**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| Jasmina Omerovic | Opinion No. 13-20WC |
| v. | By: Stephen W. Brown<br>Administrative Law Judge |
| University of Vermont Medical Center | For: Michael A. Harrington<br>Commissioner |
| | State File No. HH-54558 |

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**APPEARANCES**:

Christopher McVeigh, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

**ISSUE PRESENTED:**

Does the Department's earlier decision in this case (Opinion No. 18-19WC) collaterally estop Claimant from proving that the cervical spine surgery she now seeks is reasonable medical treatment for her accepted physical injuries?

**EXHIBITS:**

Defendant's Statement of Undisputed Material Facts ("SUMF")

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| Defendant's Exhibit A: | Department's decision in *Omerovic v. University of Vermont Medical Center*, Opinion No. 18-19WC (October 15, 2019) |
| Defendant's Exhibit B: | Medical Record from Martin Krag, M.D., dated December 19, 2019 |
| Defendant's Exhibit C: | Medical Provider's Preauthorization Form signed by Martin Krag, M.D., dated January 14, 2020 |
| Defendant's Exhibit D: | Claimant's Notice and Application for Hearing (Form 6), dated January 25, 2020 |

Claimant's Response to Defendant's Statement of Undisputed Material Facts ("CRSUMF")

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| Claimant's Exhibit 1: | Email chain between counsel and Department dated March 21, 2019[1] |

[1] Defendant supplied a slightly lengthier version of this same email chain as Exhibit A to its reply brief.

## 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:

### ***Relevant Procedural History***

1. This case arises out of a physical assault that Claimant suffered on October 14, 2015, while she was working for Defendant as a licensed nursing assistant. This is the Department's third opinion in this case. The first, Opinion No. 15-18WC (November 13, 2018) ("*Omerovic I*"), concerned a disputed witness subpoena. The second, Opinion No. 18-19WC (October 15, 2019) ("*Omerovic II*"), followed a two-day formal hearing that occurred on March 25 and 26, 2019. The record for that hearing closed on July 8, 2019. *See id*.

2. *Omerovic II* resolved the following three issues:

   (1) Did Claimant suffer post-traumatic stress disorder (PTSD) or other psychological injury as a result of her accepted October 14, 2015 workplace injury?

   (2) Are cervical spinal injections reasonable and necessary medical treatment related to Claimant's accepted workplace injury?

   (3) Is physical therapy reasonable and necessary medical treatment related to Claimant's accepted workplace injury?

3. At the 2019 formal hearing, both parties presented extensive lay testimony and multiple expert witnesses in support of their contentions. *See generally Omerovic II.* The parties supplied documentary evidence including a Joint Medical Exhibit comprising approximately 1,000 pages of medical records. *See id.*

4. The Department resolved the first issue in Claimant's favor but decided the other two issues in Defendant's favor. *See id.* Neither party appealed *Omerovic II*, and the deadline for appeal has passed.

5. This opinion presumes the reader's familiarity with *Omerovic II.*

### ***Findings and Conclusions in* Omerovic II *Relevant to the Present Dispute***

6. The evidence at the 2019 formal hearing showed that Claimant had a longstanding medical history of neck, back, and shoulder pain that significantly predated her 2015 workplace injury, and that her baseline pre-injury condition was marked by chronic neck pain. *See Omerovic II*, Findings of Fact Nos. 7-13.

7. In finding that Defendant was not responsible for the disputed injections and physical therapy, the Department credited Defendant's expert witness, Nancy Binter, M.D., over Claimant's expert witness, Michael Borrello, M.D.

8. In Dr. Binter's opinion, which the Department credited, Claimant's October 2015 workplace incident most likely caused a soft tissue neck injury that resolved after several months, and Claimant's neck condition returned to its baseline state by at least 2018. *Id.*, Findings of Fact Nos. 70-76. Any need Claimant had for injections and physical therapy was no longer related to her October 2015 workplace injury, because she had returned to her pre-injury baseline condition. *Id.*, Finding of Fact Nos. 73-74. Thus, the Department concluded that Claimant had not sustained her burden to prove the necessary causal relationship between her work injury and the injections; it also concluded that Defendant had sustained its burden to discontinue physical therapy. *Id.*, Conclusions of Law Nos. 12-19.

