

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Wendy Faery

Opinion No. 19-23WC

v.

By: Stephen W. Brown
Administrative Law Judge

Washington County Mental Health
Services, Inc.

For: Michael A. Harrington
Commissioner

State File No. Y-60390

**RULING ON CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
MOTION IN LIMINE**

APPEARANCES:

Todd D. Schlossberg, Esq. and Heidi S. Groff, Esq., for Claimant
Wesley M. Lawrence, Esq., for Defendant

ISSUES PRESENTED:

1. Has Defendant waived its right to contest the compensability, causation, nature, or extent of Claimant's traumatic brain injury by accepting this claim as compensable?
2. Should Defendant be precluded from introducing any evidence at a formal hearing disputing the compensability or causation of Claimant's traumatic brain injury and symptoms she contends to be related thereto?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts ("CSUMF")

Claimant's Exhibits 1-2: Central Vermont Hospital Medical Records

Claimant's Exhibit 3-15: Gifford Medical Center Medical Records

Claimant's Exhibit 16: Agreement for Temporary Total Disability Compensation (Form 21) approved April 20, 2012

Claimant's Exhibit 17: Independent Medical Examination ("IME") Report by Edward J. Orecchio, MD, dated July 6, 2007

Claimant's Exhibits 18-22: Gifford Medical Center Medical Records

Claimant's Exhibit 23: Clara Martin Center Medical Records

Claimant's Exhibit 24: Gifford Medical Center Medical Records

Claimant’s Exhibit 25: Clara Martin Center Medical Records

Claimant’s Exhibits 26-30: Gifford Medical Center Medical Records

Claimant’s Exhibit 31: Clara Martin Center Medical Records

Claimant’s Exhibit 32: Gifford Medical Center Medical Records

Claimant’s Exhibit 33: Neuropsychological Evaluation by Sheba R. Kumbhani, Ph.D., and Laura A. Flashman, Ph.D., dated April 29, 2008

Claimant’s Exhibit 34: Gifford Medical Center Medical Records

Claimant’s Exhibit 35: Clara Martin Center Medical Records

Claimant’s Exhibit 36: IME Report Edward J. Orecchio, MD, dated July 9, 2008

Claimant’s Exhibit 37: IME Report Edward J. Orecchio, MD, dated September 20, 2010

Claimant’s Exhibit 38: Letter Report of Laura Barber, MD, dated July 13, 2020

Claimant’s Exhibit 39: IME Report by Andrew J. Haig, MD, dated May 3, 2021

Claimant’s Exhibit 40: Neuropsychological Evaluation Report by Elizabeth Leritz, Ph.D., dated May 2, 2021

Claimant’s Exhibit 41: IME Report of Ondrea McKay, MD, dated February 2, 2023

Claimant’s Exhibit 42: IME Report of Robert Feder, MD, dated October 13, 2022

Claimant’s Exhibit 43: Permanent Impairment Evaluation Report of Andrew I. Forrest, MD, dated February 28, 2023

Defendant’s Response to Claimant’s Statement of Undisputed Material Facts (“DRCSUMF”)

Employer’s Statement of Additional Material Facts (“ESAMF”)

Defendant’s Exhibit 1: Email Correspondence between the parties’ attorneys and the Department of Labor’s Specialist II

Defendant’s Exhibit 2: Agency of Transportation, Report of a Motor Vehicle Crash

Defendant’s Exhibit 3: Central Vermont Medical Center¹ Medical Record

¹ The name, “Central Vermont Medical Center,” appears on more recent printouts but appears to refer to the same institution as Central Vermont Hospital.

