STATE OF VERMONT
DEPARTMENT OF LABOR

Bonnie Brown	Opinion No. 16-21WC
v.	By: Stephen W. Brown Administrative Law Judge
St. Johnsbury Dental Associates	For: Michael A. Harrington Commissioner
	State File No. MM-62035

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Daniel D. McCabe, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Do the 2017 amendments to 21 V.S.A. § 601(11)(J) govern the compensability of physical sequelae to psychological injuries, such as cardiac events following work-related emotional distress?

2. If so, can Claimant demonstrate that she experienced work-related stress that was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations, as required by 21 V.S.A. § 601(11)(J)(i)(I)?

3. If so, is Claimant's claim barred because her alleged stressors result from "any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer," as would defeat liability under 21 V.S.A. § 601(11)(J)(ii)?

EXHIBITS:

Claimant's Exhibit 1:	Affidavit of Bonnie Brown
Defendant's Exhibit A:	Affidavit of Dr. Darren Boles
Defendant's Exhibit A to Exhibit A:	Disciplinary Notice dated March 3, 2020
Defendants Exhibit B:	Medical Record dated March 3, 2020
Defendant's Exhibit C:	Correspondence from Jeffrey S. Garrett, MD to Claimant's Counsel dated December 21, 2020
Defendant's Exhibit D:	Printout of *Bedini v. Oakley Frost, M.D.*, Opinion No. 40-94WC (October 14, 1994)

BACKGROUND:

Except where noted below, there is no genuine dispute as to any of the following material facts:

1. Defendant is a dental practice with a principal place of business in St. Johnsbury, Vermont owned by Darren Boles, DDS. Claimant knew Dr. Boles before she began working for Defendant, having previously worked for him as a dental hygienist in Laconia, New Hampshire. (*See* Claimant's Statement of Undisputed Facts, "CSUF," 1-2; Claimant's Exhibit 1).

2. As of 2019, Claimant resided with her family in South Carolina. At that time, Defendant approached her about the possibility of returning to Vermont to set up a dental hygiene practice in its St. Johnsbury, Vermont office. Claimant accepted the offer and relocated to Vermont. In doing so, she incurred significant personal expense, and her move involved multiple phases. She moved to Vermont without her husband because they had not yet sold their home in South Carolina. Upon arriving in Vermont, she initially resided in temporary housing previously used by Defendant's former CEO. She began working for Defendant as a registered dental hygienist in December 2019. (*See* Defendant's Statement of Undisptued Facts, "DSUF," 1; Defendant's Exhibit A; CSUF 3-6; Claimant's Exhibit 1).

3. Shortly after she began working for Defendant, Claimant formed the impression that another employee, office manager Jamie Kemper, was performing the job that Defendant hired Claimant to perform. Within the first few months of her employment, she developed a contentious relationship with Ms. Kemper. (*See* CSUF 7-8; Claimant's Exhibit 1).

4. The combination of moving from South Carolina to Vermont, living apart from her husband in transitional housing owned[1] by Defendant, not having the job she expected, and a contentious relationship with her office manager caused Claimant to experience psychological stress. (*See* CSUF 8; Claimant's Exhibit 1).

5. On March 2, 2020, Claimant was performing a periodontal evaluation with a dental assistant. In Claimant's view, the assistant was charting incorrectly. Claimant restarted the procedure from the beginning and recorded the data herself. Because of time constraints, the patient's scheduled treatment was not completed that day. (*See* CSUF 9-11; Claimant's Exhibit 1).

6. On March 3, 2020, Ms. Kemper approached Claimant regarding two periodontal evaluations reflected in that patient's records. Claimant told her about the dental assistant's errors and stated that certain work had to be redone to ensure the records were accurate. (*See* CSUF 12-13; Claimant's Exhibit 1).

[1] Though not material to the present motions, the parties dispute certain aspects of Claimant's transitional housing situation. Specifically, Claimant states that she shared a home with Defendant's former CEO. Defendant states that it offered Claimant temporary housing that its former CEO had previously utilized, but it does not believe that Claimant's stay in that housing ever overlapped with the former CEO's usage of that property.

