STATE OF VERMONT
DEPARTMENT OF LABOR

Enoch Rowell	Opinion No. 17-11WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Northeast Kingdom Community Action	For: Anne M. Noonan Commissioner
	State File No. Y-58698

OPINION AND ORDER

ATTORNEYS:

Heidi Groff, Esq., for Claimant
Robert Mabey, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a consequence of his February 4, 2007 compensable work injury?

2. If not, what is the extent, if any, of Claimant's permanent partial disability causally related to his February 4, 2007 compensable work injury?

3. Is Defendant obligated to pay for a special lift chair as a reasonable and necessary medical supply causally related to Claimant's February 4, 2007 compensable work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Service Contract
Claimant's Exhibit 2:	Hours and wages for 2010 work at NCJC
Claimant's Exhibit 3:	Vocational Rehabilitation Plan, December 14, 2010
Claimant's Exhibit 4:	Resume with handwritten corrections
Claimant's Exhibit 5:	Dr. White report, January 12, 2009
Claimant's Exhibit 6:	Dr. Harris letter, May 8, 2009
Claimant's Exhibit 7:	Functional Capacity Evaluation, May 28, 2009
Claimant's Exhibit 8:	Special lift chair prescription, July 8, 2008
Claimant's Exhibit 9:	James Parker vocational assessment, January 7, 2011
Claimant's Exhibit 10:	Fran Plaisted vocational evaluation, January 5, 2011

Defendant's Exhibit A: NCJC employment records
Defendant's Exhibit B: Cover letter and resume, March 23, 2004
Defendant's Exhibit C: Newport Daily Express, January 8, 2008
Defendant's Exhibit D: Meeting attendance records, July 2009-May 2010
Defendant's Exhibit E: COSA Activity Log
Defendant's Exhibit F: *Curriculum vitae*, Fran Plaisted

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §645
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

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

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant worked as an Integrated Housing Specialist at a halfway house operated by Defendant for recently released correctional center inmates. His job involved counseling and assisting the residents with such community integration skills as finding permanent housing and securing employment. Claimant did not live at the house, but was frequently there, as his duties included checking up on both the residents and the house itself.

Claimant's February 2007 Work Injury, Subsequent Medical Course and Prior Medical History

4. On February 4, 2007 Claimant was at the halfway house, checking for frozen pipes in the basement. He tripped as he ascended the stairs and fell forward. Claimant heard a pop in his lower back and felt immediate pain both there and in his right shoulder.

5. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

6. From the beginning Claimant treated conservatively for his low back pain, principally with Dr. Harris, his primary care provider. None of the treatments prescribed, including physical therapy, aqua therapy and injections, provided effective long-term relief.

7. As for his right shoulder injury, initially Claimant experienced pain, limited range of motion and decreased function. A September 2007 MRI revealed findings suspicious for a labral tear, which was to be surgically repaired in January 2008. The night before the scheduled surgery, however, Claimant awoke to a vision of an angel and the Lord hovering over his bed. By the next morning his symptoms had completely resolved and the surgery was cancelled. Claimant described this experience as a "divine intervention." Upon reexamining the shoulder in February 2008, Claimant's primary care provider found no evidence of shoulder pathology, and offered no medical explanation for the resolution of Claimant's symptoms.

8. With the Department's approval, Defendant discontinued Claimant's temporary total disability benefits on end medical result grounds effective October 29, 2007.

9. Even after having been determined to be at end medical result, in October 2008 Claimant was evaluated for entry into a functional restoration program for treatment of his chronic low back pain, but due to both high blood pressure and a limited exercise tolerance he was determined not to be a suitable candidate. Also in October 2008 Claimant was referred for cognitive behavioral therapy to assist with chronic pain management. Claimant did not feel capable of making the weekly trip to Burlington for group sessions, however, and therefore did not participate.

10. Currently Claimant experiences constant intractable low back pain radiating into his right buttock. The pain is hot, deep and intense. It is inadequately controlled with narcotic pain medications, deep breathing, meditation and prayer. Claimant can sit or stand for only brief periods without having to alternate his position due to increased pain. With a cane, he is able to take short walks up and down his road from time to time throughout the day. Climbing stairs causes severe pain, and as a result Claimant can no longer access his bedroom, which is on the second floor of his house. He now sleeps downstairs in his living room. His sleep is often interrupted by pain.

