

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Jeremy Hilton

Opinion No. 22-19WC

v.

By: Beth A. DeBernardi  
Administrative Law Judge

Lyndon Woodworking, Inc.

For: Michael A. Harrington  
Interim Commissioner

State File No. GG-57963

**OPINION AND ORDER**

Hearing held in Montpelier on August 19 and 20, 2019  
Record closed on October 4, 2019

**APPEARANCES:**

Robert D. Mabey, Esq., for Claimant  
Erin J. Gilmore, Esq. and Bridgette L. Remington, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant permanently and totally disabled as a consequence of his December 2014 and June 2015 compensable work injuries?

**EXHIBITS:**

Joint Exhibit I:	Medical records
Claimant's Exhibit A:	Medical records, vocational rehabilitation records and report of John May, Certified Rehabilitation Counselor
Defendant's Exhibit 1:	Report of Wendy Burns, Certified Rehabilitation Counselor

**CLAIM:**

Permanent total disability benefits pursuant to 21 V.S.A. §§ 644(b) and 645  
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 Workers' Compensation Act.
2. I take judicial notice of all forms in the Department's file relating to this claim.

3. Claimant is a 39-year-old man who lives in Ryegate, Vermont. He graduated from high school in 1998, where he was enrolled in some special education courses.

#### Claimant's Prior Traumatic Brain Injury

4. In March 2000, when he was 19 years old and living in Maryland, Claimant sustained a non-work-related traumatic brain injury. He was diagnosed with a skull fracture and a large hemorrhage on his brain's left temporal lobe. He breathed with a ventilator for three days and spent five days in the hospital's intensive care unit. Claimant has no specific memory of the incident that caused his traumatic brain injury.
5. The injury caused significant cognitive deficits. Following his release from the hospital, Claimant underwent occupational therapy to relearn basic activities of daily living. He continues to suffer the effects of his injury, including vocal stuttering and short-term memory loss.
6. With his mother's help, Claimant obtained social security disability benefits. Over time, however, he grew weary of being home all day and decided to forego his benefits by reentering the workforce.

#### Claimant's Post-Traumatic Brain Injury Work History

7. After Claimant's traumatic brain injury, his girlfriend's father secured him a job at a printing company, where he loaded book covers, paper and ink into the printing machines. Claimant had difficulty with some aspects of the job, including the mixing of colored inks, but nevertheless remained in that job for two years.
8. Claimant next found employment with a roofing paper manufacturer, where Daniel Baker was his shift supervisor. Mr. Baker testified that he hired Claimant because the business had high turnover and they "needed bodies." He tried Claimant out at several stations in the production line, but quickly realized that, while "eager and willing," Claimant was incapable of working alone due to his cognitive deficits. Mr. Baker therefore told him to assist the rewinder operator, Don Turner. Mr. Turner ran the rewinder while Claimant assisted with stapling and stenciling. As long as Claimant stayed with Mr. Turner, Mr. Baker was not worried about him getting hurt or "wandering into things."
9. Even under constant supervision, however, Claimant still made mistakes like stenciling the wrong numbers on the rolls. While Mr. Baker confirmed that Claimant was a hard worker, he also acknowledged that there was nowhere in the mill where he could work without supervision. The company eventually laid Claimant off in 2009. Mr. Baker testified that Claimant was one of the first employees laid off because the company viewed him as expendable and was unwilling to take extra time to work with him in a new capacity. I find Mr. Baker's testimony credible in all respects.
10. After Claimant left the mill, his girlfriend's father secured him a job at Wendy's restaurant, where the father knew the supervisor. Claimant initially worked on the grill, but he could not keep up with the orders. Next he tried working as the drive

through cashier, but he could not learn the computer or deal with special orders. Eventually, he was relegated to cleaning and dishwashing. Claimant stayed in this position in large part due to his friendly relationship with his supervisor. When a new supervisor took over, Wendy's fired him.

11. Claimant then took a job at a furniture retailer, where his only duty was to help customers load their furniture into their vehicles. The company was going out of business when it hired Claimant, and he stayed there until it closed.
12. Claimant moved to Vermont in 2012 and got a job with Defendant in April.

