STATE OF VERMONT
DEPARTMENT OF LABOR

Charles Shaffer

v.

First Choice Communications

Opinion No. 15-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. T-04803

OPINION AND ORDER

Hearing held in Montpelier, Vermont on May 21st and 23rd, 2014
Record closed on July 21, 2014

APPEARANCES:

Joseph Galanes, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Do Claimant's ongoing Synvisc injections constitute reasonable medical treatment for his August 21, 2002 compensable work injury?

2. Is Claimant permanently and totally disabled as a consequence of his August 21, 2002 compensable work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Vocational rehabilitation records
Claimant's Exhibit 1:	Deposition of Gregory Morneau, May 2, 2014
Claimant's Exhibit 2:	Deposition of Gilbert Fanciullo, M.D., May 9, 2014
Claimant's Exhibit 3:	*Curriculum vitae*, James T. Parker
Claimant's Exhibit 4:	Google Maps, Springfield, VT – Hanover, NH
Claimant's Exhibit 5:	Google Maps, Brattleboro, VT – Bellows Falls, VT
Claimant's Exhibit 6:	Google Maps, Keene, NH – Bellows Falls, VT
Claimant's Exhibit 7:	Deposition of David Podell, M.D., May 20, 2014
Defendant's Exhibit A:	Social Security Administration Function Report, 8/6/07
Defendant's Exhibit B:	*Curriculum vitae*, John May
Defendant's Exhibit C:	Handwritten notes, Parker interview of Claimant

Defendant's Exhibit D: *Curriculum vitae*, Leon Ensalada, M.D.
Defendant's Exhibit E: *Curriculum vitae*, Charles Alexander

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Permanent total disability benefits pursuant to 21 V.S.A. §645
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 and correspondence contained in the Department's file relating to this claim.

3. Claimant worked as a service technician for Defendant's communications company. His job responsibilities included installing internet, telephone and audio/visual systems, primarily for schools and other municipal customers.

Claimant's August 2002 Work Injury and Subsequent Medical Course

4. On August 21, 2002 Claimant was working on an installation job in Morrisville when he fell from a ten-foot step ladder onto his outstretched right arm. Claimant dislocated his elbow and fractured two bones in the joint – the radial head and the coronoid process. These injuries in turn have caused early osteoarthritic changes in his elbow.

5. In the years since his injury, Claimant has credibly and consistently reported pain in his right elbow with virtually any activity. He avoids using his right arm to lift, hold or reach for objects. Seemingly innocuous movements can "annoy" his elbow to the point where he is compelled to lie down and rest until the pain subsides. The vibration associated with driving or riding in a car is painful as well. Though this is slight comfort, fortunately Claimant is left-handed. Even so, the pain in his right arm, which can range from relatively mild while at rest to severe and debilitating with use, has dramatically affected his functional abilities.

6. Claimant's medical course since his injury has been long, complicated and largely unsuccessful. He has undergone two surgeries, one to replace his radial head with a prosthetic, the second a year later to remove the hardware. He has participated in extended courses of physical and occupational therapy. He has been prescribed a variety of pain medications, both non-narcotic and narcotic. None of these treatments have provided either effective pain control or measurably increased function.

7. Claimant has consulted with four orthopedic surgeons in an effort to identify a surgical solution to his problem. Currently there is none. He may become an appropriate candidate for elbow replacement and/or fusion at some future date, but given his current age (58 as of the formal hearing), it is unlikely at this point that either of these options would provide relief for the remainder of his life expectancy, and repeat surgeries would carry the risk of even more pain and dysfunction. For that reason, the long-term prognosis from surgery is unfavorable, at least for now.

Claimant's Synvisc Treatment

8. At the suggestion of one of his consulting orthopedists, Dr. Shafritz, Claimant has been undergoing quarterly injections of Synvisc, a formulation of synthetic hyaluronic fluid, since September 2006. In its natural state, hyaluronic acid is a component of cartilage, the shock absorber in our joints. Trauma to a joint can cause a loss of cartilage, and with less cartilage between the bones tiny nerve fibers are exposed. Moving the joint becomes extremely painful. Unlike narcotic medications, which merely mask the pain, an injection of synthetic fluid bathes and refortifies the cartilage, thus protecting the raw nerve fibers and adding both strength and resilience to the bone.