11. Claimant is most comfortable sitting in a reclining chair with his knees bent, which takes the pressure off of his lower back. At home he uses a special reclining lift chair that his primary care provider, Dr. Harris, prescribed in July 2008. The chair is equipped with a mechanism that lifts him to a standing position, thus decreasing the pain he otherwise experiences when moving from sitting to standing. After Defendant refused to pay for the chair, Claimant purchased it himself at a cost of $1,040.00.

12. Prior to the February 2007 injury Claimant enjoyed hunting, fishing, playing outside with his grandchildren and attending family gatherings. Since the injury Claimant has been limited by pain from engaging in these activities.

13. Claimant acknowledged, and the medical records reflect, that he had suffered from episodes of chronic low back pain at times prior to February 2007, but these always resolved, never interfered with his ability to work and required only occasional use of narcotic pain medications. Claimant testified credibly that since the February 2007 injury his pain has been significantly more severe, more constant and more intractable than anything he had experienced previously.

14. Claimant's medical history has been complicated by numerous medical conditions unrelated to his February 2007 injury. He had been plagued by knee pain for some years prior, as treatment for which he underwent bilateral knee replacement surgeries in June and July 2007. In August 2007 he underwent carpal tunnel release surgery. Claimant also suffers from obesity, sleep apnea, diabetes and high blood pressure. He was hospitalized in June 2010 for congestive heart failure, and again in August 2010 for gall bladder surgery. Claimant's wife testified credibly that since the latter two hospitalizations Claimant's overall function has improved. He has lost weight, is walking more and has decreased his use of pain medications.

Expert Medical Opinions

15. Drs. Harris, White and Backus all expressed opinions as to (1) the causal relationship between Claimant's current condition and his February 2007 work injury; (2) the extent of the permanent impairment referable to that injury; and/or (3) Claimant's current work capacity.

(a) Dr. Harris

16. Dr. Harris is board certified in internal medicine and has been Claimant's primary care provider since 2004. He is well-positioned, therefore, to evaluate and compare Claimant's low back condition both before and after the February 2007 work injury.

17. Dr. Harris acknowledged that prior to February 2007 Claimant had some documented degenerative disc disease in his lumbar spine, and also that he experienced intermittent episodes of low back pain. In Dr. Harris' opinion, the February 2007 injury aggravated Claimant's underlying disc disease to the point where it became chronic, increased in severity and now markedly interferes with his ability to engage in both work and daily living activities. Based on his experience with similarly afflicted patients, Dr. Harris does not believe that Claimant's condition is likely to improve.

18. At Dr. Harris' referral, in May 2009 Claimant underwent a functional capacity evaluation. The results indicated that Claimant could perform some tasks to a sedentary work level, but that due to his limited tolerance for lifting, carrying, sitting, standing and walking, he lacked the capacity to sustain even sedentary work over the course of an eight-hour work day. The evaluation did not indicate the extent to which Claimant might be able to tolerate such work for less than eight hours per day.

19. In Dr. Harris' opinion, the combination of Claimant's chronic pain, his reliance on narcotic pain medications and his limited tolerance for sitting, standing, walking and driving make full-time gainful employment impossible. Dr. Harris attributes all of these limitations to Claimant's February 2007 work injury. As a result of that injury, therefore, in Dr. Harris' opinion Claimant is permanently and totally disabled.

20. Dr. Harris acknowledged that he has no special training in orthopedics, employability or vocational rehabilitation.

21. Dr. Harris testified that he could not recall prescribing a special lift chair for Claimant, but that generally he would not prescribe a medical device if he did not feel it was medically necessary.

(b) Dr. White

22. At his attorney's referral, in January 2009 Claimant underwent an independent medical evaluation with Dr. White, a specialist in occupational medicine. Dr. White interviewed Claimant, reviewed his medical records and conducted a physical examination.

23. Dr. White observed that although Claimant had suffered from intermittent low back pain in the past, after his February 2007 fall at work his condition both worsened acutely and became chronic. Since the fall, furthermore, Claimant has never returned to his baseline status or level of functioning. From this Dr. White concluded, to a reasonable degree of medical certainty, that Claimant's current condition could not be characterized as a temporary flare-up, but rather represents an aggravation of his preexisting condition causally related to his fall at work.

