STATE OF VERMONT
DEPARTMENT OF LABOR

Colleen Austin

v.

Vermont Retail Association, Inc.[1]

Opinion No. 14-21WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. FF-51663

OPINION AND ORDER

Hearing held via Microsoft Teams on February 22, 23, and 24, 2021
Record closed on April 1, 2021

APPEARANCES:

Steven P. Robinson, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a result of her accepted workplace injury?

2. Are continued opioid medications reasonable medical treatment for her accepted workplace injury?

EXHIBITS:

Joint Medical Exhibit ("JME")
Joint Vocational Exhibit ("JVE")
Curriculum Vitae of Verne Backus, MD
Curriculum Vitae of Fran Plaisted, MA
Surveillance Binder
Four surveillance videos
March 5, 2019 correspondence from Defendant's counsel to Claimant's counsel
January 18, 2019 correspondence from Defendant's counsel to Verne Backus, MD
November 19, 2007 letter from U.S. Department of Labor concerning Dictionary of Occupational Titles

[1] At the time Claimant began working for Defendant, Defendant was the Vermont Retail Association, Inc. That organization subsequently merged with the Vermont Grocers' Association to become the Vermont Retail and Grocers' Association, Inc.

CLAIMS:

Medical benefits pursuant to 21 V.S.A. § 640
Permanent total disability benefits pursuant to 21 V.S.A. § 644(b)
Costs and Attorney Fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms in the Department's file for this claim.

2. Claimant is a 54-year-old woman originally from Vermont who now resides in Sebring, Florida. She attended elementary through high school in Montpelier but moved to Florida in 1985, where she took courses at Southeastern Academy focused on tourism, airline, and hotel work. She has also taken community college courses in marketing and communications. She worked successfully in Florida's travel industry for several years, including marketing and sales positions with a hotel chain, and later worked as a marketing assistant for a chain of Florida hair salons.

3. In 1992, Claimant returned to Vermont. Her first job in Vermont was with Bombardier Corporation in Burlington in a customer service role. She later worked in multiple capacities with the Montpelier Public School District, including serving directly under its Director of Special Education.

4. After taking some time out of the workforce to raise her young children, Claimant accepted a position with the Governor's Institute of Vermont, where she helped to connect high school students with specialized programs known as "institutes" at local colleges. In that role, she was actively involved in matching applicant students with institute programs. This work involved interaction with applicants, parents, guidance counselors, and educational facilities.

5. Claimant left the Governor's Institute to work for Defendant as the assistant to the executive director in or around 2012. Defendant is a nonprofit trade organization with approximately 800 members dedicated to representing the interests of Vermont retailers and grocers. At the beginning of her employment with Defendant, its entire staff consisted of her and the executive director. As such, Claimant's duties were wide-ranging: she organized and attended trade shows, set up meetings with the board of directors, drafted day-to-day correspondence, made efforts to increase membership by distributing promotional materials and pamphlets, and "basically ran the office." She also helped support the executive director's lobbying efforts in Montpelier while the legislature was in session. Her work required frequent computer use and handling and moving large volumes of paper files that she often carried in large boxes up and down stairs.

Claimant's Workplace Injury, Surgery, and Job Loss

6. During the spring of 2013, Claimant began experiencing pain and discomfort in both hands. After a few months of persistent symptoms, she presented to the office of her

longtime primary care physician, Dale Stafford, MD. One of Dr. Stafford's assistants initially prescribed rest and hand splints, but Claimant found that those splints caused her pain to increase, so Dr. Stafford referred her to an orthopedist, who treated her with a cortisone injection. Claimant found that injection to be more painful than it was effective, and she did not receive a second one. Beginning in approximately March 2014, she began using opioid medications such as oxycodone to manage her pain. (*See* JME 133).

7. Claimant underwent physical therapy and tried multiple prescription medications including Tramadol and gabapentin, various creams and ointments, and heat and ice therapy. She also engaged in exercises intended to strengthen her hands but found that they exacerbated her pain. Dr. Stafford also recommended that a state representative perform an ergonomic evaluation of Claimant's workspace. Based on the representative's findings, Defendant made some modifications to Claimant's workspace including a wrist guard for typing.

8. In May 2014, Claimant saw hand specialist Michael Benoit, MD, who noted that after Claimant began using Dragon Speech Recognition software at work, her symptoms decreased. (JME 172). However, she was still taking approximately three to four 5 mg oxycodone pills per day under Dr. Stafford's supervision. (JME 175).

9. Because of scheduling and capacity issues with Dr. Benoit's office, Claimant was not able to see him for a follow-up visit in 2014. Instead, she followed up with orthopedic surgeon Seth Frenzen, MD, who performed multiple diagnostic tests and ultimately performed ligament surgery to stabilize her left thumb joint in February 2015.[2] (JME 300 *et seq.*).

10. Claimant missed approximately two weeks of work following that surgery, after which she continued to experience significant post-surgical pain and underwent additional physical therapy. These treatments failed to make a material difference in her pain.

11. By May 2015, Dr. Stafford noted improvement in Claimant's motion and strength but noted that her pain levels remained constant. At that time, she was using as many as eight 5 mg oxycodone pills per day, and he listed chronic pain syndrome as one of her diagnoses. (JME 493-500).

