STATE OF VERMONT
DEPARTMENT OF LABOR

Carnell Jones	Opinion No. 10-24WC
v.	By: Beth A. DeBernardi Administrative Law Judge
City of Burlington	For: Michael A. Harrington Commissioner
	State File No. HH-65250

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Brendan P. Donahue, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to judgment as a matter of law that the proposed bilateral radiofrequency ablations are reasonable treatment for his work-related injury?

2. Should Defendant be precluded from introducing the opinions of medical expert Dr. Backus at a formal hearing?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts filed April 9, 2024

Claimant's Exhibit 1:	Agreement for Permanent Partial Disability Compensation (Form 22) approved July 11, 2018
Claimant's Exhibit 2:	February 16, 2017 MRI imaging report
Claimant's Exhibit 3:	February 23, 2017 medical record of PA Robert Hemond
Claimant's Exhibit 4:	April 5, 2017 medical record of Dr. Mordechai Bronner
Claimant's Exhibit 5:	May 8, 2017 medical record of Dr. Bronner
Claimant's Exhibit 6:	June 19, 2017 medical record of PA Hemond
Claimant's Exhibit 7:	Workers' compensation payment detail spreadsheet
Claimant's Exhibit 8:	September 14, 2017 medical record of Dr. Esther Caballero-Manrique
Claimant's Exhibit 9:	October 4, 2017 medical record of Dr. Bronner
Claimant's Exhibit 10:	February 17, 2018 independent medical examination report of Dr. Philip Davignon
Claimant's Exhibit 11:	November 27, 2018 medical record of PA Hemond
Claimant's Exhibit 12:	December 19, 2018 preauthorization request for radiofrequency ablation, approved by Defendant
Claimant's Exhibit 13:	March 6, 2019 medical record of Dr. Bronner

Claimant's Exhibit 14:	March 7, 2019 preauthorization request for radiofrequency ablation, approved by Defendant
Claimant's Exhibit 15:	June 5, 2019 medical record of Dr. Tiffani Lake
Claimant's Exhibit 16:	September 29, 2020 medical record of PA Hemond
Claimant's Exhibit 17:	March 26, 2021 medical record of Dr. Lake
Claimant's Exhibit 18:	April 13, 2021 medical record of Dr. Jared Karl
Claimant's Exhibit 19:	June 2, 2022 medical record of Dr. Lake
Claimant's Exhibit 20:	August 24, 2022 preauthorization request for radiofrequency ablation
Claimant's Exhibit 21:	August 25, 2022 denial of preauthorization request (Form 2)
Claimant's Exhibit 22:	March 13, 2023 medical record of PA Hemond
Claimant's Exhibit 23:	April 12, 2023 independent medical examination report of Dr. Verne Backus

Defendant's Response to Claimant's Statement of Undisputed Material Facts filed May 13, 2024

Defendant's Exhibit A:	June 4, 2018 letter from Claimant's physical therapist
Defendant's Exhibit B:	August 21, 2019 progress note from PA Robert Hemond
Defendant's Exhibit C:	June 2, 2022 telephone log concerning Claimant's pain reports
Defendant's Exhibit D:	August 24, 2022 preauthorization request for radiofrequency ablation, denied on August 25, 2022
Defendant's Exhibit E:	Claimant's December 23, 2019 registration of a business name with the Vermont Secretary of State

FINDINGS OF FACT:

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 for the purpose of this motion:

1. Claimant sustained an accepted injury to his low back on June 14, 2016. *Claimant's Statement of Undisputed Material Facts* ("*Claimant's Statement*"), ¶ 1; *Claimant's Exhibit 1*; *Defendant's Response to Claimant's Statement* ("*Defendant's Response*"), ¶ 1.

2. A lumbar MRI was performed on February 16, 2017. *Claimant's Exhibit 2.* Concerning findings at the L4-L5 level of Claimant's spine, the MRI report's impression section states:

> Lateral disc herniation L4-L5 adjacent to the exiting right L4 nerve root without gross root compression. This should be correlated clinically. There is also no more than mild to moderate right L5 lateral recess encroachment secondary to disc bulge and degenerative facet change.

Claimant's Exhibit 2; Claimant's Statement, ¶ 2; *Defendant's Response,* ¶ 2.

