STATE OF VERMONT
DEPARTMENT OF LABOR

Darwin Cameron

v.

Lily Transport

Opinion No. 21-15WC

By: Jane Woodruff, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. DD-52480

OPINION AND ORDER

Hearing held in Montpelier, Vermont on January 16, 2015
Record closed on June 17, 2015

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a result of his August 2011 compensable work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Claimant's wage statement

CLAIM:

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 contained in the Department's file relating to this claim.

3. Claimant is 61 years old and lives with his wife in Alburgh, Vermont. When he was two years old he had an accident with a hatchet and lost parts of three fingers on his right hand. Finding school very difficult, he quit without completing eighth grade. Thereafter, in 1967 or 1968 he went to work on his father's farm. In the mid-1970's he began working as a commercial truck driver. He had no formal training, but rather learned on the job.

4. When Claimant first began trucking, state law did not require him to obtain a commercial driver's license. This changed in 1991. Claimant attended a course over four Saturdays to study for the test. He passed, and thereafter renewed his license when necessary. At one point he let his commercial driver's license lapse, but in 2014 he took the required steps to renew it, *see* Finding of Fact No. 26, *infra*. As of the formal hearing, his commercial driver's license was current.

5. Claimant began working for Defendant in the spring of 2009. He received his assignments verbally, picked up the paperwork at the office and learned which truck he was to drive. Then he would travel to his destination, deliver his load, pick up another load and return home. This routine kept him away from home from Sunday night through Friday.

Claimant's Work Injury and Course of Treatment

6. While transporting a load on August 17, 2011, Claimant stopped at a convenience store in Glens Falls, New York. As he exited the cab of his truck, he slipped on the top step. He grabbed the handrail on the side of the truck with his left hand. His momentum swung him in a 180-degree semi-circle, with all of his weight swinging from his left arm and shoulder.

7. That evening, Claimant could not raise his left arm. He waited until the next morning and then called dispatch to report his injury. Thereafter, Defendant made arrangements to pick him up and return him home.

8. Defendant accepted Claimant's injury as compensable and paid medical and indemnity benefits accordingly. Claimant's average weekly wage at the time was $1,077.49, which yielded an initial compensation rate of $718.33.

9. Upon returning to Vermont, Claimant sought treatment at the Northwestern Vermont Medical Center emergency department. X-rays failed to reveal any fractured bones. Given the mechanism of injury, the emergency physician suspected an acute rotator cuff tear. Claimant was discharged with his left arm in a sling and advised to follow up with an orthopedic surgeon.

10. Claimant treated first with Michele Machesky, a physician assistant at Associates in Orthopedic Surgery, on August 24, 2011. Ms. Machesky reported that he was unable either to raise his arm overhead or to reach behind his head, and also that his arm was painful at night. A subsequent MRI study revealed three rotator cuff tears (two complete and one partial) in his left shoulder. At a follow-up appointment, Ms. Machesky presented Claimant with various treatment options, including anti-inflammatory drugs, pain medications, injections, physical therapy and/or surgical repair. Claimant opted for surgery.

11. Claimant next met with Dr. Macy, an orthopedic surgeon, on September 28, 2011. Dr. Macy expressed concern about performing rotator cuff surgery given Claimant's pre-existing and non-worked related conditions. These included uncontrolled diabetes mellitus, heavy tobacco use and obesity. The first two conditions in particular are associated with a high incidence of rotator cuff re-tear and post-surgery frozen shoulder. Notwithstanding these potential risks, Claimant still wanted to pursue surgery. This was scheduled for November 2011 at Fletcher Allen Health Care.

12. Unfortunately, Claimant failed to pass his pre-surgery physical examination. His electrocardiogram was abnormal and his blood sugars were uncontrolled. Further tests revealed that he suffered from significant pulmonary obstructive disease, likely due to his heavy smoking. Unless and until each of these issues was addressed, Claimant was deemed a very high medical risk for surgery, such that the hospital anesthesiologists refused to clear him.

