STATE OF VERMONT
DEPARTMENT OF LABOR

Annemieke Meau

v.

The Howard Center, Inc.

Opinion No. 18-21WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. BB-59825

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Thomas C. Nuovo, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

ISSUE PRESENTED:

Does the parties' settlement agreement obligate Defendant to continue paying the medical benefits that it discontinued with the Department's approval in March 2020?

EXHIBITS:

Claimant's Exhibit 1: February 2, 2017 Settlement Agreement
Claimant's Exhibit 2: "List of Medications Agreed to from Settlement from IWP"
Claimant's Exhibit 3: Medical records dated February 16, 2017

Defendant's Statement of Disputed Material Facts filed June 4, 2021
Defendant's Exhibit A: Compromise Agreement, Addendum and Rule 13 Letter

BACKGROUND:

Considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:[1]

[1] Claimant did not file a statement of undisputed material facts, as required by V.R.Civ.P. 56(c)(1)(A). Defendant has accordingly moved to dismiss her motion on procedural grounds. Although such dismissal is available, *see Estate of Walter Wells, Jr. v. S.L. Garand*, Opinion No. 13-19WC (July 15, 2019) (dismissing summary judgment motion without prejudice for failure to file a statement of undisputed material facts), in the interest of judicial economy, I decline to dismiss this motion on procedural grounds. Instead, I consider the "Background Facts" section of Claimant's motion and Defendant's Statement of Disputed Material Facts. I also take judicial notice of the findings of fact set out in *Meau v. The Howard Center, Inc.*, Opinion No. 01-14WC (January 24, 2014), the relevant forms in the Department's claim file, and Dr. Kenosh's June 6, 2019 report.

1. Claimant worked for Defendant as a mental health counselor at the H.O. Wheeler School in Burlington. *Meau v. The Howard Center, Inc.*, Opinion No. 01-14WC (January 24, 2014) ("*Meau I*"), Finding of Fact No. 3.

2. *Meau I* sets forth the following account of Claimant's work accident:

> On March 3, 2010 Claimant was at work at the H.O. Wheeler School when she was called to assist in restraining a child who had become uncontrollable. At one point during the episode, Claimant was holding the child from behind, with her arms underneath him and his back to her chest, when he head-butted her with such force that she lost her balance. Claimant fell back against a cement wall and then down on the base of her spine. Somehow during the scuffle, she suffered two large cuts on her left arm. In recalling the episode subsequently, she was unsure whether she had lost consciousness or not. Within an hour, she felt pain in her neck and lower back.

Meau I, Finding of Fact No. 4; Claimant's Motion for Summary Judgment, Background Facts ("*Claimant's Background Facts*"), at 1.

3. Defendant accepted Claimant's cervical spine and lower back injuries as compensable and began paying workers' compensation benefits accordingly. *Meau I*, Finding of Fact No. 5.

4. After several years of litigation over various issues and following mediation, the parties signed a two-page "Settlement Agreement" on February 2, 2017. *Claimant's Background Facts*, at 2; *Claimant's Exhibit 1*. Attached to the "Settlement Agreement" was a "reimbursement worksheet" from Injured Workers' Pharmacy ("IWP"). IWP's reimbursement worksheet identified unpaid pharmacy charges that Defendant agreed to pay "in full settlement of the outstanding bills of IWP." *Claimant's Exhibit 1*, at 1.

5. Claimant also submitted a document titled "Meau List of Medications Agreed to from Settlement from IWP." *Claimant's Exhibit 2*. Claimant characterizes this document as a summary of the medications included on her Exhibit 1. *Claimant's Background Facts*, at 2. As such, Claimant's Exhibit 2 is a demonstrative exhibit offered in support of her motion, with no foundation having been laid. Accordingly, I decline to consider it.

