

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Hillary Mitchell

Opinion No. 06-22WC

v.

By: Stephen W. Brown  
Administrative Law Judge

Walker Construction, Inc.

For: Michael A. Harrington  
Commissioner

State File No. MM-51817

**OPINION AND ORDER**

Hearing held via Microsoft Teams on October 26, 2021  
Record closed December 6, 2021

**APPEARANCES:**

Christopher McVeigh, Esq., for Claimant  
William J. Blake, Esq., for Defendant

**ISSUES PRESENTED:<sup>1</sup>**

1. Has Claimant reached end medical result?
2. If not, is Claimant entitled to additional temporary disability benefits?

**EXHIBITS:**

Joint Medical Exhibit (JME), pages 165-953<sup>2</sup>

**FINDINGS OF FACT**

1. Claimant is a 21-year-old woman residing in Morrisville, Vermont. As of August 8, 2019, Defendant employed her as a truck driver.
2. On that date, she was driving a Mack dump truck in the course of her employment when the truck rolled multiple times down a steep embankment near the on-ramp to Interstate 89 in Montpelier, Vermont. Claimant does not remember the accident itself,

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<sup>1</sup> Claimant's Proposed Findings of Fact and Conclusions of Law include a third question as an issue for adjudication: whether her chiropractic treatment is reasonable. Defendant's filing does not include that issue. Neither party identified the reasonableness of chiropractic treatment as an issue in their pretrial or final disclosures, and the administrative law judge did not read that issue into the record at the beginning of the formal hearing. Neither party objected to its omission at that time. Although there was evidence at the formal hearing relevant to the reasonableness of chiropractic care, I decline to issue a ruling on that issue given the posture of this case.

<sup>2</sup> By agreement of the parties, the first 164 pages of the JME are excluded from evidence.

but she does recall crawling out of the passenger side afterwards. Contemporaneous medical records reflect a probable loss of consciousness lasting one to three minutes. (JME 166). After the accident, the truck was on its side, its cab was completely upside-down, and its roof was significantly compressed. The truck was totaled.

3. Defendant accepted liability for this claim and has paid some benefits accordingly.
4. Immediately after the accident, emergency management personnel examined Claimant and then transported her by ambulance to Central Vermont Medical Center in Berlin, Vermont, where she stayed one night.
5. Claimant experienced multiple injuries as a result of the accident, including a concussion, nerve damage, two fractures in her cervical spine, bruised lungs, bruising on her pelvis from the seatbelt, and burns and lacerations all over her body. She also complained of lower back pain at that time. (JME 179-183; 210-279). She wore a neck collar to stabilize her cervical spinal fractures for several months and has undergone physical therapy for that aspect of her injury.
6. Approximately two weeks after the accident, Claimant followed up with her primary care physician, Melissa Volansky, MD, with complaints of neck, shoulder, ear, and dental pain. (JME 411). That same month, Claimant also began treating with physiatrist Mary Flimlin, MD, who referred her to physical therapy primarily for her cervical spine. (*E.g.*, JME 416, 423). In addition to her cervical spinal treatments, Claimant also received treatment for her concussive symptoms from rehabilitation physician Jessica Johnson, MD, through approximately February 2020. Those symptoms have substantially resolved. (*See* JME 619-20).
7. Claimant did not report lower back pain to her medical providers between approximately August and November 2019, although she continued to receive care for other issues during that period. However, she reported lower back pain to several medical providers in November and December 2019. (*See* JME 498, 504, 509, 511, 533, 540, 551). In November 2019, she told her orthopedic physician assistant that her lower back symptoms had been present since the time of the accident, (JME 504), though a contemporaneous physical therapy note indicates that the pain had onset within the last two to three weeks (JME 509). Later that month, she told her physical therapist that her low back had not been bothering her very much. (JME 533). In December, however, she told a physical therapist that her lower back pain had begun around Thanksgiving and had been increasing in severity. (JME 540).
8. On February 13, 2020, Claimant reported that her lower back had not been hurting nearly as much, and she rated pain in that region as two to three out of ten. Her physical therapist noted that Claimant had made “good gains over course of therapy” and noted that her lower back pain was responding well to lumbar rolling. (JME 604-606). Her cervical range of motion had also significantly improved. Claimant’s physical therapist determined that her rehabilitation goals had been met and discharged her from physical therapy to a home exercise program. (*Id.*).

