

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Timothy Estes

Opinion No. 17-21WC

v.

By: Stephen W. Brown
Administrative Law Judge

Vermont Gas Systems, Inc.

For: Michael A. Harrington
Commissioner

State File No. KK-56375

OPINION AND ORDER

Hearing held via Microsoft Teams on July 7, 2021
Record closed on July 24, 2021

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUE PRESENTED:

Is the Return to Work Plan¹ (“RTWP”) that vocational rehabilitation counselor Amber Goss submitted for Claimant on July 27, 2020 reasonable?

EXHIBITS:

Defense Exhibit A: RTWP dated December 28, 2019

Defense Exhibit B: RTWP dated July 27, 2020

Defense Exhibit C: Vocational Rehabilitation (“VR”) Progress Report dated August 27, 2020

Defense Exhibit D: VR Progress Report dated June 29, 2021

Defense Exhibit E: Email from Amber Goss to Linette Hill and David Berman dated December 23, 2020

Defense Exhibit F: Email from Amber Goss to Linette Hill and David Berman dated January 31, 2021

¹ Vocational Rehabilitation Rule 51.2500 defines a “Return to Work Plan” as “a written document cooperatively developed by a rehabilitation counselor, the employee and the employer/insurer that describes the manner and the means by which the employee will be returned to suitable employment. The Return to Work Plan identifies the skills the employee needs to return to suitable employment, an identified job goal, the responsibilities of each party in achieving that goal and the time frame in which the plan will be completed.”

Defense Exhibit G: Email exchange between Amber Goss, Linette Hill, David Berman dated April 22, 2021

Defense Exhibit H: Independent Vocational Evaluation (“IVE”) Report by John May, dated December 31, 2020

Attachment to Defendant’s Proposed Findings of Fact and Conclusions of Law:
Correspondence from Defendant’s counsel to Department of Labor dated January 4, 2021 enclosing Denial of July 2020 RTWP (From VR-227) and John May’s December 2020 IVE

FINDINGS OF FACT:

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

Claimant’s Educational and Vocational History

2. Claimant is a 59-year-old man, originally from Tupelo, Mississippi, who currently lives in Essex Junction, Vermont. He served in the military for twenty years, including time with the United States Navy and United States Marine Corps. While serving in the military, he earned his General Equivalency Diploma (“GED”) and worked in multiple construction capacities, including ironwork, heavy equipment operation, welding, and project management. He also served as a base inspector and, during the last two years of his military career, as an instructor in nuclear and biological warfare defense.
3. In his military project management capacity, he dealt with labor and material costs, shortages, and supply chain issues; he credibly described a significant part of this work as “putting out fires.” The customers he served while working in project management included the Navy, Coast Guard, and NASA. He also performed or supervised work for the Department of State, including work on United States Embassies. The last time he served in a military project management capacity was in approximately 1998. He was honorably discharged from his military service in 2000.
4. Following his military discharge, Claimant attended a community college in Iowa for nine months and earned a certificate in heating, ventilation, and air conditioning (HVAC). While completing that program, he also worked as a third shift supervisor for a toll bridge connecting Illinois and Iowa. After obtaining his HVAC certificate, he relocated to Vermont, where his wife Fran Estes grew up.
5. During his first nine months in Vermont, Claimant performed general maintenance work for his brother-in-law. After that time, Defendant hired him as a service technician. Defendant is a public utility providing natural gas to parts of Vermont’s Champlain Valley region. Claimant’s job duties for Defendant included traversing stairs while carrying heavy tools, climbing into attics, extensive kneeling, walking to and from his truck for parts, and moving water heaters which could weigh up to 400 pounds when filled with sediment. In connection with this position, he had to learn regulations promulgated by the Department of Transportation and attend classes about

responding to odor complaints and emergencies. Although this work involved substantial manual labor, it also required Claimant to think and solve problems, which he enjoyed.

