Arthur Hawley v Webster Trucking Corp (October 16, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Arthur Hawley

v.

Webster Trucking Corp.

Opinion No. 18C-13WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. BB-00233

RULING ON CLAIMANT'S REQUEST FOR AWARD OF COSTS AND ATTORNEY FEES

Having prevailed on his claim for both permanent total disability and medical benefits, including coverage for the costs associated with his continued residence in an assisted living facility, Claimant has submitted a request for an award of costs totaling $18,908.58 and attorney fees totaling $45,501.00. Defendant has objected on various grounds, considered below.

First, Defendant objects to any attorney fees incurred prior to September 5, 2012 that were related to Claimant's permanent total disability claim. For a period of time prior to that date, Claimant's deteriorating emotional health precluded his attorney from moving forward with his claim, and thus the matter was held in abeyance for more than a year. While it is true that Defendant voluntarily advanced permanent partial disability benefits during that time, it never acceded to the permanent total disability claim. I find that the attorney hours expended during that period likely would have been necessary even had Claimant's prosecution of that issue not been delayed, and were not later duplicated. Therefore, they are reasonable and recoverable.

Defendant also objects to any attorney fees incurred prior to September 17, 2012, the date on which the Department approved its discontinuance of medical benefits related to Claimant's continued residence in an assisted living facility. More than a year earlier, however, in May 2011 Defendant had first signaled its intention to discontinue coverage, and likely would have done so had the Department not ordered it to continue paying. It was the earlier discontinuance that triggered the need for attorney involvement, not the later one. For that reason, I will not disallow the fees incurred prior to September 17, 2012.

As for Defendant's objections to individual billing entries, I find that a total of 15.5 hours pertain to time expended on unrelated and/or undisputed matters, including attention devoted to prescription charges, permanent partial disability benefits, home mortgage and foreclosure issues, trust account issues, wire transfers, dental bills, Social Security matters and rated age research. Those charges, totaling $2,247.50 are not recoverable. In addition, I find that a total of 3.9 hours represent paralegal time charged at the attorney rate. Those charges are reduced by one-half, or $282.75. Subtracting these two amounts, the total amount of attorney fees recoverable is $42,970.75.

As for expenses, I find that the following reductions are in order:

- A reduction of $3,510.00 related to Dr. Huyck's deposition charges;
- A reduction of $925.00 related to Dr. Huyck's formal hearing charges;
- A reduction of $300.00 related to Kim Patten's March 22, 2013 meeting with Claimant's attorney in advance of her deposition;
- A reduction of $10.00 related to the Keene Police parking ticket; and
- A reduction of $605.49 related to miscalculated mileage reimbursement requests.

The total reduction in expenses is $5,350.49; subtracting this from the amount requested yields a total amount recoverable of $13,558.09.

I acknowledge that the fees and expenses incurred in this case were substantial. Given the circumstances, I conclude that they were in every respect necessary. The disputed issues were hard fought and complicated both legally and factually, and the efforts of Claimant's attorney were integral to his success. Claimant's counsel demonstrated skill and thoughtfulness in preparing and presenting the case, and the fees charged are proportional to the work he did. Considering these factors, it is a proper exercise of my discretion to award the fees sought with only minor reductions. *Wilson v. Black*, Opinion No. 54-03WC (January 28, 2004), citing *Estate of Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003).

ORDER:

Defendant is hereby **ORDERED** to pay:

1. Attorney fees totaling $42,970.75; and

2. Costs totaling $13,558.09.

DATED at Montpelier, Vermont this 16th day of October 2013.

_____
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.

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AMENDED ORDER

Upon due consideration of Defendant's Motion to Amend, the Commissioner's August 9, 2013 Order is hereby amended as follows:

ORDER:

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

(a) Permanent total disability benefits pursuant to 21 V.S.A. §646;

(i) Defendant having previously paid 236.5 weeks of permanent partial disability benefits in a lump sum, covering the period up through May 1, 2015, its obligation to pay permanent total disability benefits shall not commence until May 2, 2015;

(ii) Notwithstanding the above, if requested by Claimant and approved by the Department in accordance with Workers' Compensation Rule 19.0000, Defendant shall pay an additional 93.5 weeks of permanent total disability benefits in a lump sum, for a total of 330 weeks of permanent total disability compensation, the maximum guaranteed by 21 V.S.A. §645(a);

(iii) Should such permanent total disability benefits be paid in a lump sum, Defendant's obligation to pay additional permanent total disability compensation, if any, will not commence until February 14, 2017.