12. When Claimant returned to work for Defendant, she wore a cast on her left hand and worked long hours, doing what she could with her right hand, and using Dragon voice recognition software. However, she had difficulty keeping up with the demands of her job. Part of this difficulty resulted from Defendant's database system not being fully compatible with Dragon's interface, but Claimant credibly acknowledged that she was not performing at the same level as before the surgery. Defendant ultimately eliminated her position in January 2016.

[2] Claimant underwent the surgery on her left side first because she is predominantly right-handed.

13. The month after her employment ended, Claimant underwent surgery on her right side, again with Dr. Frenzen. (JME 614-616). Like the first surgery, the second failed to eliminate her pain. She explored the possibility of additional surgeries, but after consulting with other providers, including Dr. Benoit, she decided not to pursue such treatments because of their uncertain outcomes and the risks inherent in all invasive procedures.

Claimant's Post-Surgical Chronic Pain Management

14. Following her second surgery, Claimant treated her pain with a variety of methods, including topical creams, medical marijuana, and prescription medications including narcotic opioids. Her opioid use has ebbed and flowed since that time, but she has never completely ceased its use despite attempts to taper, both on her own and under physician supervision.

15. In May 2016, Claimant came under the care of John Johansson, DO of the Vermont Center for Occupational Rehabilitation. After an initial evaluation, Dr. Johansson expressed an opinion that Claimant could "definitely, in [his] opinion, with modifications of her workstation and voice activated dictation, return to some level of work in her previous field of marketing or something similar." (JME 814). He also commented that her pain management approach at that time involved two 5 mg oxycodone tablets four times a day, for a total of 40 mg per day. In his view, this dosage reflected a "significant amount of short acting narcotic." (*Id.*). He proposed taking over her pain management medication from Dr. Stafford and decreasing her dosage over eight weeks. (JME 812-815). His records indicate that Dr. Frenzen agreed with this approach. However, Dr. Stafford continued to manage Claimant's pain over the next two years, and there is no evidence that the tapering proposed by Dr. Johansson occurred.

16. Claimant subsequently saw George White, MD for an independent medical evaluation ("IME") in October 2016. Dr. White had previously performed a medical records review and recommended against continued use of opioids. (JME 833-834; 965). In his IME report, he found Claimant at end medical result with a combined 21 percent whole person impairment based on her bilateral upper extremity injuries. (JME 956-969). He also opined that Claimant's upper extremity injuries did not explain her "constellation of symptoms and signs," and he recommended cognitive behavioral therapy. Among the diagnoses he lists in his IME is "circumferential wrist discomfort bilaterally of uncertain etiology," and he opined that Claimant's "chronic pain itself is the problem rather than some repairable anatomic entity." (*Id.*). Dr. White also reiterated his recommendation against continued opioid medications such as oxycodone for patients like Claimant with "chronic nonmalignant pain." (*Id.*).

17. Several of Dr. Stafford's records from 2016 and 2017 reflect a desire to decrease and ultimately stop Claimant's opioid use. However, he continued to prescribe those medications, noting that they seemed to be the best management of her pain "until such time as there is a definitive resolution to her underlying problem[.]" (*E.g.*, JME 951, 990-992). By July 2017, Claimant's opioid dosage was so high, at approximately

90 morphine milligram equivalents, that Dr. Stafford prescribed her Naloxone, or Narcan, an opioid agonist prescribed to rapidly reverse an opioid overdose, as required by Vermont law for that dosage level. (*See* JME 1049). The last time Dr. Stafford treated Claimant was in April 2018. At that time, Claimant was preparing to move to Florida, and she was taking six 10 mg oxycodone pills per day. (JME 1125).

18. After arriving in Florida in the late spring of 2018, Claimant experienced difficulty obtaining medical care. Multiple providers outright refused to treat her at all due to her history of opioid treatment. Eventually, she came under the care of pain specialist Mark Jawahir, MD, who has continued to manage Claimant's pain using opioids. (JME 1161). His records reflect diagnoses of idiopathic pain syndrome, opioid dependence, and a need to wean off those medications. (JME 1164-66, 1355). They reflect discussions of other treatment options and Claimant's efforts to taper, but he concluded that Claimant still needed oral narcotics as a part of her treatment plan. (*E.g.,* JME 1355).

19. Dr. Jawahir's records as of November 2020 reflect his assessments that Claimant is totally disabled and that she has made reasonable efforts to taper her opioid use by reducing her oxycodone intake from six to three 10 mg pills per day. (JME 1403-04). Dr. Jawahir did not testify at the formal hearing.

Claimant's Unsuccessful Efforts to Re-Enter the Work Force

20. In June 2016, certified rehabilitation counselor ("CRC") Michael Chartrand performed a vocational rehabilitation ("VR") entitlement assessment and found Claimant entitled to VR services. (*See* JVE 72). Mr. Chartrand worked with Claimant to develop a Return to Work Plan ("RTWP") focused on returning her to work in an office or clerical setting compatible with her sedentary work capacity, targeting positions that would allow her to use Dragon voice recognition software to accommodate her hand use limitations. (JVE 139-142).

21. During roughly the first year of the plan, Claimant applied for over 70 positions in central Vermont, mostly clerical in nature. She and Mr. Chartrand made efforts to disclose her workplace limitations to these prospective employers up front.

22. Claimant did not receive any job offers or even any in-person interviews from those applications. Therefore, Claimant and Mr. Chartrand investigated the possibility of a degree or certificate program at the Community College of Vermont ("CCV"). Claimant did not pursue any of those CCV programs, however, because she and Mr. Chartrand determined that none of them would offer her any significant skills that she did not already possess from her prior work experience.