13. Frustrated at this roadblock, in February 2012 Claimant sought a second opinion with Dr. Beattie, an orthopedic surgeon at Northwest Orthopedics, to discuss his options. Consistent with Dr. Macy's analysis, Dr. Beattie diagnosed a "massive" rotator cuff tear. However, after discussing the various treatment options, he declined to offer surgery. Dr. Beattie reasoned that Northwest Medical Center was a small community hospital, and if the staff at Fletcher Allen Health Care declined to perform surgery notwithstanding their access to the more comprehensive specialty care available there, he would do so as well.

14. At Defendant's request, in June 2012 Claimant underwent an independent medical examination with Dr. Boucher. Dr. Boucher reported a marked decrease in Claimant's left shoulder strength, but no pain with left shoulder motion. In his opinion, Claimant's prognosis was poor and he was at end medical result, with a 13-percent whole person impairment referable to his left shoulder injury.

15. Defendant engaged Dr. Thatcher, an orthopedist, to perform a medical records review of Claimant's case in April 2013. Dr. Thatcher diagnosed Claimant with a large rotator cuff tear in his left shoulder. In his opinion, Claimant

could not return to truck driving safely without surgical repair, as the function in his left shoulder was greatly compromised. Even with surgery, it was Dr. Thatcher's opinion that it was impossible to predict if Claimant could return to truck driving.

16. Considering not only his work injury but also his co-morbidities of obesity, diabetes, chronic obstructive pulmonary disease and compromised cardiac function, in Dr. Thatcher's opinion Claimant was still employable. A functional capacity evaluation would be necessary to determine at what level and with what restrictions he could work, however.

17. In April 2013 Claimant underwent triple by-pass surgery unrelated to his work injury.

18. Claimant returned to see Dr. Macy in June 2014, seeking to have his shoulder reassessed. At that time, he reported that he had returned to work part-time driving a truck and was able to do his job. Dr. Macy again determined that Claimant's shoulder could not be surgically repaired. Instead he offered rehabilitation therapy, which Claimant declined.

Functional Capacity Evaluations

(a) Charles Alexander

19. At his attorney's referral, in August 2013 Claimant underwent a functional capacity evaluation with Charles Alexander, a registered occupational therapist and certified work capacity evaluator. Mr. Alexander reported that Claimant gave high levels of physical effort throughout the testing. He exhibited limited pain behaviors and no evidence of symptom magnification. Notably, Claimant reported no pain in his left shoulder at the start of the evaluation, was not limited by pain during the testing, and reported little pain at the end of the process and on the following day – a one to two on a ten-point scale.

20. In Mr. Alexander's opinion, Claimant has a full-time sedentary work capacity, with some abilities into the light level for carrying and floor-to-waist lifting. However, with any of the tasks considered light duty, he became short of breath. Additionally, due to significant lack of strength in his left shoulder, he could not perform any bilateral hand material handling to the shoulder level.

(b) Benjamin McCormack

21. At Defendant's request, in August 2014 Claimant underwent a second functional capacity evaluation with Benjamin McCormack, a physical therapist and certified ergonomic evaluation specialist. As Mr. Alexander had found one year previously, Mr. McCormack reported that Claimant exhibited

high levels of physical effort, was reliable and accurate in his reports of pain, but was not limited thereby. Mr. McCormack further reported that Claimant experienced shortness of breath with low level work, so that was not recommended.

22. Mr. McCormack had Claimant perform a work simulation for drop and hitch truck driving.[1] During these tasks, Claimant's heart rate rose sharply and he needed more time to catch his breath than the actual tasks took to perform. For those reasons, and not even considering his left shoulder dysfunction, Mr. McCormack raised safety concerns with drop and hitch trucking.

23. Based on Claimant's demonstrated functional abilities, Mr. McCormack determined that he had a full-time sedentary work capacity, with some capabilities into the light and/or medium categories. However, in Mr. McCormack's opinion, Claimant's chronic pulmonary obstructive disease, obesity and generally poor physical fitness raised safety issues for both light and medium work. For that reason, in the final analysis Mr. McCormack concluded that Claimant was best suited for only sedentary work.

24. Mr. McCormack was aware that Claimant was working approximately 20 hours per week trucking at the time of his evaluation, *see* Finding of Fact No. 27, *infra*. In his opinion, because some of Claimant's duties approached medium level work, this was the maximum number of hours he could safely work at this job.