(b) Medical benefits pursuant to 21 V.S.A. §640(a), including but not limited to coverage of the costs associated with Claimant's residence at The Woodward Home or other medically appropriate assisted living facility; and

(c) Costs and attorney fees in amounts to be determined.

DATED at Montpelier, Vermont this 20th day of September 2013.

_____
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.

STATE OF VERMONT
DEPARTMENT OF LABOR

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Commissioner

State File No. BB-00233

OPINION AND ORDER

Hearing held in Keene, NH on February 20, 2013 and in Montpelier, Vermont on March 26, 2013
Record closed on May 17, 2013

APPEARANCES:

William Skiff, Esq., for Claimant
Robert Cain, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a result of his December 17, 2008 compensable work injury?

2. Is Defendant obligated to pay for Claimant's continued residence in an assisted living facility as a consequence of his December 17, 2008 compensable work injury?

EXHIBITS:

Claimant's Exhibit 1.1:	*Curriculum vitae,* Fran Plaisted
Claimant's Exhibit 1.2:	Vocational Assessment, 9/28/11
Claimant's Exhibit 1.3:	Functional Capacity Evaluations, 3/3/10, 9/30/10, 5/23/12
Claimant's Exhibit 1.4:	Vocational Rehabilitation Discontinuance Report
Claimant's Exhibit 1.5:	Vocational Rehabilitation Progress Report, 6/28/12
Claimant's Exhibit 1.6:	Care staff progress notes, 4/4/12 – 2/13/13
Claimant's Exhibit 1.7:	Occupational Therapy Independent Living Assessment, July 26, 2010
Claimant's Exhibit 1.8:	Occupational Therapy Evaluation of ADL Ability, 9/20/11
Claimant's Exhibit 1.9:	Occupational Therapy Independent Living Assessment, August 17, 2012
Claimant's Exhibit 1.10:	Dr. Huyck Independent Medical Exam, 1/4/2013

Claimant's Exhibit 1.11:	Permanent Impairment Rating, amended 1/11/2011
Claimant's Exhibit 1.12:	Permanent Impairment Rating, 11/10/10
Claimant's Exhibit 1.13:	*Curriculum vitae,* Karen Huyck, M.D.
Claimant's Exhibit 1.14:	Video surveillance, Woodward Home files, medical records (electronic files)
Claimant's Exhibit 2:	Chronology of residences
Claimant's Exhibit 3:	Occupational therapy referral, 11/10/10
Claimant's Exhibit 4:	Occupational Therapy Evaluation of ADL Ability, 9/20/11
Defendant's Exhibit A:	Vocational Rehabilitation Progress Report, 8/31/11
Defendant's Exhibit B:	Functional Capacity Evaluation, 5/23/12
Defendant's Exhibit C:	Resident Assessment Tool/Needs Determination, 6/18/12
Defendant's Exhibit D:	Quarterly Progress Notes, 1/18/12 – 10/11/12
Defendant's Exhibit E:	Claimant's medical records (4 notebooks)
Defendant's Exhibit F:	*Curriculum vitae*, Nancy Johnson, M.D.
Defendant's Exhibit G:	*Curriculum vitae*, Stuart Glassman, M.D.
Defendant's Exhibit H:	*Curriculum vitae*, Dennis King
Defendant's Exhibit I:	*Curriculum vitae*, April Pettengill
Defendant's Exhibit J:	*Curriculum vitae*, Joan Van Saun
Defendant's Exhibit M:	Deposition of Nancy Johnson, M.D., December 1, 2011
Defendant's Exhibit N:	Dr. Glassman Independent Medical Exam, 12/19/2012
Defendant's Exhibit O:	Vocational Assessment of Residual Employability, February 21, 2013
Defendant's Exhibit P:	April Pettengill report, January 8, 2013
Defendant's Exhibit Q:	April Pettengill report, February 15, 2013
Defendant's Exhibit R:	Functional Capacity Evaluation, 3/3/10
Defendant's Exhibit S:	Driving Evaluation, June 21, 2010
Defendant's Exhibit T:	Traffic Accident Report, 3/29/2011
Defendant's Exhibit U:	Surveillance video (DVD)
Defendant's Exhibit V:	Woodward Home records
Defendant's Exhibit W:	Kim Patten progress notes
Defendant's Exhibit X:	Kim Patten file

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §§644 and 645
Medical benefits pursuant to 21 V.S.A. §640(a)
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

RULING ON DEFENDANT'S MOTION TO ADMIT DEPOSITIONS OF CLAIMANT

Over Claimant's objection, Defendant moved to admit two prior discovery depositions it had taken of Claimant, notwithstanding that Claimant appeared and testified at hearing as well. As support for its position, Defendant cited to Vermont Rule of Civil Procedure 32(a), which provides as follows:

> (a) **Use of Depositions.** At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition . . . in accordance with any of the following provisions:
>
> . . .
>
> (2) The deposition of a party . . . may be used by an adverse party for any purpose.