23. After moving to Florida in the spring of 2018, Claimant began working with a Florida VR counselor, Mr. Richard Dibacco, but she found his services unsatisfactory. She therefore resumed working with Mr. Chartrand.

24. Her job search in Florida remained unsuccessful. In her experience, every time a new opportunity looked promising, there were some job requirements that she felt unable to perform. For instance, receptionist positions often come with responsibilities such as dealing with office supplies and making coffee. She also explored volunteer opportunities including one with a local theater company, but that volunteer position came with the expectation of moving chairs, which she felt unable to do.

25. After approximately two years of Claimant's unsuccessful efforts to re-enter the workforce with Mr. Chartrand's VR services, Defendant retained Fran Plaisted, a VR counselor licensed to practice in Vermont, to perform an independent vocational evaluation ("IVE"). Ms. Plaisted interviewed Claimant concerning a variety of subjects including Mr. Chartrand's VR services, her medical situation, work history, limitations, and daily activities. Ms. Plaisted also reviewed Claimant's VR reports and medical records.

26. In January 2019, Ms. Plaisted filed a report that criticized Mr. Chartrand's VR services and suggested additional paths to employment that Mr. Chartrand and Claimant should explore before Claimant could be considered permanently and totally disabled. (JVE 400-420). Among other things, she proposed changes in the handling of discussions with prospective employers about Claimant's work restrictions and medical conditions. She also suggested changes to Claimant's cover letter and resume, further exploration of technological assistance, and the performance of a transferrable skills analysis.

27. Ms. Plaisted also recommended an overall change in VR strategy. Rather than focusing on job placement in clerical roles, she suggested targeting occupations that would still require computer use but would focus more on verbal communication. She credibly testified at the formal hearing that Claimant presented as likeable and engaged in the VR process. She also found that Claimant had a solid and ambitious work history that showed an ability to perform a wide variety of tasks, and that Claimant demonstrated a strong desire to return to work. Ms. Plaisted specifically recommended exploring occupations in the fields of sales, fundraising, plan development, mediation, counseling, and community support worker, among others.

28. Mr. Chartrand expressed openness to Ms. Plaisted's suggestions and broadened Claimant's job placement objectives to include occupations that she suggested in her January 2019 report. He considered and investigated the viability of the positions that Ms. Plaisted suggested in her report but concluded that none of them would be suitable for Claimant. For instance, he concluded that real estate positions would not be viable because of the required hand use and that financial aid counseling positions might be possible, but there were no openings in the Sebring, Florida area. (*E.g.*, JVE 438 *et seq*.). However, there was no convincing evidence that Mr. Chartrand thoroughly explored accommodations or remote working situations to allow Claimant to perform the essential tasks of these professions even with her hand use limitations.

29. Mr. Chartrand considered the possibility of Claimant returning to school for a formal degree program but did not pursue that as an option. His VR records from November

and December 2019 also show that he explored the possibility of additional retraining options as a counselor. However, he and Claimant did not pursue that path because of concerns that her history of prescription opioid use would make it difficult to obtain professional licensure in Florida. (JVE 508-516).

30. In April 2019, Mr. Chartrand suggested an assistive technology assessment with the Florida Alliance for Assistive Services and Technology ("FAAST"). He and Claimant planned to formulate new vocational goals based on the outcome of that assessment. Claimant arranged an appointment at FAAST's Orlando office, but she did not attend in part because Defendant declined to pay for her to stay one night in a hotel in Orlando.

31. Ultimately, Mr. Chartrand determined that all the career options that Ms. Plaisted had identified were unworkable for Claimant given her work history and limitations. In a report dated May 12, 2020, Mr. Chartrand noted, "I feel that we have, in a good-faith manner, exhausted the additional vocational rehabilitation options that Ms. Austin has transferable skills for that were provided in the independent report by Ms. Fran Plaisted on January 21, 2019." (JVE 521). In December 2020, Mr. Chartrand recommended, and the Department approved, suspension of VR efforts "as no viable return to work options have been found." (JVE 531).

32. Mr. Chartrand testified at the formal hearing that Claimant's most recent functional capacity evaluation ("FCE"), which found a conditional sedentary work capacity with no lifting,[3] severely limited the types of work that she can presently do. In his view, her work capacity limitations make VR unlikely to help her find a job. Although he considered the possibility of filing a new RTWP, he testified that in his view, there would be no benefit in filing a plan that would be futile.

33. I am not convinced that additional VR services would be futile or that Mr. Chartrand fully exhausted his efforts to investigate the viability of various career paths before concluding that Claimant could not perform them.

Claimant's Current Status

Medical Symptomology and Subjective Experience

34. Claimant's present condition is stable, but she still reports chronic pain in both hands and arms. She continues to treat that pain primarily with opioid medications under Dr. Jawahir's supervision.

35. Claimant has good and bad days, but her pain is easily aggravated by using her hands. This limits her ability to engage in ordinary activities like driving, walking her dog, and performing household tasks. Still, she is able to engage in those activities in some capacity. She can use her home computer and Android smartphone for emails and social media with the aid of with a stylus and voice recognition software.

[3] *See* Finding of Fact No. 38, *infra*; JME 1283-1297.

36. Despite her pain, she maintains a desire to return to work and credibly testified that she believes she can work in some capacity. When asked on cross examination whether she had "given up," she credibly responded, "no."