24. Dr. White expressed no concerns that Claimant was faking his symptoms or otherwise malingering. He acknowledged that his opinion was based primarily on Claimant's subjective pain complaints, and particularly the history he gave as to how these changed after February 2007. It is in the nature of low back pain, however, to be a subjective phenomenon. There is, as Dr. White noted, no "pain thermometer." I find this testimony persuasive.

25. In the course of his examination, Dr. White observed evidence of both muscle guarding and asymmetrical loss of range of motion. Although he neglected to note these findings in the physical exam portion of his report, I find credible his assertion that he would not have included them in his assessment had he not in fact observed them. Based on those findings, and with reference to the *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), Dr. White rated Claimant with an 8% whole person impairment referable to his lumbar spine.

26. Dr. White did not comment on Claimant's work capacity.

(c) Dr. Backus

27. At Defendant's request, Claimant underwent two independent medical examinations with Dr. Backus, an occupational medicine specialist – the first in July 2007, the second in September 2010.

28. In the context of his July 2007 exam Dr. Backus diagnosed Claimant with chronic mechanical low back pain, which he related causally to an injury Claimant had suffered some twenty years earlier. According to Dr. Backus, this prior injury left Claimant's back in a weakened condition such that it became more susceptible to re-injury from even minor trauma. But for the old injury, Dr. Backus stated, Claimant likely would have recovered from his February 2007 fall at work within only a few weeks.

29. Dr. Backus determined that Claimant had reached an end medical result for his February 2007 injury by the time of his July 2007 evaluation.

30. As to work capacity, at the time of his July 2007 exam Dr. Backus determined that Claimant had at least a sedentary work capacity, so long as he was able to alternate sitting with standing, had only occasional use of stairs and did not use his right arm for lifting, overhead work or with it outstretched.[1]

31. In January 2009 Defendant requested a permanent impairment rating from Dr. Backus. Rather than re-evaluating Claimant, Dr. Backus referred back to his July 2007 findings to do so. Dr. Backus had not observed any evidence of either muscle guarding or asymmetrical loss of range of motion in that examination. He therefore rated Claimant with a 0% permanent impairment.

32. Dr. Backus last evaluated Claimant in September 2010. In addition to re-examining him, Dr. Backus also reviewed the more recent medical records, vocational rehabilitation reports, employment records and depositions. Based on this information, Dr. Backus concluded that Claimant had returned to his pre-February 2007 baseline level of chronic low back pain. Finding nothing to demonstrate that Claimant's preexisting low back condition had objectively worsened, Dr. Backus concluded that his current symptoms were no longer causally related to his work injury.

33. Dr. Backus acknowledged that neither he nor any of Claimant's treating physicians has ever been able to determine the exact etiology of Claimant's low back pain. In Dr. Backus' estimation, this is the case in at least 90 percent of all chronic low back pain patients.

34. As he had in 2007, Dr. Backus determined in his subsequent evaluation that Claimant still had a sedentary work capacity. In addition to recommending that Claimant be allowed to alternate sitting and standing, Dr. Backus also suggested that Claimant should work at his own pace and take short breaks to lie down. I find that these suggestions represent a reasonable way of addressing some of the deficits noted in Claimant's May 2009 functional capacity evaluation.

35. Dr. Backus was unsure what Claimant's daily work tolerance would be, especially initially. In his opinion, it is Claimant's subjective pain and disability mind set that are restricting him, not the physical condition of his back *per se.* If he were to increase his activity level gradually, he might develop greater tolerance, improve his conditioning level and thereby be able to work more hours. I find this testimony credible.

[1] Presumably this last restriction related to Claimant's right shoulder injury, which at the time was still symptomatic.

Claimant's Vocational History and Current Work Status

36. Claimant is now 56 years old. His work history is varied and impressive. He has worked as a deputy sheriff, a car salesman, a pastor, a youth runaway counselor, an alcohol and drug counselor and an anger management counselor. The latter jobs Claimant was able to secure, maintain and excel at despite having only a high school education, with no college coursework or credits whatsoever. Claimant has attended numerous seminars and training sessions ancillary to his employment over the years.