7. According to Claimant, Ms. Kemper replied with words to the effect of "I'm going to write you up because sending two periodontal charts to the insurance three minutes apart is fraud." Claimant again responded that the dental assistant's mistake was simply a mistake and not fraud. (*See* Claimant's Exhibit 1).

8. Later that day, Ms. Kemper issued Claimant a written Disciplinary Notice, stating in relevant part as follows:

> There were two Periodontal chartings from 3/2/2020, one that shows the full mouth charted with probing depths only and a second taken on the same visit with the upper and lower left quads with probing depths only. The perio charting that contained only the left side all had increased pocket depths from the original charting. When Bonnie (Bo) Brown was asked why there was two perio chartings on the same day with two different numbers on numerous teeth, she stated that the assistant messed up the first charting and before she did the second charting she "debrided the calculus and then re-probed." I then asked her why the patient chart reflected quadrant scaling and root planning [*sic*] if she only did debridement? She then stated "no, I just picked off the calculus and re-probed, I scaled." While explaining to Bo that it is not appropriate to charge the patient for one procedure and do another, not fully complete a procedure or change information on a procedure, she sharply elevated her voice and stated "you can't tell me what to do, I'm going to Dr. Boles" and aggressively snatched the periodontal charting paperwork from my hand and stormed out of my office.

See Defendant's Exhibit A to Exhibit A.

9. After receiving the disciplinary notice, Claimant presented to Dr. Boles, visibly upset. (DSUF 3; Defendant's Exhibit A). The parties dispute what happened during the conversation that followed, but it is undisputed that Claimant found it stressful.

   a. According to Defendant, Claimant gave Dr. Boles an ultimatum and stated she would leave Defendant's employment if Ms. Kemper stayed. According to Defendant, Dr. Boles advised Claimant that Ms. Kemper would not be asked to leave. Claimant then collected her personal belongings and left the building. (DSUF 3-4; Defendant's Exhibit A).

   b. Claimant denies giving Dr. Boles any ultimatum relating to Ms. Kemper's continued employment. According to Claimant, the meeting was with Ms. Kemper, Dr. Boles, and Dr. Boles's wife, Suzanne Boles. According to Claimant, during the meeting, Mrs. Boles repeatedly stated, "I need Jamie." (CSUF 18-19; Claimant's Exhibit 1).

10. Claimant's stress level escalated after being presented with a disciplinary notice that she considered inaccurate, feeling that she was being mistreated by Dr. Boles and his wife, and realizing that she may need to find a new job and move again. (*See* CSUF 20; Claimant's Exhibit 1).

11. After she left the meeting, Claimant began experiencing chest pain. She sent a text message to Mrs. Boles about that pain approximately one or two hours after the meeting ended. (*See* CSUF 21; Claimant's Exhibit 1; DSUF 5; Defendant's Exhibit A).

12. Claimant presented to Northeastern Vermont Regional Hospital that afternoon with "sudden substernal chest pain rating [*sic*] to her left arm that began roughly 30-35 minutes ago after a stressful event at work." (DSUF 6; Defendant's Exhibit B).

13. Claimant subsequently obtained an expert medical opinion from cardiologist Jeffrey S. Garrett, MD. Based on his review of Claimant's medical records, Dr. Garrett expressed the following opinions in a letter to Claimant's counsel:

    (1) Bonnie Brown does not have significant underlying coronary artery disease.

    (2) She did have a myocardial infarction due to stress. This is called a Takotsubo type cardiomyopathy from stress and not associated with underlying significant coronary disease. EF was 30% to 35%, left main was normal, LAD showed minor luminal irregularities, and left circumflex minor luminal irregularities. There was 100% stenosis of a small distal subbranch of the right coronary artery, which was not consistent with the amount of cardiomyopathy present.