9. Synvisc injections currently are FDA-approved only for use in the knee. Nevertheless, many of the medical providers who have evaluated and/or treated Claimant have endorsed their "off label" use in his case, including Dr. Wing, his physiatrist, Dr. Fanciullo, his pain medicine specialist, Dr. Podell, who currently administers the injections, and even Dr. Boucher, who evaluated him at Defendant's request in 2006.

10. Claimant undergoes a series of two Synvisc injections, administered one week apart, every three months. Following each injection, he experiences an initial period of swelling and irritation, lasting between 48 and 72 hours, during which he is unable to tolerate much activity, if any at all. Once that passes, he enjoys a significant period of both decreased pain and increased function. While he still has sporadic episodes of breakthrough pain, generally during this timeframe he is able to move his arm with greater ease and at least somewhat increased function. Towards the end of the three-month period his symptoms begin to worsen again, and with a new series of injections the cycle repeats itself.

11. In his deposition, Dr. Podell credibly described Synvisc as a safe and inexpensive treatment for Claimant's chronic elbow dysfunction. Not only has it afforded him at least a modicum of reduced pain and increased function, but by slowing down the natural progression of arthritis in the joint, it also has delayed the point at which elbow replacement surgery will become unavoidable. Perhaps most significantly, the injections have enabled Claimant to manage his symptoms without narcotics. Dr. Podell provided powerful testimony as to this barometer of the treatment's effectiveness:

> Q [by Attorney Moore]: [. . .] I think what I'm trying to understand is if one is reporting bad days and good days, despite taking these injections, isn't that a little bit contrary to the purpose of the injections and their intent? In other words, if they're intended to give prolonged and sustained relief, and what they're doing is just giving somebody good days and bad days where they can barely function, doesn't that speak to their effectiveness altogether?
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> A: No. I – I don't quite think that's right. I mean, he's not having bad days where he can barely function. I think you can – if you wanted to be very clinical and objective, you might say has he – is he requiring narcotics for pain control, or has the pain – the amount of narcotics been reduced. And the answer to that is he's on zero narcotics. That's a very powerful fact, that somebody is not taking narcotics. You could also do, which I don't have, can he lift five pounds with the – with, you know, the elbow, where before he – he couldn't, or he could lift ten pounds, and now he can only lift five. I can't assess that for you. But I can tell you he's not on narcotics. And that is a very powerful piece of information for you to understand. 'Cause many of my patients have to take narcotics, 'cause there's nothing else for them to do. And I think that's the best I can speak to this regard. We all have good days and bad days, and I think to try to assess the effectiveness of Synvisc because of a bad day is not the way to go. He's on no narcotics. How cool is that.

12. I find both Claimant's description as to the manner in which his Synvisc treatment regimen allows him to better manage his condition and Dr. Podell's analysis as to the significance of his ability to do so without narcotics to be credible in all respects.

13. Dr. Ensalada, a pain medicine specialist retained by Defendant to conduct a medical records review, provided the only evidence in opposition to the use of Synvisc as a reasonable treatment option in Claimant's case. Based primarily on his review of the medical literature, and to a lesser degree on the fact that it is not FDA-approved for use in the elbow, Dr. Ensalada concluded that Synvisc injections do not constitute reasonable medical treatment in this case.

14. Dr. Ensalada was able to find only one published research report in which viscosupplementation (the generic name for synthetic hyaluronic acid joint injections) was used to treat post-traumatic osteoarthritis in the elbow.[1] In the study, 19 elbows in 18 patients were injected with hyaluronic acid three times over a four-week period. The results showed only slight, short-term improvement in pain and function after three months, and by six months no clinically relevant improvement at all. From this data, the researchers concluded that the treatment was not effective.

15. Notably, in reporting their results the researchers added certain "critical observations," namely, that the number of patients studied was small and that there was no control group. Of particular relevance in Claimant's case, furthermore, the hyaluronic acid used in the study was not comparable on a molecular level to Synvisc. The researchers specifically queried, but did not answer, whether viscosupplementation might yield better results were Synvisc used instead.

16. When confronted with Dr. Ensalada's conclusion that Synvisc injections were not reasonable in Claimant's case, Dr. Podell voiced some of these same concerns. In Dr. Podell's opinion, it would be inappropriate to rely so heavily on a single, poorly constructed study to formulate a treatment plan for an individual patient, particularly one with Claimant's complicated post-injury medical course. Dr. Podell has been administering Claimant's quarterly Synvisc injections since August 2012. Having personally evaluated him at regular intervals, he is confident that the treatment regimen has been efficacious, in terms of both better pain relief and increased function. I find his conclusion in this regard persuasive.