3. Claimant's treating orthopedic physician assistant, Robert Hemond, recommended medial branch blocks and bilateral radiofrequency ablations to treat Claimant's work-related symptoms. *Claimant's Statement*, ¶ 3; *Claimant's Exhibit 3*; *Defendant's Response,* ¶ 3.

4. Claimant underwent medial branch blocks at L4, L5 and the ALA (the upper part of the lateral sacrum) on April 5, 2017. Those blocks resulted in one hundred percent pain relief for six hours. Claimant underwent a second round of medial branch blocks at the same levels on May 8, 2017. *Claimant's Statement*, ¶¶ 4-6; *Claimant's Exhibits 4-5*; *Defendant's Response*, ¶¶ 4-6.

5. PA Hemond saw Claimant again on June 19, 2017. He noted that Claimant's medial branch blocks were some of the most successful he had ever seen, and he recommended that Claimant move forward with radiofrequency ablation. Defendant's workers' compensation insurance carrier (the "carrier") paid for both sets of medial branch blocks. *Claimant's Statement*, ¶¶ 7-8; *Claimant's Exhibits 6-7*; *Defendant's Response*, ¶¶ 7-8.

6. Claimant underwent his first set of radiofrequency ablations on September 14, 2017 and October 4, 2017, which the carrier paid for. *Claimant's Statement*, ¶¶ 9-10; *Claimant's Exhibits 6, 8-9*; *Defendant's Response*, ¶¶ 9-10.

7. At the carrier's request, Claimant underwent an independent medical examination by occupational medicine physician Philip Davignon, MD, on February 7, 2018. In his opinion, (1) all treatment to date had been reasonable, causally related to the work injury, and necessary; (2) Claimant's symptoms, including pain complaints over both SI joints and significant paraspinal spasm during his examination, were related to the accepted injury; and (3) Claimant had a work-related six percent whole person impairment referrable to his low back condition. *Claimant's Statement*, ¶¶ 11-12; *Claimant's Exhibit 10*; *Defendant's Response*, ¶¶ 11-12.

8. On July 11, 2018, the Department of Labor (the "Department") approved an Agreement for Permanent Partial Disability Compensation (Form 22) based on Dr. Davignon's six percent whole person impairment rating. *Claimant's Statement*, ¶ 13; *Claimant's Exhibit 1*; *Defendant's Response*, ¶ 13.

9. Claimant returned to PA Hemond on November 27, 2018, complaining of a three-week history of gradually increasing back pain and expressing concern that he would have to undergo repeat medial branch blocks and radiofrequency ablations. PA Hemond recommended waiting a few weeks and, if the pain did not improve, moving forward with those procedures. The following month, his office sent the carrier a preauthorization request for medial branch blocks and radiofrequency ablations, which the carrier approved. *Claimant's Statement*, ¶¶ 14-16; *Claimant's Exhibits 11-12*; *Defendant's Response*, ¶¶ 14-16.

10. On March 6, 2019, Claimant saw Mordechai Bronner, MD, at the UVM Medical Center's Pain Clinic. Dr. Bronner wrote in his medical record that Claimant's prior radiofrequency ablations resulted in more than 80 percent improvement of his symptoms for over 16 months. *Claimant's Statement*, ¶ 17; *Claimant's Exhibit 13*. Defendant

disputes the accuracy of Dr. Bronner's statement, noting that none of Claimant's prior medical records document this level and duration of pain relief from radiofrequency ablation. *Defendant's Response*, ¶ 17, citing *Claimant's Exhibit 23*, at 16.

11. The following day, March 7, 2019, Dr. Bronner's office sent a preauthorization request for radiofrequency ablations to the carrier, and the carrier approved the request the same day. Accordingly, Claimant underwent, and the carrier paid for, a second set of bilateral radiofrequency ablations on June 5, 2019 and July 9, 2019. *Claimant's Statement*, ¶¶ 18-21; *Claimant's Exhibits 7, 14-15*; *Defendant's Response*, ¶¶ 18-21.

12. There were about 20 months between the first and second sets of radiofrequency ablations. *Claimant's Statement*, ¶ 22; *Defendant's Statement,* ¶ 22.

13. On September 29, 2020, Claimant returned to PA Hemond, who recommended a third set of radiofrequency ablations, which Claimant underwent on March 26, 2021 and April 13, 2021, at the carrier's expense. *Claimant's Statement*, ¶¶ 23-25; *Claimant's Exhibits 7, 16-18*; *Defendant's Response*, ¶¶ 23-25.