    (3) Bonnie Brown's presentation is consistent with a Takotsubo type cardiomyopathy, likely due to sudden stress and epinephrine release, which occurred in the workplace. She did not have significant preexisting coronary artery [*sic*].

    (4) The workplace stress resulted in this event and irreversible myocardial cell death and damage.

    (CSUF 22; DSUF 7; Defendant's Exhibit C).

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). 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). Where the parties have filed cross motions, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990).

Compensability of Claims Arising from Psychological Stressors

2. Vermont's workers' compensation laws require employers to pay workers' compensation benefits when "a worker receives a personal injury by accident arising out of and in the course of employment." 21 V.S.A. § 618(a).

3. "Most compensable claims originate with a physical stimulus, a slip and fall, for example, and result in a physical injury, such as a disc herniation or a ligament tear." *B.H. v. State of Vermont*, Opinion No. 17-17WC (December 1, 2017). In some cases, however, physical stimuli cause or aggravate psychological injuries. In such cases, known as "physical-mental claims," the psychological injuries are subject to the same analysis as physical injuries. Thus, if a claimant proves that a workplace physical stimulus caused a psychological injury, then the psychological sequela is compensable. *See generally id.*; *see also Omerovic v. University of Vermont Medical Center*, Opinion No. 18-19WC (October 15, 2019) (aggravation of preexisting psychological condition following physical attack at work compensable; to prevail on this claim, claimant only required to "show that her work-related physical injury aggravated or accelerated her preexisting psychological conditions").

4. By contrast, claims arising from purely psychological stimuli, or "mental-mental" claims, are subject to a more rigorous analysis. Most significantly, the Department and Vermont courts have required claimants alleging mental-mental claims to show that the stresses giving rise to their claimed psychological injuries were unusual and extraordinary. *See Bedini v. Frost*, 165 Vt. 167, 678 (1996); *Crosby v. City of Burlington*, 2003 VT 107; *B.H. v. State of Vermont*, Opinion No. 17-17WC (December 22, 2017). The Vermont Supreme Court has recognized that reasonable policy concerns justify applying a more rigorous standard to mental-mental claims than to physical-mental claims:

> … [M]edical authorities agree that the precise etiology of most mental disorders is inexplicable. Because a mental injury could have resulted from such diverse factors as social environment, culture, heredity, age, sex, family relationships, and other interpersonal relationships, as well as employment, a high degree of uncertainty exists in the diagnosis of cause. The unusual-stress standard also permits a more objective inquiry into the cause of the injury. Greater objectivity is necessary in mental injury cases because the claimant's subjective impression that work-related stress caused her injury often forms the basis for the medical opinion that the injury was caused primarily by work-related stress. … [I]t protects against nondetectable fraudulent claims and prevents the conversion of workers' compensation into general health insurance.

Bedini, *supra*, 165 Vt. at 169–70.

5. The comparison class, or "control group," against which Vermont law assesses a given psychological stressor's extraordinariness has changed over the years. For instance, in 1996, the Vermont Supreme Court in *Bedini*, *supra*, affirmed the Department's

decision to require claimants asserting mental-mental claims to "show that the work-related stress was greater than that experienced by all employees." *Id.* Later, in 2003, that Court endorsed an approach which compared a claimant's stress "to that of other similarly situated employees performing the same or similar work." *See Crosby*, *supra* 2003 VT 107, ¶ 17.

6. For all mental-mental injuries that occurred on or after July 1, 2017, the version of 21 V.S.A. § 601(11), as amended on that date, controls. *See Bergeron v. City of Burlington*, Opinion No. 14-18WC (October 15, 2018). As amended, that statute provides in relevant part as follows:

> (J)(i) A mental condition resulting from a work-related event or work-related stress shall be considered a personal injury by accident arising out of and in the course of employment and be compensable if it is demonstrated by the preponderance of the evidence that:
>
> > (I) the work-related event or work-related stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations; and
> >
> > (II) the work-related event or work-related stress, and not some other event or source of stress, was the predominant cause of the mental condition.
>
> (ii) A mental condition shall not be considered a personal injury by accident arising out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

<u>*Compensability of Physical Sequelae from Psychological Stimuli*</u>

7. This case presents the question of whether Section 601(J), *supra*, applies to cases where workplace psychological stressors cause physical, rather than purely psychological, sequelae.