#### Claimant's Employment with Defendant

13. Defendant is a wood furniture manufacturer. Its facility includes a large mill where raw wood is sent through a production line and manufactured into finished furniture.
14. Defendant hired Claimant as a glue wheel operator. The glue wheel is a large pneumatic press that presses glued pieces of pre-cut wood together to make furniture. Other employees cut the wood further up the production line and sent it to Claimant on rollers, where it would glide over the gluing mechanism. As the glued pieces of wood accumulated, Claimant would move them to the glue wheel, where he would engage the press to secure the pieces together as the glue dried. Depending on the thickness of the piece being built, he would adjust the pressure switch to two, four or six pounds per square inch.<sup>1</sup> In short, operating the glue wheel was a fast-paced, repetitive job that required Claimant to quickly move the glued wood pieces to the press.

#### Claimant's 2014 and 2015 Work Injuries and Subsequent Medical Course

15. Claimant sustained two injuries to his left upper extremity in the course of his employment with Defendant. The first occurred on December 22, 2014 when he felt a sudden sharp pain in his left shoulder blade while moving a heavy tabletop. In April 2015, occupational medicine physician Susan Higgins-Olsen, MD, examined his shoulder and diagnosed scapular dyskinesia (abnormal shoulder blade movement). In June 2015, neurologist Amanda Van Straten, MD, found "very obvious" left scapular winging and weakness in the serratus anterior muscle, consistent with a long thoracic nerve traumatic avulsion injury. In Dr. Van Straten's opinion, there is no safe and reliable way to perform nerve conduction studies on the long thoracic nerve; thus she made her diagnosis based on Claimant's symptoms and her physical findings. *Joint Exhibit I, Tab 3, Dr. Van Straten's June 15, 2015 report, at 2.*

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<sup>1</sup> Notably, Claimant does not know how to read a standard tape measure. He testified: "I can't do a tape measure. So I had to go to Walmart to get a tape measure that, that reads – I mean, I could do like an inch, one, two, three, four, five, six and, you know, up. But all the lines in-between, I never got to learn that because I went to so many different schools because my dad was in the military, so I never even had the chance to learn about tape measure." *Unofficial hearing transcript, August 19, 2019, at 34.*

16. Claimant's second work-related injury occurred on June 22, 2015 when he fell at work and struck the same shoulder. He described a stinging, burning pain that "felt like my arm was going to come off." Both claims were reported and accepted by Defendant.
17. Sometime after the June 2015 injury, Claimant's doctor took him out of work. On November 23, 2015, orthopedic surgeon John-Erik Bell, MD, performed shoulder surgery at the Dartmouth-Hitchcock Medical Center. Unfortunately, surgery did not resolve Claimant's symptoms, and he continued to complain of pain, stiffness and poor range of motion. He also reported increasing symptoms in his right upper extremity.<sup>2</sup>
18. Despite physical therapy, injection therapy and surgery, Claimant's condition did not improve. His treating physicians at Dartmouth-Hitchcock placed him at end medical result for his left upper extremity injury on June 2, 2016. *Joint Exhibit I, Tab 4.*
19. On September 7, 2016, Claimant saw occupational medicine physician Verne Backus, MD, for a permanency evaluation. Dr. Backus assessed Claimant with a 14 percent whole person impairment. Notably, Dr. Backus' evaluation was limited to Claimant's left upper extremity. He did not evaluate Claimant's cognition, nor did he assess work capacity. *Joint Exhibit I, Tab 4, Dr. Backus' report, at 78.*

*Vocational Rehabilitation Efforts, Functional Capacity Evaluation and Work Conditioning*

20. In April 2016 certified rehabilitation counselor Frances Plaisted began working with Claimant to help him find suitable employment. Ms. Plaisted initially considered truck driving as a vocational goal, but she needed clarification of his work capacity before she could devise a return to work plan for this goal.
21. In August 2016 Claimant underwent a functional capacity evaluation with David Minshall, a certified work capacity evaluator at Dartmouth-Hitchcock. *Claimant's Exhibit A, Tab 1.* Mr. Minshall concluded that Claimant had a sedentary work capacity. He could occasionally lift 12 pounds from floor to knuckle, five pounds from knuckle to shoulder, and no more than three pounds above his shoulder. He could safely carry five pounds bilaterally. He was unable to tolerate repetitive work, overhead work or reaching forward with his left arm fully extended. Mr. Minshall concluded that Claimant could return to work within these restrictions for 20 hours per week to start, gradually building up to full time. *Claimant's Exhibit A, Tab 1.*
22. Based on Mr. Minshall's evaluation, Ms. Plaisted concluded that truck driving was not a viable option for Claimant. Accordingly, she began to consider a vocational goal of small engine mechanic. Claimant was excited about this prospect, but he lacked the required lifting capacity. He therefore began a multidisciplinary work conditioning program in November 2016 overseen by occupational medicine physician Austin Sumner, MD, in an effort to increase his work capacity enough to allow him to work

