STATE OF VERMONT
DEPARTMENT OF LABOR

Scott Davis

v.

Wal-Mart

Opinion No. 14-12WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-52910

OPINION AND ORDER

Hearing held in Montpelier, Vermont on December 13, 2011
Record closed on March 15, 2012

APPEARANCES:

Ronald Fox, Esq., for Claimant
Marion Ferguson, Esq. and Glenn Morgan Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to permanent total disability benefits as a consequence of his August and September 2007 compensable work injuries?

2. If not, is Claimant entitled to permanent partial disability benefits as a consequence of his August and September 2007 compensable work injuries?

3. Is Claimant entitled to additional medical benefits as a consequence of his August and September 2007 compensable work injuries?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Vocational assessment, May 27, 2011
Claimant's Exhibit 2:	*Curriculum vitae,* Mark Bucksbaum, M.D.
Claimant's Exhibit 3:	*Curriculum vitae,* James Parker
Claimant's Exhibit 4:	*Curriculum vitae,* Louise Lynch
Claimant's Exhibit 5:	Photo of Claimant with deer
Claimant's Exhibit 6:	Correspondence to Dr. Wieneke, February 7, 2008

Defendant's Exhibit A: Photo of Claimant with deer
Defendant's Exhibit B: Correspondence to Claimant, February 25, 2008
Defendant's Exhibit C: Correspondence to Wendy Madigan, March 5, 2008
Defendant's Exhibit D: Correspondence to Claimant (undated)
Defendant's Exhibit E: *Curriculum vitae,* Kuhrt Wieneke, M.D.

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

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

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

3. Claimant is currently 33 years old. He began working at Defendant's Bennington, Vermont store as an overnight stocker in 2002. He excelled at his job and over the course of the ensuing five years was regularly promoted – first to inventory control specialist, then to customer service manager, then to sporting goods department manager, and then to assistant manager at Defendant's Pittsfield, Massachusetts store. Claimant returned to the Bennington area for personal reasons in January 2007, whereupon he resumed his prior position as sporting goods department manager in the Bennington store.

Claimant's Prior Medical History

4. Claimant stands at 6 feet, 1 inch tall. He has struggled with obesity since elementary school. In high school he weighed 380 pounds. With diet and exercise, he lost some weight thereafter, down to approximately 350 pounds in March 2006, but by September 2007 it had increased again, back up to 385 pounds. In February 2008 he weighed 395 pounds. By February 2010, he weighed 491 pounds. As of September 2011 he weighed more than 500 pounds.

5. Claimant was diagnosed with both diabetes and high blood pressure in 2006. He also suffers from chronic gastroesophageal reflux disease (GERD), edema and peripheral neuropathy.

6. According to the medical records, Claimant has a strong family history of obesity. Both of his parents are obese, as are two of his three siblings. His father, mother and four maternal aunts and uncles suffer from diabetes.

7. Despite his obesity and related medical issues, as of August and September 2007 Claimant was fully able to work and engage in activities of daily living. He enjoyed hiking, camping, fishing, four-wheeling, going places and reading. He could walk, bend, kneel and squat without limitation.

Claimant's August and September 2007 Work Injuries

8. In late August 2007 Claimant was assisting a co-employee to retrieve an elliptical machine from a high shelf. The machine, which was boxed, weighed between 80 and 100 pounds. As the co-employee, who was standing on a ladder, handed the box down to Claimant, it slipped from his grasp, dropped 1 or 2 feet and struck Claimant on the left side of his head and neck. Claimant felt a sharp pain in his neck, but shook it off and continued working.

9. Claimant reported the incident to Defendant's human resources department. He remained at work, but gradually developed pain in his right shoulder, particularly with lifting. Then, on September 3, 2007 he was walking through the store when he tripped over the edge of a pallet and fell backwards onto a mobile staircase. Claimant hit both his neck and lower back on two of the staircase's stability bars.

10. Claimant lay on the floor for some time, as he was in extreme pain. He screamed for help, but no one heard his cries. Ultimately he managed to get to the employee break room. A co-employee called the assistant manager, and Claimant called his wife, who took him to the hospital emergency department.