8. Claimant argues that the traditional "mental-mental" versus "physical-mental" dichotomy is a poor match for such situations and that the Department should recognize a third category of "mental-physical" claims and asks that the Department not require proof that the stressor giving rise to such claims was extraordinary or unusual. In support of that position, she cites the Connecticut Supreme Court's decision in *McDonough v. Connecticut Bank & Tr. Co.*, 204 Conn. 104 (1987), which held that a stress-related cardiac injury would be compensable if "a sudden, unusual, and unexpected employment factor was a substantial factor in causing the claimant's condition." *Id.* at 117 (affirming commissioner's conclusion that unexpected events at work were a substantial factor in precipitating claimant's disease).

9. I see no need to adopt a new analytic framework here. It is true that by its terms, the 2017 amendment to Section 601(11)(J) applies to claims for "mental conditions." However, before the passage of those amendments, the Department had developed a framework for assessing alleged stress-induced heart attacks that substantially mirrored its analysis of psychological injuries: for a heart attack stemming from combined physical and psychological workplace stress to be compensable, the injured worker had to prove that he or she experienced an "unusual or extraordinary exertion or stress." *See, e.g., Mattson v. C.E. Bradley Laboratories*, Opinion No. 52-95WC (November 2, 1995) (heart attack stemming from work-related psychological stress and physical exertion compensable; "[t]he stress and anxiety which resulted from the extraordinary coupling of claimant's truck with the loading dock, combined with the physical exertion required to try to pry them apart," met the "extraordinary stress or exertion" standard); *Emerson v. Transport Dynamics/Cigna Insurance Co.*, Opinion No. 40-02WC (September 27, 2002) (heart attack from workplace stress compensable; claimant had driven of over 2,000 miles in 56 hours with minimal rest and had "an emotional outburst with his employer," which created "stress greater than the usual work situation[;]" expert medical testimony supported causal nexus between those workplace stressors and his heart attack); *cf. also Birchmore v. Whiting Volunteer Fire Dept.*, Opinion No. 26-03WC (May 23, 2003) (parties disputed whether then-recent amendments to Section 601 required firefighter claimants in heart attack claims to prove that purely psychological stressors were extraordinary; Department noted that the extraordinary stress standard applied to non-firefighters and held that "[e]ven if the unusual stress standard were applicable to this case, the Claimant has met that standard as well with the stress associated with the change in notifying firefighters of emergencies.").

10. Although *Emerson*, *Matson*, and *Birchmore* were all decided before the 2017 amendments to 21 V.S.A. § 601(J), they were decided within a context of well-established Vermont jurisprudence requiring proof of extraordinary or unusual stress in claims arising from psychological stressors, at least for non-firefighters. Indeed, the Department in *Emerson* cited the Supreme Court's decision in *Bedini*, *supra*, in support of its decision to follow its own precedent and apply a heightened standard to claims alleging stress-induced heart attacks instead of simply requiring proof of causation as the claimant had requested. *See id.*, Conclusions of Law Nos. 5-6.

11. The essence of the Department's analysis in *Emerson* was that the claim was compensable because the workplace psychological stressors were "greater than the usual work situation." *See id.* Although couched in slightly different language, this standard is functionally indistinguishable from the then-applicable *Bedini* standard for mental-mental claims, which required proof that a claimant's "work-related stress was greater than that experienced by all employees." *Cf. Bedini, supra*, at 169-70.