14. There were about 21 months between the second and third sets of radiofrequency ablations. *Claimant's Statement*, ¶ 26; *Defendant's Response*, ¶ 26.

15. Claimant called the UVM Medical Center's Pain Center on June 2, 2022 and reported that his pain had returned after about one year of relief following the third set of radiofrequency ablations. *Claimant's Statement*, ¶ 27; *Claimant's Exhibit 19*; *Defendant's Response*, ¶ 27; *Defendant's Exhibit C.*

16. Claimant, through his providers, sought preauthorization for a fourth set of radiofrequency ablations on August 24, 2022. This time, however, the carrier denied his request, noting that the last date of service had been in April 2021 and there was "no new or recent visit to show this treatment is related or necessary to this claim." *Claimant's Statement*, ¶¶ 28-29; *Claimant's Exhibits 20-21*; *Defendant's Response*, ¶¶ 28-29; *Defendant's Exhibit D*.

17. On March 13, 2023, Claimant saw PA Hemond for a physical examination. PA Hemond concluded as follows:

> Low back pain as result of work-related injury dated May 2016. Physical exam reveals no signs of disc herniation or nerve root impingement. At this point I think it is reasonable to move forward with repeat medial branch blocks and radiofrequency ablation at L4-L5 and sacral alia. *I think there is a high probability this patient will receive moderate pain relief as he has in the past*.

Claimant's Exhibit 22 (emphasis added); *Claimant's Statement*, ¶ 30; *Defendant's Response*, ¶ 30.

18. The carrier responded by sending Claimant to an independent medical examination by occupational medicine physician Verne Backus, MD, on April 12, 2023. In Dr. Backus' opinion, Claimant's work-related back pain fully resolved by June 4, 2018, and any low back pain thereafter was unrelated to his work injury. *Claimant's Statement*, ¶¶ 31-32; *Claimant's Exhibit 23*, at 22-23; *Defendant's Response*, ¶¶ 31-32; *Defendant's Exhibit A.*

19. Dr. Backus further offered his opinion that radiofrequency ablation was of questionable benefit to Claimant and that, regardless, if he pursued the treatment, such treatment would be unrelated to his accepted work injury. He noted that Claimant's medical records documented an inconsistent response to his prior radiofrequency ablations, including no reported relief and a documented worsening of his symptoms after the second series in 2019. *Claimant's Statement*, ¶ 33; *Claimant's Exhibit 23*, at 15-16, 23; *Defendant's Response*, ¶ 33.

20. Relying on Dr. Backus' opinion, the carrier has declined to authorize the additional radiofrequency ablations recommended by PA Hemond in August 2022. *Claimant's Statement*, ¶ 34; *Defendant's Response*, ¶ 34.

21. Defendant adds that no medical provider has billed for additional treatment rendered nor submitted any other preauthorization requests for treatment purportedly related to Claimant's June 2016 low back injury since PA Hemond's March 13, 2023 office visit. Further, Defendant contends that PA Hemond's assessment of Claimant's chronic back pain as work-related is "patently conclusory." *Defendant's Response*, ¶ 34.

22. Finally, Defendant alleges that Claimant may be engaged in a paving side business. *Defendant's Exhibit E*. Defendant contends that the role of paving work in Claimant's low back condition may present a genuine issue of material fact after discovery is complete. *Defendant's Opposition to Claimant's Summary Judgment Motion*, at 10. Claimant contends that the evidence of his paving side business is "mere conjecture." *Claimant's Reply Motion for Summary Judgment*, at 1.

CONCLUSIONS OF LAW:

1. Claimant seeks a summary judgment determination that the proposed bilateral radiofrequency ablations are reasonable medical treatment for his compensable work-related injury as a matter of law. Defendant contends that the parties' dispute about Claimant's medical treatment is not appropriate for summary judgment resolution.

Summary Judgment Standard

2. 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. V.R.Civ.P. 56(a); *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). When such motions are evaluated, 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). 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). In determining whether there is a genuine issue as to any material fact, the Department must accept as true "the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gauthier v. Keurig Green Mountain, Inc*., 2015 VT 108, ¶ 14.

3. Defendant accepted Claimant's 2016 low back injury as compensable, and the parties entered into an approved Agreement for Permanent Partial Disability Compensation (Form 22) for this injury on July 10, 2018. *Claimant's Exhibit 1*. Defendant paid for three sets of radiofrequency ablations for Claimant's low back condition, in 2017, 2019 and 2021. Claimant now contends that Defendant's acceptance of this injury, as evidenced by the approved Form 22 and by its payment for previous radiofrequency ablations, renders additional radiofrequency ablations reasonable medical treatment as a matter of law.