6. After about ten years of working for Defendant, Claimant began to experience bilateral knee pain. Initially, this pain would begin by Thursday or Friday of each week and subside over the weekends. Over time, however, his symptoms increased, and their onset occurred earlier and earlier in the week.

Workers' Compensation Claim and Termination of Employment with Defendant

7. Claimant filed a workers' compensation claim for his knee pain in November 2017. Defendant accepted liability for that condition. Defendant's insurer for this claim is Liberty Mutual Insurance, and the insurance adjuster assigned to this case is Linette Hill. Claimant's average weekly wage during the 26-week period preceding his injury was \$1,675.70, or approximately \$41.89 per hour.
8. Claimant's knee pain eventually began to impact his ability to perform his job duties. Defendant reassigned him from his service technician position to a meter reading position, which was lighter in its physical demands. Eventually, however, Defendant concluded that Claimant was unable to perform that work and terminated his employment in April 2019.
9. Defendant subsequently explored the possibility of Claimant working as an equipment operator, but that job would have required Claimant to climb in and out of large equipment and help with manual labor such as ditch work. Claimant determined that he would not be able to tolerate that work because of his knee pain.
10. In May 2019, Claimant obtained a new job with Engineers Construction, Inc. ("ECI"), a construction company based in Williston, Vermont. His job with ECI involves operating heavy equipment but does not require climbing in and out of equipment regularly during the workday. His knees still become stiff and hurt while he performs that work, but that pain is generally tolerable because he spends most of his day inside a single piece of equipment.
11. When he began working for ECI, his rate of pay was \$18.00 per hour. He received subsequent raises, and his current rate of pay is \$20.00 per hour, slightly less than half of his pre-injury effective hourly rate.

Commencement of VR Services with Amber Goss and Formal Education Programs

12. Because Claimant's injury prevented him from returning to work for Defendant, Ms. Hill referred him for VR services with Amber Goss. Ms. Goss is a certified VR counselor whose credentials include a master's degree in vocational counseling from Assumption College.

13. Following an initial evaluation, Ms. Goss found Claimant entitled to VR services and began preparing an RTWP. She reviewed Claimant's medical records and interviewed him about his prior work experience, skills, and physical abilities. She also performed a transferrable skills analysis and a labor market survey.
14. Ms. Goss credibly testified at the formal hearing that she explored each step of the VR hierarchy.² She contacted Defendant to determine whether it had any job openings for which Claimant would be eligible and which would fit within his work capacity. While there were some positions open, none came close to matching Claimant's pre-injury earning level. Ms. Goss also determined that because of Claimant's knee issues and related activity limitations, he would not be able to work as a service technician for another employer. She explored the possibility of on-the-job training, including an evaluation of the job market, but determined that jobs offering on-the-job training would not come close to matching Claimant's pre-injury wage level. Similarly, she investigated the possibility of new skill training or retraining by performing an assessment of prior learning, which involved gathering evidence of Claimant's existing skills that might help him return to suitable employment. She explored the possibility of a computer skills course to supplement his existing skillset but determined that returning him to his pre-injury wage in a non-physical or light-duty job would require more substantive training.
15. Ms. Goss ultimately determined that Claimant would need additional education to return to work in this capacity because of his relative lack of experience in light-duty occupations. I find this opinion credible, persuasive, and well-supported.
16. To implement those determinations, Ms. Goss developed a plan to enroll Claimant in a formal educational program with a goal of eventual employment as a construction project manager. In her view, this was a reasonable way to return him to suitable employment at a wage level comparable to his pre-injury earnings. Based on her research, she determined that positions in this field had a range in hourly wages from approximately \$26.12 to \$63.50, with a median wage of \$42.06, which was commensurate with Claimant's pre-injury earnings.
17. Ms. Goss found this career path to be particularly promising because Claimant already had a strong background in project management from his work in the military. Although his skills from that work are not current, she found it likely that they would still be useful. She also found it relevant that Claimant currently works for a construction company, even though his current job with that company does not involve project management. Ms. Goss considered the fact that Claimant already had an associate's degree, but she determined that because it was over twenty years old and in a field not directly related to project management, Claimant would need additional formal education. Based on her research, Ms. Goss determined that to be

² Here and elsewhere in this opinion, the "VR hierarchy" refers to the progression of vocational goals set forth in the Department's VR 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.

competitive for employment as a construction project manager, Claimant would need either a four-year degree or at least ten years of current experience working in that field.