37. Because Claimant was restricted from climbing stairs following his February 2007 injury, he was unable to return to work at Defendant's halfway house.

38. Claimant has been receiving social security disability benefits since August 2008. In order to avoid an offset against his monthly social security benefit, he is limited to no more than approximately $1,000.00 in monthly wages.

39. In the summer of 2009 Claimant began working as a volunteer member of the Newport Community Justice Center's Reparative Board. The board is comprised of community members who hear cases referred from the court system and determine how a criminal offender might best repair the harm caused by his or her offense. The board meets monthly, typically for 2 to 3 hours. Dara Wiseman, the board's staff coordinator, testified credibly that Claimant is able to participate fully in meetings, though he typically alternates sitting and standing throughout. Claimant has missed some meetings since joining the board, but Ms. Wiseman could not recount exactly how many were due to low back pain as opposed to other health issues.

40. In January 2010 Jess Tatum, the director of the Newport Community Justice Center, approached Claimant with an offer to become a coordinator in the Center's Circles of Support and Accountability (COSA) program. The goal of the COSA program is to provide a network of volunteers to assist recently released criminal offenders in making a successful transition from prison to the community. The coordinator's role is to assemble the appropriate volunteers for each offender, and then once the support "circle" is formed, to provide leadership, training and assistance as necessary.

41. Claimant accepted Mr. Tatum's offer and entered into a contract whereby he would be paid $15.00 per hour for his services as a COSA coordinator. The contract provided that Claimant's time commitments would vary with need and thus no set work schedule was established. Mr. Tatum testified credibly that Claimant's target was to work approximately 15 hours per week. Claimant acknowledged that at this rate his monthly earnings would stay below his social security disability offset trigger.

42. In calendar year 2010 Claimant worked a 15-hour week only once. On two other occasions he worked 11 and 12 hours respectively. There were 22 weeks during which he did not work at all. Claimant's average for the remaining 27 weeks was not quite 5 hours per week.

43. Claimant is able to perform some of his COSA responsibilities from home, either by computer or by phone. At these times, he can sit, stand, recline or take breaks as necessary. Many of Claimant's responsibilities require in-person contact, however, for example, meetings with still incarcerated and/or recently released offenders, with parole officers and with other COSA volunteers. Both Claimant and Mr. Tatum testified credibly that it is Claimant's inability to attend such meetings that is limiting his weekly hours.

44. Based on Claimant's work experience and notwithstanding that he lacks a college degree, Mr. Tatum believes that Claimant is the best-qualified COSA coordinator in the program. He has great confidence in Claimant's ability to do the job and wants to continue working with him in the future. Unfortunately, Claimant's inability to maintain consistent work hours is a formidable barrier. To overcome this obstacle, Mr. Tatum has taken to assigning a co-coordinator to Claimant's cases, so that when Claimant is unable to attend to a work assignment the co-coordinator can fill in for him.

45. Claimant has been working with Ken Yeates, a Vermont-licensed vocational rehabilitation counselor, since he was determined entitled to such services in March 2010. Unfortunately, his unrelated health issues precluded him from participating in vocational rehabilitation planning through the summer of 2010. By mid-October, however, Mr. Yeates reported that Claimant had lost weight and appeared able to move more easily and with less discomfort.

46. Mr. Yeates has fashioned a return to work plan aimed at increasing Claimant's COSA coordinator work to a consistent 15 hours per week. This is what Claimant feels is achievable physically, plus it will not affect his social security disability income. To accomplish this goal, Mr. Yeates proposes to purchase new computer equipment for Claimant's use and to improve his keyboarding and computer skills. The anticipated cost of Mr. Yeates' plan is $1,150.00.

47. I find that Mr. Yeates' plan presents a cost-effective way of increasing Claimant's general marketability from a vocational rehabilitation perspective. However, it does not acknowledge what both Claimant and Mr. Tatum identified as the key factor limiting Claimant's capacity to work more hours in his current job, which is his inability to attend in-person meetings. In that respect, I find that the plan as currently written is unlikely to accomplish its stated goal, though it may be an appropriate starting point for future vocational rehabilitation planning.