Claimant's Vocational Rehabilitation Efforts

17. Claimant's vocational history demonstrates both impressive intellectual capabilities and a high degree of self-motivation. Having chosen not to attend college, he takes pride in his aptitude for self-directed learning. As just one example, with no formal training he taught himself how to write computer code. He has a passion for music, and was at times self-employed as an audio engineer with his own sound system. At the time of his injury, his work for Defendant was essentially a summer job; during the academic year he worked as a production technician for Dartmouth College, setting stages, lighting and sound for live theatre and other touring acts. He enjoyed this work immensely.

18. Other than the tasks he performs to assist his wife's internet sales business, Finding of Fact No. 26 *infra*, Claimant has not worked since his injury. Currently he receives Social Security Disability benefits.

(a) Vocational Rehabilitation Services (Fotinopoulos)

[1] Van Brakel, R. and Eygendaal, D., Intra-Articular Injection of Hyaluronic Acid Is Not Effective for the Treatment of Post-traumatic Osteoarthritis of the Elbow, *Arthroscopy: The Journal of Arthroscopic and Related Surgery* 2006; 22:1199-1203, *Joint Exhibit I* at 691-695.

19. Claimant was first determined to be entitled to vocational rehabilitation services in November 2005. In September 2006 his treating physiatrist, Dr. Wing, advised that he was capable of working at a sedentary physical demand level, involving light or even medium level activities with his left arm alone, but with his right arm serving only as an assist.

20. Working with vocational rehabilitation counselor George Fotinopoulos, Claimant's initial vocational rehabilitation goal was to find a home-based, telecommuting job in internet research, customer support or technical support. Unfortunately, problems arose between Mr. Fotinopoulos and John May, the vocational rehabilitation professional whom Defendant had retained to perform an independent vocational evaluation, as to how best to formulate and implement a Return to Work Plan. Over Claimant's objection, in September 2008 the Department removed Mr. Fotinopoulos from the claim and ordered that another counselor, Donna Curtin, begin providing services instead.

(b) Vocational Rehabilitation Services (Curtin)

21. In January 2009 Dr. Wing responded to a query from Ms. Curtin with additional information as to Claimant's work capacity. He stated that Claimant was capable of working at a full-time job, that he would be able to manage a "reasonable" commute of 20 minutes or less, and that home employment "would be preferred." Dr. Wing reiterated that Claimant should not be expected to use both hands vocationally, and specifically that he would not be able to type with both hands. For that reason, he recommended either one-handed typing or Dragon Dictate, a voice-activated software program.

22. With this information in hand, Claimant and Ms. Curtin devised a new Return to Work Plan. According to this plan, Claimant would undertake and pass three successive courses leading to certification as a network administrator. As her rationale for suggesting this vocational goal, Ms. Curtin cited Claimant's "propensity to move to other career fields with ease, impress management with his ability to learn quickly, problem solve and operate independently." She also referenced a formal vocational assessment completed in 2007, in which Claimant scored in the 91st percentile for reading, 90th percentile for math, 92nd percentile for language and 86th percentile for spelling as compared to vocational college enrollees. I find this rationale to have been supported by the evidence and credible in all respects.

23. Between April 2010 and September 2011 Claimant undertook the home study computer coursework and passed the first two certification exams with relative ease. Unfortunately, the material covered in the third exam was significantly more challenging, particularly for someone who was not already employed in the information technology industry. Over the ensuing months, Claimant became discouraged by his inability to master the complicated subject matter.

24. In an effort to overcome this obstacle, in April 2012 Ms. Curtin suggested that Claimant commence job search activities using the two certifications he had already obtained. Finding hands-on employment in the IT field, she reasoned, likely would help him absorb the information covered by the third exam, so that he might develop the proficiencies necessary to pass it. Claimant agreed to this action plan, which I find to have been a reasonable approach to attaining the vocational goal stated in his Return to Work Plan.

25. Between June and November 2012 Ms. Curtin forwarded Claimant various contacts so that he might pursue informational interviews and networking opportunities with local IT employers. Many of these were situated beyond the 20-minute commute distance that Dr. Wing had estimated Claimant could tolerate. Though this may have disqualified them as options for actual employment, I find that Claimant likely would have benefitted nonetheless by making the contacts and learning more about the skills and training necessary to become successfully employed. For whatever reason, however, he did not directly follow up on any of these leads.