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<sup>2</sup> Claimant first reported right upper extremity symptoms after his left shoulder injury led to a reassignment of work duties, including running a round sander with his right arm for ten hours at a time. He has also alleged an overuse condition of his right upper extremity.

on small engines. Claimant's work conditioning program team included Dr. Sumner, clinical psychologist Laurance Thompson, several physical therapists and a nurse care coordinator.

23. Dr. Sumner first met with Claimant in November 2016. His physical examination found "profound winging" of his left shoulder blade and weakness of his serratus anterior muscle. Dr. Sumner concluded that Claimant suffers from a long thoracic nerve injury. He explained that the long thoracic nerve innervates the serratus anterior muscle, which anchors the shoulder blade to the body. When the nerve is not functioning, the shoulder blade is not properly anchored against the back of the chest wall. Thus, the blade will "wing out" instead of providing the counter resistance needed to raise the arm above shoulder level. Dr. Sumner observed as recently as August 2019 that Claimant's wing blade "just pops off his back-chest wall as soon as he brings the arm up." Further, his condition is likely to be permanent, as it has not improved within the first year after injury. I find Dr. Sumner's testimony credible.<sup>3</sup>
24. Given Claimant's severe lifting restrictions, Dr. Sumner's team set out to teach him new lifting techniques to increase his work capacity. Due to his cognitive limitations, however, Claimant could not learn the new techniques. He needed repeated cuing for the correct and safe performance of his rehabilitation exercises, as he was unable to retain and follow instructions and simple task sequences. Without that cuing, Claimant reverted back to his typical lifting mechanics, which caused his symptoms to increase.
25. In February 2017 Dr. Sumner became increasingly concerned that Claimant was unable to retain instructions from one minute to the next. He noted Claimant's difficulty with sequencing and memory recall and questioned whether he could do any work that required new training because of his inability to retain new information. Claimant was also impulsive in a way that caused safety concerns, for example dismounting the treadmill without turning it off.
26. Dr. Sumner recommended that Claimant undergo a neuropsychological evaluation. Meanwhile, he discharged Claimant from the work conditioning program in late February 2017 with a sedentary work capacity and a ten-pound safe lifting restriction.
27. In June 2017 Claimant underwent a neuropsychological evaluation by Laura Flashman, PhD, at Dartmouth-Hitchcock. Claimant demonstrated impairments in learning and memory for both verbal and visual information, assessed executive functioning, receptive language ability, visuospatial abilities, and fine motor speed and dexterity. *Claimant's Exhibit A, Tab 1, Dr. Flashman's June 22, 2017 report.* Based

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<sup>3</sup> Defendant's expert witness, Dr. Kenosh, disagrees with the long thoracic nerve injury diagnosis because the findings of Dr. Stommel's EMG were reportedly normal. *See Joint Exhibit I, Tab 3, Dr. Stommel's September 2015 report.* However, Dr. Kenosh did not explain the role of nerve conduction studies in diagnosing long thoracic nerve injuries. Further, Dr. Sumner questioned whether Dr. Stommel was able to effectively needle Claimant's serratus anterior muscle during his nerve conduction study, given his muscle atrophy. *Claimant's Exhibit A, Tab 1.* Moreover, Dr. Sumner's diagnosis is supported by Dr. Van Straten and Dr. Bell. I accordingly find Dr. Sumner's diagnosis credible. Moreover, whatever the diagnosis, Claimant cannot anchor his shoulder blade, a condition that causes severe winging, shoulder pain, chest pain and loss of function, and is an end medical result for this condition. *See Finding of Fact No. 18 supra.*

on Dr. Flashman's findings, Dr. Sumner concluded that no additional work conditioning efforts were warranted.

