggered Claimant's right to receive a V.R. entitlement assessment or any other V.R. services.

20. Nonetheless, Ms. Parker began working on, and billing for, an entitlement assessment immediately upon Claimant's filing of her Form V.R.-8, without Defendant's knowledge.[31] Nothing in the Act or Rules triggered Claimant's right to receive, or Defendant's obligation to pay for, those services.

21. Nor is there any evidence that Defendant consented to Ms. Parker's commencement of V.R. services or waived its right to have Claimant screened before V.R. services began. Indeed, Defendant voiced its objections both to Ms. Parker and to the Department promptly upon discovering that Ms. Parker had begun providing services without its knowledge or consent.[32]

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[26] V.R. Rule 54.1000. The required contents of the entitlement assessment are detailed in V.R. Rules 54.2100−54.300.

[27] V.R. Rule 54.3000.

[28] *See generally* V.R. Rules 54.4000 and 54.5000.

[29] *See* Conclusion of Law No. 8, *supra*.

[30] *See* Conclusions of Law Nos. 8, 12−13, and 16, *supra*.

[31] *See generally* Findings of Fact Nos. 9−11 and 21−24, *supra.*

[32] Of course, an employer can waive the screening process or, through its conduct, acquiesce in an injured worker's noncompliance with it. Nothing in this decision should be construed as permitting an employer to deny payment for V.R. services because of an injured worker's noncompliance with the V.R. Rules' screening provisions if the employer has allowed V.R. services to proceed without objection despite procedural infirmities.

Statutory Construction and the Alleged Inevitability of a Positive V.R. Screening

22. Claimant urges that it is "abundantly clear" that had she been screened, she would have been found eligible to receive an entitlement assessment.[33] Thus, she argues, denying her V.R. services would be "contrary to the humane purpose for which the Workers' Compensation Act was adopted."[34]

23. Claimant is correct that the Act must be construed "liberally to accomplish the humane purpose for which it is passed."[35] However, its purpose is not only to provide employees with an expeditious remedy independent of fault, but also to provide employers a "liability which is limited and determinate."[36] As such, employers are only liable for benefits "to the extent provided for in the Act."[37] Moreover, while I must interpret the Act and the Rules "liberally" in favor of awarding benefits,[38] that cannot mean interpreting them out of existence.

24. The analysis Claimant advocates would effectively collapse the statutory distinction between screening and assessment[39] and allow claimants to unilaterally skip over the screening process whenever they believed that it would yield a positive result. That approach would deprive employers of all the procedural protections built into the screening process, including the right to an independent and conflict-free screener from a separate government agency[40] and the right to contest the independent screener's conclusions before the entitlement assessment or other V.R. services commenced.[41]

25. Moreover, entertaining Claimant's argument that had she been screened, she would have been eligible for an entitlement assessment anyway would make employers' liability for improperly-initiated V.R. services indeterminate.[42] There would always be the chance that the Department might retroactively deem a skipped screening

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[33] Claimant's Motion at 5.

[34] *Id.*

[35] *Quinn v. Pate*, 124 Vt. 121, 124 (1964).

[36] *Id.*

[37] *Id.*

[38] *Cyr v. McDermott's, Inc.*, 2010 VT 19, ¶ 7.

[39] *See* Conclusion of Law No. 3, *supra* (statute differentiating between "initial screening" and "full assessment"); *accord* V.R. Rules 53 and 54 (separate top-level headings for "screening" and "entitlement assessment").

[40] *See* Conclusions of Law Nos. 3(D) and 10 *supra.*

[41] *See* Conclusion of Law No. 13, *supra.*

[42] *Cf. Quinn*, 124 Vt. at 124, *supra* (holding that one of the purposes of the Act is to create a liability scheme that is "limited and determinate").

unnecessary, thus making employers uncertain about whether they were responsible for services that never should have begun but began anyway. This would invite endless *post hoc* litigation about just how inevitable the results of a screening would have been and would defeat the purpose of having a screening process at all.

26. Moreover, the V.R. Rules assign the V.R. screening function to a separate government agency.[43] It would not accord with the spirit of the Rules for me to presume—particularly as a matter of law—what a separate government agency would have concluded.