18. In December 2019, Ms. Goss prepared a RTWP reflecting her analysis above. That RTWP provided for Claimant to enroll and complete four courses at the Community College of Vermont (“CCV”) to prepare him to transfer to a Construction Management Program at Vermont Technical College (“VTC”). Her December 2019 RTWP explicitly stated that it was intended to “preclude [*sic*] a second RTWP for Mr. Estes’ eventual enrollment” in VTC’s construction management program. (*See* Defendant’s Exhibit 1). Ms. Goss credibly testified that the word “preclude” was a clerical error that should have read “prelude.”
19. The Evaluation section of the December 2019 RTWP provided that Claimant successfully complete courses in composition, mathematics, computer applications, and a basic skills seminar to prepare him for enrollment in VTC’s construction management program. (*Id.*). It also provided that Claimant “[m]ust be successful in one program to move on to approval for the next,” and that the plan “may be interrupted or terminated if [Claimant] fail[s] to fulfill [his] responsibilities.” (*Id.*). Ms. Hill signed the December 2019 RTWP without objection on January 3, 2020. The Department approved it on January 21, 2020.
20. During the December 2019 RTWP’s preparation and review, Claimant continued to work for ECI until it laid him off in December 2019 due to the end of the construction season. In early 2020, he enrolled in courses at CCV pursuant to the December 2019 RTWP. By the early spring of 2020, the Covid-19 pandemic necessitated a transition from in-person learning at CCV to an online learning platform. Claimant had trouble adapting to this format. Although he “did not miss a beat” in his computer applications course, the English course “started out rough,” but Claimant eventually got “on track” with that course. However, he failed his mathematics course. He credibly acknowledged that his pride inhibited him from reaching out for help with coursework and he should have sought assistance sooner.
21. Despite that failing grade, Defendant continued to pay for Claimant’s VR services under the December 2019 RTWP the following semester. Following a test in Williston, Vermont, Claimant was accepted to attend VTC in Randolph, Vermont, where he began classes in August 2020. His initial courses at VTC have been online because of the Covid-19 pandemic. He eventually intends to attend VTC in person and live near VTC’s Randolph campus while school is in session. He believes that this would not only help his learning experience by allowing him to be “immersed” in the academic environment but would also help him avoid harsh winter driving conditions. I take judicial notice of the fact that VTC’s Randolph campus is approximately 57 miles from Essex, Vermont, where Claimant currently lives.
22. Claimant has passed most of the courses he has taken at VTC, including accounting, business law, construction graphics, construction systems, and physics. However, he

failed one English class and, due to health concerns, received an incomplete in a precalculus course.

23. Ms. Goss credibly testified that although Claimant has had some challenges, he has worked quite hard to bring his academics up to where they need to be to complete this program. Claimant's wife credibly corroborated Ms. Goss's testimony as it relates to Claimant's conscientious work ethic and commitment to his RTWP. I find that Claimant is committed to succeeding in his academic program and has put significant effort toward that end.
24. In addition to his college coursework, Claimant continues to work as a heavy equipment operator for ECI between semesters. He wishes to continue with his formal education so that he can eventually find work that requires him to "use his brain." He described his current job with ECI as "braindead," although he acknowledges that the work he does there is important. He sees a potential career path for himself within ECI in the construction management field if he completes his current degree program. He knows construction project managers at ECI and credibly testified that all the ones he knows have degrees.

