STATE OF VERMONT
DEPARTMENT OF LABOR

Tammy Cochran	Opinion No. 31-09WC
v.	By: Jane Gomez-Dimotsis Hearing Officer
Northeast Kingdom Human Services	For: Patricia Moulton Powden Commissioner
	State File No. X-00726

OPINION AND ORDER

Hearing held in Montpelier on June 9, 2008
Record closed on August 8, 2008

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUES:

1. Did Claimant suffer a work-related low back injury on August 9, 2005?

2. If yes, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I: Joint medical record

Claimant's Exhibit A: Physician's Verifications of Disability and Out of Work Notices
Claimant's Exhibit B: Telephone Deposition of Dr. Rowland Hazard, April 30, 2008
Claimant's Exhibit C: Deposition Testimony of Dr. John Ajamie, May 12, 2008
Claimant's Exhibit D: Telephone Deposition of Dr. William Spina, May 28, 2008

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
Interest pursuant to 21 V.S.A. §664
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Worker's Compensation Act.

2. Judicial notice is taken of all forms contained in the Department's file relating to this claim, as well as to relevant sections of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Ed.* (the *"AMA Guides"*).

3. Claimant was employed by Defendant as a vocational specialist. Her job involved helping disabled adult clients find and maintain employment in the community. One of her responsibilities was to demonstrate to clients how to perform their assigned job tasks, by visiting them at their job sites and physically working alongside them.

Claimant's Background and Prior Medical History

4. Claimant has had a variety of prior work experiences. She has been the owner-operator of a gas station, an emergency family advocate at a supervised visitation center, and an aide for patients suffering from traumatic brain injuries. Claimant home-schooled her children and also ran a day-care facility. She has her GED and several years of college credits. She is computer literate, albeit with limited typing skills.

5. Claimant has carried a diagnosis of fibromyalgia since 1993, when she was involved in a motor vehicle accident. Her symptoms include muscle spasms and burning in her neck and left shoulder, and headaches as well. Claimant also has a history of depression. Most recently, since 2004 Claimant has treated for these conditions with her primary care provider, Dr. Ajamie, who has prescribed narcotic pain relievers and anti-depressants for her symptoms.

6. Claimant testified that notwithstanding her fibromyalgia, until her work injury (described below) she was able to engage in a variety of physical activities, including horseback riding, four-wheeling, hiking, swimming, walking and playing with her children and grandson.

7. At the time of her work injury Claimant was working only twenty hours per week. This was due in part to her family responsibilities – her father was in poor health and her daughter had a disabling condition that had flared up and required more care than previously. Claimant acknowledged that she was under a great deal of stress as a result of these family issues. She admitted as well that the pain from her fibromyalgia sometimes made it more difficult for her to do her job. In consideration of all of these factors, in May 2005 Claimant decided to cut her work hours back to half time.

The Work Injury and Ensuing Medical Treatment

8. On August 9, 2005 Claimant was working with a special needs client at his job site, a local supermarket. Claimant entered a walk-in cooler to retrieve some frozen food product for the client. As she did so, she fell on the icy floor, hitting her lower back, tailbone, and left buttocks. Claimant immediately felt pain in her low back, down her left leg and into her foot. She took the client home and then went to the emergency room. There she was referred to her primary care physician, Dr. Ajamie, for ongoing treatment.

9. As noted above, Dr. Ajamie had treated Claimant regularly for both fibromyalgia and depression since 2004. He continued to do so after the August 2005 injury, administering anesthetic injections into Claimant's upper body for her fibromyalgia and prescribing numerous narcotic pain medications, both for that condition and for her low back pain. Although Claimant had been able to work at least twenty hours weekly before the August 2005 incident, thereafter Dr. Ajamie determined that she was no longer able to do so. In keeping with Dr. Ajamie's determination, Claimant has not worked since August 16, 2005.

10. Dr. Ajamie acknowledged that his role in Claimant's treatment was as a primary care physician. For further evaluation of her orthopedic and chronic pain issues, ultimately he referred her to the Dartmouth Hitchcock Spine Center's Functional Restoration Program (the "Dartmouth Hitchcock program"). The purpose of this program is not to "fix" a patient's underlying condition, but rather to improve his or her ability to function nevertheless.

11. Claimant completed the Dartmouth Hitchcock program in November 2007. She acknowledged that the program failed to relieve her symptoms, but felt that it was successful in restoring some function. There remains some disagreement among the medical providers who have become involved in this claim as to how effective the program really was when considered in light of Claimant's current level of function and physical capabilities. Even after completing the program, Claimant still does not believe she is capable of working. Nor does she feel able to participate in most of the recreational activities she enjoyed in the past.

Expert Medical Opinions

12. Numerous medical providers have evaluated and/or treated Claimant in conjunction with her current claim. These include:

- Dr. Rose, a chronic pain specialist, and Dr. Hazard, an orthopedist, both physicians at the Dartmouth Hitchcock program;
- Dr. Gennaro, an orthopedic surgeon hired by Defendant to conduct independent medical evaluations in December 2005 and January 2006;
- Dr. Ensalada, a pain management specialist hired by Defendant to conduct an independent medical evaluation in November 2007; and
- Dr. Spina, an orthopedic surgeon retained by Claimant's attorney to evaluate Claimant in January 2008.