48. Claimant's average weekly wage at the time of his injury was $467.20. If he was to work 15 hours per week at his current COSA coordinator pay rate ($15.00 per hour), his weekly gross pay would total $225.00. Combining these wages with Claimant's social security disability income would approximate his pre-injury average weekly wage.

Expert Vocational Rehabilitation Opinions

49. Each party presented its own vocational rehabilitation expert opinion as to whether Claimant is now permanently and totally disabled – James Parker on Claimant's behalf, Fran Plaisted on Defendant's.

(a) James Parker

50. Mr. Parker has a master's degree in counseling and more than 40 years experience in the field of vocational rehabilitation. He is not a licensed vocational rehabilitation counselor in Vermont.

51. Mr. Parker described Claimant's ability to secure his current COSA coordinator position as "impressive" given his lack of basic credentials for work of this type. According to his research, 92 percent of those employed in the social work sector have at least some college credit, if not a college degree. Mr. Parker attributed Claimant's success in the field to the network of contacts he has managed to develop over the years and, most recently, to an extremely accommodating employer.

52. Mr. Parker characterized Claimant's current COSA coordinator job as so highly accommodated as to be "basically non-competitive." Absent the in-person interactions and relationship building typically associated with counseling work, according to Mr. Parker Claimant is not even performing the essential duties of the job. Mr. Parker described Claimant's position as unique, and doubted that he would be able to replicate it in any other counseling environment.

53. Based on Claimant's track record since beginning his COSA coordinator work, Mr. Parker was not hopeful that he would be able to increase his hours to a consistent 15 per week, even with vocational rehabilitation. He acknowledged the possibility that Claimant might be able to transfer his work experience into college credit, thus improving his employability in the counseling field at least from a credentialing standpoint. Even were he to do so, however, in Mr. Parker's opinion Claimant's pain, fatigue and lack of endurance are too limiting to sustain employment in any well-known branch of the labor market. On those grounds, Mr. Parker concluded that Claimant is permanently and totally disabled.

54. I find credible Mr. Parker's assessment that Claimant's current level of sporadic work does not qualify as regular gainful employment. It is not sufficiently consistent to be "regular," and it does not generate sufficient income to be "gainful."

(b) Fran Plaisted

55. Ms. Plaisted has a masters' degree in rehabilitation counseling and more than 20 years experience in the vocational rehabilitation field. She is a Vermont licensed vocational rehabilitation counselor.

56. In Ms. Plaisted's opinion, vocational rehabilitation services are available that reasonably might restore Claimant to suitable employment. For that reason, it is premature to declare him to be permanently and totally disabled.

57. Ms. Plaisted detailed various accommodations that might enable Claimant to meet his target of 15 hours per week in his current COSA coordinator job. Some of these are aimed at increasing his productivity at home. For example, an adjustable workstation would allow him to alternate sitting and standing, and a stair lift would allow him to move his home office to a quieter room upstairs. To increase his productivity outside the home, Ms. Plaisted suggested videoconferencing as a means of facilitating greater interaction with both clients and volunteers.

58. Based on Claimant's employment history, Ms. Plaisted identified a number of sedentary jobs for which Claimant appears to have transferable skills. Should he be unable to increase his COSA coordinator hours, therefore, the next step in the vocational rehabilitation process will be to investigate whether he might be able to use these skills to obtain suitable work with a different employer. This step will involve conducting a labor market survey to determine which jobs exist in Claimant's labor market area. If additional training is necessary for a particular job or set of jobs, that might be considered as well. A repeat functional capacity evaluation also may be useful, as some of Claimant's unrelated health issues have improved since the evaluation he underwent in 2009. That evaluation concluded only that Claimant was incapable of full time work, furthermore, and did not address his capacity for part time work.

59. I find credible Ms. Plaisted's assertion that Claimant has not yet completed the vocational exploration process. Consistent with Mr. Parker's testimony, however, Ms. Plaisted acknowledged that no amount of vocational rehabilitation services can change a person's physical work capacity.

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. Claimant asserts that as a result of his February 4, 2007 work injury he is now permanently and totally disabled under the "odd lot" provision of 21 V.S.A. §644(b). Defendant argues that Claimant's current medical condition is no longer causally related to his compensable work injury. Even if it is, Defendant asserts that Claimant has not sustained his burden of proving permanent total disability.