Claimant's Post-Injury Medical Course

11. Initially Claimant treated with Dr. Whittum, an orthopedist. He also consulted with Dr. Hazard, another orthopedist, at Dartmouth Hitchcock Medical Center. Claimant's symptoms included right shoulder and neck pain and low back pain with numbness extending into his lower extremities. A lumbar MRI study revealed chronic degenerative disc disease at both L4-5 and L5-S1, likely aggravated by more recent trauma and including some nerve root compression as well. A cervical MRI failed to reveal any clear nerve root impingement. Claimant's shoulder symptoms were attributed either to acute bursitis and/or to a possible rotator cuff tear.

12. Claimant has undergone only limited treatment for his work injuries. He was unable to complete a course of physical therapy due to pain complaints, and could not undergo epidural steroid injections because of his large body mass. Neither the lumbar nor the cervical MRI scans suggested surgery as an appropriate treatment option. At one point Dr. Hazard suggested that Claimant consider pursuing a functional rehabilitation approach, but Defendant refused to authorize an evaluation. From the credible medical evidence, I find that such an approach was unlikely to be successful in any event. *See* Finding of Fact No. 37, *infra.*

13. Numerous independent medical evaluators, including Dr. Wieneke, Dr. McLarney and Dr. Kinley, have commented on the fact that Claimant's pain complaints are non-verifiable and, for the most part, subjective. In multiple examinations he has exhibited positive Waddell's signs, including give-away weakness, hypersensitivity, unreliable range of motion and non-physiologic pain radiation. Claimant exhibited some of these signs in the context of two functional capacity evaluations as well, one in October 2008 and another in March 2011. Such signs are indicative of a psychological or non-organic component to his pain, but do not necessarily signify malingering or deception.

14. Currently Claimant manages his pain with narcotic and other medications. He is largely inactive on most days. He reports constant low back pain and fatigue. He rarely leaves his house and spends most of his time alternating between sitting in his recliner and standing. He walks to his mailbox daily, a distance of 20-25 yards; the excursion typically takes him almost 30 minutes to complete. Because he has difficulty focusing, he no longer reads to the extent that he used to, and can only sit at his computer for brief intervals. His sleep is not restorative, and he suffers from sleep apnea. He is severely deconditioned, from both a muscular and a cardiovascular standpoint. He cannot bend over or tie his shoes.

15. The medical evidence establishes that many of Claimant's current deficits are due primarily to his obesity. His obesity is to blame for the fact that he is severely deconditioned cardiovascularly, for example. In addition, both his difficulty focusing and his fatigue are likely a consequence of his sleep apnea, which is itself a consequence of his obesity.

Claimant's 2010 Weight Loss Efforts

16. At his primary care provider's referral, in February 2010 Claimant began treatment in the Albany Medical Center's Bariatric Surgery & Nutrition program. At the time he weighed 491 pounds, an increase of 106 pounds in the two and a half years since his 2007 work injuries. Claimant's goal in attending this program was to lose sufficient weight – approximately 50 pounds – to be eligible for weight loss surgery. As reported in the program records, his motivation was "to extend his life and lose weight and hopefully eliminate diabetes and hypertension and possibly to relieve his back pain."

17. Claimant was monitored in the bariatric program, in terms of both diet and exercise, by a clinical dietician, a bariatric surgeon and a clinical nutritionist. Upon entering the program he reported that despite his chronic low back and neck pain he already was exercising, walking 30 minutes daily four days per week.

18. By the end of April 2010 Claimant had lost 12 pounds. Again, despite his chronic low back and neck pain he was still walking regularly, and had added squats and wall pushups to his exercise regimen as well.

19. By May 2010 Claimant was reporting "no difficulty" with brisk, 40-minute daily walks. Unfortunately, however, he had gained two pounds in little more than a week, possibly as a result of edema in his ankles. Notwithstanding this setback, Claimant reported that he was still compliant with both his diet and his walking regimen.

