STATE OF VERMONT
DEPARTMENT OF LABOR

Pamela Whitney

v.

Porter Medical Center, Inc.

Opinion No. 10-21WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. JJ-64585

OPINION AND ORDER

Hearing held via Microsoft Teams on January 13, 2021
Record closed on February 23, 2021

APPEARANCES:

James A. Dumont, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant sustain a compensable low back injury as a result of her May 26, 2017 work-related fall?

2. Has Claimant reached an end medical result for her compensable May 26, 2017 work-related injuries?

EXHIBITS:

Joint Exhibit I:	Joint Medical Exhibit ("JME")
Claimant's Exhibit 1:	Incident/Accident Investigation Report completed by Claimant on May 26, 2017
Claimant's Exhibit 2:	Employer First Report of Injury (Form 1) filed June 6, 2017

CLAIM:

Temporary disability benefits pursuant to 21 V.S.A. §§ 642 and 646
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. Claimant was an employee and Defendant was her employer as those terms are defined in the Vermont Workers' Compensation Act.

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

3. Claimant is a 61-year-old woman who lives in Salisbury, Vermont, with her husband. She worked for Defendant as a licensed nursing assistant for many years. At the time of the hearing, she was not working for Defendant.

4. Claimant has memory deficits and answered "I don't remember" to many questions during her hearing testimony. Her medical providers found that she was unable to provide an accurate medical history. She has undergone cognitive testing, but the testing did not reveal a definite cause or diagnosis.

Claimant's Low Back Condition Prior to May 2017

5. Claimant has an extensive history of low back complaints prior to May 2017. In December 2007, she fell in an icy parking lot and reported low back pain from the incident. *JME at 11*. In January 2008, she sustained a low back injury at work when a patient rolled out of bed and fell on her. *Id.* at 23. In July 2015, she reported a low back injury after she slipped and fell while exiting a car. *Id.* at 46. After that incident, she underwent chiropractic adjustments for months. *Id.* at 47-58. In January 2016, she went to the Emergency Department after falling and striking a tile floor. She received low back treatment following that incident, too. *Id.* at 69.

6. Claimant also hurt her low back when she stepped into a hole while hunting in New Jersey in December 2016. *JME at 100, 104*. She underwent two months of chiropractic treatment with Mark Woodbury, DC, for her neck and lumbar spine, ending on January 20, 2017. At her last visit, she reported lumbar pain at a level five out of ten. *Id.* at 114.

7. As of May 26, 2017, Claimant was working 32 hours per week for Defendant and was able to perform her work duties without restrictions. *See* Claimant's Wage Statement (Form 25) filed August 15, 2017.

Claimant's Work Injury

8. Claimant sustained compensable neck and knee injuries on May 26, 2017. The parties disagree on whether she also sustained a compensable low back injury.

9. On May 26, 2017, Claimant was performing her usual work duties when she heard a patient's alarm buzzer sound. She rushed to the patient's room, where she found him getting out of bed and starting to fall. She grabbed him and prevented his fall, but as she did so, she slipped in a puddle of urine and fell to the floor herself.

10. Claimant continued to work her shift after she fell. A few hours later, Defendant asked her to complete an accident report. *Claimant's Exhibit 1*. In response to the question "Description of Injury or Illness, and Specific Part(s) of Body," Claimant wrote "Back, neck, Right leg." *Id.*

11. Claimant customarily took her work break at 3:00 AM. When break time arrived on May 27, 2017, she went to the nearby Emergency Department to have her injuries checked out. She then went home without completing her shift.

Claimant's Subsequent Medical Course

12. The Emergency Department medical records reflect complaints about Claimant's neck and right knee, but they make no mention of her back. *JME at 131-36.*

13. Claimant followed up with her primary care provider on June 1, 2017. That medical record references "neck pain – constant aching - posteriorly . . . radiation: down to the top of her back." *JME at 138.* The record does not mention any low back complaints, nor are there any low back findings or treatment recommendations. *Id.* at 137-39.

14. Claimant engaged in physical therapy for her right knee. On November 7, 2017, she underwent a total knee replacement performed by orthopedic surgeon Benjamin Rosenberg, MD, followed by more physical therapy, including gait training, through February 2018. *JME at 241-349.* In March 2018, Dr. Rosenberg's office noted that she was walking with an antalgic gait. *Id.* at 350. Claimant's medical records reveal no low back complaints through May of 2018. *Id.* at 140-352.