Reasonable Medical Treatment

4. 21 V.S.A. § 640(a) provides that the employer shall furnish "reasonable" medical treatment to the injured employee. For a medical treatment to be reasonable, it must be both medically necessary and causally related to the compensable work injury. *See, e.g., Baraw v. F.R. Lafayette, Inc*., Opinion No. 01-10WC (January 20, 2010); *Brodeur v. Energizer Battery Mfg., Inc.,* Opinion No. 06-14WC (April 2, 2014).

Claimant's Contention that Defendant Is Contractually Obligated to Pay for Future Radiofrequency Ablations

5. Claimant first offers a contract theory as the basis for Defendant's obligation to pay for future radiofrequency ablations as a matter of law. He contends that, because Defendant entered into the Agreement for Permanent Partial Disability Compensation, and because it approved preauthorizations for prior ablations, it is contractually bound to pay for additional radiofrequency ablations.

The Approved Agreement for Permanent Partial Disability Compensation

6. Certainly, the parties are bound by the material terms of their Agreement for Permanent Partial Disability Compensation in the absence of fraud or mutual mistake, neither of which is alleged here. *See* 21 V.S.A. § 662(a); Workers' Compensation Rule 10.1820. Indeed, Defendant does not contend otherwise. However, payment for future radiofrequency ablations is not an agreed-upon term set forth in the parties' Agreement.

7. Both parties cite *Faery v. Washington County Mental Health Services, Inc*., Opinion No. 19-23WC (December 6, 2023) in support of their respective positions. The parties in *Faery* entered into an Agreement for Temporary Disability Compensation, identifying the claimant's workplace injury as a concussion. Eventually, the defendant disputed certain claims for benefits. In response, the claimant moved for a summary judgment ruling that the Agreement for Temporary Disability Compensation precluded the defendant from challenging the compensability, causation, nature or extent of her concussion injury as a matter of law. As in the instant case, the defendant in *Faery* did not dispute that the

claimant sustained a work-related injury; rather, it just challenged whether and to what extent her ongoing symptoms and disability were causally related to her accepted workplace injury.

8. The Department in *Faery* granted the claimant summary judgment *only* to the extent that the defendant's acceptance of her concussion injury precluded it from later contending that she did not sustain a work-related concussion. The Department otherwise denied the claimant's summary judgment motion, holding that the defendant could challenge the nature and extent of her ongoing symptoms and disability and whether those symptoms were still causally related to the work injury. As the Department noted, "accepted injuries can and often do resolve," which may create a factual dispute about whether such injuries have in fact done so. *Faery*, at Conclusion of Law No 5.

9. Applying the same reasoning to this claim, Defendant here is precluded from denying that Claimant sustained a low back injury at work in June 2016, as it has accepted such injury. However, consistent with the holding in *Faery*, Defendant may challenge whether Claimant's current low back symptoms are causally related to his accepted injury and whether radiofrequency ablation is a necessary treatment for his condition. *See Faery*, at Conclusion of Law No. 7.

10. Claimant also cites *Coronis v. Granger Northern, Inc*., Opinion No. 16-10WC (April 27, 2010) for the same proposition, but that decision only reinforces the holding in *Faery*: future medical care is not a material term of an Agreement for Permanent Partial Disability Compensation. In *Coronis*, the Department approved an Agreement for Permanent Partial Disability Compensation that obligated the employer to pay benefits based on an eight percent whole person impairment for the claimant's disc herniation. The Department found that the description of the claimant's injury was a material term of that Agreement such that the defendant could not later contend that the injury had never taken place. *Coronis, supra,* at Conclusion of Law No. 5. However, the Department did not rule that the defendant could not challenge the reasonableness of additional medical treatment for that injury in the future. To the contrary:

> It is true, as Defendant argues, that the Form 22 does not necessarily preclude it from producing new medical evidence to establish that Claimant's current symptoms are causally related to something other than his October 2002 work injury. Defendant cannot do so, however, on the grounds that the injury it accepted in fact did not occur.

Id., at Conclusion of Law No. 6.