Claimant's Resumed Employment

25. In 2013 Claimant applied for and received social security disability (SSDI) benefits. His monthly check is just under $1,800.00. He and his wife split the monthly expenses in half. Claimant credibly testified that his SSDI benefits did not cover his half of the bills. To make ends meet and cover their living expenses, Claimant and his wife sold the house they had built and downsized to a mobile home, traded in both his pick-up truck and his camper for vehicles with lower monthly payments, and sold his boat.

26. In the spring of 2014, David Couture, Claimant's friend for more than 35 years, approached him to inquire if he wanted to drive a commercial truck for a day or two per week. At the time, Claimant had let his commercial driver's license lapse, but he quickly took the steps to reinstate it. This entailed passing both a written test and a physical exam.

[1] Drop and hitch trucking involves hooking the tractor to the trailer and driving to the destination. It does not require unloading the load or cleaning the trailer, tasks that Claimant was able to perform prior to his injury but not after.

27. Claimant began working for Mr. Couture in May 2014. He was paid $.40 per mile traveled. Mr. Couture instructed Claimant that when he wanted a load, he was to call the dispatcher at Bellavance Trucking, which provided dispatching services for Mr. Couture, for an assignment. The dispatcher then faxed the job orders to Mr. Couture so that he could pay Claimant.

28. Claimant credibly testified that while he had discretion to refuse a load, prior to December 2014 he never did so. There were times when his driving activities caused his shoulder to hurt, but he continued to work. Claimant credibly explained, "I was brought up to work and you don't say 'no' just because you don't feel well." In some weeks, he would make three trips; if this caused his shoulder to hurt, the next week he might only make two hauls. Claimant credibly testified that he did not take pain medication of any kind, and did not seek out medical attention at any point while working for Mr. Couture.

29. From early May through early December 2014, Claimant worked a total of thirty weeks for Mr. Couture, and earned the following net wages:[2]

Week Ending	Wages
May 9, 2014	$576.81
May 16, 2014	817.44
May 30, 2014	646.62
June 6, 2014	667.34
June 13, 2014	637.26
June 20, 2014	422.76
June 27, 2014	425.49
July 3, 2014	471.51
July 11, 2014	638.48
July 18,2014	558.09
July 26, 2014	485.16
August 1, 2014	551.07
August 8, 2014	581.10
August 15, 2014	561.60
August 22, 2014	805.35
August 29, 2014	437.19
September 5, 2014	806.52
September 12, 2014	612.77
September 19, 2014	785.85
September 26, 2014	992.55
October 3, 2014	688.66
October 10, 2014	916.89
October 17, 2014	349.44
October 24, 2014	887.25
October 31, 2014	783.12
November 7, 2014	639.21
November 14, 2014	749.19
November 21, 2014	748.02
November 28, 2014	627.12
December 5, 2014	481.73

30. Claimant's net wages for these weeks totaled $19,351.59, which yields an average net weekly wage of $645.05.

31. Claimant credibly explained that the reason he stopped working for Mr. Couture after December 5, 2014 was because he had reached the allowable earnings limit for social security purposes, and if he had earned any more, his

[2] The evidence does not reflect what Claimant's pre-tax gross wages were; Mr. Couture paid him by directly depositing his net pay into his checking account.

monthly SSDI check would have decreased. To his knowledge, work was still available to him. Claimant did not assert and I find that the evidence does not support that he ceased working in early December 2014 on account of any pain or disability in his left shoulder.

32. I find that the fact that (a) Claimant passed a physical exam in May 2014 in order to renew his commercial driver's license; (b) reported to Dr. Macy in June 2014 that he had returned to part-time truck driving and "could do his job;" and (c) was able to sustain part-time work for a total of thirty weeks in 2014 all undermine Dr. Thatcher's April 2013 opinion to the effect that he could not drive a truck safely, *see* Finding of Fact No. 15, *supra.*

Claimant's Vocational Rehabilitation Efforts

33. Defendant referred Claimant for vocational rehabilitation services in April 2012. Vocational counselor William Chapman was assigned to Claimant's case. However, vocational rehabilitation efforts were quickly suspended because Claimant had no work capacity.