28. With this additional information in hand, Ms. Plaisted discarded her efforts to return Claimant to work as a small engine mechanic. Although she did not document all of her efforts, she credibly testified that she tried to identify sedentary jobs that Claimant could do throughout her work for him. Despite her extensive experience and her efforts, Ms. Plaisted was unable to come up with any sedentary jobs within Claimant's cognitive and physical limitations.

29. Ms. Plaisted therefore concluded that Claimant's return to work was unlikely. In November 2017 she closed vocational rehabilitation services, writing in her report:

[Claimant] had a serious prior brain injury. This injury in combination with his bilateral shoulder injury and sedentary work capacity are too severe for him to return to work. He attended a work hardening program in an effort to see if we could increase the close handling ability. The difficulty was that [he] had difficulty following and recalling lifting instructions. As a result, his safe lifting capacity did not increase, and he was not released to return to work.

*Claimant's Exhibit A, Tab 2, Ms. Plaisted's November 2, 2017 report, at 2.*

#### Cognitive Functional Capacity Evaluation

30. In September 2018 Claimant underwent a cognitive functional capacity evaluation performed by certified work capacity evaluator Gregory Morneau at Dartmouth-Hitchcock. Mr. Morneau found that Claimant made near full levels of physical and cognitive effort throughout the testing and that his reports of pain and disability were fully reliable.

31. Mr. Morneau determined that Claimant was limited to part-time sedentary work for *two to three hours per day*, five days per week. He could perform occasional lifting limited to eight pounds floor to knuckle, three pounds knuckle to shoulder and no lifting above the shoulder. He could carry up to eight pounds. In addition, Claimant's balance problems caused concern even for the intermittent walking required for sedentary work. Notably, Mr. Morneau did not determine that two to three hours per day was a starting point from which Claimant could gradually increase his hours, but rather determined that two to three hours per day was his actual work capacity.

32. Mr. Morneau also determined that Claimant presented with cognitive deficits for immediate memory, delayed memory, selective attention, shifting attention, planning, organization, problem solving and impulsivity. He required multiple repetitions of verbal directions. He was also highly distractible by his physical symptoms, as well as verbal and auditory distractions. Mr. Morneau wrote:

[Claimant] is cognitively limited to work that has minimal environmental distraction with limited shifting attention. Multitasking should not be an essential job function. Work roles should be few and repetitive in nature with an extended period of supervision including demonstration initially to learn the job tasks. Supervision will need to be continued to ensure appropriate performance. Depending on the complexity of job tasks he may require continued assistance to perform the tasks accurately.

*Claimant's Exhibit A, Tab 1, Mr. Morneau's report, at 7.*

33. Finally, Mr. Morneau considered two potential job descriptions for Claimant: fast food worker and dental ceramist. In his opinion, Claimant lacks both the physical and the cognitive capacity to perform either of these jobs.

#### Claimant's Current Condition

34. Claimant credibly testified that he would prefer to be working but his pain level is too severe. His left shoulder pain is constant and made worse by activities like housework and washing the car. He does not wish to take opioid medications because of their abuse potential. To relieve pain, he places his arm on towels to take the weight off his shoulder and uses a heating pad.
35. Claimant testified that it is hard for him to remember things: "My mind just can't stay focused at all." Further, chronic pain makes his memory worse because it interferes with his ability to focus. I find this testimony credible as well.

#### Expert Opinions as to Employability

36. Both parties presented expert opinions from medical professionals and certified rehabilitation counselors as to Claimant's ability to secure and maintain regular gainful work. According to Claimant's experts, he is not likely to be able to secure and maintain regular gainful work. According to Defendant's experts, he can perform regular gainful work, which may consist of supported employment.