6. Claimant also submitted "a doctor's note from February 16, 2017" that "gives a summary of all the relevant medications that [she] was taking at the time." *Claimant's Background Facts*, at 2; *Claimant's Exhibit 3.*

7. The parties finalized their settlement on March 1, 2017, putting the terms from the February 2, 2017 "Settlement Agreement" into a Compromise Agreement (Form 16 with medicals open) and Addendum to the Modified Form 16 Settlement and Release Agreement (together, "Form 16 and Addendum"). *Claimant's Background Facts*, at

2; *Defendant's Exhibit A*. The Department approved the Form 16 and Addendum on March 6, 2017. *Defendant's Exhibit A*.

8. As set forth in the Form 16 and Addendum, the parties agreed that Claimant sustained the following injuries: "head/traumatic brain injury, low back, shoulder, neck and any and all natural sequelae." *Form 16 and Addendum*, at 1; *Claimant's Background Facts*, at 2.

9. The Form 16 and Addendum state in pertinent part:

> This is an agreement in which Claimant agrees to accept $650,000.00 in full and final settlement of the following benefits: temporary total disability; permanent partial disability; permanent total disability; temporary partial disability; vocational rehabilitation; other: Full and final settlement of any and all benefits claimed or due **except** medical benefits, which shall remain **open**. It is agreed that the employer/ insurance carrier will continue to furnish all workers' compensation benefits causally related to the alleged injury referenced above other than those specifically resolved by this Compromise Agreement.

Defendant's Exhibit A, Form 16 and Addendum, at 1 (emphasis added); *Defendant's Statement of Disputed Facts*, at 3-4; *see also Claimant's Background Facts*, at 2.

10. The parties' agreement further provides: "The written terms of the Form 16 and Addendum constitute the entire Agreement and understanding of the parties with respect to their subject matter. The terms of the Form 16 and Addendum may only be modified in writing with the consent of each" party. *Defendant's Exhibit A, Form 16 and Addendum*, at 4; *Claimant's Background Facts*, at 3.

11. Finally, the parties also submitted a letter supporting their settlement, as required by Workers' Compensation Rule 13.1600. *Claimant's Background Facts*, at 2; *Defendant's Exhibit A*. The Rule 13 Letter provides in part as follows:

> Since the injury many medical providers have determined that [Claimant] has suffered a Traumatic Brain Injury as a result of the March 3, 2010 incident and, for the first time since her injury, [Defendant] has sought to challenge those findings. [Defendant] had support for its challenge to [Claimant's] TBI claim based on the reports of its experts. In an interim order, however, the Department held that [Claimant's] TBI was related.
>
> [Claimant] had also challenged a denial that she had suffered an injury to her foot, her plantar fasciitis claim, and most recently that she was suffering nerve pain in her jaw which she also believed was related. The settlement reached by the parties is a fair and just method of ending the ongoing litigation over what injuries are covered and allowing the parties to proceed within clear and defined limits.

> The settlement leaves all medicals open. The fact the parties have now clearly defined what injuries are covered should reduce the need for future litigation and allow for less confusion as to what treatment [Defendant] should be paying for. It is believed this settlement is in the best interest of all the parties.

Defendant's Exhibit A, Rule 13 Letter, at 1-2; *Claimant's Background Facts*, at 3.

12. On June 6, 2019, physical medicine and rehabilitation physician Michael Kenosh, MD, performed an independent medical examination of Claimant and prepared a report at Defendant's request ("Dr. Kenosh's report"). Based on Dr. Kenosh's opinions that certain medical treatments were either not medically necessary or not causally related to Claimant's accepted work injuries, Defendant sought to discontinue certain medical benefits and to deny other proposed treatments. *Defendant's Memorandum of Law*, at 2.

13. Specifically, on September 10, 2019, Defendant filed a Notice of Discontinuance of Payments (Form 27) seeking to discontinue Claimant's pain medications, transportation to medical appointments, and other medical treatment as set forth in Dr. Kenosh's report on the grounds that these services were not medically necessary or causally related to her work injury. Defendant also filed a Denial of Benefits (Form 2) the same day for scrambler therapy booster visits, right hip treatment, and ketamine. The Department approved both forms on March 10, 2020.[2]

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).