37. At the formal hearing, Claimant presented well. She spoke in a calm, professional tone. She expressed her thoughts cogently and in a well-organized manner.

Functional Capacity

38. Claimant underwent a total of three FCEs, in May 2016, February 2018, and April 2019. All three found that she had a sedentary, conditional sedentary, or modified sedentary work capacity with restrictions. The most recent FCE, which Anthony Pribila, PT performed in April 2019, concluded in material part as follows:

> Ms. Austin demonstrated consistent effort on all tasks with 100% consistent pain reports on activities tested… Based on the findings of this initial functional capacity assessment the client does not meet 52% of the job demands of her former position of employment which was determined to be within a medium physical demand level. Due to [her] limited ability to lift beyond two repetitions on most tasks and poor finger coordination… [she] only meets the job demands of a modified sedentary physical demand level at this time.
>
> … [I]n order for [Claimant] to be able to find gainful employment it would have to be a part-time (four hours a day) occasional sedentary position limited to occasional repetitive hand use. This would have to be in a form of employment where fine motor skills are not required due to the client's poor finger dexterity.

(JME 1283-1297).

39. I find Mr. Pribila's conclusions credible, well-supported, and broadly consistent with Claimant's testimony and the weight of other evidence in the case. Additionally, because Mr. Pribila's FCE is the most recent of the three performed in this case, I find it to be the most relevant in assessing Claimant's current capacity.

Expert Medical Testimony

Dale Stafford, MD

40. Claimant presented Dr. Stafford as an expert witness. Dr. Stafford is a family medicine physician who has practiced in the Montpelier and Berlin area since 1984. He was Claimant's family physician for many years and was involved in most aspects of her care before her move to Florida, including referrals to specialists, physical therapy, injections, and eventual surgery. He was the first physician to prescribe Claimant opioid pain medication.

41. He credibly testified Claimant was reluctant to begin opioid medication, but that he thought it was necessary to manage her pain to allow some level of functionality and sleep. He also credibly testified Claimant that continued to seek alternatives to opioids and that she struggled to work up until her termination in 2016. Dr. Stafford has never had concerns regarding treatment with narcotic medication and felt Claimant was making every effort to find alternatives to stay at her job.

42. The last time Dr. Stafford treated Claimant was in April 2018. As of that time, he felt that her pain and limitations were so severe that she would have great difficulty returning to work. He also spoke with Claimant shortly before the formal hearing in this case regarding her current symptoms, functionality, and ongoing treatment. In his opinion, nothing had changed regarding her disability. In his opinion, Claimant's continued use of opioid medications is reasonable and necessary.

Verne Backus, MD

43. Defendant presented Verne Backus, MD, as an expert witness. Dr. Backus is a board-certified occupational medicine physician with over 25 years of experience. He currently devotes most of his professional practice to forensic work, though he still sees patients occasionally.

44. Dr. Backus performed two independent medical examinations ("IMEs") of Claimant, the first in March 2015 (JME 443 *et seq.*) and the second in January 2019 (JME 1201 *et seq.*). Following his first IME, he diagnosed Claimant with chronic bilateral thumb/wrist pain, bilateral deQuervain's tendinosis and elbow tendinosis, carpal tunnel syndrome, and bilateral thumb carpometacarpal joint arthritis with associated ligamentous instability. He found all those conditions to be causally related to Claimant's work for Defendant. (JME 459). Defendant does not deny liability for those conditions. Dr. Backus's first IME also assessed whether Claimant had reached end medical result. He concluded she had not, and therefore, he did not address the extent of her permanent impairment. (*See generally id.*).

45. Following his second IME in January 2019, Dr. Backus noted the lack of progress in Claimant's bilateral thumb and wrist pain and a lack of anatomical explanation for that pain. He attributed her continued pain to somatoform disorder, a psychological condition that in his opinion was not causally related to her employment, but which in his opinion could complicate her recovery. He also opined that Claimant's continued use of opioids was not reasonable. (*See* JME 1236-38).

46. With respect to his somatoform disorder diagnosis, Dr. Backus acknowledged that he is not a psychologist and would not treat a patient for psychological disorders. However, he considers psychological factors in every IME and credibly testified that he can recognize somatoform disorder even if he would not treat it. He based his diagnosis of this condition primarily on Claimant's persistent pain that was not well explained by objective findings but, in his opinion, was partly explained by psychological factors. He noted non-physiological findings such as muscle weakness giveaway and pain behaviors that were grossly disproportionate to the underlying wrist issue, particularly since she had undergone bilateral surgery that corrected the

anatomical and structural problems. He also noted that multiple orthopedic specialists had examined her and "have not been able to explain her symptoms from anatomic abnormalities that require additional treatment." (JME 1237). Thus, he concluded that Claimant's primary problem "is at this time the pain in the form of a somatic symptom disorder."[4] (*Id.*). He could not state exactly when Claimant's somatoform disorder developed, but he credibly testified that it was not apparent when he first examined her in 2015.

47. With respect to the causal relationship between Claimant's somatoform disorder and her employment, Dr. Backus testified that it is not known why that disorder presents when it does, and that pain syndromes develop in some individuals but not others for personal reasons unique to the individual. He credibly testified that while the precise causes of somatoform disorder are unknown, narcotics are a risk factor. That said, he did not identify any potential causes of Claimant's somatoform disorder other than her injury and narcotic medications.