I concur with Defendant's assertion that as a party opponent, Claimant's depositions may be admissible irrespective of the fact that he was available and in fact did testify at formal hearing. *See, e.g., Fey v. Walston & Co., Inc.*, 493 F.2d 1036, 1046 (7th Cir. 1974); *Coughlin v. Capitol Cement Co.,* 571 F.2d 290, 308 (5th Cir. 1978). However, to qualify for admission the depositions also must not be excludable under the rules of evidence. That means that even though otherwise relevant, their probative value must not be "substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." V.R.E. 403; *see also* Workers' Compensation Rule 7.1020 (allowing for exclusion of repetitive material at formal hearing).

Defendant's attorney here had full opportunity to cross-examine Claimant at formal hearing, and in fact did so for almost 60 minutes. This included at least one line of questioning during which he used Claimant's prior deposition testimony in an effort either to impeach and/or to refresh his recollection. Defendant's attorney easily could have continued in that vein, but chose not to.

Defendant now seeks to introduce 237 pages of what it characterizes as "complementary" testimony, at least certain portions of which it acknowledges "could be said to overlap, in a general way," Claimant's hearing testimony. Defendant's Motion to Admit Depositions of Claimant at 3. I find this to be an insufficient justification for admitting both depositions in their entirety. Rather, I conclude that whatever probative value the depositions might have is likely outweighed by their needlessly repetitive and cumulative contents, and for that reason I decline to admit them.

Defendant's Motion to Admit Depositions of Claimant is hereby **DENIED**.

FINDINGS OF FACT:

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

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

3. Claimant is 66 years old. He began working as a tractor-trailer driver for Defendant in 2003. His job involved both local and long-distance driving, as well as loading and unloading freight.

Claimant's December 2008 Work Injury, Subsequent Treatment and Current Medical Status

4. On December 17, 2008 Claimant was removing various items from his truck at the end of his shift when he slipped and fell backwards, striking his head forcefully on the icy pavement. Initially he could not move either his arms or his legs. He was transported to the hospital via ambulance, where he was diagnosed with a serious injury to his cervical spinal cord. Defendant accepted this injury as compensable and began paying workers' compensation benefits accordingly.

5. Claimant's injury was diagnosed as a cervical cord contusion. He was hospitalized at Dartmouth Hitchcock Medical Center from December 17, 2008 through December 23, 2008. From there he was discharged to Farnham Rehabilitation Center in Keene, NH, for acute in-patient rehabilitation. On January 20, 2009 he was discharged from that facility to the Genesis Healthcare Keene Center for skilled nursing care and sub-acute rehabilitation. On July 17, 2009 he was discharged from Genesis to The Woodward Home, an assisted living facility in Keene, where he has lived ever since.

6. As treatment for his work injury, in March 2009 Claimant underwent surgery to decompress his spinal cord at the C3-6 levels.[1] In August 2010 his treating physiatrist, Dr. Johnson, determined that he had reached an end medical result, and on those grounds the Department approved Defendant's discontinuance of temporary disability benefits effective October 15, 2010. In November 2010 Dr. Huyck, a specialist in occupational medicine who evaluated Claimant at his attorney's request, rated him with a 43 percent whole person permanent impairment referable to his work-related cervical spine injury.

[1] Claimant also suffered from congenital spinal stenosis, meaning that his spinal canal already was very narrow at those levels. The purpose of the surgery was both to assist his recovery and to prevent further injury.

7. As an impairment rating of this magnitude suggests, Claimant continues to suffer even now from a number of injury-related symptoms, none of which are expected to improve significantly in the future. These include:

- Quadriparesis, or weakness in both his arms and his legs;
- Chronic pain and restricted range of motion in his neck;
- Occasional neuropathic (burning) pain in his lower legs, ankles and feet;
- Decreased fine motor coordination in his hands;
- Decreased sensation in his upper extremities;
- Increased muscle tone, spasticity and contracture in his lower extremities;
- Chronic edema (swelling) in his lower calves and feet; and
- Impaired balance, station and gait.