9. On February 18, 2020, Dr. Flimlin released Claimant to work with no restrictions subject to a physician's release for concussive symptoms. (JME 613).
10. On February 25, 2020, Claimant saw rehabilitation physician Jessica Johnson, MD, who noted a 90 percent improvement in her symptoms. Claimant was engaged in college coursework at that time and was on track to graduate the following spring. Dr. Johnson provided Claimant a work release with no restrictions and no further visits scheduled. (JME 619-622).
11. On March 4, 2020, John Johansson, DO performed an independent medical evaluation (IME) of Claimant (JME 627 *et seq.*). During Dr. Johansson's IME, Claimant reported continued symptoms in her lower back, upper back, both shoulders, and neck. Dr. Johansson found that she was not yet at end medical result, and recommended manipulative therapy and possible trigger point injections, as well as further evaluation for her head injury. Dr. Johansson did not testify at the formal hearing in this case.
12. On June 8, 2020, Claimant underwent a functional capacity evaluation (FCE) with occupational therapist Charles Alexander. (JME 658 *et seq.*). Mr. Alexander noted that Claimant was doing well except for intermittent low back pain which seemed to be aggravated with sustained sitting or standing. He concluded that she had a full-time light duty work capacity with abilities into the medium capacity for both occasional and frequent lifting, carrying, pushing, and pulling. (JME 663). He recommended additional short term physical therapy focused on her back and pelvis. (JME 664). I find Mr. Alexander's findings well-supported.
13. On August 17, 2020, Claimant presented to occupational medicine physician Austin Sumner, MD. She told Dr. Sumner that her concussion had resolved but not her lower back pain. She complained that her lower back pain radiated down both legs from her buttocks to her outer thighs, to her knee level. Dr. Sumner observed that Claimant was able to rise from her chair easily and had a symmetric gait, could walk up and down a flight of stairs and walk on her heels and toes, and could fully squat down and rise again. (JME 688). After reviewing her symptoms and examining her, he determined that her only residual pain was in her lower back, and he recommended approximately six to eight sessions of physical therapy, and then a transition to a work conditioning program. (JME 691). Dr. Sumner provided Claimant with a work release with a limitation of 30 pounds of lifting, working up to two hours per day, with the expectation that she could progress up to three hours per day after two weeks. (JME 690).
14. The next day, Claimant underwent trigger point injections for myofascial lower back pain. She described her lower back pain as dull and achy at that time but denied any recent changes in strength or sensation. (JME 696-699)
15. Claimant was scheduled for a follow up appointment with Dr. Sumner in October 2020, but she failed to return to his office. Dr. Sumner's office called Claimant approximately three times but failed to reach her. (JME 707). Claimant explained at

the formal hearing that she did not like Dr. Sumner's personality. Because she did not return to Dr. Sumner's office, she did not partake in the work conditioning program that he recommended.

16. After approximately ten additional physical therapy sessions through November 2020, Claimant stopped physical therapy and began treating with chiropractor Jason Charkalis, DC in December 2020. (JME 724). Dr. Charkalis initially recommended one to two visits per week for four weeks. (JME 730).
17. In January 2021, however, Dr. Charkalis recommended another six to eight months of chiropractic care, with two visits per week for the first six to eight weeks, one visit per week for the next four to six weeks, one visit every other week for four weeks, one visit every three weeks and then one visit per month for two months. (JME 776).
18. As of October 2021, Claimant had seen Dr. Charkalis approximately 69 times and was still actively treating with him. Claimant credibly testified that she found Dr. Charkalis's treatment helpful and that she finds his chiropractic care makes her back symptoms less severe and more tolerable.
19. In addition to her medical treatments, Claimant exercises in a gym. She has also engaged in some of the lighter tasks in home remodeling projects, including painting and laying polyurethane on floors. She also cares for farm animals that she keeps as pets and showed a cow at a fair while she was recovering from her work-related vehicle accident.
20. Claimant has completed associate's degrees in dairy farm management and agribusiness and a bachelor's degree in diversified agriculture, all on full scholarships. She completed her bachelor's degree while recovering from her work-related vehicle accident, performing most of her coursework online, and graduated in 2021.
21. Claimant has not applied for employment since graduation, though she is currently working with a vocational rehabilitation counselor. There is no evidence that Defendant has expressly advised Claimant of any obligation to perform a work search.

### Expert Medical Opinions

#### Jason Charkalis, DC

22. Dr. Charkalis is a licensed chiropractor who has practiced in Vermont for approximately twelve years. He has experience treating a variety of sports injuries as well as workers' compensation claimants. He has treated Claimant since December 2020 and is familiar with her medical history and physical condition.
23. Dr. Charkalis testified at the formal hearing that the chiropractic treatment that he was providing Claimant resulted in improvements both in her symptom management and in her functionality. Although he initially predicted that his treatment would end after

a few months, he testified that Claimant's response required him to modify his treatment expectations.