Defendant's Exhibits 4-8: Gifford Medical Center Medical Records

Defendant's Exhibit 9: Clara Martin Center Medical Records

Defendant's Exhibits 10-11: Gifford Medical Center Medical Records

Defendant's Exhibit 12: Clara Martin Center Medical Records

Defendant's Exhibit 13: Addendum to Neuropsychological Evaluation by Sheba R. Kumbhani, Ph.D., and Laura A. Flashman, Ph.D., dated May 29, 2008

Defendant's Exhibits 14-15: Clara Martin Center Medical Records

Defendant's Exhibit 16: Minnesota Multiphasic Personality Inventory 2 and Interpretive Report by James N. Butcher, Ph.D., dated October 14, 2020

Defendant's Exhibit 17: Psychiatric Evaluation Report by Albert M. Drukteinis, MD, JD, dated October 26, 2009

Defendant's Exhibit 18: Dartmouth-Hitchcock Memorial Hospital Medical Records

Defendant's Exhibit 19: Gifford Medical Center Medical Records

Defendant's Exhibit 20: Multiple Letters Between the Parties' Attorneys and the Department of Labor's Specialist II, Including Discovery Requests and Responses

Defendant's Exhibit 21: Gifford Medical Center Medical Records

Defendant's Exhibit 22: Dartmouth-Hitchcock Memorial Hospital Medical Records

Defendant's Exhibits 23-25: Gifford Medical Center Medical Records

Defendant's Exhibit 26: Dartmouth-Hitchcock Memorial Hospital Medical Records

Defendant's Exhibit 27: Psychiatric Re-Evaluation Report by Albert M. Drukteinis, MD, JD, dated July 1, 2013

Defendant's Exhibit 28: Dartmouth-Hitchcock Memorial Hospital Medical Records

Defendant's Exhibit 29: Gifford Medical Center Medical Records

Defendant's Exhibits 30-31: VNAH Home Care North PT Medical Records

Defendant's Exhibit 32: Dartmouth-Hitchcock Memorial Hospital Medical Records

- Defendant's Exhibit 33: Gifford Medical Center Medical Records
- Defendant's Exhibit 34: Dartmouth-Hitchcock Memorial Hospital Medical Records
- Defendant's Exhibit 35: IME Report by Michael J. Kenosh, MD, dated December 15, 2016
- Defendant's Exhibit 36: IME Report by Nancy E. Binter, MD, dated May 19, 2020

BACKGROUND:

Viewing the record in the light most favorable to the Defendant as the non-moving party, there is no genuine issue as to the following material facts, except as noted:²

1. As of March 19, 2007, Defendant Washington County Mental Health employed Claimant as a caseworker. On that date, she was involved in an automobile accident in the course of her employment. At the Emergency Room later that same day, she complained of severe right-sided neck pain that radiated into the right side of her head and a sharp right-sided headache that went behind her eyes. She was diagnosed with a neck strain secondary to a motor vehicle accident. (CSUMF 1-2; Claimant's Exhibits 1-2).
2. Medical treatment records from the following week reflect Claimant's continued complaints of headache and neck pain, as well as concerns of possible amnesia and loss of consciousness. She was diagnosed with a concussion and referred for diagnostic imaging. (CSUMF 4-5; Claimant's Exhibits 3-4).
3. Subsequent medical records from the spring of 2007 identify multiple cognitive and sensory symptoms including a dissociative experience, absence episodes, trouble problem solving and processing information, speech problems, decreased sense of taste, dizziness, vertigo, altered pace sensation, mood change, and nausea. (CSUMF 6-11; Claimant's Exhibits 5-9). These symptoms led her treating providers to diagnose her with post-concussion syndrome. (*See* CSUMF 15, Claimant's Exhibit 13).
4. By June 27, 2007,³ both parties had executed an Agreement for Temporary Disability Compensation (Form 21)⁴ identifying Claimant's accepted workplace injury as "concussion and post-concussion syndrome." (CSUMF 18; Claimant's Exhibit 16). The Department approved that Agreement on April 20, 2012,⁵ and Defendant began paying Claimant temporary total disability benefits thereafter. (ESAMF 8).

² The parties recite the medical and procedural history of this claim at much greater length than presented here. The recitation here is not intended to be comprehensive but summarizes the key events necessary to identify and resolve the disputed legal issues in Claimant's motion.

³ Claimant's signature is dated June 27, 2007. Defendant's insurer's adjuster's signature appears to be dated June 19, 2007, but the text is less than perfectly legible.

⁴ In 2015, the Department redesignated Form 21 as Form 32.

⁵ The reason for the nearly five-year delay between this agreement's execution and its approval is not entirely clear but not material for the purposes of resolving this motion.

