STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Hathaway

v.

Engineers Construction, Inc.

Opinion No. 03-17WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. FF-55659

OPINION AND ORDER

Hearing held in Montpelier on February 17, 2016
Record closed on April 21, 2016

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimantôs low back condition causally related to his 2013 work accident?

2. Did Claimant sustain an aggravation of his pre-existing erectile dysfunction causally related to his 2013 work accident?

3. Did Claimant sustain a traumatic brain injury causally related to his 2013 work accident?

4. Are Claimantôs complaints of depression causally related to his 2013 work accident?

5. Has Claimant reached an end medical result for the injuries he sustained in the 2013 work accident?

EXHIBITS:

Joint Medical Exhibit I:	Medical records, September 27, 1998 ï October 25, 2013
Joint Medical Exhibit II:	Medical records, October 28, 2013 ï December 8, 2015
Defendantôs Exhibit A:	*Curriculum vitae*, William Boucher, MD
Defendantôs Exhibit B:	Deposition of William Boucher, M.D., February 8, 2016
Defendantôs Exhibit C:	Approved Compromise Agreement (Form 16), *Hathaway v. S.T. Griswold & Company*, State File No. S-22188

CLAIM:

All workersô compensation benefits to which Claimant establishes his entitlement as causally related to his 2013 work accident

Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

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

2. Judicial notice is taken of all forms and correspondence in the Departmentôs file relating to this claim. Judicial notice is also taken of the Commissionerôs Ruling on Defendantôs Motion for Summary Judgment in *Hathaway v. S.T. Griswold & Company*, Opinion No. 04-14WC (March 17, 2014).

3. Claimant was involved in a work-related accident on October 28, 2013. Defendant accepted his right shoulder injury as compensable and paid benefits relative to that injury. Claimant subsequently made claims for several other injuries, which he relates to the 2013 accident but which Defendant has denied.

Claimant's Prior (2002) Work Injury and Subsequent Medical Course

4. In June 2002 Claimant injured his lower back in a work accident; that injury was the subject of a prior workersô compensation claim (State File No. S-22188). Briefly, while working in concrete construction for S.T. Griswold & Company, he fell twenty feet from a crane and landed on his left foot. He sustained injuries to his heel, knee and lower back. He returned to full time work a few days after the accident, and by August 2002 he reported that his back pain was mostly resolved.

5. Following the Departmentôs ruling in *Hathaway v. S.T. Griswold & Company, supra,* in October 2014 Claimant and Griswold reached a full and final settlement of all workersô compensation benefits related to his 2002 crane accident. As part of the settlement, Claimant relinquished his right to future medical benefits necessitated by his low back injury and any other causally related injuries.

6. In the years after his 2002 work injury, Claimantôs complaints evolved to include mid- and upper back pain (as reflected in medical records from 2005 and 2007), bilateral leg and hip pain (2007), lumbosacral joint dysfunction (2007) and left groin pain and cramping in both legs (2009). In 2013 (prior to October, the date of the injury currently at issue), he reported low back pain with lower extremity symptoms through his buttocks, thigh, calf and foot.

7. Claimant sought medical treatment for his low back pain sporadically, with chiropractic treatment in 2007 and physical therapy and steroid injections in 2010. He reported a significant increase in low back pain in 2012, and received steroid injections in June and October of 2013.

8. Diagnostic tests found degenerative disc changes in Claimantôs lumbar spine (at levels L4-5 and L5-S1) with sacroiliac involvement. In 2008 Dr. White diagnosed chronic mechanical low back pain associated with L4-5 degenerative disc changes. In 2009 Dr. Wieneke diagnosed chronic low back pain, mild to moderate degenerative changes at L4-5 and L5-S1, and symptom magnification. In 2010 and 2013 Claimant underwent lumbar spine MRIs, which confirmed degenerative changes from L3 to S1 bilaterally.

Claimant's 2013 Work Injury and Subsequent Medical Course

9. In 2008 Claimantôs employment with S.T. Griswold ended. In 2009 he began full time concrete construction work for Defendant.