Causal Relationship

3. Conflicting expert medical opinions were presented as to the causal relationship, if any, between Claimant's current condition and his work injury. Testifying on Claimant's behalf, Drs. Harris and White both conceded that Claimant had suffered from intermittent episodes of low back pain prior to February 2007, likely due to degenerative disc disease in his lumbar spine. Both concluded, however, that the work injury aggravated this preexisting condition to the point where it worsened acutely, became chronic and now significantly interferes with Claimant's function. In contrast, Dr. Backus testified that Claimant's condition has returned to its pre-injury baseline, with no evidence that it had objectively worsened as a result of the February 2007 work injury.

4. Where expert medical opinions are conflicting, 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 (September 17, 2003).

5. All of the experts here are well qualified to render opinions as to the causal relationship between Claimant's February 2007 injury and his current condition. Each of them conducted a sufficiently comprehensive evaluation, based on a sufficient review of the pertinent medical records, to support their opinions. As to the other factors, however, I conclude that the opinions expressed by Drs. Harris and White are the most persuasive.

6. Dr. Harris' credibility benefits from his longstanding relationship as Claimant's primary care provider. More so than either of the other two experts, he was best qualified to compare and contrast Claimant's condition before and after the February 2007 injury.

7. As to the objective support underlying each expert's opinion, I am mindful of the fact, as Dr. Backus acknowledged, that it is rarely possible to determine the exact etiology of chronic low back pain. It is, as Dr. White described, an inherently subjective phenomenon, and there is no "pain thermometer" by which to measure it. In that context, therefore, "objective support" may take the form not of medically verifiable findings such as one might see on an MRI study, but rather of credible evidence showing how a person's pain has impacted his or her ability to function. *See, e.g., Badger v. BWP Distributors, Inc.*, Opinion No. 05-11WC (March 25, 2011).

8. There is sufficiently credible objective evidence to establish that Claimant's condition worsened appreciably as a result of the February 2007 work injury. Pain that previously had been intermittent became chronic. It came to interfere with both work and recreational activities. It did not respond to narcotic pain medications and even now is poorly controlled. It has required lifestyle changes that were never necessitated before. Given all of these changes, for Dr. Backus to conclude in September 2010 that Claimant had returned to his pre-injury baseline of low back pain, such that his current complaints were no longer causally related to his February 2007 work injury, is simply not persuasive. The opinions of Drs. Harris and White are more credible in this regard.

9. I conclude that Claimant has sustained his burden of proving that his current condition is causally related to his February 2007 work injury.

Permanent Total Disability

10. Claimant contends that as a consequence of his work injury he is now permanently and totally disabled. Defendant asserts that Claimant has a work capacity and has not yet exhausted his vocational rehabilitation options. Therefore, it argues, it is premature to declare him permanently and totally disabled.

11. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

> The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

12. The workers' compensation rules provide further guidance. Rule 11.3100 states:

> Permanent Total Disability – Odd Lot Doctrine
>
> A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.
>
> A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

13. A finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's physical capabilities are accurately assessed, and second, all corresponding vocational options are comprehensively considered and reasonably rejected. *Hill v. CV Oil Co., Inc.*, Opinion No. 15-09WC (May 26, 2009); *Hurley v. NSK Corporation*, Opinion No. 07-09WC (March 4, 2009); *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008).

14. In this case, Claimant underwent a functional capacity evaluation in May 2009. Although the results indicated that he lacked even a sedentary work capacity, it is unclear to what extent his other health conditions, some of which now have resolved, might have impacted the results. Perhaps more important in the context of this claim, the 2009 evaluation considered only Claimant's capacity for full-time work, and did not address what his part-time work capacity might be.

15. Dr. Backus presented a more credible assessment of Claimant's current work capacity, one that will accommodate sedentary work on at least a part time basis. His suggestions as to allowing Claimant to work at his own pace and to alternate positions target at least some of the endurance deficiencies that the 2009 functional capacity evaluation revealed. I conclude from this that Claimant's work capacity is not so limited as to preclude further consideration from a vocational rehabilitation perspective.