34. Thereafter, no substantial vocational rehabilitation work was performed on Claimant's case throughout 2013. In April 2014 Claimant requested the assignment of a new vocational rehabilitation counselor. Jay Spiegel took over his case and performed an entitlement assessment. Claimant was found entitled to services.

35. Mr. Spiegel credibly explained that given Claimant's high average weekly wage, focused work history (driving truck for more than thirty years), academic limitations and significant physical restrictions, he was concerned that Claimant would have difficulty finding suitable employment that would pay him close to his pre-injury average weekly wage.

36. However, as Claimant was entitled to vocational rehabilitation services, Mr. Spiegel began the process of developing a vocational rehabilitation plan. Claimant had very few transferable skills, no computer skills (keyboarding was questionable given his partially amputated right fingers), and limited writing and grammar skills. However, one of his strengths was his knowledge of the trucking industry. Therefore, that became Mr. Spiegel's starting point for devising a plan.

37. Over the course of the next four months, Claimant and Mr. Spiegel worked on a return to work plan. At the end of November 2014, Mr. Spiegel presented a draft of the plan to the parties for their approval. The plan placed great emphasis on one-to-one academic and computer skills tutoring, and also on identifying suitable work in an on-the-job setting. Mr. Spiegel estimated the total cost of the plan, including the costs associated with purchasing computer hardware, software and internet service, at just under $16,000.00.

38. Mr. Spiegel identified four potential employment positions (in ascending order) to which Claimant might aspire – transportation dispatcher, traffic manager, customs broker and truck terminal manager. In his credible opinion, retraining for these positions would take Claimant anywhere from six months to one year (for a transportation dispatcher job) to as long as ten years (for a truck terminal manager position).

39. As part of his vocational rehabilitation plan, Mr. Spiegel arranged for Claimant to undergo a vocational assessment with Iris Banks, a certified vocational evaluator. Ms. Banks agreed with Mr. Spiegel that Claimant's best chance for returning to suitable work would be as some type of transportation professional. In Ms. Banks' opinion, however, given Claimant's limited transferable skills, academic deficiencies, limited dexterity in his non-dominant hand and positional and functional limitations, achieving this goal would be very difficult.

40. Even as he was drafting his return to work plan, Mr. Spiegel knew that Claimant was working part-time for Mr. Couture as a commercial truck driver. At the formal hearing Mr. Spiegel testified that in his opinion this job was not regular work, because it was not available during the winter months. However, Claimant himself testified that the reason he stopped working in December 2014 was so as not to jeopardize his SSDI benefits, Finding of Fact No. 31, *supra*, and not because Mr. Couture did not have work available for him. For that reason, I find the factual basis for Mr. Spiegel's opinion lacking.

41. As of the formal hearing, Mr. Spiegel's draft return to work plan had yet to be finalized. Mr. Spiegel credibly testified that he remains willing to work with Claimant. He also credibly assessed Claimant as being highly motivated to return to work, notwithstanding the significant challenges he would need to overcome in order to do so suitably and successfully.

42. Of note, Mr. Spiegel never expressed an opinion that Claimant would be unable to secure regular, gainful employment, the appropriate standard for evaluating permanent total disability claims. Rather, as Ms. Banks did, he emphasized his belief that given all the challenges Claimant faced, he would not be returned to suitable employment, which is the standard for successful completion of vocational rehabilitation.

43. Given Claimant's age, limited education, work experience and transferable skills, as well as his myriad health issues (including cardiovascular and pulmonary disease, obesity and diabetes), I find it highly unlikely that Mr. Spiegel's draft plan will result in Claimant's successful return to suitable employment, as defined in the vocational rehabilitation context.

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 here seeks permanent total disability benefits under the odd lot doctrine. He argues 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 as he will not be able to sell his services in a competitive market, and he must rely on the charity of his friend Mr. Couture for whatever employment he can secure.

3. Defendant counters that Claimant clearly has a work capacity, as evidenced by his own recent success at securing work through Mr. Couture. As this work qualifies as regular, gainful employment, Defendant further asserts, Claimant does not meet the test for permanent total disability.

4. 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.