26. As an alternative to finding suitable employment as a network administrator, during this time period Claimant and Ms. Curtin also discussed amending the Return to Work Plan and focusing instead on developing a position for him in his wife's home-based eBay sales business. Claimant's wife buys and resells historical photographs of railroad-related items such as locomotives and train stations. On the days when his pain is tolerable, Claimant routinely spends three to four hours assisting her, whether by researching the photographs online and/or by scanning them into the computer and using Photoshop to color-correct and size them for sale. He has a left-handed computer station (which Defendant previously had purchased as part of his Return to Work Plan), and is able to accomplish these tasks without using his right arm at all, albeit with frequent rest breaks. Claimant and Ms. Curtin hoped that by applying his newly acquired computer networking skills he could expand the business.

27. In furtherance of this alternative, in October 2012 Ms. Curtin proposed that the Return to Work Plan be revised to formalize Claimant's involvement in his wife's business as the stated vocational goal. As part of the plan, Defendant would contribute $5,000.00, which would be used to purchase higher quality scanning equipment as well as additional business inventory. Though initially receptive to the idea, ultimately Claimant and his wife determined that even with his involvement the business was unlikely to expand significantly. Therefore, they rejected Ms. Curtin's proposal.

28. With the option of returning to work as a partner in his wife's business no longer under consideration, Ms. Curtin anticipated resuming her efforts to assist Claimant in passing his final certification exam and locating suitable employment in the IT field. She suggested finding a tutor, and researched various employers who she thought might be able to offer appropriate job opportunities. She also forwarded information so that Claimant might register his name on Flex Jobs, a website with listings for telecommuting IT positions nationwide.

29. At the same time, however, at Claimant's request his treating pain medicine specialist, Dr. Fanciullo, issued an opinion as to his work capacity. In a November 2012 letter to Claimant's attorney, Dr. Fanciullo stated that Claimant "is not capable of even sedentary levels of employment because of the severe and unrelenting pain in his elbow and the fact that his elbow pain is exacerbated by even minimal activity." This assessment stood in marked contrast to Dr. Wing's earlier determination that Claimant was capable of sedentary work, *see* Finding of Fact Nos. 19 and 21 *supra*. Pending clarification on the issue, Ms. Curtin suspended vocational rehabilitation services; these have never been resumed.

(c) Claimant's Functional Capacity

30. In January 2013 Claimant underwent a functional capacity evaluation with Gregory Morneau, an occupational therapist. Mr. Morneau is certified in the Matheson system for rating an individual's physical tolerance for work at the four levels – sedentary, light, medium and heavy – that the Dictionary of Occupational Titles uses to classify jobs from a functional perspective.

31. Mr. Morneau's objective findings and clinical observations justify the following conclusions as to Claimant's work capacity:

- He performed at least at a sedentary to light level for bilateral lifting and carrying, though his movements became increasingly slow, deliberate and uncoordinated as the assessment progressed;

- On dexterity tests involving forward reaching, handling, fingering and above-shoulder work, his tolerance was severely limited in his right arm, significantly less so in his left (dominant) arm;

- He demonstrated a tolerance for medium level work in terms of standing, walking and sitting.

32. Claimant reported to Mr. Morneau that when he tries to use his right arm for sustained activities at home, he experiences escalating swelling and pain in his elbow. He also reported unpredictable pain levels from day to day, sometimes so severe that he has to lay down to avoid any vibration to, or movement of, his right arm. Mr. Morneau credibly concluded that these limitations likely would carry over into a work environment.

33. In his deposition testimony, Mr. Morneau acknowledged that assessing Claimant's work capacity was not a straightforward endeavor. Although he was able to perform at least at a sedentary level in some areas, he demonstrated significant deficits on tasks that Mr. Morneau characterized as involving "essential requirements of sedentary employment" – coordination, reaching and sustained positioning with his right arm, for example. Beyond that, in Mr. Morneau's opinion Claimant's self-report of unpredictable pain levels, need for frequent rest breaks and limited ability to tolerate the vibration associated with riding in a car posed further barriers to employment. Considering all of these factors together, Mr. Morneau concluded that Claimant had no "competitive work tolerance" and therefore was unable to pursue gainful employment.