16. Claimant's vocational expert, Mr. Parker, concluded that even with vocational rehabilitation assistance Claimant's pain, fatigue and endurance levels are so limiting as to render him permanently incapable of regular gainful employment. I disagree. As Ms. Plaisted suggested in her testimony, even at his current level of functioning viable vocational options exist for someone with Claimant's transferable skills. Improving his computer skills, modifying his home office, using videoconferencing technology, obtaining college credit for his work experience – these are all steps that cannot help but improve Claimant's employment potential, whether it be as a COSA coordinator or in some other work setting.

17. Vermont's workers' compensation rules establish a hierarchy of options that a vocational rehabilitation counselor is to consider in drafting a suitable return to work plan. *Workers' Compensation Rule 55.2000.* The first step in the hierarchy is to return the claimant to his or her pre-injury employer, in either a modified or a different job. *Workers' Compensation Rule 55.2100.* If that fails, then the second step is to consider other employers. *Workers' Compensation Rule 55.2200.* Steps three, four and five involve retraining, from on-the-job through formal education. *Workers' Compensation Rules 55.2300-55.2500.* The final step considers self-employment as an option. *Workers' Compensation Rule 55.2600.*

18. Throughout the process, the counselor's job is to determine first, at what step in the hierarchy the injured worker is likely to become re-employed, and second, what type of assistance is necessary in order to make that happen. If it becomes apparent that the claimant is unlikely to achieve success at one stage of the hierarchy, the plan can be amended so that both counselor and claimant can consider the next step. *Workers' Compensation Rule 55.6000*. In this way, the rules envision a process whereby all reasonable return to work options are considered before either party throws in the towel.

19. I conclude that Mr. Parker's analysis of Claimant's return to work potential focused primarily on his inability to sustain regular gainful employment in his current COSA coordinator position. It did not adequately consider whether with the appropriate vocational rehabilitation assistance Claimant might be employable at some other level of the hierarchy, however.

20. It is Claimant's burden of proof to show that in his labor market area no viable vocational options exist for a person with his physical capabilities, his limitations and his transferable job skills. As the vocational exploration process has only just begun, I am as yet unconvinced that this is the case.

21. I conclude that Claimant has failed to establish that he is permanently and totally disabled.

Permanent Partial Disability

22. The parties presented conflicting expert testimony as to the extent of the permanent partial disability Claimant suffered as a consequence of his February 2007 work injury. Having observed evidence of both muscle guarding and asymmetrical loss of range of motion, Dr. White rated Claimant with an 8% whole person impairment. Dr. Backus observed no such evidence, and therefore found no impairment.

23. These two experts are well known to this Department, and I consider them equally proficient at rating the extent of an injured worker's permanent impairment. The process is not an exact science, however. What one doctor may observe during the course of an examination, another doctor may not see.

24. In this case, I conclude that Dr. White's opinion is more credible, and that Claimant suffered an 8% whole person permanent impairment as a result of his February 2007 work injury.

Reclining Lift Chair

25. Claimant asserts that the reclining lift chair that Dr. Harris prescribed in July 2008 constitutes a reasonable medical supply necessitated by his February 2007 injury. Claimant seeks reimbursement from Defendant for the cost of the chair in accordance with 21 V.S.A. §640(a).

26. Dr. Harris could remember none of the details of his prescription. His assertion that he generally does not prescribe a medical device unless he feels it is medically necessary is insufficient to establish that the chair was necessitated by Claimant's February 2007 work injury. I conclude that Claimant is not entitled to reimbursement, therefore.

Costs and Attorney Fees

27. Claimant has submitted a request for costs totaling $4,967.19 and attorney fees in an amount to be determined. Claimant is entitled to an award of only those costs that relate directly to the claims upon which he prevailed, *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), namely (a) causal relationship; and (b) permanent partial disability. 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 his allowable costs and attorney fees.

ORDER:

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

1. Permanent partial disability benefits in accordance with an 8% permanent impairment referable to the spine, in accordance with 21 V.S.A. §648;

2. Interest on the above amount beginning on October 29, 2007 and calculated in accordance with 21 V.S.A. §664;

3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 6th day of July 2011.

_____
Anne M. Noonan
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.