10. On October 28, 2013, Claimant was traveling to a worksite with coworker Douglas Cone in a pickup truck, pulling a trailer, when they pulled over to the side of the Interstate. Claimant was standing between the truck and the guardrail when a passing vehicle left the travel lane and struck the trailer. The trailer bumped into the truck, which hit Claimant and sent him over the guardrail and down the embankment. Mr. Cone helped Claimant climb back up and took him to the hospital.

11. Claimant reported right shoulder pain in the Emergency Department; he did not report any low back pain. Staff diagnosed him with abrasions and contusions, and sent him home. Claimant returned to work full time about one week after the accident. Defendant accepted his right shoulder injury as compensable.

12. Claimant continued to work full time after the accident until he had rotator cuff repair surgery in May 2014. He left work to recover from the surgery and, as of the hearing date, had not worked since. During the six-month period immediately following the accident, he did not have any injury to his lower back that prevented him from working full time.

13. In May 2014 Dr. White performed an independent medical examination at Claimantôs request. Claimant reported that there had been no change in his lower back symptoms in recent years and that his pain did not radiate down either leg. He reported that he hurt his shoulder in the 2013 accident, but didnôt hurt his back at all. He told another doctor at that time that his current hobbies included yard work, swimming, flower gardening, and helping his neighbors.

14. Nevertheless, as time progressed, Claimant began to complain of low back and hip pain, which he attributed to the 2013 accident. Eventually, he complained of severe low back pain radiating into both legs, hip and buttocks pain and cramping in both legs. Sometimes he reported more severe pain on the right side, and sometimes on the left side.

15. Claimantôs doctors could not identify the cause of the variable symptoms he reported. CT scans of his back and pelvis revealed no new injury from the 2013 accident. Hip x-rays found only mild osteoarthritis that did not explain his hip pain. A 2014 lumbar spine MRI showed no changes from the previous MRIs in 2010 and May 2013. Nerve conduction studies revealed only mild findings that did not explain the muscle cramping in his legs. In 2015 Dr. Hazard found no indication of lumbar spine instability and no indication that surgery would be appropriate. By that time, Claimant was being followed by doctors at the spine institute (for back and leg pain), the urology department (for erectile dysfunction), the interventional pain program (for back and leg pain), physiatry (for traumatic brain injury), and orthopedics (for his shoulder injury). Steroid injections remained his only treatment for back pain, and he reported no lasting relief from those injections.

16. The variable nature of Claimantôs pain complaints, and his doctorsô difficulties in finding the cause of those complaints, are well illustrated by his primary care physicianôs office notes. Claimant and his wife saw Dr. Hebert in October 2014. Claimantôs wife reported on his leg spasms, back pain, buttocks pain, right shoulder pain, a different pain down his right arm, cramping in both legs and insomnia. She complained that everyone was ignoring him, that he was tearful and that he felt like life wasnôt worth living. Dr. Hebert noted that Claimant had been seen by orthopedics, the pain clinic, the spine institute, urology and neurology. He reported that Claimant had a normal mood and affect. He reviewed recent EMG test results, which did not explain Claimantôs complaint of muscle cramping, and he saw no muscle cramping during his physical exam. Dr. Hebert wrote, ñWe have found little to correlate with his symptoms thus far,ò and concluded, ñIt has been difficult to find diagnosis for several of his problems. I have to wonder about malingering in this case.ò

Expert Medical Opinions

17. The parties submitted 1,192 pages of medical records and presented expert medical testimony on what injuries, if any, Claimant sustained in the 2013 accident aside from his accepted shoulder injury. Expert testimony addressed five questions: (1) whether Claimantôs low back symptoms are causally related to the 2013 accident; (2) whether the 2013 accident aggravated his pre-existing erectile dysfunction; (3) whether he sustained a traumatic brain injury in the 2013 accident; (4) whether his complaints of depression are causally related to the 2013 accident; and (5) whether he has reached an end medical result for the injuries he sustained in the 2013 accident.

(a) Expert Opinions as to Cause of Claimant's Low Back Pain

18. The parties presented conflicting expert testimony regarding whether Claimantôs low back symptoms were caused or aggravated by the 2013 accident.