24. In Dr. Charkalis's opinion, Claimant is not at end medical result because she is continuing to make progress, and because Claimant is not yet at a point where she can perform activities of daily living without fluctuating pain patterns interfering with her life.<sup>3</sup> He believes that her course of chiropractic treatment could continue for another year depending on how she continues to respond to this care. Dr. Charkalis acknowledged that he had not reviewed any medical records relating to Claimant's physical therapy or any records from before 2019. I do not find Dr. Charkalis's opinions on the issue of end medical result persuasive.

William Boucher, MD

25. On December 15, 2020, Claimant underwent an independent medical evaluation (IME) with occupational medicine physician William Boucher, MD at Defendant's request. (JME 731 *et seq*). Dr. Boucher is a licensed physician who dedicates most of his practice to forensic work such as IMEs.
26. Dr. Boucher reviewed Claimant's medical records and physically examined her. He found that her lumbar range of motion was normal and that while she expressed complaints of neck and low back pain, he found no structural or neurological abnormalities. He assessed her with psychogenic chronic pain syndrome, which he described at the formal hearing as a somatic diagnosis for long-lasting unresponsive pain when the examiner cannot identify a specific reason for that pain.
27. Dr. Boucher found that Claimant had reached end medical result and assigned her a five percent whole person impairment rating for her cervical spine fracture. He found no objective evidence to support an impairment rating for her lumbar spine. He also concluded that Claimant had a light to medium work capacity. (JME 743).
28. Dr. Boucher also testified that, in his opinion, no additional treatment was likely to make a significant difference in Claimant's condition. He noted that her recorded complaints had remained stable for some time and that her recent imaging studies were unremarkable.
29. Claimant had only recently begun chiropractic care at the time of Dr. Boucher's IME. Dr. Boucher credibly testified that while chiropractic treatment can be very helpful in the acute phase of an injury, Claimant was well beyond that point, and medical studies do not support the continued efficacy of chiropractic care at Claimant's stage of recovery.

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<sup>3</sup> Dr. Charkalis was not able to express an accurate definition of "end medical result" at the formal hearing. I find that relevant, though not dispositive, as to the persuasiveness of his opinions on that issue.

30. Although Dr. Boucher had “fewer than all” of Claimant’s medical records at the time of his IME, he subsequently received the entire JME and determined that none of the records post-dating his IME changed his opinion.
31. I find Dr. Boucher’s opinions on the issue of end medical result well-supported and persuasive.

Verne Backus, MD

32. On September 15, 2021, Claimant underwent an IME with Verne Backus, MD, at Defendant’s request. (JME 882 *et seq*). Dr. Backus is an occupational medicine physician who has been licensed to practice in Vermont since approximately 1993. Like Dr. Boucher, he also dedicates most of his practice to forensic medical work.
33. Dr. Backus reviewed all of Claimant’s relevant medical records, interviewed her concerning her medical history, and performed a physical examination. He specifically checked Claimant for radiculopathy but found no evidence of that condition. He also examined her lower back and found no muscle spasms or trigger points. He noted that her ranges of motion were normal. He diagnosed her with non-specific low back pain, meaning that he was unable to identify a specific cause of her complaints.
34. Dr. Backus noted that at the time of his evaluation, Claimant was continuing chiropractic treatment twice per week, but with over 53 visits between December 2020 and August 2021, he found no evidence that the treatment was providing any lasting benefit.
35. Based on his review of recent radiological reports, Dr. Backus noted that Claimant appeared to have only minimal disc changes with no evidence of neuroforaminal or spinal canal stenosis and no lumbar radiculopathy. He also noted that Claimant had not appeared to make any material progress since Dr. Boucher’s December 2020 IME.
36. Dr. Backus recommended that Claimant change her pain management strategies by avoiding passive modalities like spinal manipulation and recommended that she continue her gym exercises. He also recommended resources including the “Curable” app and a workbook entitled *Managing Pain Before It Manages You* by Margaret Caudill, MD, Ph.D., MPH.<sup>4</sup>
37. Dr. Backus made clear at the formal hearing that he does not oppose chiropractic treatment as a general matter and that he refers people to chiropractic treatment when appropriate, especially with a coordinating strength program. However, he testified that another year of chiropractic treatment for Claimant would not affect her overall recovery timeline. As such, her ongoing chiropractic treatment does not change his conclusion that she is already at end medical result. He went further and stated that

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<sup>4</sup>Claimant’s treating physician Dr. Volansky also recommended that workbook. Claimant credibly acknowledged that she had not read it.

ongoing chiropractic care at this point concerned him because it could contribute to a “disability mindset.”