#### Medical Experts

##### *(a) Austin Sumner, MD*

37. Claimant presented expert medical testimony from Austin Sumner, MD. Dr. Sumner is board certified in occupational medicine and currently practices that specialty at the Central Vermont Medical Center. Dr. Sumner began treating Claimant in November 2016, when Claimant participated in his work conditioning program, and has evaluated him several times thereafter, most recently in August 2019.
38. In Dr. Sumner's opinion, Claimant is not capable of competing for employment in the open market. He explained that Claimant's physical and cognitive limitations are such

that his prospects of finding sustained, gainful employment are at best “remote.” Although he noted that Claimant could work “in theory” if he had a simple, repetitive, seated job with a lifting requirement of less than ten pounds, in practice his return to regular gainful employment was unlikely because he has “two strikes” against him: his physical restrictions and his “fairly limited cognitive function.” Dr. Sumner noted that, in his experience as an occupational medicine physician, the people who struggle the most with gainful employment are the ones who have both physical and cognitive impairments.

39. Dr. Sumner based his opinions on his review of Claimant’s medical records, including the June 2016 neuropsychological evaluation and the September 2018 cognitive functional capacity evaluation, as well as his own observations and interactions with Claimant during his participation in the work conditioning program and afterwards.
40. I find Dr. Sumner’s testimony regarding Claimant’s work prospects to be clear, well-founded and persuasive, based on his education, training and experience as a rehabilitation physician, as well as on his treating relationship with Claimant.

(b) Laurance Thompson, MS

41. Claimant also presented expert testimony from Laurance Thompson, MS. Mr. Thompson is a master’s level licensed psychologist who focuses his practice on the rehabilitation of injured workers. He has 37 years’ experience in his field and currently works with Dr. Sumner in the work conditioning program. Mr. Thompson’s services include cognitive behavioral therapy and cognitive assessments to determine whether a patient has any psychological barriers to recovery.
42. Mr. Thompson became concerned about Claimant’s cognitive abilities in January 2017, during his participation in the work conditioning program. He observed Claimant consistently showing difficulty following directions, keeping on task and being safe. He accordingly recommended a neuropsychological assessment. Having reviewed the neuropsychologist’s report, Mr. Thompson stated that he was not surprised by the findings, including impaired executive functioning, impaired memory and severely impaired attention, as these findings were consistent with his observations of Claimant’s performance in the work conditioning program. Mr. Thompson also offered his opinion that Claimant’s chronic pain from his shoulder injury likely increases the effects of his traumatic brain injury because pain further inhibits his already reduced ability to sustain attention.
43. In Mr. Thompson’s opinion, Claimant’s employment outlook is “prohibitive.” He identified the main barriers to employment from a psychological perspective as difficulty following directions, multitasking and prioritizing, as well as problems with memory, distractions and impulsivity.
44. I find Mr. Thompson’s testimony regarding Claimant’s cognitive impairments and their effect on his work prospects to be credible and well-founded on his training and

experience as a licensed master's level psychologist. I further find persuasive his opinion that chronic pain has likely worsened the effects of Claimant's brain injury.

(c) Michael Kenosh, MD

45. Defendant presented expert medical testimony from Michael Kenosh, MD. Dr. Kenosh is board certified in physical medicine and rehabilitation. He is the medical director of rehabilitation services at Rutland Regional Medical Center and has experience helping patients return to the workforce.
46. Defendant hired Dr. Kenosh to review Claimant's medical records in September 2018. *See Joint Exhibit I, Tab 6.* Dr. Kenosh also reviewed one vocational rehabilitation progress report, Dr. Backus' permanency evaluation and the August 2016 functional capacity evaluation. Notably, he never met or examined Claimant, nor did he review the results of his neuropsychological evaluation or the cognitive functional capacity evaluation.
47. Dr. Kenosh offered his opinion that Claimant is not permanently and totally disabled as a result of his work injury. In his report he explained the basis for his opinion: "When I consider a *representative example* of this type of musculoskeletal injury, I feel it is reasonable to expect that at worst the patient may be limited to light duty lifting below shoulder height and negligible lifting above shoulder height for the left upper extremity." *Joint Exhibit I, Tab 6, Dr. Kenosh's report*, at 19 (emphasis added). Thus, his opinion is not based on Claimant's condition, but rather on what is typical for patients with a certain type of injury. Dr. Kenosh offered no basis for his assumption that Claimant's injury was typical, nor did he address the capabilities of patients with similar injuries who obtain a poor outcome after surgery. For these reasons, I find that his opinion is not relevant to Claimant's condition.
48. Dr. Kenosh also offered his opinion that Claimant's cognitive and executive functioning are more likely than not "average and functional." *Joint Exhibit I, Tab 6, Dr. Kenosh's report*, at 20. He based this opinion solely on Dr. Backus' report that Claimant worked full-time and unrestricted for years after his traumatic brain injury.<sup>4</sup> However, Dr. Kenosh did not review the cognitive functional capacity evaluation or the neuropsychological assessment. Moreover, he had no specific knowledge of Claimant's job duties while working for Defendant, nor did he have any knowledge of the accommodations that previous employers made for him. *See Finding of Fact Nos. 7 through 11 supra.* Finally, Dr. Kenosh never met or examined Claimant. Had he done so, he might have drawn some additional conclusions about Claimant's cognitive abilities from his presentation. For all of these reasons, I find Dr. Kenosh's opinion as to Claimant's cognitive functioning wholly unsupported as well.