Dr. Huyck

19. At his attorneyôs request, in January 2015 Claimant underwent an independent medical examination with Dr. Huyck. Dr. Huyck is board certified in preventive medicine, with a subspecialty in occupational and environmental medicine. She has a clinical and research practice at Dartmouth-Hitchcock Medical Center and also performs independent medical examinations.

20. In Dr. Huyckôs opinion, to a reasonable degree of medical certainty, Claimantôs 2013 work accident worsened his low back condition. According to her analysis, prior to the accident Claimant had low back pain in the area of L4-5, which radiated into his left leg. After the accident, he had pain on the right side, new pain in his buttocks, hips and sacral area, and intermittent pain radiating into both legs.

21. Dr. Huyckôs opinion is largely based on Claimantôs subjective reports of pain, particularly his complaints of right-sided radiculopathy and hip and SI joint pain. Her analysis fails to account for multiple references in the medical records to similar pain complaints in the same areas well prior to the 2013 accident, however. It does not adequately explain why diagnostic MRI and nerve conduction studies documented findings that were either mild or unchanged from pre-accident studies. It also fails to account for physical findings inconsistent with Claimantôs reported pain complaints, evidence of which had caused both Dr. Wieneke and Dr. Hebert to question whether symptom magnification or malingering might have been present. I find that Dr. Huyckôs failure to address these issues significantly weakens her opinion.

Dr. Boucher

22. At Defendantôs request, Dr. Boucher reviewed Claimantôs medical records in November 2014 and conducted an independent medical examination in March 2015. Dr. Boucher is board certified in occupational medicine and as an independent medical examiner. He currently performs independent medical examinations and maintains a clinical practice at the Procter & Gamble manufacturing plant in Central Maine. Dr. Boucher has treated thousands of patients with low back injuries.

23. In Dr. Boucherôs opinion, to a reasonable degree of medical certainty, there is a causal relationship between Claimantôs current low back complaints and the 2002 crane accident; however, the 2013 accident did not result in any significant aggravation of that condition. According to his analysis, Claimantôs low back symptoms and the physical findings before and after the 2013 accident are essentially identical. Although his complaints of low back pain increased after the 2013 accident, neither physical examination nor diagnostic studies found anything different from what was present before. In Dr. Boucherôs opinion, Claimantôs chronic pain complaints are psychogenic and have their origin in depression.

24. Dr. Boucherôs examination found multiple non-physiologic findings indicative of symptom magnification. Symptom magnification is an effort by a patient to underrate abilities or overstate complaints and limitations. Such efforts can be identified by tests that reveal when a patientôs subjective complaints are not consistent with physical findings or diagnostic test results. In most cases, symptom magnification is an involuntary psychological response caused by depression.

25. According to Dr. Boucher, Claimant demonstrated non-physiologic findings to superficial touch, meaning that he complained of pain radiating down his leg when his skin was only lightly touched. He also reported decreased sensation in his legs that was not consistent with either radiculopathy or a specific peripheral neuropathy. Dr. Boucher also found evidence of symptom magnification on Claimantôs pain inventories. These findings support Dr. Boucherôs conclusion that Claimantôs variable and diffuse pain complaints were due to symptom magnification.

26. Claimant underwent MRIs of his lumbar spine in 2010, 2013 (pre-accident) and 2014. Dr. Boucher testified that the series of MRIs revealed no significant changes over time. Similarly, nerve conduction studies in 2014 found no evidence of polyneuropathy in his legs and only mild findings at the L5-S1 level, neither of which explain his complaints of severe cramping in both legs.

27. Dr. Boucher further opined in his report:

> [Claimantôs] low back condition on a purely objective basis is fairly mild. He has changes on MRIs which are appropriate for his age. He has relatively mild findings on physical examination, yet he reports severe pain and a perception of severe disability. . . . His reports are out of proportion to his physical findings and to the diagnostic studies and, generally, that points towards a psychological factor involved in the complaints. He does appear to be depressed and that is probably the most common reason for a disconnect, if you will, between complaints and findings.