38. Dr. Backus found that Claimant was at end medical result as of the date of his evaluation. Based on his review of medical records between December 2019 up to the date of his evaluation, he also believed that Claimant was likely at end medical result by some time before Dr. Boucher’s IME. I find this opinion well-supported and persuasive.

## 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 Was at End Medical Result at the Time of Dr. Boucher’s IME

2. Under Vermont workers’ compensation law, an injured worker is entitled to temporary disability compensation until reaching an end medical result or successfully returning to work. See *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996). “The fact that some treatment, such as physical or drug therapy, continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition.” *Id.* at 529. The determination of end medical result is a question of fact for the Commissioner. *Id.*
3. The Department’s Rules define “end medical result” as “the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment.” Workers’ Compensation Rule 2.2000. The Vermont Supreme Court has held that the “proper test” of whether a person has reached end medical result is “whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement.” *Brace v. Vergennes Auto, Inc.*, 2009 VT 49 ¶ 11 (citing *Coburn, supra*, at 533).
4. The parties presented conflicting expert medical opinions on the issue of whether Claimant has reached end medical result in this case. In such instances, 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 (Sept. 17, 2003).

5. In this case, the first factor favors Dr. Charkalis over Drs. Boucher and Backus because of his lengthy and frequent treating relationship with Claimant. The second factor favors Drs. Backus and Boucher over Dr. Charkalis, as Drs. Backus and Boucher both reviewed a more comprehensive set of medical records including all physical therapy notes. I find that the fourth and fifth factors do not heavily favor either position in this case.
6. As in many cases, however, the third factor is the most important here. This factor favors Drs. Boucher and Backus over Dr. Charkalis. Drs. Boucher and Backus persuasively explained that their clinical findings did not reveal any objective abnormalities in Claimant's lower back and that chiropractic care was unlikely to significantly alter her recovery timeline. They also demonstrated a more accurate understanding of the concept of end medical result than Dr. Charkalis. I also find it persuasive that Dr. Backus was able to determine from the medical records between the time of Dr. Boucher's IME and his own that Claimant had not materially improved despite undergoing over 50 chiropractic sessions.<sup>5</sup>
7. Based on Dr. Boucher's testimony that Claimant was at end medical result at the time of his IME and Dr. Backus's testimony that Claimant was most likely at end medical result sometime before Dr. Backus's IME, I find that Claimant reached end medical result on December 15, 2020.

*Claimant Is Not Entitled to Ongoing Temporary Disability Benefits*

8. Vermont law provides for the payment of temporary total or temporary partial disability benefits when a workplace injury causes disability for work. 21 V.S.A. §§ 642, 646.
9. An employer's obligation to pay temporary disability generally terminates when the injured worker either reaches an end medical result or successfully returns to work, whichever comes first. *Cyr v. Record Concrete*, Opinion No. 22-15WC (October 2, 2015) ("Once the worker either regains full earning power or reaches an end medical result, his entitlement to temporary disability benefits, whether total or partial, ends."); *see also Barry v. Ethan Allen Interiors, Inc.*, Opinion No. 10-18WC, Conclusion of Law No. 5 (June 25, 2018) (citing 21 V.S.A. § 643a; Workers' Compensation Rule 12.1200).

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<sup>5</sup> This does not mean that Dr. Charkalis's care is not reasonable or necessary; it may still be reasonable palliative care. However, Dr. Charkalis's testimony does not persuade me that continued chiropractic care is likely to lead to lasting medical improvements that would affect whether Claimant has reached end medical result.



10. In this case, because Claimant has reached end medical result, Defendant has no further obligation to pay Claimant temporary disability benefits.
11. Because the reason I conclude that Defendant no longer has any obligation to pay temporary disability benefits is that Claimant has reached end medical result, I need not assess the sufficiency of Defendant's efforts to notify Claimant of her work capacity and/or of any duty to conduct a good faith work search. *Cf. Sawyer v. Mount Snow, LTD.*, Opinion No. 22-97WC (August 13, 1997).

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, I determine that Claimant reached end medical result on December 15, 2020, and Defendant has no further obligation to pay temporary disability benefits to Claimant.

**DATED** at Montpelier, Vermont this 3<sup>rd</sup> day of March 2022.

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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.