15. The first mention of low back pain in the post-accident treatment records appears in Dr. Woodbury's chiropractic note dated June 20, 2018, more than one year after Claimant's fall at work. *JME at 367.* The record notes an "*acute* lumbar complaint after knee surgery since 5/23/18." (emphasis added). Claimant described an aching dull pain in her low back, and Dr. Woodbury began a several-month course of chiropractic treatment. *Id.*

16. In September 2018, Claimant saw physiatrist Todd Lefkoe, MD, for evaluation of her low back pain. She told Dr. Lefkoe that she had no prior history of low back pain, and he noted that her symptoms began after knee replacement surgery. Dr. Lefkoe observed an antalgic gait and thought that Claimant's low back pain was "mechanical in nature." He recommended physical therapy. *JME at 397-400.*

17. Claimant began a two-month course of physical therapy in September 2018. Physical therapist Michael Cooper noted an antalgic gait "secondary to limited right knee flexion," and he included gait training in her physical therapy plan. *JME at 407, 410.*

18. Claimant received sacroiliac joint steroid injections from Dr. Lefkoe in November 2018, but the injections were ineffective. *JME at 486, 492-93.* In December 2018, Dr. Lefkoe stated that he had nothing else to offer. *Id.* at 493. He wrote: "If no visceral source of pain [is] identified, PCP may wish to consider referral to chronic pain clinic. Pain behaviors remain prominent." *Id.* at 494. A December 2018 imaging study found degenerative changes in Claimant's lumbar spine. *Id.* at 508.

19. In January 2019, Claimant underwent another knee procedure and started a course of physical therapy directed toward her knee. *JME at 515.* In April 2019, Dr. Rosenberg noted that she was still walking with an "antalgic, guarded limp." *Id.* at 583.

20. A lumbar spine MRI in June 2019 revealed no findings that would account for Claimant's symptoms. *JME at 618-21*. In July 2019, she began a course of physical therapy for her right hip. *Id.* at 632-733.

21. In September 2019, Claimant saw physiatrist Michael Kenosh, MD. Dr. Kenosh reassured her that he did not see "anything concerning" on her MRI or during his physical examination, and he recommended cognitive behavioral therapy. *JME at 752*. On October 16, 2019, Claimant underwent bilateral lumbosacral facet steroid injections at the UVM Pain Clinic, *id.* at 780, but they were not helpful. *Id*. at 911.

22. In November 2019, Claimant returned to Dr. Kenosh complaining of "widespread total body pain and cognitive dysfunction." *JME at 835*. Dr. Kenosh indicated that he had no further treatment recommendations. *Id.* at 825. Claimant began another course of chiropractic treatment with Dr. Woodbury later that month. *Id.* at 863.

23. Claimant saw Dr. Woodbury from November 2019 through September 2020. *JME at 863-1125*. In November 2019, when she started that course of treatment, she reported her low back pain level at five out of ten. *Id.* at 863. In early December, she reported her pain level at four out of ten. *Id.* at 870. Thereafter, her reported pain level remained at four out of ten throughout the next ten months. *Id.* at 870-1125. From March 19, 2020 through September 25, 2020, Dr. Woodbury wrote after each visit that Claimant's condition was "about the same" or "status quo" or other words to that effect. *Id.* at 1023-1125. Claimant discontinued her course of treatment with Dr. Woodbury on September 25, 2020.

24. In March 2020, Dr. Rosenberg's office ordered a hip MRI. *JME at 1013*. The hip MRI was "unremarkable." *Id.* at 1043.

Claimant's Current Status

25. Claimant credibly testified that she experiences some low back pain, but she did not explain whether the pain is different from the low back pain she often experienced prior to her May 2017 work-related fall. She treats her pain by taking hot baths, as she did before her fall. She has not received any treatment for her low back since she stopped seeing her chiropractor in September 2020.

26. Claimant's medical records reflect her current employment as a home health aide for several clients. She also drives an automobile and runs errands.

Expert Medical Opinions

27. The parties agree that Claimant sustained a right knee injury in the May 26, 2017 work incident and that she is at end medical result for that injury. They presented conflicting expert testimony concerning the cause of her low back pain and whether she is at end medical result for that condition.