5. The statute further provides that an injured worker who is deemed to be permanently and totally disabled is entitled to ongoing benefits for so long as he or she has "no reasonable prospect of finding regular employment." 21 V.S.A. §645(a).

6. 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.

7. 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.

8. Here, Claimant underwent two functional capacity evaluations, one in 2013 and one in 2014, both of which documented a sedentary to light work capacity. Having successfully maintained steady employment at a competitive salary for more than six months in an arm's length relationship

with Mr. Couture, he has established his ability to work in the most convincing way possible. That he has not continued in that job has everything to do with his own personal choice, driven primarily by his interest in not suffering a reduction in his monthly SSDI benefit, and nothing whatsoever to do with either the availability of work or his ability to perform it.

9. Further, the fact that Claimant worked only one, two or three days per week for Mr. Couture does not disqualify the job from consideration as regular, gainful employment. The statute, 21 V.S.A. §644, "does not require that one have a full-time work capacity to be capable of regular gainful employment." *Arnold v. Central Vermont Hospital*, Opinion No. 20-06WC (April 21, 2006) (holding that claimant who was capable of performing childcare services for up to 25 hours per week was not permanently totally disabled).

10. I conclude that Claimant's work for Mr. Couture constituted "regular gainful employment" as that term is applied in the odd lot context.

11. Neither Mr. Spiegel nor Ms. Banks expressed an opinion whether Claimant was capable of securing and maintaining "regular gainful employment." Instead, both concluded that because of the many challenges Claimant faced, it was unlikely that he would return to "suitable employment." Workers' Compensation Rule 51.2600 defines that term as follows:

> "Suitable employment" means employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;
>
> 51.2601 Located where the employee customarily worked, or within reasonable commuting distance of the employee's residence;
>
> 51.2602 Which pays or would average on a year-round basis a suitable wage; and
>
> 51.2603 Which is regular full-time work. Temporary work is suitable if the employee's job at injury was temporary and it can be shown that the temporary job will duplicate his/her annual income from the job at injury.

12. "Suitable employment" defines the yardstick by which an injured worker's entitlement to vocational rehabilitation services is measured. *Bishop v. Town of Barre*, 140 Vt. 564, 579 (1982) (citing 21 V.S.A. §641(b) and holding that "[a]lthough injured workers are entitled to [vocational] rehabilitation, they are only entitled if the proffered plan will result in suitable employment"). Tested against this standard, I might agree not only that Claimant's current work for

Mr. Couture does not qualify, but also that Mr. Spiegel's draft return to work plan likely will not succeed.

13. The plain language of both 21 V.S.A. §645 and Workers' Compensation Rule 11.3100, requires a different standard for evaluating permanent total disability, however – not "suitable" work, but rather "regular gainful" work. I conclude that Claimant's actual experience more than amply demonstrates his ability to perform the latter, notwithstanding that he may never again achieve the former.

14. Admittedly, the gap between Claimant's current earning capacity, as demonstrated by his part-time wages for Mr. Couture, and his pre-injury wages is sizeable. With that in mind, some might consider this a harsh result. At its core, however, workers' compensation represents a legislative balancing act between the competing interests of employer and injured worker. *Gerrish v. Savard*, 169 Vt. 468, 470 (1999) (citing *Murray v. St. Michael's College*, 164 Vt. 205, 209-10 (1995), and characterizing workers' compensation law as a "public policy compromise" between employee and employer). Recognizing that an injured worker in Claimant's position, who is capable of gainful, though not suitable, employment likely will be able to access the social security safety net, perhaps the legislature determined that employers should be spared the responsibility for paying permanent total disability compensation as well in such situations. Whatever the reason, having been legislatively created, the discrepancy can only be resolved through legislation. In the meantime, I am bound to apply the law according to its plain language.

15. I conclude that Claimant has failed to sustain his burden of proving that he is permanently and totally disabled under the odd lot doctrine as enunciated in 21 V.S.A. §644 and Workers' Compensation Rule 11.3100.

16. As Claimant has failed to establish his claim for benefits, he is not entitled to an award of attorney's fees and costs.

ORDER:

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

DATED at Montpelier, Vermont this _____ day of _____, 2015.

_____
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.