28. Dr. Boucher reviewed Dr. Huyckôs report and wrote:

> Dr. Huyck stated that the examineeôs low back condition was worsened by the October 2013 injury because his symptoms were now primarily right-sided, and because he developed additional radiculopathy at S1. As far as right-sided complaints are concerned, he reported to her that he had pain in the right gluteal and hip region, but no pain below the hip. When I examined him, he complained of bilateral low extremity complaints extending to the feet. I must note that his pain complaints have been quite variable over the past year, probably related to symptom magnification (which Dr. Huyck did not address).

29. In short, Dr. Boucher opined that Claimantôs current low back and SI joint symptoms are not causally related to the 2013 accident. His opinion is supported by diagnostic testing and multiple findings in the medical records, and for that reason I find it credible.

(b) *Expert Opinions as to Cause of Claimant's Erectile Dysfunction*

30. As to whether the 2013 accident caused an aggravation of Claimantôs pre-existing erectile dysfunction, the credible medical evidence establishes the following:

- Claimant has had erectile dysfunction since 2002. Although he attributed the onset of this condition to his 2002 crane accident, the Commissioner concluded that the required causal connection had not been established. *Hathaway v. S.T. Griswold & Company, supra.*
- Claimant sought treatment for erectile dysfunction periodically between 2003 and 2012. In 2013 (prior to the accident at issue here), Dr. Bove, a board certified urologist, concluded that he most likely suffered from progressive erectile dysfunction caused by limited arterial blood flow common in men in their mid-fifties who are mildly obese. Following the accident, in 2014 Dr. Sargent, his treating urologist, concluded that the cause was likely multifactorial, a combination of vascular disease, high blood pressure medication and psychogenic factors.

- Medical records document variable complaints over time. Significantly, some medical records prior to the 2013 accident document the inability to achieve an erection (for example, in August 2012), and some records subsequent to the 2013 accident document erection and penetration (for example, March, May and September 2014).

31. Claimant and his wife both testified that he was able to achieve an erection sufficient for penetration prior to the 2013 accident, but that there has been a complete absence of any erection or rigidity since the 2013 accident. Given the contemporaneous medical records cited above, I do not find this testimony credible.

Dr. Huyck

32. Dr. Huyck recognized the possibility that Claimantôs back pain could have been a contributing factor to his erectile dysfunction, and that if the former condition had worsened as a consequence of his 2013 accident, the latter condition might have done so as well. However, she conceded that the medical records did not support this theory; instead, they established that Claimant had been reporting insufficient rigidity for penetration as early as 2012. With that in mind, Dr. Huyck was unable to offer an opinion, to the required degree of medical certainty, that Claimantôs 2013 accident had caused his erectile dysfunction to worsen.

Dr. Boucher

33. Dr. Boucher concluded that Claimantôs erectile dysfunction is vascular in origin, as is common in his age group, and is unrelated to either his 2002 or his 2013 work accidents. In support of his analysis, he noted medical records documenting the presence of erectile dysfunction at least since 2008, with no significant change thereafter. He also noted a March 2014 urology record in which Claimant reported that he was able to sustain an erection sufficient for penetration and ejaculation even after the 2013 accident. For that reason, Dr. Boucher concluded, to a reasonable degree of medical certainty, that the 2013 accident neither caused nor aggravated Claimantôs erectile dysfunction. I find this analysis credible.

(c) Cause of Claimant's Traumatic Brain Injury

34. Claimantôs pertinent medical history includes an incident in 2011, when he slipped and fell on the ice at a fire station and hit his head and elbow on the pavement. He sought treatment at an urgent care facility, where he reported that he had lost consciousness for about two seconds and ñsaw stars.ò He had a severe headache and blurry vision. A CT scan of his head revealed no abnormalities, and he had no neurological symptoms. The examining physician diagnosed a contusion on the back of his head, which resolved over time.

35. As to the 2013 accident, Claimant testified that he remembered standing next to his truck on the Interstate, and then coworker Douglas Cone coming down the embankment to help him, but nothing in between. I find this testimony credible.