Causal Relationship Between Claimant's Low Back Condition and her May 26, 2017 Fall

Philip Davignon, MD

28. Dr. Davignon is a board-certified occupational medicine physician. He graduated from the University of Vermont College of Medicine in 1981 and earned the Canadian equivalent of a master's degree in public health from McGill University in 2000. Dr. Davignon has been performing independent medical examinations for many years.

29. On October 21, 2019, Claimant underwent an independent medical examination with Dr. Davignon, arranged by her attorney. *JME at 789-95*. Dr. Davignon interviewed her, performed a physical examination, and reviewed some medical records. He reviewed the full set of 1,165 pages of medical records prior to his hearing testimony.

30. Although Claimant denied to Dr. Davignon that she had any pre-existing low back condition or injuries prior to May 26, 2017, Dr. Davignon reviewed a January 4, 2016 Emergency Department record of a prior back injury. In his opinion, therefore, Claimant's May 26, 2017 fall aggravated a pre-existing low back condition.

31. Dr. Davignon offered two bases for his opinion. As to the first basis, he relied on Claimant's recollection of falling at work and her mention of a "back" injury to her primary care provider on June 1, 2017. Claimant has exhibited significant memory deficits that call her recollections into question, however. When she testified at the hearing that she hurt her "back," she did not appear to have a recollection of the event itself. Instead, her testimony appeared to be based on her having written "back" on the accident report that she completed. *See Claimant's Exhibit 1*.

32. In addition, the June 1, 2017 medical record upon which Dr. Davignon relies states that Claimant had neck pain radiating into her *upper* back. *See* Finding of Fact No. 13 *supra.* Dr. Davignon acknowledged that the primary care provider made no findings and offered no treatment recommendations for any low back condition. Further, he acknowledged that the medical records reflect no other back complaints until June 2018, more than one year after Claimant's fall.

33. I therefore find a lack of objective support for Dr. Davignon's opinion that Claimant sustained an injury to her low back in the May 2017 fall. Although she credibly reported "back" when she completed her accident report on May 26, 2017, there is no evidence that she was referring to her low back, nor any indication that any back symptoms she experienced immediately upon falling were more than transient.

34. Dr. Davignon also offered a second basis for his opinion that Claimant's low back condition is causally related to her May 2017 fall. He testified that Claimant's knee replacement surgery caused an antalgic gait. The altered gait, in turn, contributed to her low back "discomfort" by placing different stressors on her ligaments and paraspinal muscles. Claimant's medical records are replete with observations of her post-knee surgery antalgic gait, and Dr. Davignon's explanation that an altered gait changes a patient's body mechanics was clear and credible. However, he offered no opinion as to whether Claimant's antalgic gait caused any injury to her low back or

any objective worsening of her pre-existing low back condition. His opinion was limited to stating that her antalgic gait contributed to her low back "discomfort."

Verne Backus, MD

35. Dr. Backus is a board-certified occupational medicine physician. He graduated from Dartmouth Medical School in 1993 and completed an occupational medicine residency at the Harvard School of Public Health. Dr. Backus has substantial experience in occupational medicine and independent medical examinations.

36. At Defendant's request, Dr. Backus performed an independent medical examination of Claimant on August 28, 2019. *JME at 695-732*. His examination included an interview, a physical examination, and a review of some medical records. Prior to his hearing testimony, Dr. Backus reviewed the entire 1,165-page joint medical exhibit.

37. In Dr. Backus' opinion, Claimant did not sustain a low back injury during the May 26, 2017 work-related fall. First, he cited the absence of objective evidence of an injury, including the lapse of more than one year before Claimant mentioned low back pain to a medical provider. In his opinion, the delay of symptom onset indicates that she did not injure her back when she fell. Second, he cited her prior history of non-specific low back pain, also known as mechanical low back pain. Dr. Backus explained that mechanical low back pain, by its nature, recurs in at least 95 percent of cases. In his opinion, therefore, the low back pain that Claimant has experienced after her fall is likely an expected recurrence of her pre-existing mechanical low back pain, rather than an injury sustained in the fall. I find this opinion thorough, clear and objectively supported by the medical evidence.

38. Dr. Backus also testified that the antalgic gait that Claimant developed after her knee surgery might have caused her to experience some "reactive back pain," although he could not say so to a reasonable degree of medical certainty. In his opinion, there is no evidence that Claimant sustained any low back injury or any objective worsening of her pre-existing low back condition as a result of her antalgic gait. I find this opinion to be clear, thorough and well supported.