20. In early June 2010 Claimant reported that his back pain precluded him from walking more than 40 minutes daily, but that he was able to maintain that amount, with two hills included. His edema had worsened, however, and in the intervening month he had gained an additional five and a half pounds. Claimant was advised to consult with his primary care physician about his blood pressure and edema, but otherwise to continue with his current diet and exercise program.

21. Two days later, Claimant presented to the hospital emergency room complaining of increased edema and burning pain in his right lower leg. The next day he followed up with his primary care physician, who attributed the condition primarily to his weight, and possibly aggravated by a recent salty meal he had eaten.

22. By mid-July 2010 Claimant was reporting to his primary care physician that his lower extremity edema had worsened to the point that he could not even walk up a flight of stairs. The following week he reported to his bariatric program nutritionist that he had been rendered sedentary because of the condition. Claimant had gained another five and a half pounds since June, and now weighed 493 pounds, two pounds more than when he had entered the program in February. As Claimant consistently had reported that he was vigilant with his diet throughout this period, it seems likely that his weight gain was largely attributable either to his edema itself and/or to his inability to exercise as a result.

23. Claimant did not schedule his planned follow-up appointments, and did not participate further in the bariatric program after mid-July 2010. Although the record is somewhat unclear as to exactly why he dropped out, I find that it was in no way connected to his work-related injuries.

24. With a change in medications, by October 2010 Claimant's edema had improved. He did not resume his exercise regimen, however. By the time of his March 2011 functional capacity evaluation he became extremely short of breath after walking just 150 feet, and needed three rest breaks in a span of three minutes to do so. There having been no reported change in his chronic low back pain during the intervening months, I find that this reduced capacity likely was not due to any worsening of his work-related injuries.

Medical Opinions as to the Extent of Claimant's Permanent Partial Impairment

25. Drs. McLarney, Kinley, Bucksbaum and Wieneke all have rendered permanent impairment ratings relative to Claimant's work-related neck, shoulder and lower back injuries. Drs. McLarney and Bucksbaum were retained by Claimant to do so; Drs. Kinley and Wieneke did so on Defendant's behalf.

(a) Dr. McLarney

26. Dr. McLarney is an orthopedic surgeon. She conducted an independent medical evaluation of Claimant, at his attorney's request, in April 2009.

27. Dr. McLarney diagnosed Claimant with the following conditions attributable to his work-related injuries:

- Right upper extremity cervical radiculopathy, without identifiable cause on MRI;
- Right shoulder weakness consistent with either rotator cuff tendinopathy or tear; and
- Chronic low back pain with L4 radiculopathy.

28. With reference to the *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.), Dr. McLarney assessed the following permanent impairment ratings attributable to these injuries:

- An 8 percent whole person impairment attributable to Claimant's cervical spine, based on non-verifiable radicular complaints without objective findings (DRE cervical category II);
- A 12 percent whole person impairment attributable to range of motion deficits in Claimant's right shoulder; and
- An 8 percent whole person impairment attributable to Claimant's lumbar spine, based on asymmetric loss of range of motion and non-verifiable radicular complaints (DRE lumbar category II).

29. Dr. McLarney failed to specify whether she complied with the protocol mandated by the *AMA Guides* for consistently and reliably measuring a patient's range of motion. Nor did she combine her ratings to achieve a final whole person impairment, as is also required by the *Guides*.[1] For these reasons, I find her analysis to be incomplete.

[1] Under Vermont law, the basis for calculating permanency benefits differs with respect to injuries referable to the spine as opposed to those referable to other body parts. 21 V.S.A. §§648(a) and (c); Workers' Compensation Rule 11.2000. As to Dr. McLarney's rating, therefore, only the cervical and lumbar spine ratings should have been combined as required by the *AMA Guides*; the right shoulder rating would then be added in separately. Workers' Compensation Rule 11.2220.

30. Barring Claimant's possible participation in a multidisciplinary pain clinic, Dr. McLarney determined that he had reached an end medical result as of the date of her evaluation, April 9, 2009.