The July 2020 RTWP Giving Rise to the Parties' Present Dispute

25. In July 2020, Ms. Goss prepared an amended RTWP intended to continue the original December 2019 RTWP's goal of Claimant completing a degree program to obtain eventual employment in construction project management. The July 2020 RTWP includes updated cost figures that include the cost of housing, books, supplies, tuition, and fees necessary for Claimant to complete his current program at VTC. These cost figures also account for the effect of a grade audit under which VTC reviewed Claimant's prior associate's degree transcripts and military work experience and awarded him 32 transfer credits toward his VTC degree program. The results of this grade audit reduced the total amount of time his degree program would take to complete.
26. Although Defendant approved Ms. Goss's December 2019 RTWP, it opposes her July 2020 plan. Specifically, Ms. Hill expressed opposition to the July 2020 RTWP's inclusion of housing costs and expressed a desire for the RTWP to be reevaluated every semester because of Claimant's failing grades.
27. Ms. Goss credibly testified that she stands behind both the reasonableness of her July 2020 RTWP and Claimant's ability to successfully complete it. In her opinion, it will be difficult for Claimant to return to a wage comparable to his pre-injury earnings without a degree like the one contemplated in both the RTWPs that she prepared. I find this opinion credible and persuasive.
28. With respect to Defendant's desire to reevaluate the RTWP on a semester-by-semester basis, Ms. Goss credibly testified that she would evaluate Claimant's performance each semester anyway. I find Ms. Goss's testimony in this regard credible; however, I also find it reasonable for the written plan to reflect that regular, periodic reevaluation.

Independent Vocational Evaluation and Expert Opinions of John May

29. During the fall of 2020, Defendant hired VR counselor John May to conduct an independent vocational evaluation (“IVE”) pursuant to VR Rule 53.6000. Mr. May completed his IVE report on December 31, 2020. Because of the timing of Mr. May’s vocational evaluation and the registration process at VTC, Defendant paid for Claimant’s spring term at VTC, without prejudice.
30. Defendant presented Mr. May as an expert witness. Like Ms. Goss, Mr. May earned a master’s degree in vocational counseling at Assumption college. He credibly acknowledged that both he and Ms. Goss had the credentials necessary to conduct vocational evaluations.
31. Mr. May reviewed Claimant’s medical records, including his independent medical examinations and functional capacity examinations, as well as Ms. Goss’s entitlement assessment, RTWPs, and progress reports. He also performed a transferrable skills analysis and some labor market research. However, he never interviewed Claimant or spoke with anyone else in forming his opinions. He credibly acknowledged that the best practice would be to consult with an injured worker before forming an expert opinion, but he testified that performing an interview would have taken longer than the time he was given to render his opinion. In his view, the written record was sufficient for him to render opinions.
32. In his opinion, the July 2020 RTWP is not reasonable. He noted that it is a formal education plan, which is step five in the VR hierarchy, and he does not believe that the second through fourth levels of the hierarchy were thoroughly explored before settling on the fifth level. Additionally, he testified that if all relevant parties were committed to an academic plan, it would make the most sense to reevaluate the plan each semester.
33. Mr. May acknowledged that he never asked Ms. Goss what steps she took to investigate steps two through four, but he testified that based on the documents he reviewed, Ms. Goss did not adequately document the steps she took to evaluate each of these steps before settling on an academic plan.
34. Mr. May’s IVE report also emphasized several clerical errors in the RTWPs that Ms. Goss prepared. For instance, he seized upon a coding error in the December 2019 RTWP: in one location, that plan lists the vocational goal as “superintendent” instead of “project manager.” However, the rest of that plan makes clear that the vocational goal is for Claimant to obtain work as a construction project manager. Additionally, he cited the word “preclude” in the December 2019 RTWP, referenced above. Although he credibly testified that he assumed Ms. Goss intended for that word to read “prelude,” he used this typographical error to argue that according to the language of the December 2019 plan, Defendant did not commit itself to any future academic expenditures. I find this unpersuasive.