48. Dr. Backus believes that Claimant's work capacity and opioid use are interrelated and that her dependency on opioids sets her up to encounter additional problems. He credibly characterized her opioid history as showing several years of moderate to high doses of oxycodone. In Dr. Backus's experience, these drugs are typically reserved for use approximately one or two months after surgery, after which patients wean off. He credibly testified that long-term use of these drugs increases the risks of dependency, overdose, the need for more opioids to feel normal, and analgesic hypersensitivity. He found no evidence that Claimant's opioid use was doing anything other than perpetuating her dependency on those drugs. Additionally, he considers her continued opioid use likely to complicate her ability to effectively respond to treatment for her somatoform disorder. (*See* JME 1343).

49. In a Supplemental Report to his second IME (JME 1353 *et seq*.), Dr. Backus proposed a tapering plan, including a slow version and a fast version, to gradually decrease Claimant's opioid dosage and eventually cease her opioid use. He credibly testified that tapering is difficult but that patients generally benefit.

50. Although not specifically mentioned in his tapering plans, Dr. Backus had noted in an earlier supplement to his second IME report that cognitive behavioral therapy and mindfulness-based therapy with appropriate pharmacology managed by a mental health treatment specialist or multidisciplinary team would be necessary parts of Claimant's treatment plan. (JME 1343).[5] He credibly testified at the formal hearing

[4] Dr. Backus clarified at the formal hearing that somatoform disorder is the updated terminology for what was formerly referred to as somatic symptom disorder.

[5] Dr. Backus acknowledged that Claimant's medical records showed that she was seeing a psychiatrist, but he credibly noted that those records did not reflect any ongoing therapy beyond routine medication management.

that without such treatment, Claimant's chances of recovery are poor, but that if those services were available to her, her work capacity would likely improve.[6]

51. Additionally, Dr. Backus believes that keeping Claimant out of the workforce is not productive to managing her conditions and that she should ultimately be able to work in a sedentary capacity with limitations on activities such as gripping. However, he credibly acknowledged that getting Claimant into such a position would be much more likely if she ceased her opioid use.

52. I find Dr. Backus's testimony credible, well-supported, and persuasive in all respects.

Vocational Rehabilitation Expert Testimony

John Bopp

53. Claimant presented John Bopp as an expert witness in the field of VR to support her claim that she is permanently and totally disabled. Mr. Bopp is a VR professional affiliated with Rehabilitation Service Associates in Henniker, New Hampshire. He has worked in the VR field for approximately 45 years and currently focuses primarily on consulting services, mostly in the social security context.

54. Mr. Bopp performed a vocational assessment of Claimant, which included meeting with her, reviewing several hundred pages of her medical records, reviewing Mr. Chartrand's VR file, Claimant's deposition, and Fran Plaisted's report and deposition.

55. In Mr. Bopp's opinion, Claimant has no reasonable prospect of being hired for or sustaining regular, gainful employment. In support of that opinion, he noted that Claimant had worked with Mr. Chartrand for approximately five years and that the search for semi-skilled jobs was unsuccessful despite Claimant's good faith efforts. He also noted that Claimant's subsequent efforts targeting skilled occupations in Florida were also unsuccessful.

56. Mr. Bopp does not believe that going up the VR hierarchy[7] or exploring more assistive technologies would have strong probabilities of success, due largely to the severity of Claimant's limitations for handling and fingering. While he acknowledged that voice recognition software has improved in recent years, he testified that it is still not a cure-all. In his opinion, programs such as Dragon speech recognition software work reasonably well for word processing, but their functionality is not ideal for web applications like Google or Indeed.

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[6] Defendant has denied liability for cognitive behavioral therapy of the kind Dr. Backus recommends. *See* Denial of Benefits (Form 2) dated March 19, 2019.

[7] Here and elsewhere in this opinion, the "VR hierarchy" refers to the progression of vocational goals set forth in the Department's Vocational Rehabilitation Rule 55.2000 *et seq.*, which are in descending order of preference as follows: (1) return to the same employer in a modified job or a different job; (2) return to a different employer in a modified or different job; (3) on-the-job training; (4) new skill training or retraining; (5) educational or academic programs; and (6) self-employment.

57. Mr. Bopp did not perform a transferable skills analysis of Claimant. Based on his review of her clinical history and his vocational interview of her, he formed the opinion that she is not even minimally close to having the ability to perform the quality, quantity, or dependability of work that would meet the demands of competitive employment. Thus, in his view, assessing Claimant's transferable skills would not be relevant.

58. In particular, he found that there were no "semi-skilled" sedentary jobs in the Dictionary of Occupational Titles ("DOT") that did not require handling or fingering; most sedentary jobs in that publication that only required occasional handling or fingering were in the "skilled database." (*See* JVE 546). He credibly acknowledged that the DOT was a U.S. government publication that had not been updated since 1991 but testified that the publication is still widely used in the VR field. He explained that the DOT is not a "cookbook" that "spits out" jobs, and that VR professionals still need to use their professional judgment in drawing inferences from that publication.

59. In Mr. Bopp's view, Claimant is unemployable and there are no further vocational rehabilitation services that are likely to improve her chances for obtaining and maintaining regular, gainful employment. I do not find that this opinion accords with Claimant's own presentation and work history or with Mr. Priblia's 2019 FCE that found some work capacity. Nor do I find that Mr. Bopp's analysis adequately accounts for changes to the labor market since 1991 or that he adequately considered potential approaches to accommodate Claimant's physical limitations, whether with assistive technology or otherwise. I therefore find Mr. Bopp's analysis generally unpersuasive.