36. Mr. Cone credibly testified that when he retrieved Claimant from the embankment, he was ñtotally confused.ò Claimantôs wife reported to his doctor that when he telephoned her from the accident scene, he sounded ñdelirious.ò

37. The Emergency Department record reported that Claimant was alert and oriented to person, place, and time, with a normal affect. He denied any loss of consciousness, and his head showed no trauma. His pupils were equal, round and reactive to light. A CT scan of his head found no abnormalities.

38. Two days later Claimant saw Dr. Schwartzberg, a family practice and occupational medicine practitioner at a nearby urgent care facility. Dr. Schwartzberg reported that although he had scored 15 (out of a possible 15) on the Glasgow Coma Scale in the Emergency Department, which indicated normal consciousness, his medical record reflected that he did not remember details of the accident and appeared to have retrograde amnesia.

39. Claimant saw Dr. Bjornson, an internist, on November 1, 2013. He reported that Claimant had not experienced any loss of consciousness or change in neurologic status after the accident, that his judgment and insight were good and that his recent and remote memory were intact.

40. Fifteen months later, in January 2015 Claimant underwent an evaluation for head trauma with Dr. Barlow, a board certified physiatrist with additional certification in brain injury medicine. Dr. Barlow reported Claimantôs complaints of amnesia surrounding the accident, dizziness, headaches, fatigue, mood changes and cognitive difficulties involving both concentration and memory. Despite contemporaneous records documenting the opposite, she reported that he had lost consciousness during the accident. She also reported that Claimant had no history of prior head injuries, thus apparently overlooking the 2011 slip-and-fall accident during which he lost consciousness and ñsaw stars.ò

41. Dr. Barlow performed the Montreal Cognitive Assessment (MoCA) for mild cognitive impairment. Claimant scored 22 out of 30. A score below 26 is considered abnormal, and a score of 22 is consistent with mild cognitive impairment. In interpreting this result, Dr. Barlow noted that factors contributing to his symptoms included his ñhistory of concussionò as well as ongoing pain, lack of sleep, current medications and depression.

42. Dr. Barlow evaluated Claimant again in May 2015. By this point, he reported that his headaches, dizziness and cognitive difficulties were improving, but his depression, fatigue, and insomnia continued. When Dr. Barlow retested him on the MoCA, his score improved somewhat, but was still likely affected by ongoing pain, lack of sleep, current medications and depression. Dr. Barlow continued his prescription for Venlafaxine (for depression) and recommended mental health counseling. In addition, she suggested that if his memory difficulties persisted, he might consider a neuropsychological evaluation; however, Claimant indicated that his memory was already improving and that he was more concerned about his back pain. Presumably for that reason, he did not pursue her suggestion. Nor did he return for his scheduled follow-up visit with her in July 2015.

Dr. Huyck

43. Based on Claimantôs description of the 2013 accident and his amnesia surrounding it, as reflected in the contemporaneous medical records, Dr. Huyck concluded that he likely sustained a mild traumatic brain injury. A traumatic brain injury consists of a physical injury to the head that results in an alteration in mental status at the time of the injury. In making her diagnosis, Dr. Huyck utilized the diagnostic criteria adopted by the American Congress of Rehabilitation Medicineôs Head Injury Interdisciplinary Special Interest Group. Any one of four factors can establish the diagnosis: (1) loss of consciousness; (2) memory loss for events immediately before or after the accident; (3) alteration in mental state at the time of the accident; and/or (4) focal neurologic deficits, which may or may not be transient.

44. Notably, according to this definition and as Dr. Huyck specifically testified, while loss of consciousness is one diagnostic factor, it is not a prerequisite. In Claimantôs case, Dr. Huyck based her diagnosis on the single fact that he experienced amnesia for events immediately after the accident. I find this analysis credible and persuasive.

45. Dr. Huyck was unable to determine whether Claimantôs memory loss and confusion were causally related to his mild traumatic brain injury or to other factors, such as pain, poor sleep or depressed mood. For that reason, she recommended further evaluation, which Claimant later pursued with Dr. Barlow, Finding of Fact Nos. 40-42 *supra*.