34. At Defendant's request, Charles Alexander, an occupational therapist also trained and certified in the Matheson system, reviewed and critiqued Mr. Morneau's work capacity assessment. Based on the objective data contained in the report, Mr. Alexander concluded that Mr. Morneau had underestimated Claimant's work capacity. According to Mr. Alexander's analysis, which I find credible, Claimant exhibited at least a part-time work capacity, with demonstrated abilities at sedentary, light and even medium physical demand levels.

35. As Mr. Morneau himself observed, and as Mr. Alexander's analysis confirmed, it is quite difficult to assess the work capacity of an individual with a condition as complex and unpredictable as Claimant's. Mr. Alexander criticized Mr. Morneau for inappropriately expanding his role as a functional capacity evaluator and venturing instead into the realm of vocational rehabilitation professional. I agree. Indeed, immediately after concluding in his report that Claimant lacked even a sedentary work capacity, Mr. Morneau made the following statement:

> He does have the potential to work part time from home with computer based tasks. He would be able to change arm positions as necessary, vary his work to accommodate for quick declines in coordination, and not work on days where his pain level is high to the extent he has to lay down. He is motivated to pursue this further and has been trying to push his tolerance for computer work in a modified fashion with success averaging 3 hours per day.

36. As Mr. Alexander correctly explained, it is the vocational rehabilitation professional's job, not the functional capacity evaluator's, to determine whether a person with the physical abilities and limitations Mr. Morneau documented is employable given such other factors as age, education and transferable skills. Thus, while I accept as valid both the objective data Mr. Morneau reported and the clinical observations he noted, from that evidence alone I cannot find that Claimant is incapable of even sedentary work at a competitive level.

37. Consistent with Mr. Alexander's analysis, Dr. Ensalada, the pain medicine specialist who reviewed Claimant's records at Defendant's request, appropriately distinguished the specific question put to him – what is Claimant's work capacity – from the broader question whether Claimant was or was not employable. Based on the objective data Mr. Morneau had reported, Dr. Ensalada concluded that Claimant had demonstrated at least a sedentary work capacity, with abilities at the light and medium levels as well. Again, I find this conclusion credible.

(d) Expert Vocational Rehabilitation Opinions as to Employability

38. As to the broader question Dr. Ensalada posed – whether Claimant is or is not employable – the parties each presented their own vocational rehabilitation expert – James Parker for Claimant, John May for Defendant.

39. Mr. Parker is an independent vocational consultant. He holds certifications as a vocational rehabilitation provider and counselor, and also as a vocational expert for the Social Security Administration, which is the primary focus of his current practice. Mr. Parker is not certified in Vermont, and has never provided direct vocational rehabilitation services in this state. Prior to rendering his opinions in this case, he interviewed Claimant on one occasion and reviewed some, but not all, of his medical records. As for the substance of Mr. Fotinopoulos' and Ms. Curtin's vocational rehabilitation efforts, Mr. Parker reviewed only the entitlement assessment and suspension report, but not any of their interim progress reports.

40. In Mr. Parker's opinion, Claimant's ability to sustain work is so limited in quality, dependability and quantity that a reasonably stable market for it does not exist. Among the specific barriers to employment he noted:

- Claimant's inability to drive for more than short distances, need to rest or nap at unpredictable times and anticipated absenteeism while undergoing quarterly Synvisc injections;
- His limited ability to keyboard at an acceptable level;
- His lack of educational qualifications for computer-based occupations; and
- His age and time away from the labor market.

41. Mr. Parker criticized the vocational rehabilitation services Ms. Curtin had provided as both inadequate in scope and unlikely to succeed. According to his research, the vast majority of employees in computer-based occupations have at least some college-level training. Thus, in his opinion, Claimant was unlikely to become employed in the field even with the network administrator credentials Ms. Curtin had assisted him to obtain. Add to this not only the barriers noted above but also the limited southern Vermont labor market and the lingering effects of the recession, and, in Mr. Parker's view, Claimant is now unemployable.

42. Mr. Parker acknowledged in his testimony that a more substantial training program might be devised that would make Claimant more employable in a computer-based occupation, provided, of course, that he was able to undertake it despite his physical limitations. He also admitted that he did not perform any labor market research in Claimant's area and did not investigate any of the Vermont-based organizations that provide employment assistance to older workers. As for the possibility that accommodations such as voice-activated software might allow Claimant to keyboard at an acceptable level, Mr. Parker first dismissed these as inadequate, but later acknowledged that he was unfamiliar with recent technological improvements in this area. Taken together, I find that these omissions significantly undermine his opinion.