(b) Dr. Kinley

31. Dr. Kinley, an orthopedic surgeon, evaluated Claimant at Defendant's request in July 2009.

32. Dr. Kinley diagnosed Claimant with a cervical strain causally related to his work injuries, for which he found no ratable impairment. Nor did he rate any impairment for the right shoulder, as he concluded that Claimant's range of motion testing was completely subjective and therefore unreliable.

33. Dr. Kinley did find some permanent impairment referable to Claimant's lumbar spine, but his 9 percent whole person rating was calculated according to the 6th edition of the *AMA Guides* rather than the 5th edition, as is required by Vermont law, 21 V.S.A. §648(b). For that reason, I cannot consider it.

(c) Dr. Bucksbaum

34. At Claimant's request, Dr. Bucksbaum conducted an independent medical examination in April 2011. Dr. Bucksbaum is board certified in physical and rehabilitative medicine.

35. Dr. Bucksbaum rated the permanency attributable to Claimant's work-related injuries as follows:

- A 5 percent whole person impairment attributable to Claimant's chronic cervical sprain/strain (DRE cervical category II);
- An 8 percent whole person impairment attributable to Claimant's chronic right rotator cuff injury with residual loss in range of motion; and
- An 8 percent whole person impairment attributable to Claimant's chronic mechanical low back pain (DRE lumbar category II).

36. Using the *AMA Guides'* combined values chart, Dr. Bucksbaum determined that the total whole person impairment referable to Claimant's work-related injuries was 19 percent.[2]

37. Dr. Bucksbaum specifically noted in his report that his range of motion measurements were calculated in compliance with the *Guides'* protocol. For that reason, although their analyses were quite similar I find that Dr. Bucksbaum's impairment rating is more reliable, and therefore more persuasive, than Dr. McLarney's.

[2] As noted in footnote 1 *supra*, though consistent with the *AMA Guides'* protocol, in order to comply with Vermont law Dr. Bucksbaum should not have combined all three impairments to arrive at a final rating, but rather only the two attributable to the spine.

38. Dr. Bucksbaum determined that Claimant had reached an end medical result for his work-related injuries by the date of his evaluation, April 20, 2011. He did recommend that Claimant pursue bariatric surgery options and also that he maintain a home exercise program, but these recommendations were directed at prolonging Claimant's life, not at treating his work injuries. Dr. Bucksbaum expressed doubt that the type of multidisciplinary functional restoration program first suggested by Dr. Hazard in 2007 and later reiterated by Dr. McLarney would be effective at increasing Claimant's work capacity or otherwise improving his condition. I find his reasoning in this regard credible.

(d) Dr. Wieneke

39. At Defendant's request, Dr. Wieneke conducted an independent medical examination for the purposes of rating Claimant's permanent impairment in September 2011.[3] Dr. Wieneke is a board certified orthopedic surgeon.

40. Dr. Wieneke diagnosed Claimant with chronic neck and right shoulder girdle pain and low back pain. Having observed no positive findings either on clinical examination or on diagnostic studies, Dr. Wieneke found no ratable impairment to Claimant's cervical spine. Nor did he rate any impairment to Claimant's right shoulder. As for Claimant's lower back, Dr. Wieneke rated a 5 percent whole person impairment based on non-verifiable radicular pain (DRE lumbar category II).

41. Dr. Wieneke admitted in his deposition testimony that he did not use the protocol mandated by the *AMA Guides* for measuring the extent of any range of motion deficits, as Dr. Bucksbaum did. For that reason, I find his impairment rating to be less reliable.

Medical Opinions as to Work Capacity and Permanent Total Disability

42. Claimant has not worked since his September 3, 2007 injury. Initially his treating providers disabled him from working, and Defendant paid temporary total disability benefits accordingly.

(a) Discontinuance of Temporary Disability and Medical Benefits

43. At Defendant's request, in early February 2008 Claimant underwent an independent medical examination with Dr. Wieneke. In the context of this evaluation Dr. Wieneke recommended that Claimant undergo further diagnostic studies to rule out cervical radiculopathy. If the results were negative, Dr. Wieneke stated that Claimant would be able to return to work, first as a greeter and then at his regular job.