46. As noted above, Finding of Fact Nos. 11-12 *supra*, Claimant returned to work full time one week after his 2013 accident, and continued to work until his May 2014 shoulder surgery. I do not doubt that the cognitive symptoms he and his wife described ï misplacing his car keys or cell phone, getting lost while driving familiar routes and other episodes of forgetfulness and confusion ï are likely troublesome to him. However, the credible evidence does not establish that these symptoms were ever so severe as to disable him from working.

Dr. Boucher

47. Dr. Boucherôs analysis proceeded along different lines than Dr. Huyckôs. He cited to the Emergency Department record, which reported negative physical findings and no complaints pertaining to head injury, in support of his conclusion that Claimant had not suffered a traumatic brain injury as a result of his 2013 accident. Dr. Boucher testified to various indicators of traumatic brain injury that were *not* present in the medical record, including loss of consciousness and memory difficulties.

48. Dr. Boucher acknowledged that symptoms of depression might be indicative of a traumatic brain injury, but noted that Claimant did not report these until later. He further noted that Claimant had at one point been diagnosed with post concussive syndrome, but ñthat was based entirely on his multiple somatic complaints, which are well explained by his obviously significant depression.ò

49. I find that Dr. Boucher failed to utilize clear and specific criteria for diagnosing a traumatic brain injury. He also overlooked the contemporaneous medical evidence establishing that Claimant demonstrated amnesia for the events immediately following the 2013 accident. These omissions weaken his opinion.

(d) Cause of Claimant's Depression

50. Claimant and his wife both credibly testified that he often felt sad and tearful about his erectile dysfunction, both before and after the 2013 accident. After the accident, they both testified that he was also sad because he missed work. I find this assertion somewhat less credible.

51. Claimantôs medical records do not reference depression prior to his 2013 accident. The first references to depression appear in September and October 2014, and attribute his tearfulness and depression to erectile dysfunction. Of note, during one phone call in September to Dr. Sargent, his treating urologist, Claimantôs wife reported that he was tearful and depressed about erectile dysfunction, and asked whether there was a way to connect that condition to possible head trauma from his 2002 crane accident. Thereafter, in October, Claimantôs wife reported to Dr. Hebert that he was tearful and upset about erectile dysfunction and that he thought life was not worth living.

52. Medical records also reflect that Claimantôs complaints of feeling tearful, sad and emotional started after his Gabapentin dosage was increased in August 2014. Claimant later reported that he felt better emotionally after discontinuing that medication.

Dr. Huyck

53. Dr. Huyck diagnosed Claimant with probable adjustment disorder with depressed mood, which she causally related to his 2013 work accident. As support for her opinion, she noted that Claimant had reported that he loved his job, that he ñbecame very depressedò when his shoulder surgeon did not clear him for return to work, and that thereafter he suffered from crying episodes and a feeling of worthlessness.

54. Dr. Huyck failed to address whether Claimantôs erectile dysfunction and/or use of Gabapentin may have been a more probable cause of his depression. Instead she relied solely on his self-report. For these reasons, I find her causation opinion conclusory and unconvincing.

Dr. Boucher

55. Dr. Boucher acknowledged that Claimant appeared to be depressed during his examination, but did not believe it was caused by the 2013 accident. To the contrary, in his opinion Claimantôs depression caused his ongoing pain symptoms, not the other way around. On the subject of depression generally, he testified:

> Everything is caused by something; however, in a lot of cases we donôt yet know what that something is, and that is certainly the case with depression. . . . The known causes of depression are actually very few. Acute depression can be caused by situations [such as the death of a friend or family member]. . . . Most people who are depressed, we have no idea why theyôre depressed. Probably hereditary, probably genetic in origin but we donôt know for sure at this point. . . . [T]he huge majority of the time there is no clear cause.

56. Accordingly, Dr. Boucher ruled out the 2013 accident and its sequelae as a likely cause of Claimantôs depression. Although he posited the opposite ï that Claimantôs depression in fact caused his chronic pain ï he failed to provide specific support for this theory. For that reason, I remain unconvinced by his analysis.