11. Thus, neither *Faery* nor *Coronis* supports Claimant's contention that the parties' Agreement for Permanent Partial Disability Compensation precludes Defendant from disputing the reasonableness of his proposed medical treatment. I therefore conclude that the parties' Agreement does not contractually obligate Defendant to pay for additional radiofrequency ablations as a matter of law.

The Approved Preauthorizations of Prior Radiofrequency Ablations

12. Next, Claimant contends that an approved preauthorization functions just like an Agreement for Temporary Disability Compensation; once the carrier approves the preauthorization request, it is contractually obligated to pay for the proposed treatment. *Claimant's Motion for Summary Judgment*, at 6. Further, Claimant contends that such approval is an acknowledgment that the proposed treatment is medically necessary and causally related to the work injury. *Id.*

13. In this case, the carrier paid for three separate sets of radiofrequency ablations, in 2017, 2019 and 2021. For the second and third sets,[1] it was presented with separate preauthorization requests that it approved. Although Defendant's expert later opined that Claimant's work injury resolved in June 2018, Defendant is not seeking to recoup the cost of the 2019 and 2021 ablations; rather, Defendant acknowledges that it is bound by its agreement to pay for those procedures.

14. The issue now is the requested fourth set of radiofrequency ablations, which Defendant has never approved nor authorized. The previous preauthorizations were each for one specific set of radiofrequency ablations; neither of them authorized payment for all such procedures that Claimant may wish to undergo in the future. Accordingly, I conclude that Defendant's agreement to pay for prior radiofrequency ablations in 2019 and 2021 contractually bound it to pay for those procedures but did not bind it to pay for additional procedures that were not specifically included in the approved preauthorizations.

15. Further, the fact that the prior radiofrequency ablations were considered reasonable treatment for Claimant's work injury does not, by itself, establish that the procedure will always be reasonable treatment in the future. Reasonable treatment must be both medically necessary and causally related to the work injury. *See* Conclusion of Law No. 4 *supra*. Over time, Claimant's response to radiofrequency ablation might change, or he might develop low back symptoms due to an unrelated cause. Accordingly, Defendant is entitled to present evidence challenging the reasonableness of additional radiofrequency ablations as set forth in *Faery* and *Coronis, supra*.

16. I therefore conclude that the approved preauthorizations from 2019 and 2021 do not contractually obligate Defendant to pay for additional radiofrequency ablations as a matter of law.

Claimant's Contention that Defendant Waived its Right to Contest the Reasonableness of Future Radiofrequency Ablations

17. Second, Claimant offers a waiver theory as the basis for Defendant's obligation to pay for future radiofrequency ablations as a matter of law. He contends that Defendant waived its right to contest the reasonableness of future radiofrequency ablations because it has already preauthorized and paid for the same procedure multiple times.

[1] Claimant's Statement of Undisputed Material Facts establishes that Defendant paid for the first set of radiofrequency ablations in 2017 but does not indicate whether the treatment was preauthorized.

18. A waiver is the voluntary relinquishment of a known right. To establish it, "there must be shown an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question." *Greene v. Bellavance Trucking, Inc.*, Opinion No. 11-23WC (April 18, 2023), citing *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954). A waiver may be express or implied, but if it is the latter, "caution must be exercised both in proof and application. The facts and circumstances relied upon must be unequivocal in character." *Holden & Martin, supra,* 118 Vt. at 289.

19. The record before me does not reveal any express waiver of Defendant's right to contest the reasonableness of future radiofrequency ablations. Each of the prior preauthorizations specifically identified just one set of radiofrequency ablations; they did not expressly authorize all future such procedures or any additional procedures beyond what was specified in the preauthorization agreement.

20. Thus, I must consider whether an implied waiver prevents Defendant from disputing the radiofrequency ablations proposed in August 2022. In considering an implied waiver, I must exercise caution and look for facts and circumstances that are unequivocal in character. *Holden & Martin, supra,* 118 Vt. at 289.

21. The facts and circumstances here are that Claimant's medical providers recommended radiofrequency ablation procedures in 2017, 2019 and 2021, and Defendant agreed to pay for each one, after reviewing separate preauthorization requests in 2019 and 2021. Beyond that, the provider recommended one more set of ablations in 2022 that Defendant has not agreed to pay for. There is no allegation that the prior requests for approval included anything more than one time approval in each case.