[3] Claimant underwent a prior independent medical examination with Dr. Wieneke, also at Defendant's request, in February 2008. *See* Finding of Fact No. 43, *infra.*

44. Shortly after making this recommendation, in mid-February 2008 Dr. Wieneke was presented with a photograph that purported to show Claimant exhibiting a deer he had killed during the October 2007 bow hunting season. Upon viewing the photo, Dr. Wieneke revised his opinion as to work capacity. If Claimant was capable of the type of physical activity required to successfully hunt a deer, Dr. Wieneke reasoned, then he was capable of returning to work full-time, at least as a greeter and probably at his regular job as well.

45. In fact, Claimant did not hunt or kill the deer depicted in the photograph. According to his testimony, which I find credible, an acquaintance had shot the deer, but because he lacked the proper license, or "tag" for it, he asked Claimant to use his tag instead. Even though this was an illegal use of Claimant's tag, he agreed to do so. He thus accompanied the friend to the weigh station and was photographed with the tagged deer.

46. Notwithstanding this explanation of events, and based instead on Dr. Wieneke's revised work capacity opinion, on February 25, 2008 Defendant wrote to offer Claimant light duty work as a greeter. Claimant did not respond. Thereafter, Defendant filed a Notice of Intent to Discontinue Payments (Form 27), in which it sought to terminate Claimant's temporary total disability benefits effective March 6, 2008 on the grounds that he had refused a suitable offer of modified duty work. The Department rejected the discontinuance. Having found that Dr. Wieneke's revised opinion was based on a faulty premise, that is, that Claimant had shown himself to be capable of hunting when in fact he was not, I find that it was proper for the Department to do so.

47. Following a medical records review by Dr. Rosati, an occupational medicine specialist, in November 2008 Defendant again sought to terminate Claimant's temporary total disability benefits on the grounds that he was capable of returning to modified duty work as a greeter and had failed to do so when requested. Defendant also sought to discontinue Claimant's narcotic pain medications, based on Dr. Rosati's assessment that these constituted inappropriate treatment for complaints that were unconfirmed by MRI studies. This time the Department approved the discontinuance, effective November 27, 2008.

48. Claimant's new primary care provider, Mark Schiffner, a physician's assistant, disagreed with Dr. Rosati's assessment as to Claimant's modified duty work capacity. Mr. Schiffner had only recently assumed Claimant's care, and had not yet reviewed his medical history. Nevertheless, he recommended that Claimant remain out of work "until further notice." Mr. Schiffner failed to specify the rationale behind his recommendation, and therefore I find it to be relatively unpersuasive. Instead, based on Dr. Rosati's records review I find that Claimant's temporary total disability benefits were appropriately terminated in November 2008.

49. I find that Dr. Rosati's records review did not provide sufficient support for Defendant to have discontinued Claimant's narcotic pain medications, however. Dr. Bucksbaum has recommended that so long as Claimant continues to be monitored with periodic urine toxicology and appropriate laboratory studies, his prescribed medications constitute reasonable and appropriate treatment. I find this reasoning persuasive.

(b) *Functional Capacity Evaluations*

50. Claimant has undergone two functional capacity evaluations – the first in October 2008 with Robb Wright, an occupational therapist, and the second in March 2011 with Louise Lynch, a physical therapist.

51. Claimant's performance on the October 2008 functional capacity evaluation was striking for its unreliable results. According to Mr. Wright, Claimant demonstrated subjective limitations that were incongruous and out of proportion to his presenting musculoskeletal challenges. His pain sense and perception of disability were maladaptive. Perhaps most disturbing, to Mr. Wright's observation Claimant made no effort to adapt, compensate or explore ways in which to enhance his ability or tolerance. To the contrary, he consistently self-limited and on at least one test appeared actively to under-represent his ability level.