35. Mr. May also emphasized a difference between both of the RTWPs that Ms. Goss prepared in this case and the template RTWP available on the Department's website.³ Specifically, the Department's template RTWP contains the following language:

This plan **may** be interrupted or terminated if you fail to fulfill your responsibilities to:

- Meet your responsibilities in carrying out this plan
- Perform job search activities identified in this plan
- Attend all appointments and scheduled activities
- Notify your counselor of any change which will impact on your ability to complete or participate in this plan
- Attain passing grades in any and all training
- Follow medical or other professional's instructions

Both RTWPs that Ms. Goss prepared for Claimant contain all the foregoing provisions except for the phrase, "Attain passing grades in any and all training." (*See* Defendant's Exhibits 1 and 2). In Mr. May's view, this renders those RTWPs facially defective. I find this opinion unpersuasive. The parties agreed to the December 2019 RTWP without that language. Both the December 2019 and July 200 RTWPs contain adequate evaluation provisions to ensure Claimant's accountability with respect to his responsibilities under such plans. It would be unreasonable to invalidate an entire plan based on the parties' voluntary customization of template language.

36. Finally, Mr. May cited Claimant's failing grades in certain courses as evidence that he had not fulfilled his obligations under the December 2019 RTWP. He testified that when an injured worker is unsuccessful in one step of a plan, it is generally appropriate to reevaluate the level of service to avoid setting someone up for failure. He also raised a concern in his IVE that Claimant's failure to successfully complete college-level English coursework may reflect poorly upon his ability to fulfill employers' expectations in the field of construction project management, as "written communication" is often listed as an essential skill in job postings within that field. (*See* Defendant's Exhibit H, p. 24).
37. While I find it appropriate to consider Claimant's academic performance in evaluating whether a particular RTWP is reasonable, Claimant has been successful in most of his courses and was admitted to VTC despite one failing grade during his time at CCV. There is no evidence that his academic performance is so poor as to result in academic probation or dismissal. Nor is there any evidence that his grades to date will prevent him from completing his current degree program. Instead, Claimant's performance demonstrates a strong effort toward successful completion despite experiencing some difficulty. Additionally, I do not find job listings identifying "written communication" as an essential skill to be compelling evidence that a person's difficulty in one college English course will undermine the viability of such a position as a career path.

³ See https://labor.vermont.gov/sites/labor/files/doc_library/Vocational%20Rehabilitation%20Return%20to%20Work%20Plan%20%5BPDF%5D.pdf (last visited August 30, 2021, at 8:40 A.M.).

38. Neither RTWP expressly requires Claimant to pass every single class in which he enrolls. Both RTWPs in evidence require that Claimant “be successful in one program to move on to approval for the next.” They do not define “successful,” but I find that Claimant has been at least substantially successful in his programs, despite his failure in two courses. For these reasons, I do not find Mr. May’s opinion that Claimant has failed to fulfill his obligations under the December 2019 RTWP persuasive.

CONCLUSIONS OF LAW:

1. Section 641(a) of the Workers’ Compensation Act provides for the availability of VR services as follows:

When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to suitable employment.⁴

2. In general, injured workers bear the burden of proving entitlement to VR services, as well as the reasonableness and necessity of a particular RTWP. If the employer or insurer agrees that the injured worker is entitled to services, or if it accepts a RTWP, then it shall have the burden of proving that the injured worker is no longer entitled to services or that a return to work plan is not reasonably necessary to return the injured worker to suitable employment. *See* VR Rule 56.4000; *Bowen v. Novartis Pharmaceuticals Corporation*, Opinion No. 16-19WC (September 9, 2019).

3. “Suitable employment,” in turn, is defined as follows:

... employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;

Located where the employee customarily worked, or within reasonable commuting distance of the employee’s residence;

Which pays or would average on a year-round basis a suitable wage;
AND

Which is regular full-time work. Temporary work is suitable if the employee’s job at injury was temporary and it can be shown that the temporary job will duplicate his or her annual income from the job at injury.