27. For all these reasons, I decline to presume the outcome of the independent screening process as a matter of law, no matter how likely or unlikely I believe a particular outcome may have been.[44]

28. Finally, Claimant argues that her disregard of the screening process should be excused because the Department of Labor is "well aware that the screening process is broken."[45] Although she does not specify what exactly is broken about the screening process, she cites the Department's unsuccessful efforts in 2018 to amend the V.R. Rules, which included proposed changes to the screening process. Certainly, the mere fact that the Department sought to modify the Rules in the past does not mean that the existing Rules are "broken." However, for the purposes of the present Motions, the most important aspect of the Department's 2018 proposed rule changes is that the proposed rules were not adopted. As such, the existing V.R. Rules remain in full effect and they govern this case.[46]

29. Ms. Parker's unilateral commencement of an entitlement assessment and other V.R. services without any screening or referral, let alone any advance notice to Defendant, short-circuited the statutory V.R. screening process and unfairly deprived Defendant of any say in whether V.R. services should proceed. Requiring Defendant to pay for Ms. Parker's services under such circumstances would improperly result in liability that is not provided for in Rules and the Act and would contravene the Act's purposes.[47]

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[43] *See* Conclusion of Law No. 10, *supra*.

[44] While I do not wish to invite speculation about the outcomes of improperly-skipped screenings in future cases, it is worth noting that in this case, a positive screening was not as pre-ordained as Claimant argues, particularly given Defendant's demonstrated willingness to accommodate Claimant's restrictions and create new jobs around her limitations, as well as the factual uncertainties about Claimant's ability to tolerate a work hardening program and whether she would "eventually" be able to return to her original job. *See generally* Findings of Fact Nos. 4−5, 8, and 11, *supra*; Conclusions of Law Nos. 9−13, *supra.*

[45] Claimant's Motion at 4.

[46] Additionally, whatever difficulties might exist in the screening process, there is not enough factual matter in the present Motions for me to conclude as a matter of law that the process is so broken as might justify excusing Claimant's disregard of it in this case.

[47] *Cf. Quinn*, *supra*, 124 Vt. at 124 (employers only liable for benefits "to the extent provided for in the Act").

Conclusion

30. For all these reasons, Claimant's Motion must be denied.

31. Defendant's Motion is granted to the extent that it seeks a reversal of the Department's July 11, 2019 rejection of its request to discontinue V.R. services. Its Motion is also granted to the extent that it seeks an order absolving it of liability for the invoices Ms. Parker has submitted to date and an order approving the suspension of V.R. services.

32. Defendant's requests to remove Ms. Parker as Claimant's V.R. counselor and allow Defendant to appoint a replacement counselor are denied. Generally, replacing a V.R. counselor is within the Department's discretion; it is not an automatic legal right.[48] However, because V.R. services never lawfully commenced in this case, Ms. Parker should never have begun providing Claimant with V.R. services. As such, there is no basis to "remove" her. That said, either party may still seek to initiate V.R. services in accordance with the Rules, starting with the screening that Claimant remains entitled to receive. If V.R. services are warranted, a counselor may be selected in accordance with the Rules, and nothing in this decision shall prevent the parties or the Department from selecting Ms. Parker as Claimant's V.R. counselor. Defendant shall remain free to assert any objections based on Ms. Parker's past noncompliance with the V.R. Rules in the event that she is selected.

ORDER:

Claimant's Motion is **DENIED**.

Defendant's Motion is **GRANTED IN PART** as follows: The Department's July 11, 2019 rejection of Defendant's Form VR-227s is reversed. Because V.R. services were never properly commenced in this case but continued over Defendant's objection, Defendant is not liable for the invoices Ms. Parker has submitted to date, and V.R. services in this case are suspended until further action by the Department.

Defendant's Motion is otherwise **DENIED**.

DATED at Montpelier, Vermont this 23rd day of April 2020.

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Michael A. Harrington
Interim Commissioner

[48] *See* V.R. Rule 53.5400 (providing that the "Commissioner ***may*** order a change in a rehabilitation counselor if presented evidence that the current counselor is not complying with the law or the rules…") (emphasis added); 56.1100 (providing that V.R. services "***may*** be suspended and/or terminated" under enumerated circumstances) (emphasis added).