

D. D. v. Northeast Kingdom Human Services

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

D. D.

Opinion No. 47-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Northeast Kingdom Human Services

For: Patricia Moulton Powden  
Commissioner

State File No. U- 01564

Hearing held on March August 16, 2006  
Record closed on September 1, 2006

**APPEARANCES:**

Steven P. Robinson, Esq. for the claimant  
John W. Valente, Esq. for the defendant

**ISSUES:**

1. Did the Claimant reach medical end result on July 25, 2005?
2. Is the functional restoration program reasonable and necessary medical treatment as a result of the work related injury from May 1, 2003?
3. Attorneys' Fees

**EXHIBITS:**

Joint I: Medical Records

**OTHER EXHIBITS:**

Defendant's sealed envelope pertaining to attorney fee award.

**FINDINGS OF FACT:**

1. Before her work related injury, the Claimant worked in the healthcare field for approximately twenty years.
2. In the mid-1990's the Claimant sustained a work related injury to her back. After completing a three-week functional restoration program, the Claimant was able to return to full time employment.

3. By May 2003, the Claimant had been employed by Defendant Northeast Kingdom Human Services as a service provider and home care attendant for over three years.
4. On May 1, 2003, the Claimant suffered work related injuries to her back and right knee when she slipped down an entire flight of stairs.
5. On May 6, 2003, the Claimant consulted her primary care giver, Nurse Practitioner Susan Taney, at Concord Health Center. Ms. Taney referred the Claimant to physical therapy for her back injury. Dr. Berrian is also a health care provider Concord Health Center.
6. By May 20, 2003, the Claimant began taking Percocet to treat her continued knee and low back pain.
7. By July 30, 2003, the Claimant was diagnosed with situational depression as a result of the chronic back pain and limitations related to her work injury. To treat these symptoms, the Claimant was prescribed an antidepressant in addition to the Percocet.
8. While helpful for a time, the Claimant reached a plateau in physical therapy by October 2003. As a result, Ms. Taney referred the Claimant to Dr. Cody at the Spine Institute.
9. In May 2004, the Claimant began taking MS Contin in addition to the Percocet and antidepressants.
10. In June 2004, after injection therapy, water therapy, and a medial branch block failed to provide significant relief, Dr. Cody recommended that the Claimant would be the "perfect candidate" for a functional restoration program.
11. On July 12, 2004, the Claimant began a functional restoration program at the Work Enhancement Rehabilitation Center. After three days, the Claimant left the program because of a family emergency. As a result, the Claimant's program was "put on hold" until July 26, 2004.
12. The Claimant was unable to return to the functional restoration program on July 26, 2004 because she underwent care for symptoms unrelated to her work injury.
13. On January 10, 2005, the Department notified the parties that the Defendant's Form 27 to discontinue temporary total disability payments was approved because the Claimant was unable to treat the work related low back injury.
14. In February 2005, the Claimant attended physical therapy, but saw no real improvement in her low back condition.
15. In March 2005, the Claimant's unrelated medical condition was successfully treated and the Claimant received medical release to resume the functional rehabilitation program.
16. In May 2005, the Claimant was still experiencing chronic low back pain and depression as a result of her work injury. At this time, the Claimant's medications included MS

Contin, Percocet and an antidepressant. The Claimant was also using a TENS unit to manage her pain.

17. On May 27, 2005, Dr. Gennaro performed an independent medical evaluation at the Defendant's request. He determined that the Claimant's primary barriers to recovery are obesity and physical deconditioning. Dr. Gennaro also noted the Claimant's probable depression and narcotic addiction.
18. Dr. Gennaro determined that the Claimant had reached an end medical result with a 5% whole person impairment because of non-verifiable radicular complaints and nonuniform loss of range of motion. Dr. Gennaro also determined that the Claimant had a sedentary to light work capacity.
19. While Dr. Gennaro recommended vocational rehabilitation, his June 21, 2005 note indicated that further treatment, such as physical therapy or the Spine Institute's functional restoration program, would be unlikely to change her circumstances.
20. As a result of Dr. Gennaro's assessment, the Defendant filed a form 27 to discontinue benefits. This form was approved by the Department on August 8, 2005.
21. In a June 16, 2005 progress note, Ms. Taney strongly disagreed with Dr. Gennaro's assessment that the Claimant had a significant narcotic addiction and that the injury was not the most relevant factor in her symptoms.
22. On June 27, 2005, a functional capacity exam showed that the Claimant could sustain a light level of work for three hours out of an eight-hour day. The exam also noted that it might be possible for the Claimant to work more than three hours at a sedentary capacity.
23. In July 2005, Ms. Taney released Ms. Drew to work part-time at a light duty capacity.
24. On September 27, 2005, Ms. Taney's practitioner's note showed that the Claimant was prevented from starting a new job because of severe swelling in her legs.
25. In October 2005, Ms. Taney referred the Claimant for an MRI after the Claimant rolled over in bed and experienced an increase in the pain stemming from her the work injury. At this time, Ms. Taney continued to recommend that the Claimant resume the functional restoration program.
26. In a May 2006 letter to Claimant's counsel, Dr. Berrian states that the June 27, 2005 FCE is consistent with her diagnosis of the Claimant. Dr. Berrian further notes that Ms. Drew is likely to remain disabled from her work injury until she receives the recommended physical therapy and behavioral care.
27. Although the Claimant is obese, she worked full time in the healthcare field at her current weight and has not gained additional weight since her work injury.
28. Dr. Berrian and Ms. Taney continue to assert that a functional restoration program

would improve the Claimant's chances for returning to work.