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<sup>4</sup> The purpose of Dr. Backus' examination was to assess Claimant's shoulder-related permanent impairment. He was not asked to determine Claimant's work capacity or offer an opinion on his ability to engage in regular gainful employment. Thus, the work history set forth in his report did not focus on how Claimant came to be hired for past jobs or what allowances past employers made for his cognitive deficits.

49. Overall, Dr. Kenosh's lack of knowledge about Claimant's work history and his cognitive deficits severely detracts from his opinion that Claimant is not permanently and totally disabled. That he never met or examined Claimant further undermines his opinion.

Vocational Experts

(a) Frances Plaisted, MA

50. Frances Plaisted is a certified rehabilitation counselor who has a master's degree in rehabilitation counseling and 30 years' experience in the field. She worked with Claimant from April 2016 through November 2017.
51. Ms. Plaisted offered her opinion that, due to Claimant's restricted, part-time sedentary work capacity and his cognitive issues, there is no vocational option available to him. In particular, she testified that he could not perform most sedentary jobs, such as receptionist, patient registration, administrative occupations and computer jobs, because of his cognitive impairments. In her opinion, all viable vocational rehabilitation options were fully explored and exhausted, and no additional rehabilitation efforts would likely increase his employability.
52. Ms. Plaisted also has experience providing supported employment and job coaching from her college days. In her opinion, supported employment positions are not readily available in the open labor market, and most disabled people do not move out of supported employment. Furthermore, most supported employment opportunities are jobs such as grocery store baggers and cleaners, which are beyond Claimant's physical restrictions. In her opinion, therefore, supported employment would not increase Claimant's employability, either.
53. Based on her extensive experience in the vocational rehabilitation field and the personal knowledge she derived about Claimant from working with him, I find Ms. Plaisted's opinions to be thorough, well-founded and persuasive.

(b) John May, MA

54. In October 2018 Claimant engaged certified rehabilitation counselor John May to perform an independent vocational evaluation. Mr. May has a master's degree in rehabilitation counseling and 25 years' experience in the field. He also worked as a facilities resource coordinator for the Vermont Brain Association, an organization that helps persons with brain injuries access appropriate services.
55. Mr. May prepared his report (*Claimant's Exhibit A, Tab 3*) based on his review of Claimant's medical records, vocational rehabilitation records, neuropsychological evaluation and both functional capacity evaluations. He also performed a structured clinical interview of Claimant before forming his opinions. Mr. May believes that meeting the injured worker is important in cases where there are cognitive deficits to fully understand the worker's vocational prospects.