12. Moreover, the Department's analysis in *Emerson* is consistent with the 2017 amendment to 21 V.S.A. § 601(J). Both *Emerson* and the amended statute require proof of an extraordinary stressor as a prerequisite to compensability for claims arising from purely psychological stimuli. The amended statute merely adds specificity to the analysis by establishing the control group against which a stressor's extraordinariness

is measured (average employee across all occupations), providing a standard causation standard (predominant cause), and codifying pre-amendment decisional authority holding that certain adverse employment actions like discipline and termination taken by employers in good faith are not sufficiently extraordinary to form the basis of a compensable claim. *See generally id.*[2]

13. Some states have expressly recognized a separate category of "mental-physical" claims and have chosen to subject such claims to a different analysis than for "mental-mental" or "physical-mental" claims.[3] Vermont has not developed a separate standard for this type of claim.[4] Instead, it has analyzed such claims under the same essential framework as mental-mental claims by requiring that the claimant prove that the psychological stressors giving rise to such a claim are extraordinary.[5]

14. I presume that the Legislature makes changes to the Workers' Compensation Act in light of the relevant decisional authority. *See West v. N. Branch Fire Dist. #1*, 2021 VT 44, ¶ 48; *Kapusta v. Dep't of Health/Risk Mgmt.*, 2009 VT 81, ¶ 15; *In re Town of Killington*, 2003 VT 87A, ¶ 13. As such, I presume that it was aware of Departmental precedent, including *Emerson, Mattson*, and *Birchmore*, when it amended the Workers' Compensation Act's provisions relating to psychological stress claims. It is a natural inference from that premise that it intended for the amendment to apply to

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[2] Prior to the 2017 amendment to Section 601, *supra*, the Department held that such adverse actions were not "extraordinary" for the purposes of evaluating mental-mental claims. *See J. C. v. Passumpsic Savings Bank*, Opinion No. 08-08WC (March 11, 2008) ("The supervisory actions and decisions of which [claimant] complained were based on legitimate policy considerations specific to her job duties and represented reasonable managerial responses to her job performance. And while certainly [claimant's supervisor] might have delivered her message in a manner more conducive to Claimant's personality and work style, by itself her failure to do so is not so extraordinary or outrageous as to establish a compensable stress claim.").

[3] *E.g.*, *Whiteside v. W.C.A.B. (Unisys Corp.)*, 168 Pa. Cmwlth. 488, 494–95 (1994); *Kelly v. State, Dep't of Corr.*, 218 P.3d 291, 298 (Alaska 2009); *McCowan v. Matsushita Appliance Co.*, 95 S.W.3d 30, 32–33 (Ky. 2002). Montana recognizes the concept of such claims solely for the purpose of excluding them. *See Stratemeyer v. Lincoln Cty.*, 276 Mont. 67, 75 (1996) ("It is the intent of the legislature that stress claims, often referred to as 'mental-mental claims' and 'mental-physical claims', are not compensable under Montana's workers' compensation and occupational disease laws.") (quoting statute).

[4] *But cf. Dubuque v. Grand Union Company*, Opinion No. 34-02WC (August 20, 2002) (claimant suffered panic attack at work and fell while descending stairs; defendant denied claim on multiple grounds, one of which was that the claimant was "unable to meet the rigorous test for a mental-physical claim that first requires proof of a mental injury," citing *Bedini*, *supra*, *inter alia*; Department did not articulate compensability standard for "mental-physical" claims, but found claim compensable because fall was caused by a combination of purely personal psychological stressors and work-related physical factors such as the staircase layout; "[w]hen employment and personal risks concur to produce injury, the injury arises out of the employment, since the employment need not be the primary cause, but need only contribute to the injury."); *cf. also White v. Porter Hospital et al.*, Opinion No. 23SJ-02WC (May 23, 2002) (using the phrase "mental-physical claim," but in the context of analyzing which of multiple employers could be responsible for psychological sequelae of accepted physical injury; situation would more typically be described as a "physical-mental" claim).

[5] Moreover, even if the 2017 amendment does not by its own force apply to so-called "mental-physical" claims, Vermont's pre-amendment decisional authorities discussed above would still require proof that the stressors giving rise to a claim were extraordinary. Regardless of terminology, I see no reason to disturb this framework.

physical sequelae, like those in *Emerson*, which the Department had previously analyzed under the same framework that it uses for mental-mental claims.