8. Though originally diagnosed as a cervical cord contusion, Claimant's work-related injury is now best described as central cord syndrome, meaning that the injury has caused more damage to the center (as opposed to the periphery) of the spinal cord. The spinal cord is made up of both motor and sensory nerve tracts, which together control one's ability to move and feel one's extremities. When the central cord becomes compromised, the result is often decreased strength and sensation in the upper extremities, which explains both the weakness and fine motor deficits in Claimant's arms and hands, and increased weakness, spasticity and tone in the lower extremities, which explains his impaired balance, station and gait. The nerves that control autonomic function – sweating and vascular tone, for example – also become impaired, which likely accounts for the chronic swelling in Claimant's feet and ankles. Central cord syndrome is the most common type of incomplete spinal cord injury.[2] The prognosis for recovery depends on the severity of the injury, and is worse in patients over fifty.

9. Claimant's impaired balance, station and gait have been well documented in the medical records. Deficits in these areas were apparent in surveillance video taken while he entered and exited a car on December 19, 2012. They also were evident at the February 20, 2013 formal hearing. Claimant's posture was bent forward, and he walked with his feet close together, taking mincing steps in a slow, shuffling gait and using either a rolling walker or a cane for support. He was able to put on his coat while standing without support, but the process appeared difficult for him.

[2] An "incomplete" spinal cord injury is one in which the patient retains some function at the affected level(s), as opposed to a "complete" injury, in which the loss of function is total.

10. There is credible evidence that Claimant's central cord syndrome has worsened since 2010. Relative to her prior evaluation in November 2010, when Dr. Huyck had occasion to re-evaluate Claimant in January 2013 she observed decreased range of motion and increased tenderness in his neck, decreased sensation in his arms, increased spasticity in his legs and markedly hyperactive reflexes throughout his upper and lower extremities. These observations were consistent with Claimant's report as to the progression of his symptoms. Claimant also reported gradually worsening function over this period of time, including decreased fine motor coordination, increased low back pain and several near falls. Of note, despite these progressive symptoms, Claimant had not sought any neurosurgical follow-up treatment since 2009. Dr. Huyck interpreted this as evidence of his passive nature with respect to medical self-advocacy. I find this assessment credible.

Claimant's Prior Medical History

11. Claimant's prior medical history includes treatment for chronic low back pain, hypertension, osteoarthritis, angina pectoris, coronary artery disease, cardiomyopathy and hyperlipidemia. Barely ten days prior to the December 2008 work injury, he reported to his primary care provider that he had been suffering from occasional bowel and bladder incontinence for the past year, though no definitive diagnosis for this problem had yet been reached.

12. At various intervals in the past, Claimant also treated for symptoms of anxiety and depression. He thought that perhaps he suffered from attention deficit hyperactivity disorder (ADHD), but neither a psychological evaluation in 1997 nor a neuropsychological evaluation in 2002 found sufficient evidence to support that diagnosis. In 1997 he tested in the high average range for intelligence. Prior to the work injury, he had no history of hallucinations, delusions or psychotic behavior.

13. Although never definitively diagnosed with ADHD, the medical records document that prior to his work injury Claimant at times reported symptoms indicative of long-standing deficits in executive function and cognitive skills. For example, while engaged in psychotherapy from 1998 to 2000, he described difficulties with attention, concentration, forgetfulness and disorganization dating back to his childhood. His therapist noted other areas of concern as well, including his lack of assertiveness and failure to follow through on suggestions made during therapy. A neuropsychological evaluation in 2002 described similar problems with sustained attention and information processing speed, the latter likely affecting his ability to complete tasks in a work environment.

14. Contradictory medical evidence was submitted as to whether Claimant's preexisting low back pain has been aggravated by his work-related central cord syndrome. In her April 28, 2010 office note, Dr. Johnson, the treating physiatrist, stated that his ongoing low back pain was "certainly" related at least in part to the lower extremity muscle contractures caused by his cervical injury. She reiterated that opinion in the context of her March 24, 2011 note. However, her deposition testimony was to the opposite effect.