End Medical Result

39. Neither Dr. Davignon nor Dr. Backus found Claimant at an end medical result for her low back condition during their 2019 independent medical examinations. However, at the hearing, they both testified that she has reached an end medical result for this condition.

Dr. Davignon

40. Dr. Davignon performed his independent medical examination on October 21, 2019. At that time, Claimant told him that she was scheduled for a follow up visit with the Pain Clinic. Based on that statement, Dr. Davignon offered his opinion that she was not at end medical result for her low back condition on October 21, 2019. *JME at 794*.

41. Dr. Davignon later reviewed Claimant's medical records concerning her treatment after October 2019. Those records included Dr. Woodbury's chiropractic records from November 2019 through September 2020. Dr. Davignon expressed some skepticism about the usefulness of the chiropractic records, but nonetheless included them in his review. There is no record of any follow up treatment with the Pain Clinic after October 21, 2019.

42. Dr. Davignon testified that Claimant is not undergoing any additional treatment and that she is not a surgical candidate. Thus, in his opinion, she is at end medical result for her low back condition. As to the date of end medical result, Dr. Davignon selected "August 2020" based on Claimant's discontinuance of chiropractic treatment.[1] However, he did not address whether her chiropractic care from November 2019 through August 2020 was curative or palliative. Further, he did not explain why he was relying on the chiropractic records after expressing skepticism about them. These omissions significantly weaken his opinion.

Dr. Backus

43. Dr. Backus offered his opinion that Claimant had reached an end medical result for her low back condition by August 28, 2019. He based his opinion on the lack of any subsequent low back treatment that was expected to significantly improve her condition. He noted that she received an injection and some chiropractic adjustments geared toward pain management after that date, but in his opinion, those treatments were palliative.

44. I find Dr. Backus' end medical result opinion clear, well supported and credible.

Claimant's Claim for Workers' Compensation Benefits

45. The parties entered into an Agreement for Temporary Compensation (Form 32) in July 2017. The Agreement lists the accepted injuries as "Neck Back and right knee." *See Form 32 filed July 25, 2017.* The Agreement does not specify "low" back.

46. At the time the Agreement was prepared, the only medical evidence pertaining to Claimant's "back" was the June 1, 2017 primary care provider note describing neck pain radiating into her upper back. No medical record or other evidence described any low back complaints for more than a year after Claimant's fall. Subsequent forms filed with the Department listed Claimant's "right knee and neck" as accepted injuries but did not include her back. *See, e.g.*, Denial of Benefits (Form 2) filed September 30, 2019; Form 2 filed March 19, 2020, denying treatment for Claimant's low back and hip as "not causally related to the work injury."

47. Defendant has paid temporary disability compensation and medical benefits for Claimant's accepted right knee injury. On October 7, 2019, it filed a Notice of Intention to Discontinue Benefits (Form 27) pertaining to her temporary disability

[1] Claimant actually discontinued her chiropractic treatment on September 25, 2020. *JME at 1125.*

compensation. The discontinuance was based on Dr. Backus' August 2019 report finding Claimant at end medical result for her work-related injuries. The discontinuance became effective on October 27, 2019.

48. On December 17, 2019, Claimant's counsel filed a letter with the Department asserting a low back injury and requesting an interim order to reinstate temporary disability benefits on the grounds that Claimant was not at end medical result for that injury. In March 2020, the Department's specialist considered this claim at an informal conference and determined that the low back claim was not compensable. Claimant then requested the formal docket referral.

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). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton*, *supra* at 19; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993).

2. Claimant contends that Defendant accepted her current low back condition by including the word "back" on the Agreement for Temporary Disability and that therefore Defendant has the burden of proving that her current low back condition is not causally related to her employment. *See Kobel v. C & S Wholesale Grocers*, Opinion No. 28-99WC (August 2, 1999), citing *Cormier v. Capital Candy Co.*, Opinion No. 60-96WC (October 25, 1996) and *Merrill v. University of Vermont*, 133 Vt. 101 (1974) (once a claim has been accepted, the burden shifts to the employer or carrier to establish the propriety of ceasing further compensation).

3. The parties here entered into the Agreement for Temporary Disability on July 11, 2017. The Agreement identifies Claimant's accepted injuries as "Neck Back and right knee." Claimant contends that the reference to "Back" encompasses her current low back condition. However, as of July 11, 2017, Claimant had not reported any low back condition, and the only medical record mentioning her back was the June 1, 2017 record referencing neck pain radiating to her *upper* back. *See* Finding of Fact No. 13 *supra*. Accordingly, I find that Defendant accepted Claimant's neck condition including the symptoms that radiated into her upper back. It did not accept a low back condition that had not yet manifested. Accordingly, I conclude that Claimant retains the burden of proof to establish a work-related low back condition.