15. For all these reasons, I conclude that for injuries that occurred on or after July 1, 2017, Section 601(J), as amended, governs the compensability of alleged physical sequelae flowing from psychological stresses at work, irrespective of whether such cases are referred to as "mental-physical" claims or a subspecies of "mental-mental" claims with physical sequelae.

16. In this case, Claimant alleges that psychological stressors at work caused her cardiac events. All the relevant stressors and cardiac events giving rise to this claim happened after July 1, 2017. Therefore, the 2017 amendments to Section 601(J) govern the compensability of her claim, and Claimant must prove that the psychological stressors giving rise to her claim were extraordinary and unusual under the standard set forth in that statute.

17. Accordingly, Claimant's Motion for Summary Judgment as to the legal standard applicable to this case is denied.

Genuine Issues of Material Fact as to the Extraordinariness of Claimant's Stressors and Defendant's Good Faith in Taking Disciplinary Action Prevent Summary Judgment

18. Defendant contends that Claimant's claim fails as a matter of law under the amended version of Section 601(J) for two reasons: first, because Claimant's alleged stressors were not extraordinary or unusual, and second, because the amended statute expressly excludes compensation for claims arising from employers' disciplinary actions taken in good faith.

19. Defendant's arguments on both points ultimately stem from a premise that the disciplinary notice that Ms. Kemper gave Claimant on March 3, 2020 was the sole stressor giving rise to this claim. From that premise, Defendant argues that such personnel actions cannot as a matter of law be "extraordinary," and even if they could be, they are statutorily excluded from the definition of "personal injury by accident arising out of and in the course of employment." *See* 21 V.S.A. §§ 601(J)(i)(I) and (ii).

20. Claimant disputes the factual accuracy of Defendant's central premise. She claims that a much broader set of circumstances contributed to her stress, including the stresses of moving from South Carolina to Vermont, living away from her family in transitional housing, and seeing someone else do the job she thought she was hired to do. According to her, Ms. Kemper's verbal accusation of fraud, the issuance of Disciplinary Notice whose content Claimant considered to be inaccurate, and the meeting that followed, all increased her stress and contributed to her cardiac events. According to her, the entire workplace experience since arriving in Vermont created a stressful state. *See generally* Background, ¶¶ 3-4. It would therefore be an oversimplification of her position to say that the disciplinary notice was *the* stressor giving rise to her cardiac event.

21. Even assuming *arguendo* that the disciplinary notice and the meeting that followed were the sole stressors giving rise to this claim, Claimant vehemently disputes the accuracy of the statements in the notice. The parties also dispute who said what during the meeting that followed the notice. The statutory exclusion on which Defendant relies covers "any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken ***in good faith*** by the employer." 21 V.S.A. § 601(J)(ii) (emphasis added). Without resolving the disputed facts surrounding the accuracy of the statements in the Disciplinary Notice or assessing Ms. Kemper's mental state when she issued it, I cannot determine as a matter of law whether Defendant's disciplinary action was taken in "good faith," as required by 21 V.S.A. § 601(J)(ii). A formal hearing will be necessary to develop evidence on this issue.

22. Nor can I hold as a matter of law whether the Disciplinary Notice or the meeting that followed constituted an "extraordinary" stressor. If, as Claimant alleges, Ms. Kemper wrongfully accused her of fraud without a reasonable factual basis, that *may* go beyond usual workplace discipline, but I cannot so hold as a matter of law. Depending on the totality of circumstances adduced at a formal hearing, such an accusation might constitute an extraordinary stressor such that it could potentially form the basis of a compensable claim, but reaching such a conclusion will require a formal hearing to make more detailed factual and credibility determinations than are possible on the current record.

23. For these reasons, Defendant's Motion for Summary Judgment must be denied.

ORDER:

Based on the foregoing analysis, the parties' motions are both **DENIED**.

DATED at Montpelier, Vermont this 26th day of August 2021.

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Michael A. Harrington
Commissioner