15. Dr. Huyck's opinion on this issue was unequivocal. In both her November 2010 permanency evaluation and in her formal hearing testimony, she asserted that the lower extremity symptoms attributable to Claimant's cervical spinal cord injury, for example, muscle contractures resulting in imbalance, altered gait and decreased mobility, place increased stress on his lower back and thus negatively affect the ongoing degenerative changes in that area. I find this analysis credible.

Claimant's Work Capacity

16. Claimant has undergone three functional capacity evaluations since his injury, all performed by the same occupational therapist, in March 2010, September 2010 and May 2012. All three evaluations documented similar findings, including:

- Deficits in both posture and gait;
- Impaired balance, resulting in a moderate fall risk;
- Increased muscle tone, limited range of motion and pain in both upper and lower extremities;
- Limited cervical range of motion;
- Significantly limited fine motor coordination;
- Limited ability to bend from waist, and inability to squat; and
- Limited endurance.

17. Functionally, as a consequence of these deficits, the evaluator suggested that Claimant's activities be restricted as follows:

- No lifting at all from floor to waist or from shoulders to overhead, and no more than 15 pounds occasionally from knees to shoulders; and
- No carrying more than five to ten pounds with one hand (leaving the other hand free to grasp a cane, railing or other support for balance).

18. With these restrictions in mind, in all three evaluations the evaluator concluded that Claimant was capable of tolerating part-time work (up to four hours per day, five days per week) at a sedentary physical demand level, but only if the job met the following criteria:

- It could be performed primarily sitting, with breaks to stand and walk briefly after every 20 minutes;
- It would not require manipulating extremely small (less than one inch) parts;
- It would not require work at a fast pace; and
- It would not require bending or extended arms' reach.

19. In all three evaluations the evaluator concluded that Claimant would not tolerate returning to work as a truck driver. Nor would he be capable of even sedentary full-time work, because of his need to recline or semi-recline for at least one hour after every four hours of upright activity in order to control his back pain.

20. Following Claimant's first functional capacity evaluation in March 2010, Dr. Johnson surmised that he would be capable of part-time sedentary work "once we get him reconditioned." She felt similarly following the second evaluation in September 2010, which documented improvements in some areas (upper extremity strength, fine motor coordination and endurance, for example), albeit with no concomitant increase in overall work capacity. As of her December 2011 deposition, Dr. Johnson continued to maintain that Claimant was capable of working in accordance with the part-time sedentary restrictions noted above. Of note, however, the record does not support a finding that Claimant has ever attained the reconditioned state Dr. Johnson anticipated in 2010.

Vocational Rehabilitation

21. Claimant has not worked since his December 2008 accident. Besides truck driving, his prior experience includes work as a home health aide. He did not graduate from high school, but later attained his GED. Claimant has minimal computer skills and no sedentary work experience.

22. In June 2010 Claimant was found entitled to vocational rehabilitation services, following an evaluation by Fran Plaisted, a certified vocational rehabilitation counselor. Ms. Plaisted holds a master's degree in rehabilitation counseling and is a fellow of the American Board of Vocational Experts. She has more than 25 years of experience in the field.

23. By the time Ms. Plaisted became involved in his case, Claimant already was living at The Woodward Home, where staff assumed responsibility for many of his daily living activities, including laundry, meal preparation and some aspects of personal hygiene. Most notably, at The Woodward Home Claimant was absolved of responsibility for managing his own medical care – scheduling and attending doctors' appointments, accurately and appropriately reporting new or worsening symptoms and remembering when to take the numerous medications that have been prescribed for his various medical conditions.

24. As many of the skills Claimant would need for reentering the workforce were similar to those he needed in order to live independently, Ms. Plaisted identified successfully transitioning him out of The Woodward Home as the first step in his vocational plan. To assist in that process, Kim Patten, an occupational therapist, was retained to assess Claimant's capacity for independent living. In her 27 years of practice, Ms. Patten has performed more than 2,700 such assessments.

25. Ms. Patten first evaluated Claimant at The Woodward Home in July 2010. As part of her evaluation, she interviewed care staff and also observed Claimant while he organized his room. Among her observations:

- Claimant struggled with hoarding issues, with the result that keeping his room clean was a challenge for him;

- He showed deficits in the executive function skills that predict competence in daily living, including slow processing speed, distractibility, poor "big picture" organization and difficulties with working memory, problem solving and decision making; and

- According to The Woodward Home staff, he had difficulty managing his complex medical situation independently, with impaired judgment and insight with respect to following through on medical recommendations and attending appointments.