***Presently-Proposed Surgery for Claimant's Neck and Shoulder Pain***

9. In December 2019, orthopedic surgeon Martin Krag, M.D., evaluated Claimant for neck and right upper extremity pain. (SUMF 21; Defendant's Exhibit B; CRSUMF 21).[2] He noted that Claimant experienced a "significant increase" in her right upper limb tingling in October 2019. (Defendant's Exhibit B at 1). He assessed her with a right C5-C6 disc herniation and C6 radiculopathy, for which he recommended several treatments, including a discectomy, nerve root decompression, and disc replacement at the C5-C6 level. (Defendant's Exhibit B at 3).

10. In January 2020, Dr. Krag's office filed a Preauthorization Request seeking Defendant's approval for those procedures. (SUMF 22; Defendant's Exhibit C; CRSUMF 22). The Preauthorization Request contains the word "Yes" typed into the field entitled, "Work Related Injury." (Defendant's Exhibit C).

11. Defendant denied Dr. Krag's preauthorization request based on the Department's finding in *Omerovic II* that Claimant had returned to her pre-injury baseline for chronic neck and right upper extremity complaints and the Department's conclusion that the modalities targeted to treat those symptoms were not Defendant's responsibility. (SUMF 23; CRSUMF 23).

12. On January 25, 2020, Claimant filed a Notice and Application for Hearing (Form 6), on the issue of "[w]hether the surgery Dr. Krag has recommended is reasonable and causally related to Ms. Omerovic's work injury[.]" (Defendant's Exhibit D). A referral to the formal hearing docket followed.

13. In the instant motion, Defendant argues that the Department's findings and conclusions in *Omerovic II* preclude Claimant from establishing that Dr. Krag's proposed treatment is causally related to her October 2015 workplace injury.

[2] For each paragraph of DSUF except for the first, Claimant responded, "The Department's opinion speaks for itself," even for statements of fact that do not relate to the Department's decision in *Omerovic II*. I treat these responses as acknowledgements that there is no dispute as to Defendant's factual assertions.

## 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). 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. 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, ¶ 14.

***Collateral Estoppel***

2. The doctrine of collateral estoppel "bars the subsequent relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to the resolution of the dispute." *Scott v. City of Newport*, 2004 VT 64, ¶ 8. The doctrine "applies to issues of both fact and law," and its purpose is "to conserve the resources of courts and litigants by protecting them against repetitive litigation, to promote the finality of judgments, to encourage reliance on judicial decisions, and to decrease the chances of inconsistent adjudication." *In re P.J.*, 2009 VT 5, ¶ 8. The doctrine applies to administrative proceedings when an agency is acting in a judicial capacity. *See Sheehan v. Dep't of Employment & Training*, 169 Vt. 304 (1999) (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

3. Application of collateral estoppel requires the following five elements:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

*Scott*, *supra*, ¶ 8.

4. There is no dispute that the first two elements are met here, as this case involves the same parties as *Omerovic II* and all issues decided in *Omerovic II* were resolved in a final judgment on the merits. The remaining three elements are discussed below.

***Identity of Issues***

5. For an issue of fact or law to be conclusive in a subsequent action, "the same essential issue must have been litigated and determined in the first judgment." *State v. Ramsay*, 146 Vt. 70, 74 (1985). For this requirement to be satisfied, "[c]ommonality of evidence alone is insufficient[;]" the "actual factual or legal question presented in the first action must be the same as the question presented in the second." *State v. Nutbrown-Covey*, 2017 VT 26, ¶ 13. Additionally, the first judgment is "conclusive only of such facts as must have been found to warrant the judgment." *Buck v. Hunter*, 98 Vt. 163 (1924). However, the doctrine "is equally applicable whether these matters are, themselves, the ultimate and vital ones, or only incidental to the main question, but essential to its decision." *McKee v. Martin*, 119 Vt. 177, 179–80 (1956).

***1. The Causation Issue in the Present Dispute is Not Identical to the Causation Issues in* Omerovic II**

6. Both *Omerovic II* and the present dispute involve issues of whether specific medical treatments are "reasonable" under 21 V.S.A. § 640(a). The Workers' Compensation Rules define "reasonable medical treatment" as "treatment that is both medically necessary and offered for a condition that is causally related to the compensable work injury." Workers' Compensation Rule 2.3800. In other words, a proposed medical treatment may be unreasonable "either because it is not medically necessary or because it is not causally related to the compensable injury." *Lahaye v. Kathy's Caregivers*, Opinion No. 05-18WC (March 26, 2018).

7. Thus, both *Omerovic II* and the present dispute involve issues of whether the disputed medical treatments are for conditions caused by Claimant's October 2015 workplace injury. However, that does not mean that the two disputes raise the ***same*** causation question.