5. Between the time the parties executed that Agreement and the time the Department approved it, Claimant underwent three independent medical examinations (IMEs) at Defendant's request with board-certified neurologist Edward J. Orecchio, MD. In his first IME in July 2007, Dr. Orecchio noted impairment in Claimant's memory, executive function, and visual/spatial abilities, as well as depression, all attributable to her head injury from automobile accident. (CSUMF 19-21; Claimant's Exhibit 17). In his second IME approximately one year later, he assessed Claimant with post-traumatic cognitive dysfunction along with vertigo or post concussive syndrome, which in his opinion, "appear[ed] to be permanent." In his opinion at that time, she could not return to work, and he recommended additional treatments including counseling, speech therapy, and further evaluation of her vestibular and auditory functions. (See CSUMF 40; Claimant's Exhibit 36). In his third IME in 2010, he found that there had "really been no change" since his 2008 IME and that Claimant could not "work in any area that requires cognitive or physical skills." (CSUMF 43; Claimant's Exhibit 37).⁶
6. Defendant does not deny that Claimant suffered a work-related automobile accident or that it accepted her concussion and post-concussion syndrome as compensable. Instead, it challenges whether and to what extent Claimant's ongoing reported symptoms are causally related to that accident, as well as the extent, if any, of her ongoing disability resulting from that accident. In support of this challenge, Defendant relies on multiple IMEs and records reviews by medical experts after its acceptance of this claim as compensable.
7. Specifically, on December 15, 2016, Claimant underwent an IME with physiatrist Michael Kenosh, MD, who placed her at end medical result with a 0% whole person impairment from a medical standpoint. (ESAMF 38; Defendant's Exhibit 35). Additionally, on May 19, 2020, neurosurgeon Nancy Binter, MD conducted a medical records review of Claimant's medical history and concluded that any post-concussive complaints Claimant could have sustained from her 2007 motor vehicle accident had "long since resolved," and found her to be at end medical result with 0% whole person impairment. (ESAMF 39; Defendant's Exhibit 36).⁷
8. Defendant also relies on more recent reports from physiatrist Andrew Haig, MD, and neuropsychologist Elizabeth Leritz, PhD, both of whom performed IMEs on Claimant in April 2021. (CSUMF 52; DRCSUMF 52; ESAMF 44-45; Claimant's Exhibits 39-40). In Dr. Haig's opinion, there is "no objective evidence of any disorder or impairment" that he can link to Claimant's 2007 automobile accident, nor any "aspect of her current medical

⁶ Dr. Orecchio was not the only medical expert to evaluate Claimant during the period between the Form 21's execution by the parties and its approval by the Department. In 2008, Claimant also underwent a neuropsychological evaluation with Drs. Seba Kumbhani, Ph.D., and Laura Flashman, Ph.D., who concluded that Claimant suffered from "mild to severe difficulties across a number of cognitive domains." (CSUMF 37; Claimant's Exhibit 33; DRCSUMF 37). Additionally, Claimant underwent an IME with psychiatrist Albert Drukteinis, J.D., M.D., who diagnosed Claimant with a non-occupational somatoform disorder. Defendant had sought to discontinue temporary disability benefits based on Dr. Drukteinis's 2009 IME, but the Department rejected that discontinuance as not reasonably supported.

⁷ Defendant sought to discontinue Claimant's ongoing temporary disability benefits based on Dr. Binter's opinion later that month, but the Department rejected that request on October 29, 2020. (ESAMF 40).

complaints or functioning challenges that is, or remains related to the motor vehicle accident on March 19, 2007.” He believes that Claimant has a non-work-related somatization disorder and questions her credibility. He found her to be at end medical result and rated her with a 0% whole person impairment. (*See* Claimant’s Exhibit 39).