Causal Relationship between Claimant's Low Back Condition and her Employment

4. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

5. The parties presented conflicting expert medical opinions concerning whether Claimant's low back condition is related to her May 26, 2017 work accident and whether she has reached an end medical result for this condition. 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).

6. Here, neither Dr. Davignon nor Dr. Backus was a treating physician. Both physicians reviewed all of Claimant's medical records prior to their hearing testimony. Both performed comprehensive evaluations, and both are well qualified to offer opinions on Claimant's low back condition. Thus, as is often the case, the persuasiveness of their opinions turns largely on the third *Geiger* factor, namely the clarity, thoroughness and objective support underlying their opinions.

7. With particular reliance on the third *Geiger* factor, I find Dr. Backus' opinion that Claimant did not injure her low back in the May 2017 fall clear, thorough and objectively supported. His explanation of her pre-existing mechanical low back pain, and the tendency of this type of pain to recur, was persuasive. Further, the absence of any low back findings or treatment in the medical records for 13 months after her fall supports his opinion. Thus, I conclude that Dr. Backus' opinion is more persuasive than Dr. Davignon's, which relied on Claimant's memory and on one medical record that did not mention her lower back.

8. Both physicians agree that Claimant has a pre-existing condition that causes low back pain. Further, they agree that an antalgic gait can contribute to low back discomfort. Although Dr. Backus could not say to a reasonable degree of medical certainty that Claimant's antalgic gait did in fact contribute to her low back discomfort, I am persuaded by Dr. Davignon's explanation of her altered body mechanics, as well as the timing of her increased low back pain, that it did.

9. Finally, Dr. Davignon did not offer an opinion as to whether Claimant's antalgic gait caused any new injury or any objective worsening of her underlying condition beyond an increase in her discomfort. Thus, I credit Dr. Backus' uncontested opinion that her antalgic gait caused no new injury and no objective worsening of her underlying condition.

10. It is a well-settled tenet of Vermont's workers' compensation law that the aggravation or exacerbation of an underlying condition can qualify as a work-related injury.

Quebec v. FCI Federal, Inc., Opinion No. 03-16WC (February 4, 2016); *Stannard v. Stannard Co., Inc.*, 2003 VT 52, ¶11, citing *Jackson v. True Temper Corp*., 151 Vt. 592, 596 (1989). The causation test in these circumstances is "whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred." *Stannard, supra* at ¶ 11 (internal citations omitted). However, exacerbated symptoms alone will not establish compensability unless the underlying disability has also worsened. *Id.*

11. Although I have accepted Dr. Davignon's opinion that Claimant's altered gait contributed to her low back discomfort, her gait did not cause any injury or objective worsening of her low back condition, nor did any disability from her low back condition come upon her sooner than it otherwise would have. I therefore conclude that the causation test enunciated in *Stannard* has not been met.

12. Although Claimant's work-related knee replacement did not cause her underlying low back condition objectively to worsen, under the circumstances of this case, I conclude that her exacerbated symptoms constituted a work-related flare-up. Workers' Compensation Rule 2.2300 defines a "flare-up" as "a temporary worsening of a pre-existing condition caused by a new injury for which a new employer or insurance carrier is responsible, but only until the condition returns to baseline and not thereafter." *See Quebec v. FCI Federal, Inc.*, Opinion No. 03-16WC (February 4, 2016) (when a distinct, new work-related injury temporarily worsens the symptoms referable to a pre-existing condition, the employer is responsible for benefits until the flare-up returns to its pre-injury baseline); *Cehic v. Mack Molding, Inc*., 2006 VT 12, ¶¶ 9-10 (same).

13. Claimant underwent a pre-accident course of chiropractic treatment in December 2016 and January 2017, at the conclusion of which her lumbar spine pain level was five out of ten. *See* Finding of Fact No. 6 *supra*. After her work-related knee surgery, she underwent low back injections and physical therapy, followed by an eleven-month course of chiropractic treatment that ended on September 25, 2020. *JME at 1125*. Her pain level when she discontinued that chiropractic treatment was four out of ten. *See* Finding of Fact No. 23 *supra*. Comparing these two courses of chiropractic treatment, one just prior to the May 2017 accident and one three years after knee surgery, I find that her low back condition and reported pain levels are essentially the same. Thus, I conclude that Claimant's flare-up returned to her pre-injury baseline on September 25, 2020, when she discontinued chiropractic treatment.