8. *Omerovic II*'s causation determinations were, by necessity, limited to Claimant's condition ***as of July 8, 2019***, the date on which the record closed for that hearing. *See* Finding of Fact No. 1, *supra.* It would not have been possible to make any factual findings relating to Claimant's condition as it might have existed after that date.

9. By contrast, the causation issue in the present dispute is whether Dr. Krag's proposed treatment for Claimant's condition ***as it exists right now*** is related to her October 2015 workplace injury. *Omerovic II* could not have resolved that issue. Importantly, Dr. Krag evaluated Claimant in December 2019 and noted that she complained of a "significant increase" in symptoms in October 2019, after the record closure in *Omerovic II*. *See* Findings of Fact Nos. 9, *supra*. He also marked "yes" next to the field labeled "Work Related Injury" on his request for preauthorization of the proposed surgery, apparently expressing a belief that he was proposing surgery for a condition related to Claimant's workplace injury. *See* Findings of Fact Nos. 10-11, *supra*.

10. A finding that Claimant's physical condition returned to its baseline by 2018, *see* Finding of Fact No. 8, *supra*, does not necessarily mean that it stayed there forevermore.

11. While Claimant's condition remaining at her baseline until the date of record closure in *Omerovic II* is a fact necessary to support the judgment in that decision,[3] *Omerovic II* could not have analyzed any the causation of any changes in Claimant's condition that might have happened afterward.

12. Nothing in *Omerovic II* precludes the possibility that Claimant could have suffered a recurrence or flare-up related to her October 2015 workplace injury after the record closed on July 8, 2019. Thus, treating all of *Omerovic II*'s findings and conclusions as conclusive leaves open the legal possibility of Claimant proving that her 2015 workplace injury caused her presently-asserted need for cervical spinal surgery.[4]

13. The causation issues in the present dispute and *Omerovic II* are therefore not identical.

### ***2. There is an Identity of Issues as to Certain Factual Questions Incidental to the Ultimate Question of Causation***

14. Inherent within any causal analysis, however, are myriad subsidiary factual issues.

15. *Omerovic II* resolved multiple factual questions that were incidental to the ultimate causation issue, but which were nonetheless essential to its resolution. As discussed below, several of those factual issues overlap with factual issues incidental to the present causation dispute. *Cf. McKee v. Martin*, *supra*, at 179–80 (holding that collateral estoppel "is equally applicable whether these matters are, themselves, the ultimate and vital ones, or only incidental to the main question, but essential to its decision.").

16. Specifically, in the present dispute, whether Dr. Krag's proposed treatments for Claimant's current complaints are related to her 2015 workplace injury requires resolving multiple incidental factual questions, including[5] the following:

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[3] *See Wells v. Bos. & M.R.R.*, 82 Vt. 108 (1909) ("[E]very point that was expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment, is concluded.").

[4] The record presently does not contain any expert opinion that Claimant in fact suffered a recurrence or flare-up after July 8, 2019 because of her October 2015 workplace injury. Such evidence would be necessary for Claimant to prove the causal relationship between her accepted injury and her asserted need for the surgery that Dr. Krag has proposed. However, the legal possibility that Claimant could prove a causal connection between her current complaints and her workplace injury even in the face of all *Omerovic II*'s findings and conclusions demonstrates a non-identity of the causal issues in the two disputes.

[5] This list is not intended to be exhaustive.

(1) What was Claimant's pre-injury baseline neck and upper extremity condition?

(2) Did Claimant's October 2015 workplace injury cause a departure from that baseline condition?

(3) Did Claimant ever return to that baseline condition?

(4) If so, when?

(5) If so, did her condition subsequently worsen?

(6) If so, was that subsequent worsening causally related to Claimant's October 2015 workplace injury?

17. In *Omerovic II*, the Department's causal conclusions regarding injections and physical therapy rested on its findings that Claimant suffered a soft tissue neck injury that resolved and returned to its baseline condition marked by chronic pain by 2018. *See* Findings of Fact Nos. 6-8, *supra*; *Omerovic II*, Findings of Fact Nos. 7-13 and 70-76; Conclusions of Law Nos. 12-19. That causal analysis expressly answers the first four of the incidental factual questions listed above. It also implicitly answers the fifth question, but only for the time period ending on July 8, 2019, when the formal hearing record closed. *Cf.* Conclusions of Law Nos. 8-12, *supra*; *Wells*, *supra*, 82 Vt. 108.

18. However, *Omerovic II* could not have resolved the fifth or sixth question as to any worsening that may have happened after July 8, 2019, for the same reasons discussed *supra* at Conclusions of Law Nos. 8-12.