9. Dr. Leritz, in turn, opines that Claimant’s “subjective report of persistent symptoms is being driven by and maintained by factors other than her concussion of 3/19/07. These factors include but are not limited to iatrogenesis, psychosocial stressors, mood, secondary gain and litigation. Her reported persisting symptoms are therefore not causally related to the concussion she sustained on 3/19/07, which is the basis of her current claim.” In her opinion, “there is no evidence of persisting or permanent neurocognitive impairment as a result of her accident on 3/19/07.” (*See* Claimant’s Exhibit 40).
10. Claimant disputes Drs. Haig’s and Leritz’s opinions and seeks to have them excluded from evidence on the grounds that they are inconsistent with Defendant’s acceptance of post-concussion syndrome as a compensable condition when the Department approved the Form 21 in 2012. In further opposition to Drs. Haig’s and Leritz’s opinions, Claimant cites yet another IME that she underwent on September 27, 2022 with brain injury specialist Ondrea McKay, MD, who was critical of both Drs. Haig and Dr. Leritz for failing, in her view, to account for modern brain injury science and practice. (CSUMF 57; Claimant’s Exhibit 41).
11. This case is scheduled for a three-day formal hearing in February 2024 on multiple issues, including whether Claimant is permanently and totally disabled as a result of her 2007 automobile accident.

ANALYSIS:

Claimant’s Motion for Partial Summary Judgment on the Causal Origin of Claimant’s Ongoing Symptoms and Complaints

1. Summary judgment is proper when “there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party.” *State v. Delaney*, 157 Vt. 247, 252 (1991). 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). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
2. When an employer and injured worker enter into an agreement as to the benefits payable, they must file a memorandum of that agreement with the Department for its review and approval, and their agreement becomes enforceable upon the Department’s approval. *See generally* 21 V.S.A. § 662(a). Once the parties sign and the Department approves an agreement for temporary compensation, it becomes an enforceable contract and “absent

evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof.”⁸

3. In this case, the parties entered into such an agreement, under which Defendant accepted Claimant’s concussion and post-concussion syndrome as compensable. There is no evidence or allegation of fraud or mutual mistake of fact related to the approved Agreement that the parties signed in 2007. As such, it became enforceable upon the Department’s approval on April 20, 2012. *See* Background, *supra*, at 4. Defendant thus contractually waived any right to contest its acceptance of Claimant’s concussion and post-concussion syndrome as compensable.
4. However, that does not render every symptom, complaint, or disability that might suggest post-concussive syndrome a part of what Defendant accepted. *See, e.g., Meau v. The Howard Center, Inc.*, Opinion No. 18-21WC (September 14, 2021) (rejecting contention that a settlement agreement that left medical benefits open waived employer’s right to challenge future medical treatments and prescriptions for the accepted conditions specified in settlement).
5. Certainly, an employer’s acceptance of a condition includes acceptance of all the natural consequences that follow from the accepted condition. *E.g., Cross v. State of Vermont*, Opinion No. 16-12WC (June 6, 2012). However, accepted injuries can and often do resolve. Factual disputes about whether specific symptoms or complaints constitute natural consequences of an accepted condition are intrinsically fact-specific and poorly suited for summary adjudication.
6. Defendant is entitled to contest the causal relationship of Claimant’s current symptoms to the accepted injury, as well as the extent of Claimant’s ongoing disability that results from that accepted injury. It has identified two expert witnesses who call the causal relationship of Claimant’s ongoing symptoms to the 2007 accident into question. That is sufficient to create a genuine issue of material fact as to the causal origin of her ongoing symptoms.
7. Accordingly, Claimant’s motion for partial summary judgment is granted as it relates to the fact of Defendant’s acceptance of her concussion and post-concussion syndrome, but denied as it relates to the compensability or causal origin of her ongoing symptoms.

Claimant’s Motion in Limine

8. In her Motion in Limine, Claimant seeks to preclude any argument or opinion testimony contesting the causation or compensability of her post-concussive symptoms that she has experienced since her 2007 accident. In particular, she contends that the expert opinions of Drs. Haig and Leritz are inconsistent with Defendant’s contractual acceptance of her post-concussion syndrome. In support of this contention, she notes that Defendant was

⁸ *See* former Workers’ Compensation Rule 17.0000 (in effect at time of Department’s approval of the Form 21 at issue here); *accord* current Rule 9.1400 (“Once approved, a duly executed *Agreement for Temporary Compensation* constitutes a binding and enforceable contract. Absent evidence of fraud or material mistake of fact, the parties will be deemed to have waived their right to contest the material portions thereof.”).

aware of her hallmark post-concussive symptoms well before the Department approved the Form 21 in 2012. She argues that Defendant's experts contend that her post-concussive symptoms likely resolved within months after her 2007 accident,⁹ which if credited, would mean that Claimant's condition resolved sometime before 2012. This, in her view, would be inconsistent with the Form 21 becoming an enforceable contract reflecting Defendant's waiver of its right to contest the occupational origin of Claimant's post-concussion syndrome.