Entitlement to the Medical Services Specified on Defendant's Notice of Intention to Discontinue Payments Filed September 10, 2019

2. Workers' Compensation Rule 13.1500 provides that, with the Commissioner's approval, "the parties may enter into a compromise agreement to fully and finally resolve all or part of an injured worker's claim for workers' compensation benefits." *See* 21 V.S.A. § 662(a). In this case, the parties entered into a compromise agreement (the Form 16 and Addendum) to fully and finally resolve this claim except for medical benefits, which remain open. *See* Background, ¶¶ 7, 9 *supra*.

3. Claimant contends that Defendant is attempting to unilaterally modify the terms of the Form 16 and Addendum by seeking to discontinue certain medical benefits based on

[2] Claimant's summary judgment motion focuses on the Form 27.

Dr. Kenosh's report. Claimant asks the Department to find that she is entitled to those benefits as a matter of law and to reject Defendant's approved Form 27. *Claimant's Motion*, at 1, 4.

4. In support of her motion, Claimant essentially argues that her intent and belief in reaching a settlement with medical benefits open was that Defendant would waive all rights and defenses to challenge future medical treatments and prescriptions for the accepted conditions specified in the Form 16 and Addendum. She refers to the list of medications she was taking at the time of settlement and contends that such medications cannot be discontinued. *See Claimant's Exhibit 3*. She further relies on her counsel's representation that the work required to achieve settlement was "extensive" and that she gave up "significant rights" by settling, including the dismissal of a federal court claim against Defendant. *Claimant's Motion*, at 2-3. Claimant asks the Department to consider this information and to conclude that Defendant is precluded by the parties' settlement from challenging any medical treatments or prescriptions for her accepted conditions.

5. Consideration of Claimant's request requires interpretation of the Form 16 and Addendum. The goal of contract interpretation is to give effect to the parties' intent, as reflected in the plain language of the document, when that language is clear. *Northern Sec. Ins. Co. v. Mitec Telecom, Inc*., 2008 VT 96, ¶ 28. Where contract terms are unambiguous on their face, they cannot be modified by extrinsic evidence. *Hall v. State of Vermont*, 2012 VT 43, ¶ 21.

6. The plain language of the Form 16 and Addendum here manifests the parties' intent to settle the claim with medical benefits open. Nothing in the Form 16 and Addendum indicates that Claimant bargained for the lifetime continuation of any specific medical benefit, nor is there any ambiguity in this regard. Further, the law not only presumes that a written contract contains the parties' entire agreement, *Economou v. Vermont Elec. Coop., Inc*., 131 Vt. 636, 638 (1973), but the Form 16 and Addendum expressly state that they contain the parties' entire agreement. *See* Background, ¶ 10 *supra.* Thus, neither Claimant's exhibits nor her counsel's representations concerning the settlement process are relevant to my interpretation of the Form 16 and Addendum. Where the language of the agreement is clear, "the intention and understanding of the parties must be taken to be that which their agreement declares." *Maglin v. Tschannerl*, 174 Vt. 39, 45 (2002), quoting *Lamoille Grain Co. v. St. Johnsbury & Lamoille County R.R.*, 135 Vt. 5, 8 (1976).

7. As the parties reached no agreement concerning Claimant's medical benefits beyond leaving them open, Defendant must continue to furnish Claimant with "reasonable surgical, medical, and nursing services and supplies, including prescription drugs and durable medical equipment." 21 V.S.A. § 640(a). Medical services and prescription drugs are "reasonable" when they are medically necessary and causally related to the work injury. *See, e.g., Baraw v. F.R. Lafayette, Inc*., Opinion No. 01-10WC (January 20, 2010), at Conclusion of Law No. 3; *Brodeur v. Energizer Battery Mfg., Inc*., Opinion No. 06-14WC (April 2, 2014), at Conclusion of Law No. 2.