Fran Plaisted

60. Defendant presented Fran Plaisted as a VR expert witness. Ms. Plaisted is a CRC with a master's degree in rehabilitation counseling and approximately 30 years of experience providing VR services to injured workers in Vermont, as well as over ten years testifying as a forensic expert. She testified at the formal hearing about the IVE she performed, as discussed *supra* at Findings of Fact Nos. 25-27.

61. Ms. Plaisted testified that Claimant had a strong work history and demonstrated an above average skill set "by a long shot." In her view, Claimant had above average verbal and mathematical intelligence and good clerical skills, as well as strong "people skills." In her opinion, although Claimant's hand use limitations pose some challenges to her reemployment, Claimant has many assets for employment, including a history of learning, adaptation, and growth in a variety of jobs, as well as a strong motivation to return to work.

62. In Ms. Plaisted's opinion, the VR services that Mr. Chartrand provided to Claimant were "subpar," as he focused so much of his efforts on direct placement in clerical positions where keyboarding would be a primary work activity. In her view, Mr. Chartrand did not provide Claimant with full access to the complete hierarchy of VR services including formal educational programs.

63. Ms. Plaisted acknowledged that after her January 2019 report, Mr. Chartrand explored many of the specific jobs that Ms. Plaisted recommended for Claimant. She also acknowledged that she had not taken steps to determine whether each of the jobs she recommended that Claimant explore actually existed in the Sebring, Florida area. However, Ms. Plaisted testified that Mr. Chartrand's services after her January 2019 report did not reflect the broader change in approach that she had recommended. In her view, there was not enough evidence of a collaborative approach to create a new focus toward a workable path to reemployment.

64. Among other things, Ms. Plaisted believes that Claimant's resume and cover letter should have been rewritten to highlight her varied work history. She also recommended computer applications courses as well as remedial classes in mathematics or English to provide avenues for Claimant to identify career options that she might be able to pursue within her limitations.

65. Ms. Plaisted credibly acknowledged that Claimant's physical capacity has declined over time and noted that everyone agrees that she is limited in her ability to perform repetitive motions or any role with a required activity level greater than sedentary. However, she noted that Claimant had no "positional" restrictions and emphasized her strong motivation toward reemployment.

66. With respect to Claimant's opioid use, although Ms. Plaisted is not a medical professional, she testified that in her experience, weaning injured workers off narcotics can be helpful and testified that she would encourage Claimant to talk to her doctors about reducing her use to see how such a reduction would impact her job performance.

67. Ms. Plaisted's ultimate opinion is that because VR services were not fully exhausted in this case, Claimant cannot be considered permanently and totally disabled. I find this opinion to be credible, persuasive, and well-supported.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights she presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). She must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Claimant's Continued Use of Opioid Medications Is Not Reasonable

2. Notwithstanding a workers' compensation claimant's burden of proof in the first instance, once an employer accepts a claim and pays benefits, the employer incurs the burden to establish a sufficient basis for discontinuing benefits. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).

3. 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).

4. In the context of opioid medications, the Vermont Department of Health (VDOH) promulgated its first rule governing the prescribing of opioids for chronic pain in 2015.[8] It amended that rule in 2017 to encompass both acute and chronic pain.[9] The VDOH Rule established various "best practices" for opioid prescribers, including the performance of a risk assessment, consideration of non-opioid alternatives, urine testing and pill counts, and consultations with appropriate specialists. *Id.*

5. In 2016, this Department incorporated the VDOH Rule as its best practices guideline for determining the reasonableness of opioid treatment in the workers' compensation context. The amendments to the Workers' Compensation Rules also 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.

6. However, the Department has held that the Workers' Compensation Rule amendments discussed above affect the parties' substantive rights and responsibilities and not solely the method of obtaining redress or enforcing their rights. Accordingly, the rule amendments cannot not be applied retroactively to claims for injuries that occurred before the amendments' effective date. S*ee Wiggins v. Ben & Jerry's Homemade,*

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

[9] *Rule Governing the Prescribing of Opioids for Pain,* Code of Vermont Rules 13-140-076. The Department of Health updated the rule on March 1, 2019.
https://www.healthvermont.gov/sites/default/files/documents/pdf/REG_opioids-prescribing-for-pain.pdf

Inc./Unilever, Opinion No. 03-20WC (February 11, 2020) (citing 1 V.S.A. § 214(b)(2); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988); *Agency of Natural Resources v. Towns*, 173 Vt. 552, 555 (2001); *Smiley v. State of Vermont*, 2015 VT 42, ¶ 18; *Bergeron v. City of Burlington,* Opinion No. 14-18WC (October 15, 2018)). Because the claimant's injury in *Wiggins*, *supra*, occurred before the amendments, the employer bore the burden to prove that its discontinuance of Claimant's opioid medications was warranted. *See id.*, Conclusions of Law Nos. 9-11.

7. Likewise, in this case, Claimant's injury occurred in 2013, before the opioid-related amendments discussed above. Therefore, as in *Wiggins*, the amendments do not apply to this claim, and Defendant bears the burden to prove that Claimant's opioid medications are not reasonable medical treatment for her accepted workplace injury.

8. The parties have offered conflicting expert medical opinions, from Drs. Stafford and Backus, respectively, as to the reasonableness of Claimant's prescription opioid medications for treatment of her 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).