56. In Mr. May's opinion, Claimant is unlikely to obtain or maintain regular gainful work now or in the future. At best, he would be limited to part-time sedentary work at an unskilled level with lifting and positional limitations. Even if an employer could accommodate him, no such work would be regular or gainful.
57. Mr. May's opinion is based on Claimant's having both physical and cognitive deficits. In his experience, it is extremely challenging to return someone to work with a part-time sedentary work capacity, even when that person does not have a cognitive impairment. Claimant's significant cognitive limitations make his vocational outlook even bleaker, as they prevent him from performing tasks requiring initiation, planning, organization and memory. Thus, he is unlikely to be able to perform any skilled or semi-skilled work within his physical demand levels. Further, unskilled sedentary jobs do not exist in sufficient quantity in the labor market to constitute an opportunity for regular, gainful work. I find Mr. May's opinion to be well-supported and credible.
58. Mr. May also reviewed the work performed by Claimant's rehabilitation counselor, Ms. Plaisted. In his opinion, Ms. Plaisted made a sufficient effort to identify appropriate vocational goals for Claimant, but she was unable to do so. He agreed that given Claimant's functional limitations and his work background, a transferable skills analysis was not necessary because it would not likely identify any occupations that he could do. Thus, in Mr. May's opinion, Ms. Plaisted made a reasonable effort to devise a return to work plan for Claimant before concluding that he could not safely return to suitable, or even gainful, employment. I find Mr. May's testimony here well-founded and credible.
59. Mr. May has experience with supported employment both as a rehabilitation counselor and from his work at the Brain Injury Association. He testified that supported employment jobs are not readily available on the open market but rather are created for a particular individual. In his experience, supported employment is available only for individuals with developmental disabilities diagnosed before age 18. He has never returned an injured worker to suitable or regular, gainful work with supported employment. Recently, he had an assignment involving supported employment, during which he learned that the cost for two years of support was \$90,000.
60. Based on Mr. May's extensive experience as a vocational rehabilitation counselor, and in particular his recent experience with supported employment, I find this testimony to be well founded and credible.

(c) Wendy Burns, M.Ed.

61. Defendant presented expert vocational testimony from Wendy Burns, M.Ed. Ms. Burns is a certified rehabilitation counselor affiliated with Wagner Rehab, LLC. She has a master's degree in education and 15 years' experience providing vocational rehabilitation services in Vermont.

62. Prior to working as a vocational rehabilitation counselor, Ms. Burns worked as a job coach and manager of supported employment services for people with disabilities. Her goal in this line of work was to integrate disabled people into the community and help them achieve a sense of self-worth. Notably, her goal was not to return them to regular, gainful employment. Ms. Burns has never used supported employment in any of her return to work plans as a vocational rehabilitation counselor, nor has she had any substantive dealings with supported employment for over 20 years.
63. Defendant hired Ms. Burns to review Claimant's records and offer her opinion as to whether he is permanently and totally disabled. Like Dr. Kenosh, she has never met Claimant. She reviewed the 2016 functional capacity evaluation, the 2018 cognitive functional capacity evaluation, Ms. Plaisted's progress reports, Dr. Kenosh's records review and Mr. May's October 2018 statement. She then produced her own report dated July 19, 2019. *Defendant's Exhibit 1*.
64. In Ms. Burns' opinion, it is premature to find Claimant permanently and totally disabled because vocational rehabilitation has not been fully exhausted.
65. First, in her opinion, Ms. Plaisted did not conduct an exhaustive search to consider sedentary occupations consistent with Claimant's physical capabilities. Ms. Burns performed her own research and found some jobs located within 25 miles of Claimant's home that she thought he could perform. However, her analysis was based on some significant flaws in her understanding of his work history and present capabilities. For example, Ms. Burns thought Claimant was a sales representative at the Maryland furniture store, when in fact his duties were limited to loading customer purchases into their vehicles. *See Finding of Fact No. 11 supra*. Ms. Burns suggested a food service job without knowing that Claimant could not perform food service work at Wendy's. *See Finding of Fact No. 10 supra*. She also suggested billing clerk, a job that requires operating a calculator and a keyboard, without considering that Claimant cannot use a standard tape measure and could not operate the Wendy's order screen. *See Finding of Fact Nos. 10 and 14 supra*. Ms. Burns ultimately admitted that she did not consider Claimant's cognitive limitations at all when she identified sedentary jobs for him. This major omission undermines both her own vocational analysis and her opinion of Ms. Plaisted's efforts to identify appropriate sedentary jobs for Claimant.
66. Second, in Ms. Burns' opinion, Claimant has not fully exhausted vocational rehabilitation because Ms. Plaisted did not consider returning him to work through supported employment. Ms. Burns wrote in her report:

[S]upported employment in Vermont is individualized and person-centered, taking into accounts the person's mental and physical capabilities; and working with that person to develop gainful, competitive employment in the community. In some instances, supported employment services will work one-on-one with an employer to create a job description based on the person's (service recipient's) skills and strengths, and based on value-added needs of the employer. Within the scope of utilizing supported employment

services, [Claimant] can reasonably be expected to return to regular, gainful work, with vocational rehabilitation assistance, and is therefore not permanently totally disabled.