VR Rules 51.2600-51.2603.

⁴ 21 V.S.A. § 641(a).

4. “Suitable wage,” in turn, is defined as “a wage as close as possible to 100 percent of the average weekly wage If the goal of 100% of the [average weekly wage] is not reasonably attainable then the closest reasonably attainable wage to 100% may be considered suitable.” VR Rule 51.2700.
5. In this case, there is no dispute that Claimant is entitled to VR services. Nor is there any dispute that the December 2019 RTWP was a reasonable one. Indeed, both parties signed that plan, and the Department approved it.
6. The parties only dispute the reasonableness of the July 2020 RTWP, which has the very same vocational goal as the December 2019 RTWP, namely construction project management. The December 2019 RTWP expressly contemplated Claimant transferring to a VTC’s construction management program after completing some preliminary courses at CCV. Claimant did so; he enrolled in VTC’s construction management program in August 2020 while the 2019 RTWP was still in effect.
7. Although Claimant has experienced some academic challenges, he has substantially complied with his obligations under the 2019 RTWP. He has invested significant time and effort in his academic pursuits and has passed most of the courses he has taken. There is no evidence that the courses he has failed have jeopardized his ability to complete his academic program. Nor am I convinced that they undermine the likelihood that Claimant can develop the aptitudes necessary for a career in construction project management.
8. I find Defendant’s arguments that Ms. Goss failed to adequately explore levels two through four of the VR hierarchy unpersuasive. Ms. Goss credibly testified that she did in fact consider all levels of that hierarchy but determined that a formal education plan would be the most likely way to return Claimant to his pre-injury wage level. Even if she could have documented her consideration of each step more thoroughly, it would be unfair to cut off Claimant’s VR benefits solely because of any putative shortcomings in his VR counselor’s recordkeeping.
9. Moreover, the parties agreed in principle to an academic plan when they agreed to the December 2019 RTWP. Defendant could have objected to the academic nature of that plan before signing it, but it did not. It would be unfair under the circumstances of this case to allow Defendant to challenge the *bona fides* of Ms. Goss’s exploration of stages two through four of the VR hierarchy at this point after all parties have invested so heavily in formal education as the primary means of returning Claimant to suitable employment.
10. Although there may be other paths that might eventually lead Claimant to suitable employment, Defendant has not convincingly articulated what those paths would entail. I see no convincing reason to interrupt Claimant’s current academic path after the progress he has made under the December 2019 RTWP just because there *might* be additional paths to suitable employment that would be possible without formal education.

11. With respect to Defendant's concerns about the inclusion of housing costs in the July 2020 RTWP, I find that such costs are reasonable considering the distance between Claimant's home in Essex and VTC's location in Randolph. Additionally, I find it likely that an in-person campus experience will provide a more immersive educational experience than the virtual format which has contributed to some of Claimant's difficulties so far.
12. Finally, I find that Defendant's concerns that Claimant's academic challenges to date merit a semester-by-semester reevaluation to be well-founded. Ms. Goss testified that she would perform such evaluation anyway in the ordinary course of her VR services. While I find her testimony in that regard credible, I also find it appropriate to formally include such a periodic reevaluation mechanism in Claimant's VR plan.
13. Based on all the evidence presented, I conclude that the July 2020 RTWP is a reasonable one, subject to the requirement that Claimant's progress toward completing his degree program be evaluated at the end of each semester as a condition of Defendant's responsibility to pay for the next semester. Claimant's future progress should be evaluated on a standard of substantial compliance with his responsibilities under the plan.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is **ORDERED** to pay:

- 1) VR benefits pursuant to 21 V.S.A. § 641, consistent with the July 2020 RTWP prepared by Amber Goss, subject to reevaluations at the end of each academic semester as provided for in this opinion; and
- 2) Attorneys' fees and costs pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 3rd day of September 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.