52. In light of Claimant's unreliable effort in testing, Mr. Wright felt unable to fully understand or appreciate the extent of his low back and right shoulder complaints. Nor was he able to delineate those complaints from the ones attributable to Claimant's gross obesity, poor conditioning and cardiovascular challenge. Thus, although Mr. Wright categorized Claimant's work capacity as "none/undetermined to sedentary," he emphasized that this was intended only as a description of Claimant's performance, not as an accurate determination of his functional capacities. I concur.

53. Claimant was determined to have a less than sedentary work capacity following Ms. Lynch's March 2011 functional capacity evaluation as well, but this time his performance was not deemed nearly as unreliable as it had been with the earlier testing. Ms. Lynch observed that Claimant was willing to attempt all activities, but needed verbal cues and encouragement to exhibit full effort. Without implying any bad motive or intent, Ms. Lynch concluded from this that Claimant likely was capable at times of doing more physically than he demonstrated. I find her conclusion in this regard to be credible.

54. Claimant's activity level, both as he reported it and as demonstrated during Ms. Lynch's testing, was markedly less than what he had been able to achieve and maintain a year earlier, when he was engaged in the Albany Medical Center bariatric program. He was extremely short of breath and sweaty, even when sitting, and severely limited in walking. His endurance level and cardiovascular conditioning were poor as well.

55. Ms. Lynch concluded that Claimant's functional limitations precluded even sedentary work. She attributed these deficits to Claimant's work injuries, stating that they "[have] led to significant cardiovascular and muscular deconditioning and weight gain that make most daily functional activities difficult." Notably, I cannot discern from the record whether in reaching this conclusion Ms. Lynch was aware of Claimant's exercise tolerance while in the Albany Medical Center bariatric program. Given that it was Claimant's edema, a condition related solely to his other medical issues and not at all to his work injuries, that caused him to curtail his activities while in that program, I must question her conclusion that the latter are to blame for his current limitations.

(c) *Claimant's Vocational Rehabilitation Prospects*

56. In the opinion of his vocational rehabilitation expert, James Parker, the multiple disabilities and related functional limitations from which Claimant suffers have effectively disabled him from regular gainful employment in any well known branch of the labor market.

57. Mr. Parker based his assessment of Claimant's vocational prospects in large part on the results of Ms. Lynch's March 2011 functional capacity evaluation. I do not discern from Mr. Parker's analysis any consideration of the extent to which Claimant may have self-limited his activity level in that testing, as even Ms. Lynch observed. Mr. Parker acknowledged, furthermore, that chronic pain, which Claimant identified as his most significant limiting factor, is difficult to quantify. Nevertheless, I find that there is sufficient objective evidence in Ms. Lynch's evaluation, including notations as to Claimant's heart rate, sweaty skin and shortness of breath, to justify Mr. Parker's reliance on that report. Certainly, to the extent that Claimant's severe deconditioning, fatigue and endurance levels impact his ability to sustain work activities, I accept that these pose significant, and likely insurmountable, vocational barriers.

(d) *Permanent Total Disability*

58. In the context of his April 2011 independent medical examination, Dr. Bucksbaum concluded, to a reasonable degree of medical certainty, that Claimant's neck, right shoulder and low back injuries were causally related to his August and September 2007 accidents at work. Based both on Ms. Lynch's determination that Claimant is unable to work at even a sedentary level, and on his own determination that Claimant has reached an end medical result for his work-related injuries, Dr. Bucksbaum further concluded that Claimant is now permanently and totally disabled. I find that these conclusions are adequately supported by the credible evidence.

59. As to the causal relationship between Claimant's work injuries and his permanent inability to work, Dr. Bucksbaum's opinion is somewhat less clear. Dr. Bucksbaum attributes only 65 pounds (approximately one-half) of Claimant's post-injury weight gain to inactivity; the rest, in his opinion, is a consequence of Claimant's dietary habits. Dr. Bucksbaum did not state any opinion as to whether Claimant would have been permanently and totally disabled had his weight gain been limited only to that attributable to his work injuries and not also to his food intake. I find this gap in his reasoning troublesome.