43. John May, the vocational rehabilitation counselor whom Defendant had retained to perform an independent vocational evaluation during the time when Mr. Fotinopoulos was providing services, *see* Finding of Fact No. 20 *supra*, stated opinions directly contrary to Mr. Parker's. Mr. May is a certified vocational rehabilitation counselor and fellow of the American Board of Vocational Experts. He has been providing direct vocational rehabilitation services in Vermont since 1993. In formulating his opinions in this case, Mr. May reviewed Claimant's medical records and vocational rehabilitation reports. However, he did not personally interview Claimant, because his request to do so was denied.

44. Mr. May employed a nine-step methodology for evaluating Claimant's employability. As part of this analysis, he created two distinct "worker trait profiles" based on Claimant's assessed work capacity. The first profile assumed material handling abilities at a sedentary level with additional limitations for occasional reaching, handling and fingering. Using that profile, which was essentially consistent with Mr. Morneau's stated opinion as to Claimant's functional limitations, Mr. May identified only three potentially suitable occupations.

45. In the second profile, Mr. May assumed material handling abilities at the light level, and, based either on Claimant's ability to work left-handed and/or his access to assistive technology, frequent reaching, handling and fingering. Thus, this profile was consistent with the objective data Mr. Morneau had reported in his evaluation, albeit at odds with his ultimate conclusion. Using this profile, Mr. May identified a total of 119 potentially suitable occupations, 17 of which involved directly transferable skills. I find that the number of potentially suitable occupations Mr. May identified using this worker trait profile more accurately reflects Claimant's employability than the first profile does.

46. Mr. May conceded that not all of the occupations he identified under the second profile were likely to be feasible for an individual, like Claimant, who is severely limited with respect to tasks that must be performed with two hands. By the same token, however, Mr. May noted that were Claimant to complete the vocational plan he had undertaken with Ms. Curtin's guidance, a much broader range of opportunities likely would become available to him. I find this analysis credible.

47. Mr. May acknowledged that home-based employment likely presents the most viable option for Claimant to become re-employed, given the flexibility it offers. Claimant already has demonstrated his ability to work in at least a part-time capacity at such a job, by virtue of his involvement in his wife's internet sales business. With or without additional vocational rehabilitation services, therefore, in Mr. May's opinion Claimant is more likely than not capable of regular gainful activity.

48. Beyond that, notwithstanding Claimant's functional limitations and other employment barriers, Mr. May believes that vocational rehabilitation is still feasible and should be offered. Services might include helping him to obtain additional job skills, coordinating his access to assistive technology and adaptive equipment and conducting structured and focused job development. With those possibilities in mind and assuming additional vocational rehabilitation assistance, in Mr. May's opinion Claimant is more likely than not capable not just of securing regular gainful activity, but likely suitable employment as well.

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. The parties have raised two disputed issues here – first, whether Claimant's quarterly Synvisc injections constitute reasonable medical treatment for his compensable injury, and second, whether as a result of that injury he is now permanently and totally disabled.

Compensability of Synvisc Injections

3. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).

4. The determination whether a treatment is reasonable must be based primarily on evidence establishing the likelihood that it will improve the patient's condition, either by relieving symptoms and/or by maintaining or increasing functional abilities. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000). However, as is the case with many aspects of medical decision-making, there can be more than one right answer, and thus more than one reasonable treatment option for any given condition. *Lackey v. Brattleboro Retreat*, Opinion No. 15-10WC (April 21, 2010).

5. The parties introduced conflicting expert medical evidence on the question whether Claimant's regimen of quarterly Synvisc injections meets the above standard. In such situations, 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).

6. I conclude here that the expert evidence strongly favors a finding of reasonableness. All of Claimant's treating providers have supported using Synvisc injections as a means of managing his pain, none more forcefully than Dr. Podell. Dr. Podell has been administering the injections since 2012, and therefore is well positioned to evaluate their effectiveness. His comments regarding Claimant's ability to remain off narcotics are extremely persuasive. The Legislature has identified the use of opioid medications to treat chronic pain as an issue of particular concern in the workers' compensation arena, *see* 21 V.S.A. §640c (added 2014, No. 144, §52). In that context, an alternative treatment regimen that is both safe and cost effective merits full consideration, especially where, as here, it appears by all accounts to be working.