9. Relying primarily on the third factor, I find Dr. Backus's opinion the most persuasive. I find his opinion that there is no evidence that Claimant's opioid use is doing anything other than perpetuating her drug dependency to be persuasive and well-supported by the totality of the medical record and consistent with the concerns that other physicians who have examined Claimant, including Drs. White and Johansson, have expressed concerning her opioid use. I also find his analysis of the risks of dependency and overdose particularly relevant given the diagnoses in Claimant's medical records of opioid dependency and the required prescription for Narcan. I also find his testimony that tapering is difficult but that patients generally benefit credible and persuasive.

10. While it may have been reasonable for Dr. Stafford to prescribe Claimant opioids in the first instance, that does not mean that they remained reasonable and necessary indefinitely. Indeed, Dr. Stafford's records make it clear that he intended Claimant to eventually taper off these drugs. *See* Finding of Fact No. 17, *supra*. Dr. Stafford has not treated Claimant since the spring of 2018, and although he spoke with her briefly before the formal hearing, I do not find that he was in a strong position to fully evaluate her current treatment plan.

11. Dr. Jawahir, as Claimant's current treating provider managing her opioid medications, would be in a better position than Dr. Stafford to explain the rationale for Claimant's continued opioid use, but he did not testify. While his medical records express an opinion that her continued use of those medications remains a reasonable part of her

treatment plan, they also express a need for Claimant to taper her use of those drugs. In any event, his records do not contain the kind of analysis in support of his opinion that opioids remain reasonable that would allow close evaluation under the *Geiger* factors set forth above without the aid of his testimony.

12. I do not find that Dr. Stafford's testimony or Dr. Jawahir's medical records overcome the strength and persuasiveness of Dr. Backus's opinions concerning Claimant's opioid use. I conclude that Dr. Backus's testimony satisfies Defendant's burden to prove that Claimant's ongoing opioid use is not reasonable medical treatment.

13. That does not end the analysis, however. Workers' Compensation Rule 12.1720 provides that if a proposed discontinuance pertains to narcotic or other medications for which a safe taper plan is medically necessary, the employer must provide "credible medical evidence establishing that the date of its proposed discontinuance comports with such a plan. Additionally, Workers' Compensation Rule 12.1730 provides that the Department "shall not approve a proposed discontinuance under this Rule unless credible medical evidence establishes that the effective date thereof comports with a safe taper plan as required by Rule 12.1720."

14. Here, Dr. Backus has proposed two alternative tapering plans, one long and one short. Before Claimant's opioid medications may be discontinued, Defendant must submit an updated proposed discontinuance date and specify which taper plan it proposes. It must also submit sufficient information to determine whether the discontinuance date is reasonable. In so doing, Defendant shall bear in mind the concerns the Department expressed in *Wiggins*, *supra*:

> Not every patient responds to the discontinuance of medications in the same way. Thus, in fashioning a safe taper plan and proposed discontinuance date, employers and their insurance carriers must be mindful of the injured worker's specific medical history and circumstances and should build a reasonable amount of flexibility into the taper plan and the discontinuance date.

See id., Conclusion of Law No. 19.

15. Specifically, given Dr. Backus's diagnosis of somatoform disorder, other providers' diagnoses of idiopathic pain disorders, and Dr. Backus's express recommendation for psychological treatment, any new request to discontinue Claimant's opioid medications must expressly address whether, and if so, what, psychological or psychiatric services may be necessary to ensure such plan's success. Defendant shall also specifically address whether its previous denial of psychological services would defeat the viability of any tapering plan it proposes.

Permanent Total Disability Under Vermont's Workers' Compensation Act

16. Under Vermont's workers' compensation statute, claims for permanent total disability benefits are governed by 21 V.S.A. § 644, which provides a list of six enumerated

injuries that conclusively constitute permanent and total disability.[10] It also provides for other non-enumerated injuries to give rise to a claim for permanent total disability benefits based on the specific facts of each case:

> (b) The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the Commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education, and mental capacity.

17. The Workers' Compensation Rules provide additional guidance on permanent total disability. The applicable rule in effect at the time of Claimant's injury provided as follows:

> *Rule 11.3100 Permanent Total Disability – Odd Lot Doctrine*
>
> A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.
>
> A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.[11]

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[10] At the time of Claimant's injury, those enumerated injuries were as follows: (1) the total and permanent loss of sight in both eyes; (2) the loss of both feet at or above the ankle; (3) the loss of both hands at or above the wrist; (4) the loss of one hand and one foot; (5) an injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and (6) an injury to the skull resulting in incurable imbecility or insanity. Effective July 1, 2014, the language "incurable insanity or imbecility" in 21 V.S.A. § 644(a)(6) was replaced with "severe traumatic brain injury causing permanent and severe cognitive, physical, or psychiatric disabilities." *See* 2014 Vermont Laws No. 96 (S. 27).

[11] Effective August 1, 2015, the Workers' Compensation Rules were amended and renumbered. The current rules governing odd lot permanent total disability claims are Rules 10.1700 through 10.1217. Rule 10.1710 currently provides that "[u]nless the extent to which an injured worker's functional limitations preclude regular, gainful work is so obvious that formal assessment is not necessary," an odd-lot permanent total claim should be supported by a functional capacity evaluation and a vocational assessment. The Department has noted that this additional language merely "codifies preexisting Department precedent as determined under the prior rule." *See Bartlett v. Trapp Family Lodge*, Opinion No. 02-18WC (January 31, 2018) (citing *Bohannon v. Town of Stowe*, Opinion No. 01-15WC (January 5, 2015)).