60. Equally troublesome is Dr. Bucksbaum's failure to address the increased activity level that Claimant demonstrated while enrolled in the Albany Medical Center bariatric program in 2010. Given his own training in nutrition and weight loss, which includes membership in the American Society of Bariatric Physicians, I would have expected Dr. Bucksbaum to scrutinize closely the reasons behind Claimant's failed weight loss attempt in that program. More importantly, I would have expected Dr. Bucksbaum to explain why either the chronic pain and/or the weight gain attributable to Claimant's 2007 work injuries would be causing such an extreme degree of inactivity now when they did not do so in 2010. Again, the fact that Dr. Bucksbaum did not address these issues renders his opinion as to the causal connection between Claimant's work injuries and his permanent total disability less persuasive.

Claimant's Credibility

61. Defendant cited to various incidents in Claimant's past that it alleges indicate a pattern of dishonesty serious enough to call his credibility into question. These include:

- The incident referred to above, Finding of Fact No. 45 *supra*, in which Claimant allowed his own deer tag to be used to weigh in and register his friend's kill, even though he knew it was illegal to do so;

- Claimant's acceptance of wages paid "under the table" by a former employer; and

- Claimant's use of a separate address (the basement of his parent's home) as a means of qualifying for food stamps and fuel assistance even though he did not actually live there.

62. I agree with Defendant that these instances of questionable conduct demonstrate a disturbing tendency on Claimant's part either to mislead authorities and/or to flaunt the law for financial gain. I also agree that these events provide good cause for me to examine closely Claimant's assertions as to his chronic pain and inability to function. I will not go so far, however, as to conclude that he is purposely exaggerating his pain complaints or intentionally faking his disability.

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. In addition to establishing the connection between a claimant's injury and his or her employment, another prerequisite to any workers' compensation award is proof of a causal nexus between the injury and the specific benefits claimed. This applies to both medical and indemnity benefits. *See, e.g., Mujic v. Vermont Teddy Bear Factory*, Opinion No. 04-12WC (February 7, 2012); *Pitaniello v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008).

Permanent Total Disability

3. Claimant's claim for permanent total disability benefits is based on his assertion that the chronic pain and inactivity attributable to his work injuries combined with his preexisting obesity to cause him to become totally incapacitated from ever maintaining regular gainful employment. Should the medical evidence establish, to the required degree of medical certainty, that the work injuries did in fact aggravate, accelerate or otherwise contribute to cause Claimant's ultimate disability, then he will have laid the appropriate foundation for this claim. *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989).

4. Claimant points to Dr. Bucksbaum's opinion to establish the required connection. Dr. Bucksbaum did conclude, to a reasonable degree of medical certainty, that Claimant's inactivity from September 2007 forward likely caused him to gain approximately 65 pounds. I have no reason to doubt this conclusion.

5. What I do doubt, however, is Dr. Bucksbaum's conclusion that Claimant's inactivity, and therefore 65 pounds of his weight gain, was attributable to his work injuries. To my mind, Claimant's ability to maintain a significantly higher activity level while enrolled in the Albany Medical Center bariatric program – taking brisk, 40-minute daily walks, for example – effectively undercuts any such conclusion. That this occurred in early 2010, more than two and a half years after the work injuries and by which point Claimant already had gained 106 pounds, means that notwithstanding any injury-related sequelae he was capable of walking, standing, squatting and moving about to a far greater extent than he is now. There being no evidence that Claimant's work-related injuries have worsened since 2010, I can only attribute the dramatically increased functional limitations he now exhibits to other, non-injury-related factors.

6. Similarly, I find significant the fact that, after his initial success in the bariatric center program, Claimant's weight loss efforts were derailed not by any work injury-related complications or consequences, but rather by a serious bout of edema. Again, I conclude from this that Claimant's work injuries were not a factor in his subsequent decline.