8. Although Claimant was receiving certain medical treatments and medications for her accepted "head/traumatic brain injury" in 2017, *see Claimant's Exhibit 3*, that fact alone does not determine whether those treatments are reasonable for her compensable injury today. The medical needs of an injured worker often change over time. A physician may seek preauthorization for a new treatment, for example. Similarly, a treatment that was once reasonable may no longer be, either because the treatment is no longer medically necessary or because the condition for which the treatment is provided is no longer causally related to the work injury. Settling an accepted injury with medical benefits open provides no guarantee that the treatments received at the time of settlement remain reasonable over time.

9. When parties to a settlement with medical benefits open disagree about the reasonableness of a particular treatment, they may present their dispute to the Department for adjudication. Such adjudication requires the presentation of evidence concerning the reasonableness of the treatment. As the parties here did not settle Claimant's medical benefits, she remains in the same position as any other claimant with a compensable work injury whose desire for a particular medical treatment is disputed.[3] The settlement agreement here does not preclude Defendant from denying or discontinuing any medical treatment, but rather permits the parties to present their dispute to the Department for adjudication.

10. I therefore conclude that Claimant is not entitled to summary judgment awarding her medical benefits for the disputed medical treatments set forth in Defendant's approved Form 27 as a matter of law.

Exclusion of Dr. Kenosh's Report

11. Claimant asks the Department to exclude Dr. Kenosh's report as an improper after-settlement rejection of her accepted work injuries. *Claimant's Motion*, at 8. If Dr. Kenosh's report were excluded, she contends, then Defendant would have no evidence upon which to base its discontinuance of certain medical benefits and she would be entitled to summary judgment. *Claimant's Reply to Defendant's Opposition to Summary Judgment*, at 2-3.

12. Claimant characterizes Dr. Kenosh's report as a rejection of the parties' agreement that she sustained a "head/traumatic brain injury" in the March 3, 2010 work accident. She cites to the portion of his report stating that "none of the patient's current symptoms arise out of or in the course of the minor traumatic incident that occurred on 03/03/2010." *Dr. Kenosh's report*, at 62. In Dr. Kenosh's opinion, Claimant's traumatic brain injury was mild and resolved years ago. *Id.* Claimant argues that Dr. Kenosh's report is an attempt to "subvert the settlement," as the Form 16 and Addendum expressly listed the accepted injuries as "head/traumatic brain injury, low

[3] *See, e.g., Shores v. Mack Molding Co., Inc*., Opinion No. 01-21WC (January 15, 2021) (whether radiofrequency ablation is reasonable treatment for accepted work injury); *Houle v. Verizon Communications Inc.*, Opinion No. 02-20WC (January 16, 2020) (whether opioid medication is reasonable treatment for accepted work injury); *Bernick v. Northeast Kingdom Human Services, Inc*., Opinion No. 02-19WC (January 24, 2019) (whether total knee replacement is reasonable treatment for accepted work injury).

back, shoulder, neck and any and all natural sequelae." *See* Background, ¶ 8 *supra*. Thus, Claimant contends that Dr. Kenosh's report is an inadmissible and should be excluded.

13. I disagree with Claimant's characterization of Dr. Kenosh's report. Dr. Kenosh acknowledges that Claimant sustained a mild traumatic brain injury in the March 3, 2010 work accident. It is his contention that she has recovered from that injury and that her current cognitive symptoms likely have a different cause. He then offers his opinion as to whether certain medical treatments are medically necessary and causally related to her accepted work injury.

14. Far from "unilaterally voiding" the settlement, Dr. Kenosh's opinions provide relevant evidence concerning the extent and nature of Claimant's current medical condition and the reasonableness of certain treatments. If Defendant offers Dr. Kenosh's opinions at the formal hearing, then the Department will assess his credibility and determine the persuasiveness of his opinions in the context of all the evidence offered at hearing. See *Merling v. Barrows Coal Co*., Opinion No. 25SJ-98WC (April 30, 1998) (Department determines whether medical opinions are credible and convincing after evaluation of all the evidence).

15. I accordingly decline to exclude Dr. Kenosh's report from consideration.

ORDER:

Based on the foregoing background and discussion, Claimant's motion for summary judgment is hereby **DENIED.**

DATED at Montpelier, Vermont this 14th day of September 2021.

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Michael A. Harrington
Commissioner