(e) End Medical Result

57. As to Claimantôs compensable right shoulder injury, Dr. Huyck concluded in January 2015 that he had not yet reached an end medical result, primarily because it had not yet been a year since his shoulder surgery. In her formal hearing testimony, however, she deferred to Dr. Lawlis, Claimantôs treating surgeon, who determined that Claimant had reached an end medical result as of May 6, 2015. I find Dr. Lawlisôopinion on this issue credible.

58. Dr. Boucher determined that Claimant had reached an end medical result for his shoulder injury as of March 10, 2015, with a ten percent whole person permanent impairment. While I defer to Dr. Lawlisôopinion as to end medical result, I accept Dr. Boucherôs permanent impairment rating as credible.

CONCLUSIONS OF LAW:

1. In workersô 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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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*, *supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Claimant seeks a determination that he sustained several compensable injuries in the 2013 accident, for which he has not yet reached an end medical result.

3. The parties presented conflicting expert medical testimony on these issues. In such cases, the Commissioner traditionally uses a five-part test to determine which expertôs 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).

4. Neither Dr. Huyck nor Dr. Boucher had a patient-provider relationship with Claimant. Both doctors examined the pertinent medical records and performed comprehensive evaluations. Both presented impressive qualifications, training and experience, and therefore neither is entitled to greater deference on those grounds. Accordingly, the evaluation of their respective opinions turns largely on the clarity and thoroughness of their opinions and the objective support underlying them.

Causal Relationship between Claimant's Low Back Pain and his 2013 Work Accident

5. On this issue, I conclude that Dr. Boucherôs causation opinion is the most persuasive. His opinion is well supported by the medical records, which show a progression of symptoms dating back to Claimantôs 2002 accident. That those symptoms became more diffuse and variable was more likely a consequence of symptom magnification and depression, not because of the 2013 accident. The fact that Claimant was able to return to work within a week after the accident, and did not miss any additional work until his May 2014 shoulder surgery, provides further support for Dr. Boucherôs opinion.

6. Dr. Huyckôs opinion was weakened by her failure to account for the variable nature of Claimantôs complaints, many of which well predated his 2013 accident. She also failed to address the possibility of symptom magnification and disregarded objective findings that were at odds with his pain complaints.

7. I conclude from the more credible medical evidence that Claimantôs low back symptoms are not causally related to the 2013 accident.

Causal Relationship between Claimant's Erectile Dysfunction and his 2013 Work Accident

8. Dr. Boucherôs causation opinion on this issue is also persuasive. His conclusion that Claimantôs condition is most likely vascular in origin is in accord with both Dr. Boveôs and Dr. Sargentôs analyses. It is also consistent with contemporaneous medical records documenting variable symptoms both before and after the 2013 accident.

9. Dr. Huyck did not offer an opinion to a reasonable degree of medical certainty that the 2013 accident worsened Claimantôs erectile dysfunction. She theorized that worsening back pain might exacerbate erectile dysfunction, but conceded that the medical records did not establish that that is in fact what occurred in his case. Her opinion is speculative, and for that reason I cannot accept it as credible. *Daignault v. State of Vermont Economic Services Division*, Opinion No. 35-09WC (September 2, 2009).

10. I conclude from the credible medical evidence that Claimantôs 2013 accident did not cause or aggravate his erectile dysfunction.

Traumatic Brain Injury

11. On this issue, I conclude that Dr. Huyckôs causation opinion is persuasive. Her diagnosis was based on clearly established, objective criteria. It was supported by contemporaneous medical records documenting Claimantôs retrograde amnesia, thereby supplying a required element for diagnosing the condition. Dr. Huyckôs opinion was thus objectively based, complete and convincing.

12. Dr. Boucher based his causation opinion on the fact that Claimant did not lose consciousness immediately after the 2013 accident. He failed to explain why this diagnostic criterion was absolutely disqualifying, however. He also denied that Claimant had exhibited amnesia for the events surrounding the 2013 accident, even though the medical records indicated otherwise. These omissions render his opinion unconvincing. The fact that Claimant did not lose consciousness, become disoriented or complain of other symptoms indicative of head trauma might be relevant to determining the severity of his injury, but the absence of those factors does not negate the diagnosis.