14. Although Claimant has not met her burden of proving that she sustained a work-related low back injury, she has established that she suffered a work-related temporary flare-up of low back discomfort. Defendant is responsible for paying benefits relative to that flare-up until her condition returned to baseline on September 25, 2020.

End Medical Result

15. End medical result is "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant improvement is not expected, regardless of treatment." Workers' Compensation Rule 2.2000. End medical result

signals a shift in treatment from curative interventions, the goal of which is to "diagnose, heal or permanently alleviate or eliminate a medical condition," to palliative ones, which aim to "reduce or moderate temporarily the intensity of an otherwise stable medical condition." *Kendrick v. LSI Cleaning Service, Inc*., Opinion No. 07-16WC (May 2, 2016), quoting Workers' Compensation Rule 2.3400.

16. Because temporary disability benefits are payable only for so long as the medical recovery process is ongoing, once an injured worker reaches an end medical result, his or her entitlement to temporary indemnity benefits ends, and the focus shifts instead to consideration of any permanent disability. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).

17. The Vermont Supreme Court has defined the proper test for determining end medical result as "whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Brace v. Vergennes Auto, Inc*., 2009 VT 49 at ¶11, citing *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996). Continued treatment, such as physical or drug therapy, does not preclude a finding of end medical result if the underlying condition is stable and further treatment will not improve it. *Id.*

18. In cases decided since *Brace*, the Commissioner has ruled that a defined course of treatment that (a) offers long-term symptom relief rather than just a temporary reprieve; and (b) is reasonably expected to provide significant functional improvement can, in appropriate circumstances, negate a finding of end medical result. *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010) (trial implantation of spinal cord stimulator); *Cochran v. Northeast Kingdom Human Services*, Opinion No. 31-09WC (August 12, 2009) (participation in functional restoration program). In contrast, the chiropractic treatment in *N.C. v. Kinney Drugs*, Opinion No. 18-08WC (May 9, 2008) did not negate end medical result because it provided only a temporary reprieve of the claimant's symptoms.

19. Again relying on the third *Geiger* factor, I find Dr. Backus' opinion on end medical result more persuasive than Dr. Davignon's. Dr. Backus considered the medical treatment that Claimant received after his August 28, 2019 independent medical examination and credibly testified that none of that treatment was expected to be curative. In contrast, Dr. Davignon chose the date of her last chiropractic treatment as the end medical result without addressing whether that course of treatment was expected to significantly improve her condition. I therefore conclude that Claimant reached end medical result for her low back condition on August 28, 2019.

20. End medical result signals the shift from curative interventions to palliative ones. *See* Conclusion of Law No. 15 *supra*. Although such a finding forms the basis for the discontinuance of temporary disability benefits, it does not negate a claimant's entitlement to reasonable medical treatment, even when such treatment is palliative. Thus, Claimant is entitled to reasonable medical treatment for her flare-up of low back pain until she returned to baseline on September 25, 2020, but not thereafter.

Costs and Attorney Fees

21. Claimant has not established a work-related low back injury, but she has established a temporary flare-up of her pre-existing low back pain. Thus, she is entitled to reasonable medical treatment for that flare-up until her condition returned to baseline on September 25, 2020.

22. Claimant reached an end medical result for her low back condition on August 28, 2019. Thus, she is not entitled to temporary disability benefits beyond October 27, 2019, the date on which the discontinuance of those benefits became effective.

23. As Claimant has partially prevailed, she is entitled to an award of costs that relate to the portion of her claim that she successfully litigated. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 07-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, and in accord with 21 V.S.A. § 678(e), Claimant shall have 30 days from the date of this opinion to submit evidence of her allowable costs and attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits referable to her low back condition is **DENIED**, except to the extent that she has established a work-related flare-up of her low back pain. Claimant's claim for temporary disability benefits beyond October 27, 2019 is also **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Medical benefits in accordance with 21 V.S.A. § 640(a) for the reasonable treatment of Claimant's flare-up of low back pain through September 25, 2020; and

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

DATED at Montpelier, Vermont this 5th day of May 2021.

_____
Michael A. Harrington
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.