29. The Claimant is requesting attorney fees and costs. The Claimant's itemized statement of professional services rendered lists 68.1 attorney hours at \$90.00 per hour, and 3.4 paralegal hours at \$60.00 per hour totaling \$6, 333.00 in attorney fees. The Claimant also lists \$447.68 in litigation costs.

## **CONCLUSIONS OF LAW:**

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. The Claimant has successfully shown that she has not yet reached a medical end result and that a functional restoration program is a reasonable and necessary treatment for her May 1, 2003 work injury.

### Medical End Result

4. A medical end is reached when there is a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. WC 2.1200. "Once the recovery process has ended, or the worker has achieved the maximum possible restoration of his earning power, he is no longer entitled to temporary disability benefit." *Sawyer v. Mt. Snow, Ltd.*, Opinion No. 22-97 WC (1997) (quoting *Bishop v. Town of Barre*, 140 Vt. 464, 571 (1982)).
5. The Defendant's expert, Dr. Gennaro, ultimately found that the Claimant had reached a medical end and that she could not be helped by further treatment. However, Ms. Taney, Dr. Barrian, and Dr. Cody maintain that the Claimant would likely derive great benefit from a functional restoration program.
6. In a situation where experts disagree, the Department considers the following factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience; *Morrow v. Vt. Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Jul. 20, 1998).

7. The Department has traditionally given greater weight to the treating physician's opinion. *Searles v. Price Chopper*, Opinion No. 68S-98WC (1998) (citing *Mulinski v. C&S Wholesale Grocers*, Opinion No. 34-98WC (June 11, 1998)). The Defense argues that the Department should not rely on Nurse Practitioner Taney's opinion, despite her long-time treatment of the Claimant, asserting a lack of objectivity, education and experience. I disagree. First, while it is true that Ms. Taney is not a physician, her opinion that the Claimant is a strong candidate for a functional restoration program is based on her first-hand knowledge of the Claimant's condition combined with her training and experience as a healthcare provider. Furthermore, Ms. Taney's opinion is shared by both Dr. Barrian and Dr. Cody. Second, after sustaining a back injury in the 1990's, the Claimant was able to successfully return to work after completing a functional restoration program. Finally, the Claimant herself believes that there is a strong likelihood that she will meet her goal of returning to full time employment if given the opportunity to complete the work hardening program. The combination of these factors lends substantial weight to the opinion supported by Ms. Taney.
8. In light of Ms. Taney's opinion, I believe that Dr. Gennaro's assessment actually supports the validity of a functional restoration program for the Claimant. If obesity and deconditioning pose the major barriers to recovery, then an extensive functional restoration program that is structured to improve the Claimant's pain management skills and overall physical condition increases the likelihood that the Claimant's condition will improve.
9. Therefore, after acknowledging that a "Medical End Result" occurs only at "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," it is evident that this Claimant has not yet reached medical end.
10. Furthermore, the Defendant's assertion that the Claimant will not benefit from a functional restoration program because of her weight is untenable. "An employer takes each employee as is and is responsible under workers' compensation for an injury which disables one person and not another." *Stoddard v. Northeast Rebuilders*, Opinion No. 28-04WC (2004) (citing *Morrill v. Bianchi*, 107 Vt. 80 (1935)). Before the work injury, the Claimant was fully capable of performing her job as a full time service provider and healthcare attendant at her current weight. Aside from obesity and deconditioning, the Defendant offers no other physical impediment that might bar the Claimant from benefiting from a work hardening program. As such, a functional restoration program designed to increase the Claimant's conditioning and help her cope with her low back pain is an entirely reasonable and necessary treatment.

Attorneys' fees and costs

11. The Defendant has submitted a sealed envelope containing a settlement offer that was rejected by the Claimant. This envelope is to remain sealed until after the Department has written its decision. If the Claimant's award is less than the rejected offer, then the Defendant argues that the Department should not award attorneys' fees and costs to the Claimant.
12. While the Department has allowed a "last best offer" submission in the past, there are several persuasive arguments for why this practice should not continue in this forum. First, when a claimant's attorney is certain that the client has a right to the benefits requested, that attorney should not feel compelled to urge the client to bargain with his or her right to a certain amount of benefits. Second, a large number of workers' compensation claimants find themselves in a desperate financial situation as a result of their work-related injuries. This prevalent situation provides a strong impetus to settle for smaller sums than a claimant might be awarded after formal hearing. If allowed to prevail, the above practice might encourage attorneys to urge their clients to take inferior settlements out of fear that attorney fees could be denied after the hearing. Finally, this practice encourages eleventh-hour settlement offers where the claimant's attorney has already put in the effort and expense of preparing for hearing. If the claimant does not accept this last-minute offer, then there is a danger the attorney will not be compensated for building a successful case.
13. As such, the Department has not considered the rejected settlement offer in this decision.

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law, the Claimant has not yet reached a medical end result and is entitled to the following:

1. Medical benefits regarding the Claimant's back injury and related depression, including the MRI of March 16, 2006;
2. Payment for a comprehensive work restoration program;
3. Past TTD from June 25, 2005 to the present, and ongoing until a medical end is reached;
4. Attorneys' fees of \$6,333.00 and costs of \$447.68

Dated at Montpelier, Vermont this 9<sup>th</sup> day of January 2007.

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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.