7. I acknowledge that aside from Defendant's assertion that Claimant may have been exaggerating his subjective pain complaints, the evidence as to his current functional limitations and vocational rehabilitation potential was largely undisputed. The most significant of these limitations, however, and the ones that impact most upon his vocational potential, relate to Claimant's limited endurance, severe deconditioning and fatigue levels, deficits that I cannot attribute to his work injuries. Thus, while I reasonably can conclude that Claimant likely is permanently and totally disabled, I cannot conclude that this disability was caused, aggravated or accelerated by his compensable work injuries. For that reason, his claim for permanent total disability benefits must fail.

Permanent Partial Disability

8. Conflicting medical evidence was submitted as to the extent of Claimant's permanent partial disability. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

9. With particular reliance on the third factor, I conclude that Dr. Bucksbaum's permanency opinion is the most credible. Dr. Bucksbaum demonstrated the greatest familiarity with the *AMA Guides* and scrupulously documented his adherence to the appropriate impairment rating protocol. For that reason, his ratings are both more reliable and more persuasive than those of Drs. McLarney, Kinley or Wieneke.

10. I conclude, therefore, that as a result of his work-related injuries Claimant has sustained a 5 percent whole person permanent impairment referable to his cervical spine, an 8 percent whole person impairment referable to his lumbar spine and an 8 percent whole person impairment referable to his right shoulder.

11. I must disregard Dr. Bucksbaum's 19 percent total combined whole person impairment rating, however, as his methodology does not comply with the requirements of 21 V.S.A. §648 and Workers' Compensation Rule 11.2220. Taking judicial notice of the *AMA Guides'* combined values chart (5^{th} ed., p. 604), I conclude that Claimant is entitled to permanent partial disability benefits in accordance with a 13 percent whole person permanent impairment referable to his spine and an 8 percent whole person permanent impairment referable to his right shoulder.

12. The permanency benefits so awarded constitute lump sum compensation for a permanent impairment that will affect Claimant for the rest of his life. Calculated from the date of the formal hearing, at which point he was 33 years old, according to National Vital Statistics Reports, Vol. 54, No. 14 (April 19, 2006) Claimant's remaining life expectancy is 47 years, or 564 months. Claimant may submit a request to prorate the amounts awarded for his permanent disability in accordance with 21 V.S.A. §652.

13. Claimant has submitted a request for reimbursement of costs totaling $8,670.13 and attorney fees totaling $17,636.50.[4] As Claimant has prevailed only on his claim for permanent partial disability benefits, he is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997).

14. I conclude that the costs billed for Ms. Lynch's and Mr. Parker's services, totaling $3,935.00, related solely to Claimant's claim for permanent total disability benefits. As he failed to prevail on this claim, these costs are disallowed. The remaining costs, totaling $4,735.13, are hereby awarded.

15. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Here, Claimant prevailed only on his claim for permanent partial disability benefits, the value of which is significantly less than his unsuccessful permanent total disability claim. With that in mind, I conclude that it is appropriate to award him 30 percent of his requested fees, or $5,290.95.

[4] Claimant's fee request details 27.6 hours billed prior to June 15, 2010, for which the maximum reimbursement rate according to Workers' Compensation Rule 10 was $90.00 per hour, and 104.5 hours billed thereafter, for which the reimbursement rate is $145.00 per hour.

ORDER:

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

1. Permanent partial disability benefits as compensation for a 13 percent whole person impairment referable to the spine, a total of 71.5 weeks, and an 8 percent whole person impairment referable to the shoulder, a total of 32.4 weeks, in accordance with 21 V.S.A. §648 and Workers' Compensation Rule 11.2220;

2. Interest on the above calculated from the date when temporary total disability benefits terminated (November 27, 2008), in accordance with 21 V.S.A. §664;

3. Medical benefits for ongoing treatment of Claimant's compensable injuries, including coverage for prescription pain medications, in accordance with 21 V.S.A. §640; and

4. Costs totaling $4,735.13 and attorney fees totaling $5,290.95, in accordance with 21 V.S.A. §675.

DATED at Montpelier, Vermont this 16th day of May 2012.

_____
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.