19. Accordingly, there is an identity of factual issues between *Omerovic II* and the present dispute only as to the first four incidental issues listed above, and as to the fifth issue as it relates to the time period ending on July 8, 2019.

***Full and Fair Opportunity to Litigate; Fairness***

20. Identifying the issues that the present dispute shares with *Omerovic II* does not end the analysis. Collateral estoppel only applies to issues if there was a "full and fair opportunity to litigate them in the earlier action," and if applying the doctrine would be "fair." *Scott*, *supra*, ¶ 8.

21. Vermont courts generally consider these two elements together. In applying them, courts must "balance [a] desire not to deprive a litigant of an adequate day in court against a desire to prevent repetitious litigation of what is essentially the same dispute." *In re Apple Hill Solar LLC*, 2019 VT 64, ¶ 22, reargument denied (October 2, 2019). No single test is determinative as to these two elements; they must be assessed on a case-by-case basis. *See Daiello v. Town of Vernon*, 2018 VT 17, ¶ 13, as amended (March 19, 2018). Among the relevant factors are "the type of issue preclusion, the choice of forum, the incentive to litigate, the foreseeability of future

litigation, the legal standards and burdens employed in each action, the procedural opportunities available in each forum, and the existence of inconsistent determinations of the same issue in separate prior cases." *Id.*

22. Both *Omerovic II* and the present dispute involve workers' compensation cases before the Department of Labor. The two disputes therefore involve the same forum, legal standards, burdens of proof,[6] and available procedural opportunities. These factors favor the application of collateral estoppel.

23. The parties were also in a strong position to foresee the likelihood of future disputes like the present one. Defendant accepted liability for Claimant's physical injuries at the outset of this case. It is common in such circumstances for the parties to dispute the reasonableness of proposed medical treatments. As such, they had a strong incentive to litigate the question of causation at the 2019 formal hearing, including the incidental factual issues necessary to resolving of the causation question. These factors favor the application of collateral estoppel in this dispute.

24. Finally, allowing Claimant to relitigate the incidental factual issues identified above would create a risk of inconsistent determinations. Declining to apply collateral estoppel here would leave open the possibility of Claimant proving that her baseline condition was not characterized by chronic neck, back, and shoulder pain. *Cf. contra Omerovic II.* It would also allow her to relitigate whether her physiological improvement in the months following her injury constituted a return all the way to baseline. *Cf. contra id.* The parties have had more than ample opportunities to develop evidence on those questions. Claimant could have appealed the Department's determinations on those issues but did not do so. I see no reason why binding her to the Department's unappealed determinations on those questions would be unfair.

25. Therefore, the fourth and fifth elements of collateral estoppel are satisfied as they relate to the incidental factual questions resolved by *Omerovic II*, discussed in Conclusions of Law Nos. 16-19, *supra*.

***Conclusion***

26. Collateral estoppel is appropriate in this case, but its proper application is narrower than the relief Defendant seeks. While Claimant is bound by the factual findings that underly the causation determination in *Omerovic II*, those findings do not preclude her from proving a causal relationship between her October 2015 workplace injury and Dr. Krag's proposed cervical spine surgery.

[6] The physical therapy and injections at issue in *Omerovic II* were subject to different burdens of proof because the physical therapy dispute involved a discontinuance of previously-accepted benefits, while the injections involved an outright denial. *See generally Omerovic II*, Conclusions of Law Nos. 10-19. Since the present dispute concerns a denial, the burden of proof here is the same as the legal standard applicable to the injections at issue in *Omerovic II*.

**ORDER:**

Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

As a matter of law, the doctrine of collateral estoppel precludes Claimant from denying the following factual matters which were litigated and determined in *Omerovic II*:

(a) Claimant had a longstanding medical history of neck, back, and shoulder pain that significantly predated the October 2015 workplace injury; her baseline pre-injury condition was marked by chronic neck pain;

(b) Claimant's October 2015 workplace injury caused a soft tissue neck injury;

(c) Claimant's soft tissue neck injury resolved after several months; and

(d) Claimant's neck condition returned to its baseline state by 2018 and remained there until at least July 8, 2019.

Nothing in either this decision or *Omerovic II* precludes Claimant from establishing that Dr. Krag's proposed treatment is for a flare-up or recurrence of symptoms that occurred after July 8, 2019, or that such flare-up or recurrence was causally related to Claimant's 2015 workplace injury.

To the extent not expressly resolved above, Defendant's Motion is otherwise **DENIED**.

**DATED** at Montpelier, Vermont this 4th day of August 2020.

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Michael A. Harrington
Commissioner