Each of these physicians has rendered opinions as to Claimant's diagnosis, treatment, end medical result and permanent impairment.

Diagnosis and Causal Relationship to Work Injury

13. All of the medical experts agree that at least initially the August 2005 work injury caused a low back strain. They disagree, however, as to the severity of that strain and the extent, if any, to which it led to further causally related symptoms. Thus, both Dr. Rose and Dr. Hazard, who evaluated Claimant in the context of her admission to the Dartmouth Hitchcock program, found evidence of radiculopathy, which both related back to the initial injury.

14. In contrast, Drs. Gennaro and Ensalada found no evidence of radiculopathy, and no objective signs of fracture, herniated disc or nerve root involvement. Both noted findings suggestive of symptom magnification and psychological overlay. Both concluded that the August 2005 work injury caused nothing more than a soft tissue injury or low back strain, from which Claimant reasonably should have recovered within a few months.

15. Dr. Spina concurred with Drs. Gennaro and Ensalada both as to their low back strain diagnosis and as to their findings of psychological overlay. However, in Dr. Spina's opinion the latter finding was a component of reflex sympathetic dystrophy. Apparently Dr. Spina related this diagnosis as well to the August 2005 work injury.

Ongoing Treatment and End Medical Result

16. Drs. Gennaro, Ensalada and Spina all noted that Claimant's current use of narcotic pain medications is excessive. Excessive dosage of such medications is counter-productive, in that it actually decreases a patient's pain threshold, thereby requiring more frequent doses to remain effective. All three doctors recommended strongly that Claimant's narcotic medication dosages be titrated down.

17. As for Claimant's participation in the Dartmouth Hitchcock program, both Dr. Gennaro and Dr. Ensalada stated that the August 2005 work injury did not necessitate such an approach, and that treatment of this kind probably would not be beneficial. Obviously, Claimant's treating providers at Dartmouth Hitchcock, as well as Dr. Ajamie, the primary care provider who referred her there, disagreed with this assessment.

18. Given their opposition to the Dartmouth Hitchcock program, both Dr. Gennaro and Dr. Ensalada opined that Claimant had reached an end medical result for her August 2005 work injury and resulting low back strain by January 20, 2006, the date of Dr. Gennaro's second evaluation of her. In contrast, Dr. Hazard did not declare Claimant to be at end medical result until she completed the Dartmouth Hitchcock program, November 9, 2007.

Permanent Partial Impairment

19. Not surprisingly, the difference of opinion between Claimant's medical experts and Defendants as to the appropriate diagnosis causally related to the August 2005 work injury yielded different permanency ratings as well. Drs. Gennaro, Hazard, Ensalada and Spina all conducted permanency evaluations.

20. Drs. Gennaro and Ensalada both noted that their examinations failed to reveal any objectively verifiable evidence of radiculopathy and that instead, Claimant's pain pattern was non-radicular in distribution. With reference to the diagnosis-related estimate (DRE) method for determining permanent impairment under the *AMA Guides*, both concluded that Claimant fit within DRE category I, a 0% impairment rating.

21. Dr. Spina's examination as well revealed no objective evidence of radiculopathy, but he did observe both muscle spasms and limited range of motion in Claimant's lumbar spine. Based on those observations, Dr. Spina placed Claimant in DRE category II and rated her with an 8% permanent impairment.

22. Dr. Spina's evaluation was problematic, however, in that he appeared unfamiliar with the testing techniques mandated by the *AMA Guides*. In particular, he was unfamiliar with the *Guides'* directive for differentiating a true muscle spasm from a voluntary muscle contraction. He also did not take multiple range of motion measurements, as the *Guides* require.

23. Last, Dr. Hazard based his impairment rating on what he considered to be findings suggestive of nerve root involvement. With that in mind, he placed Claimant in DRE category III and rated her with a 10% permanent impairment.

Vocational Rehabilitation

24. As noted above, Claimant has not worked since the August 2005 injury. Both Dr. Gennaro and Dr. Ensalada believe that she is capable of full time work in at least a sedentary to light capacity.

25. Wayne Sullivan, a certified vocational rehabilitation counselor, performed an entitlement assessment and determined that Claimant was not entitled to vocational rehabilitation services. In reaching this conclusion, Mr. Sullivan considered Claimant's varied work experience, education, work capacity and transferable skills. Mr. Sullivan believed that it would be possible for Claimant to return to work for Defendant, but even if not, her pre-injury wage level was not so high as to eliminate minimum wage jobs from consideration as suitable options.