22. Further, the statute requires Defendant to pay for "reasonable" medical treatment, which means that any treatment must be medically necessary and causally related to the work injury. As the status of an injury may change over time, it does not follow that authorizing a treatment once would act as a waiver to dispute the reasonableness of the same treatment under different circumstances. Accordingly, I cannot find that Defendant's agreement to pay for specific treatment in the past acts unequivocally as an implied waiver of its right to contest the reasonableness of additional treatment in the future. In fact, Defendant's review of each preauthorization request separately is inconsistent with an implication that it intended to permanently surrender its right to contest the reasonableness of all such treatments in the future. *See, e.g., Hastings v. Green Mountain Log Homes*, Opinion No. 03-09WC (January 21, 2009) (providing some medical benefits for claimant's knee condition does not waive defendant's right to contest future medical treatment).

23. I therefore conclude that Claimant has failed to establish a waiver of Defendant's right to contest the reasonableness of future radiofrequency ablations as a matter of law.

24. Having failed to establish either a contractual obligation or a waiver of rights on the part of Defendant, Claimant is not entitled to a summary judgment ruling that additional radiofrequency ablations are reasonable treatment as a matter of law.

Claimant's Alleged Paving Side Business

25. Based on Claimant's business registration for a paving business, Defendant contends that he may have sustained a subsequent injury to his low back while engaged in paving. Although Defendant may obtain additional evidence relevant to this issue prior to the hearing, it does not have such evidence now. If Defendant wished to develop evidence on this issue prior to my ruling on the summary judgment motion, it could have followed the procedure outlined in V.R.Civ.P. 56(d), which allows the court to defer consideration of a summary judgment motion pending additional discovery. However, Defendant did not do this. Accordingly, for purposes of this motion, I find that the evidence of a relationship between Claimant's alleged paving operation and his low back condition is insufficient to create a genuine issue of material fact at this time. *See Morisseau v. Hannaford Brothers*, 2016 VT 17, ¶ 22 (to defend against a summary judgment motion, the opposing party cannot rely on conclusory allegations or mere conjecture.)

26. Nevertheless, Defendant has successfully opposed Claimant's summary judgment motion without my having to consider whether he might have sustained an injury while engaged in an alleged paving side business. *See* Conclusion of Law No. 24 *supra*.

Claimant's Request to Preclude Dr. Backus' Testimony[2]

27. Dr. Backus performed an independent medical examination of Claimant in April 2023. He offered his opinion that Claimant's work-related back pain resolved by June 4, 2018 and that any low back pain thereafter was unrelated to his work injury. *See* Finding of Fact No. 18 *supra*.

28. Claimant requests that Dr. Backus' testimony be precluded at formal hearing on the basis that his opinion is inconsistent with Defendant's acceptance of several radiofrequency ablations as reasonable treatment for his low back injury after June 4, 2018.

29. By accepting Claimant's 2016 low back injury as compensable, Defendant has waived its right to contest that Claimant sustained such an injury. It would be impermissible, therefore, for Defendant to offer medical testimony that Claimant did not sustain such an injury. *See* Conclusion of Law Nos. 8, 10 *supra*. However, Dr. Backus does not dispute that Claimant sustained such an injury, nor does Defendant claim otherwise.

30. Although there is tension between Dr. Backus' opinion of the causal origin of Claimant's low back condition after June 2018 and Defendant's agreement to pay for radiofrequency ablations in 2019 and 2021, this tension does not provide a basis to exclude Dr. Backus' opinion. *See Faery*, *supra*, at Conclusion of Law Nos. 8-13; *see also Meau v. The*

[2] Claimant made the request to preclude Dr. Backus' testimony in his reply to Defendant's opposition. *See Claimant's Reply Motion for Summary Judgment*, at 3.

Howard Center, Inc., Opinion No. 18-21WC (September 14, 2021), at Conclusion of Law Nos. 13-14 (denying 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").

31. In this vein, the Department will allow Dr. Backus to offer his opinion and explain the basis for his opinion at a formal hearing. If Defendant offers his testimony, the Department will weigh his credibility and persuasiveness along with the other evidence to determine whether additional radiofrequency ablations are reasonable medical treatment under 21 V.S.A. § 640(a).

ORDER:

Based on the foregoing, Claimant's Motion for Summary Judgment is hereby **DENIED**, and his Request to Preclude the Testimony of Dr. Backus is also **DENIED**.

DATED at Montpelier, Vermont this 28 day of June 2024.

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Michael A. Harrington
Commissioner