13. I conclude from the credible medical evidence that Claimant sustained a mild traumatic brain injury as a result of his 2013 accident.

Depression

14. Claimant presents a so-called ñphysical-mentalò claim ï one in which a compensable physical injury provokes a psychological injury as well. If there is sufficient medical evidence to establish a causal connection between the former and the latter, then the psychological injury is deemed to have arisen out of the physical injury and therefore becomes compensable. *Farnham v. Shaw's Supermarkets*, Opinion No. 11-13WC (March 29, 2013).

15. Dr. Huyck diagnosed Claimant with probable adjustment disorder with depressed mood. According to her analysis, the injuries Claimant suffered in his 2013 accident caused him to miss work, and when he was not released to return thereafter, his depression resulted.

16. Dr. Huyckôs testimony is conclusory, lacking in objective support and unconvincing. She is not a psychologist or psychiatrist. She performed no diagnostic testing. She did not compile a history of Claimantôs psychological condition prior to the 2013 accident in order to compare it to his post-accident emotional state. She did not identify any medical criteria for diagnosing adjustment disorder with depressed mood. Her opinion was based almost entirely on Claimantôs subjective report, thereby ignoring repeated references in the medical records that his erectile dysfunction, not his inability to work, triggered his depressive symptoms.

17. Dr. Boucherôs opinion was similarly conclusory. Like Dr. Huyck, he is not a psychologist or psychiatrist. He also failed to perform any diagnostic testing. He acknowledged that depression can be caused by situations such as the death of a friend or family member, but did not address whether other situations, such as erectile dysfunction or a period of unemployment, can cause depression.

18. Claimant has the burden of proof on causation; thus his expertôs credibility matters most. Regardless of what Dr. Boucher opined, Dr. Huyckôs opinion is insufficient on its own to establish a causal connection between the 2013 accident and his depression. *Meau v. The Howard Center, Inc.,* Opinion No. 1-14WC (January 24, 2014) (*citing Seymour v. Genesis Health Care Corp*., Opinion No. 53-08WC (December 29, 2008)).

19. I conclude that Claimant has failed to sustain his burden of proof as to the causal connection between his 2013 accident and his depression.

End Medical Result

20. In accordance with his treating surgeonôs credible opinion, I conclude that Claimant reached an end medical result for his compensable right shoulder injury on May 6, 2015. I further conclude, in accordance with Dr. Boucherôs permanent impairment rating, that he suffered a ten percent whole person permanent impairment referable to that injury.

21. Having determined that Claimantôs ongoing low back pain, erectile dysfunction and depression are not causally related, it is not necessary to determine when he reached an end medical result for these conditions. As for his mild traumatic brain injury, I conclude from his failure to pursue additional treatment that he reached an end medical result for this condition as of Dr. Barlowôs May 2015 evaluation.

Summary

22. To summarize, I conclude that Claimant has failed to sustain his burden of proving the necessary causal relationship between his 2013 accident and his ongoing low back complaints, erectile dysfunction or depressive symptoms. Therefore, Defendant is not responsible for indemnity, medical or other workersô compensation benefits associated with those conditions. I further conclude that Claimant has reached an end medical result for his compensable shoulder injury, with a ten percent whole person permanent impairment. Last, I conclude that Claimant suffered a compensable mild traumatic brain injury causally related to his 2013 accident, for which he has established his entitlement to medical benefits only.

23. As Claimant has prevailed on only some aspects of his claim, 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. 07-97WC (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 claimantôs success. Subject to these limitations, in accordance with 21 V.S.A. §678 Claimant shall have 30 days from the date of this opinion within which to submit his itemized request. Defendant shall have 30 days thereafter within which to file any objections thereto.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimantôs claim for workersô compensation benefits referable to his claimed low back injury, erectile dysfunction and depression is hereby **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Medical benefits covering all reasonable medical services and supplies necessitated by his mild traumatic brain injury, in accordance with 21 V.S.A. §640(a); and

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

DATED at Montpelier, Vermont this 10th day of February 2017.

_____
Lindsay H. Kurrle
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.