26. Claimant presented testimony from her own vocational expert, Paul Langevin, also a certified vocational rehabilitation counselor. Mr. Langevin disputed Mr. Sullivan's conclusions and determined instead that Claimant was entitled to vocational rehabilitation services. In reaching this conclusion, Mr. Langevin noted that Claimant treated her pain with significant dosages of narcotic medications, which might limit her ability to drive. He also found her computer skills to be deficient. Of note, however, Mr. Langevin did not perform a transferable skills analysis, did not speak directly to her employer as to her pre-injury job responsibilities, and did not consider Claimant's pre-injury average weekly wage.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (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 v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. As it pertains to Claimant's entitlement to workers' compensation benefits, the dispute here centers on end medical result, permanent impairment, ongoing medical treatment and vocational rehabilitation. Procedurally, Defendant has never accepted Claimant's injury as compensable (although it did pay medical benefits voluntarily), and therefore the burden of proof lies with Claimant on these issues.

3. The expert medical evidence was conflicting on each of these issues. In such situations the Department traditionally uses a five-part test to determine which 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).

Causation

4. Even Defendant's expert medical witnesses agree that Claimant suffered a soft tissue injury or low back strain as a result of her work activities on August 9, 2005. I conclude that she did, and that that injury is compensable.

End Medical Result

5. At the crux of the dispute as to end medical result is whether the Dartmouth Hitchcock program was reasonably necessary treatment for Claimant's compensable injury. I find that it was. The fact is that Claimant's injury arose in the context of her pre-existing medical and psychological status. Whether diagnosed in Dr. Ajamie's terms (fibromyalgia and depression), or in Dr. Gennaro's terms (chronic pain syndrome with psychological overlay), or in Dr. Ensalada's terms (somatoform pain disorder), the prior condition impacted Claimant's response to the August 2005 work injury and impeded her recovery. The Dartmouth Hitchcock program presented a viable option for restoring some of the function Claimant had lost. In that sense, it offered at least the prospect of further improvement in the medical recovery process, which is sufficient under our rules to negate a finding of end medical result. *Workers' Compensation Rule 2.1200; D.D. v. Northeast Kingdom Human Services*, Opinion No. 47-06WC (January 9, 2007).

6. Nor does the fact that the program ultimately may have been unsuccessful at improving Claimant's function to any appreciable extent change this result. The reasonable necessity of further treatment must be evaluated as of the time it is proposed, not in hindsight. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009).

7. I conclude, therefore, that Claimant did not reach an end medical result until after she completed the Dartmouth Hitchcock program. I accept Dr. Hazard's end medical result date. Claimant is entitled to temporary total disability benefits beginning on August 16, 2005 and ending on November 9, 2007.

Permanent Partial Impairment

8. On this issue, I must choose among three expert witness' ratings. Dr. Ensalada placed Claimant in DRE category I, with a corresponding 0% permanent impairment. Dr. Spina placed her in DRE category II, an 8% impairment. Dr. Hazard fit her in DRE category III, a 10% impairment.

9. I must reject Dr. Spina's rating given his clear unfamiliarity with the *AMA Guides* and his failure to adhere to its mandated techniques for ensuring reliable and valid measurements. I also must reject Dr. Hazard's rating, because the category in which he placed Claimant requires objectively verifiable signs of radiculopathy, which I find were lacking in her case. I am left, therefore, with Dr. Ensalada's 0% rating as the one most in accord with the *AMA Guides'* direction, and therefore the one most credible.

Ongoing Medical Treatment

10. Drs. Gennaro, Ensalada and Spina all expressed concern about Claimant's continued use of narcotic pain medications. I share their concern and am convinced that to continue to prescribe them in such quantities does not constitute reasonably necessary treatment for Claimant's work injury. After an appropriate weaning period, Defendant should not bear any further responsibility for this treatment.

11. Nor am I persuaded that the medications Claimant has been prescribed for her depression are necessitated by her work injury as opposed to her pre-existing condition. I conclude that Defendant is not responsible for the ongoing cost of these drugs either.

Vocational Rehabilitation

12. Last, I conclude that the evidence presented by Defendant's vocational expert was more credible than that offered by Claimant's expert. Mr. Sullivan's determination that Claimant was not entitled to vocational rehabilitation services was based on a comprehensive review of her work experience and included direct correspondence with her employer as to the requirements of her pre-injury job. It also took into account her pre-injury average weekly wage, as is required by our statute and rules. In comparison, Mr. Langevin's analysis was deficient. I find, therefore, that Claimant is not entitled to vocational rehabilitation services as a result of her August 2005 injury.

Costs and Attorney Fees

13. As Claimant has prevailed only on her claim for temporary total disability benefits, she is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of her allowable costs and attorney fees.

ORDER:

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

1. Temporary total disability benefits commencing on August 16, 2005 and ending on November 9, 2007;

2. Interest on the above amount in accordance with 21 V.S.A. §664;

3. Medical benefits in accordance with Conclusion of Law No. 10 above; and

4. Costs and attorney fees to be determined in accordance with Conclusion of Law No. 12 above.

5. Claimant's claim for permanent partial disability benefits and vocational rehabilitation benefits is hereby **DENIED**.

DATED at Montpelier, Vermont this 12th day of August 2009.

_____
Patricia Moulton Powden
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.