18. Additionally, the Department has held that

> A finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's physical capabilities are accurately assessed, and second, all corresponding vocational options are comprehensively considered and reasonably rejected.

Rowell v. Northeast Kingdom Community Action, Opinion No. 17-11WC (July 6, 2011), Conclusion of Law No. 13.

19. In this case, Claimant has presented a strong and varied employment history. She has successfully worked in jobs demanding high levels of responsibility in multiple fields and demonstrated a high level of resourcefulness and learning capacity. Moreover, her past employment has not been reliant on manual labor. Although typing and keyboarding have been important tasks in several of her prior roles, those activities have not been the primary purpose for which her positions existed. Instead, her past roles have demanded cognitive and organizational skills as key strengths.

20. Importantly, Claimant credibly testified that she believes that she can work in some capacity. *See* Finding of Fact No. 36. Her most recent FCE supports her self-assessment in this regard. *Cf.* Findings of Fact Nos. 38-39.

21. Moreover, I am persuaded by Dr. Backus's opinion that if Claimant successfully ceases her opioid usage, her work capacity will likely improve. This opinion is not only convincing on its face but also finds support from the reports of other physicians who have examined Claimant, including Dr. White.[12]

22. Although Dr. Jawahir's medical records reflect an opinion that Claimant is "totally disabled," *see* Finding of Fact No. 19, *supra*, there is no temporal dimension to that assessment; nothing in his notes reflects a judgment that Claimant is *permanently* and totally disabled. Even if he does hold such a belief, his records do not develop the reason for that opinion, and he did not testify at the formal hearing to elaborate. Additionally, while Dr. Stafford testified that Claimant's pain levels would cause her great difficulty returning to work, I do not find that this opinion, even if credited, would carry Claimant's burden to show that she is permanently and totally disabled. Many things are difficult yet feasible.

[12] With respect to Claimant's future work capacity, it is true that Defendant has already paid permanent partial disability benefits based on Dr. White's IME that found Claimant to be at end medical result for her upper extremity injuries. However, in that same IME, Dr. White expressed a distinction between Claimant's pain itself and the underlying injury and opined that her pain experience rather than the structural problems in her hands was the main problem giving rise to her limitations. Thus, Defendant's payment of benefits based on Dr. White's findings did not prejudice its right to contend that Claimant's work capacity might still improve.

23. That is not to diminish the difficulty of returning Claimant to the labor force, however. Her multi-year effort to regain employment with the help of Mr. Chartrand's VR services has been unsuccessful. However, a significant portion of those services involved efforts to place Claimant in positions where keyboarding responsibilities would be central to the job.

24. After Ms. Plaisted produced her 2019 report, Mr. Chartrand explored some additional occupations and ruled them out, but I am unconvinced that Claimant is truly incapable of serving in many of the roles that he excluded such as real estate agent or, if Claimant successfully ceases her opioid use, counselor.

25. While I find it credible that most sedentary occupations generally require some hand use, there are often some manual tasks that are non-essential, delegable to coworkers, or manageable with assistive technology. I am not convinced that there was an adequate effort during Claimant's VR program to separate truly essential from ancillary tasks, or to devise accommodations before rejecting potential occupations as impossible for Claimant to perform.

26. Nor am I convinced that assistive technologies to help Claimant reenter the workforce were thoroughly explored. The evidence was convincing that Dragon software is not a cure-all, but there was no evidence that Dragon controls the entire marketplace of technologies that might help Claimant get back to work.

27. Defendant certainly bears some blame in the failure to fully explore assistive technologies, as it refused to support Claimant's visit to FAAST based on the cost of a night in a hotel. Going forward, Defendant is strongly urged to be accommodating in the efforts to help Claimant reenter the labor force. However, concluding that Claimant is permanently and totally disabled based on hand use limitations without evidence of a deeper query into the set of potentially available assistive technologies—regardless of who is to blame for the limitations of that query—would be premature.

28. Based primarily on the lack of adequate exploration of alternative career paths and assistive technologies, I find Ms. Plaisted's opinion that VR services were not exhausted in this case to be persuasive and consistent with the weight of the evidence. For those same reasons, I am not persuaded by Mr. Bopp's opinions that Claimant is unemployable and that no additional VR services would help her return to work. Accordingly, I conclude that not all occupational options have been "comprehensively considered and reasonably rejected." *Cf. Rowell*, *supra*, Conclusion of Law No. 13.

29. Considering factors specific to Claimant, including her training, experience, age, occupational history, mental capacity, functional limitations, and pain levels, as provided in Workers' Compensation Rule 11.3100, *supra*, I cannot conclude that she is permanently and totally disabled from obtaining regular, gainful employment.

30. However, in light of my conclusion that VR services have not been exhausted, either party may request that VR services resume pursuant to Vocational Rehabilitation Rule

56.3000. If such services resume and a more comprehensive VR program remains unsuccessful in returning Claimant to a position where she can gain and maintain regular, gainful employment, she may renew her claim for permanent total disability benefits.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's continued use of opioid medications is not reasonable medical treatment. Defendant may begin the process to discontinue medical benefits for those medications with a discontinuance date and a taper plan consistent with this opinion.

Claimant's claim for permanent total disability benefits is denied without prejudice to her right to reassert that claim in the future if her situation changes.

DATED at Montpelier, Vermont this 12th day of August 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.