9. As discussed above, Defendant has contractually waived its right to contest the fact that Claimant suffered a concussion and post-concussion syndrome as a result of her 2007 automobile accident. It would be inappropriate, therefore, for Defendant to offer testimony, whether from Drs. Haig and Leritz or any other source, that Claimant *never* suffered those conditions.¹⁰ That would be inconsistent with Defendant's admitted acceptance of these conditions as compensable.
10. That does not end the analysis, however. While the Department's approval of the Form 21 rendered Defendant's acceptance of Claimant's concussion and post-concussion syndrome enforceable as of the time of approval in April 2012, it did not hold that every intervening symptom between 2007 and 2012 was causally related to the accepted injury.
11. Both Drs. Haig's and Leritz's reports offer opinions that Claimant's *ongoing* complaints today are no longer related to that accident, which Defendant is entitled to question. As such, they should be permitted to testify as to these opinions. *See Meau, supra*, at Conclusion of Law Nos. 13-14 (denying analogous motion *in limine* to exclude expert testimony about causal origin of ongoing symptoms in the context of a contractually accepted concussion: "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. 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.").
12. Further, to the extent that Drs. Haig's and/or Leritz's opinions are based on the typical recovery time for the conditions that Claimant either has or had, they should be allowed to explain the basis of their opinions. To the extent their rationales conflict with other credible evidence, that may affect the weight of their opinions, but that does not mean they should be disallowed from testifying. If Drs. Haig and/or Leritz testify at the formal

⁹ Defendant disputes Claimant's characterization of Drs. Haig's and Leritz's opinions. Dr. Leritz's opinion states in relevant part on page 52, "It is my professional opinion that Ms. Faery sustained a mild traumatic brain injury, or concussion as a result of the MVA she had on March 19, 2007. It is also my professional opinion that Ms. Faery would have recovered physical, somatic and cognitive symptoms within three months of the incident." (Claimant's Exhibit 40).

¹⁰ It merits repeating that Defendant has disavowed any intent to do so.

hearing, I will weigh their credibility and persuasiveness on their own merits and in the context of all other evidence presented.

13. Claimant's Motion *in Limine* is thus granted only to preclude evidence or argument that Claimant never suffered the conditions that Defendant accepted as compensable, but denied as it relates to Defendant's right to present argument and evidence, including expert testimony by Drs. Haig and Leritz, as to the extent, duration, and resulting disability, if any, of Claimant's accepted injuries, consistent with my ruling on Claimant's Motion for Partial Summary Judgment, *supra*.

ORDER:

Based on the foregoing, Claimant's Motion for Partial Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. As a matter of law, Defendant contractually waived its right to deny that Claimant suffered a concussion and post-concussion syndrome as a result of her March 19, 2007 automobile accident. However, Defendant is entitled to challenge whether and to what extent Claimant's ongoing symptoms are related to her accepted injury, as well as the extent, if any, of her resulting disability.

Similarly, Claimant's Motion in Limine is **GRANTED IN PART** and **DENIED IN PART**. Defendant may not introduce any expert testimony that Claimant never suffered a concussion or post-concussion syndrome as a result of her March 19, 2007 automobile accident. However, it may present expert opinions that Claimant's symptoms today are no longer related to her March 19, 2007 automobile accident, as well as evidence as to the extent, if any, of her disability resulting from that accident.

To the extent Claimant seeks any relief not expressly granted herein, such request stands denied.

DATED at Montpelier, Vermont this 6th of December 2023.

Michael A. Harrington
Commissioner