7. While Dr. Ensalada's concerns as to the efficacy of Synvisc injections when used "off label" are worth noting, I do not consider them determinative in this case. *See, e.g., Perry v. State of Vermont, Office of Attorney General*, Opinion No. 13-13WC (April 25, 2013) (medications deemed compensable despite off label use); *N.B. v. Verizon*, Opinion No. 24-08WC (June 12, 2008) (same as to synthetic disc replacements). Nor am I convinced that the results of a single, poorly constructed research study necessarily should control the outcome of this case. Hopefully, additional research will assist practitioners to better understand when and how to use Synvisc to its best effect. In the meantime, I concur with Dr. Podell's assessment that the treatment relieves Claimant's symptoms and improves his function, if not completely then at least enough to justify its continued use. Therefore it is medically necessary.

8. I conclude that Claimant's current regimen of Synvisc injections constitutes reasonable medical treatment under §640(a) and is therefore compensable.

Permanent Total Disability

9. Claimant asserts that the barriers posed by his injury-related physical limitations, when considered in conjunction with his age, education, training and experience, render him permanently unemployable under the odd lot doctrine. Defendant asserts in response that even without vocational rehabilitation assistance Claimant is capable of regular, gainful work, and therefore is not permanently and totally disabled.

10. 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.

11. 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.

12. As Professor Larson describes it, the essence of the odd lot test is "the probable dependability with which [the] claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck or the superhuman efforts of the claimant to rise above crippling handicaps." 4 Lex K. Larson, *Larson's Workers' Compensation* §83.01 at p. 83-3 (Matthew Bender, Rev. Ed.), quoted with approval in *Moulton v. J.P. Carrera, Inc.*, Opinion No. 30-11WC (October 11, 2011). As the Commissioner observed in *Moulton*, it would be a harsh result to deny an injured worker's claim for permanent total disability benefits solely because the possibility exists, however slight, that he or she might someday find a job. The standard required by Rule 11.3100 is what is reasonably to be expected, not what is remotely possible. *Moulton*, *supra* at Conclusion of Law No. 10.

13. Nevertheless, 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. *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011); *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. The parties presented conflicting expert evidence on the question whether the barriers to Claimant's re-employment are too substantial to be overcome, either with or without additional vocational rehabilitation services. I agree with Mr. Parker that, on paper at least, a person of Claimant's age, with only a high school education, significant physical limitations and a lengthy absence from the work force, poses a major vocational rehabilitation challenge. However, I am troubled by the gaps in Mr. Parker's analysis. He failed to perform any specific labor market research, did not investigate assistive technology options, and neglected even to fully review how the vocational rehabilitation process had unfolded in Claimant's case and what further services might yet have been offered. It appears his starting point was to assume that Claimant was unemployable and then focus his efforts on justifying that conclusion. What I expect from the vocational rehabilitation process is exactly the opposite – to begin by assuming employability and continue until all reasonable pathways to success are eliminated.

15. Mr. May's analysis more closely approximated the latter approach, and for that reason I consider it more persuasive. I conclude, as he did, that if Claimant avails himself of additional vocational rehabilitation services such as tutoring, access to assistive technology and focused job development, it is reasonable to expect that he will be able to resume regular, gainful work.

16. I acknowledge that there is no guarantee of a successful outcome even with additional vocational rehabilitation services. It may well be that Claimant's employment-related assets – for example, his intelligence, self-directed learning style and proven ability to problem-solve independently – will be insufficient to overcome the deficits upon which Mr. Parker focused. But given the particular circumstances of this case, rather than withdrawing from the vocational rehabilitation process while meaningful assistance is still on offer, he is obliged at least to see it through. I conclude that he has not yet done so. For that reason, it is premature to consider him permanently and totally disabled.

17. I conclude that Claimant has failed to sustain his burden of proving that he is permanently and totally disabled as a consequence of his compensable injury.

18. As Claimant has prevailed on his claim for medical benefits, he 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 his allowable costs and attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for permanent total disability benefits is hereby **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Medical benefits covering all reasonable medical services and supplies associated with Claimant's Synvisc injection treatment regimen, in accordance with 21 V.S.A. §640; and

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

DATED at Montpelier, Vermont this 21st day of October 2014.

_____
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.