*Defendant's Exhibit 1*, at 4.

67. Ms. Burns acknowledged that the goal of vocational rehabilitation is to return the injured worker to suitable employment working independently without a support person. Her opinion, therefore, is that Claimant's need for supported employment would be temporary. However, his cognitive functional capacity evaluation indicates that he would likely require *ongoing* support in performing job tasks, not just initial training. *See Claimant's Exhibit A, Tab 1, Mr. Morneau's report*, at 7.
68. Finally, Ms. Burns testified that funding for supported employment is provided by federal and state government programs. Accordingly, she does not know how much it costs to place an employee in supported employment. In her opinion, the cost is not an issue because it is borne by the taxpayers.
69. I find Ms. Burns' opinion on supported employment to be lacking in foundation and unpersuasive. Having reviewed only select medical records and without meeting Claimant, she lacks even a basic grasp of his actual work capacity, both physical and cognitive. Further, she did not address Ms. Plaisted's contention that supported employment jobs generally require a physical capacity beyond what Claimant possesses. Ms. Burns' opinion that Claimant could return to work with the aid of supported employment is therefore speculative. Moreover, she herself has never used supported employment in any of her own vocational rehabilitation plans for the past 15 years, nor has she ever seen supported employment used to return an injured worker to suitable employment.

#### **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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

#### *Permanent Total Disability*

2. The disputed issue is whether Claimant's work-related shoulder injuries have rendered him permanently and totally disabled. 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 paraplegia. 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.

3. The Workers' Compensation Rules provide further guidance. The rule in effect at the time of Claimant's injuries<sup>5</sup> provided:

Rule 11.3100 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 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.

4. 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).

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<sup>5</sup> Rule 11.3100 was amended and re-numbered as Rule 10.1700 *et seq.*, effective August 1, 2015. Rule 10.1710 similarly requires that unless the extent to which an injured worker's functional limitations precludes regular gainful employment is so obvious that formal assessment is not necessary, a claim for odd-lot permanent total disability should be supported by a functional capacity evaluation and a vocational assessment.

### Work Capacity

5. Based on the evidence presented, I find that Claimant has a part-time sedentary work capacity for two to three hours per day, with significant lifting and other restrictions.

### Employability

6. Based on their respective professional qualifications and their role as treating providers, I accept the opinions of Dr. Sumner and Mr. Thompson as to Claimant's prospects for returning to regular gainful work. Dr. Kenosh offered his opinions without ever having met Claimant, despite the fact that his relevant conditions included cognitive deficits. Further, he did not review all the relevant records, nor did he provide a plausible basis for the opinions he offered. I therefore conclude that Claimant's prospects for returning to regular gainful employment are prohibitive or, at best, remote.
7. Further, based on the well-founded and persuasive opinions of Ms. Plaisted and Mr. May, I find that Claimant has exhausted vocational rehabilitation services and cannot be reasonably expected to return to regular gainful employment.

### Supported Employment

8. Supported employment jobs are created on an individual basis through the assistance of an accommodating employer who is willing to take on the disabled employee and his or her support personnel. A supported employment position is, in essence, a position specifically created by a sympathetic employer exclusively for the disabled person. Thus, it is not regular employment in a well-known branch of the labor market but rather work that is so limited in quality, dependability or quantity that a reasonably stable market for it does not exist. As such, it is not regular gainful work under Workers' Compensation Rule 11.3100.
9. For this reason, I reject Defendant's contention that the prospect of supported employment serves to defeat Claimant's permanent total disability claim.

### Conclusion

10. I conclude that Claimant has sustained his burden of proving that, as a result of his work injury, he is unable to successfully perform regular, gainful work. This circumstance is unlikely to change even with the provision of further vocational rehabilitation services. He is therefore permanently and totally disabled.

### Costs and Attorney Fees

11. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. § 678(e), he shall have 30 days from the date of this opinion within which to submit his itemized claim.

**ORDER:**

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

1. Permanent total disability benefits commencing on the date when temporary disability benefits ended in accordance with 21 V.S.A. § 645, with credit for any permanent partial disability benefits paid thereafter, in accordance with 21 V.S.A. § 648(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 9<sup>th</sup> day of December 2019

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Michael A. Harrington  
Interim 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.