26. Despite these challenges, Ms. Patten noted that Claimant demonstrated good safety awareness in his small, cluttered room, had very good functional verbal reasoning and was highly motivated to reach his goal of independent living and eventual return to work. To assist him in this process, she recommended that he work with a team consisting of a community-based occupational therapist, a life skills trainer, assisted living facility staff and others to develop and reinforce strategies in such areas as homemaking, meal preparation, laundry, medication management and medical and personal self-advocacy.

27. With Ms. Patten's independent living assessment in hand, in September 2010 Ms. Plaisted proposed a preliminary Return to Work Plan. The plan's objective was first to clarify Claimant's physical capacity, aptitudes and interests and then to develop a suitable vocational goal "if this is possible for [him]." In addition to implementing Ms. Patten's independent living recommendations, to move forward with the plan Ms. Plaisted anticipated that Claimant would undergo an updated functional capacity evaluation and a vocational assessment. Once those steps had been successfully completed, she would begin vocational exploration of appropriate sedentary to light unskilled occupations and Claimant would investigate appropriate pre-vocational activities, such as volunteering in his community.

28. According to The Woodward Home care staff progress notes, from September through October 2010 Claimant was working consistently towards the goal of becoming more independent with managing his own medications. Unfortunately, however, in November 2010 his psychological health began to deteriorate significantly. Between December 2010 and May 2011 he was hospitalized on four separate occasions for psychiatric evaluation and treatment of paranoia, delusions and both auditory and visual hallucinations.[3] In addition, in March 2011he was hospitalized for treatment of physical injuries sustained when he attempted suicide by driving his car into a tree. As a result of these events, both Ms. Patten's program for transitioning Claimant to more independent living and Ms. Plaisted's vocational rehabilitation efforts were suspended indefinitely.

29. By the fall of 2011 Claimant's psychological health had stabilized. At his attorney's request, in September 2011 Ms. Patten conducted a second independent living assessment. This time she used a standardized assessment tool, the Assessment of Motor and Process Skills, or AMPS, to measure the quality of Claimant's performance on activities of daily living. In AMPS testing, a certified rater uses specific criteria to score how well a person is able to complete two self-selected daily living tasks. The criteria cover both motor ability (moving oneself or task objects) and process ability (selecting and using task materials, carrying out individual task steps and modifying performance when problems are encountered). Task items are calibrated for their level of difficulty, such that the results are indicative of the motor and process skills required generally to perform activities of daily living. For this reason, occupational therapists commonly use tests such as the AMPS to inform their clinical judgment as to whether a person is likely to experience difficulty living independently or not.

[3] Claimant has not alleged that the deterioration of his psychological health was in any way related to his work injury; the medical record is at best inconclusive on this issue.

30. The two tasks Claimant chose for his AMPS testing were making his bed and shopping, both familiar and relevant daily living activities for him. His score on the motor skills scale was indicative of increased clumsiness and physical effort; on the process skills scale his score indicated decreased efficiency. Both scores were well below those of healthy, age-matched peers. In Ms. Patten's clinical judgment, the test results corroborated her conclusion that Claimant likely would need assistance to live independently in the community, and "may even require moderate to maximal support." I find both her reliance on the AMPS test data and her analysis credible.

31. Concurrently with Ms. Patten's assessment and at Ms. Plaisted's referral, in September 2011 Claimant also underwent a vocational assessment with Robert Gray, an experienced evaluator. The purpose of this type of assessment is to assist in the process of developing an appropriate vocational goal by identifying a person's specific aptitudes and interests. This is particularly useful information in cases, as here, where the recipient of vocational rehabilitation services has only minimal transferable skills.

32. As part of his assessment, Mr. Gray interviewed Claimant and administered various tests to measure his learning ability, academic achievement and career abilities and interests. From this information, he identified both assets (strengths) and considerations (barriers) relevant to Claimant's vocational potential. Among the assets:

- High average (68th percentile) receptive vocabulary (understanding of spoken, individual words);
- Average word knowledge and reading achievement;
- Pleasant, cooperative and motivated.

Among the considerations:

- Below average (10th percentile) ability to follow simple to moderately complex oral directions;
- Below average (8th percentile) verbal reasoning (a predictor of success in academic courses);
- Below average (2nd percentile) perceptual speed and accuracy (a predictor of success in certain clerical tasks);
- Below average (17th percentile) language usage (ability to recognize grammar and punctuation errors);
- Below average (8th percentile) manual speed and dexterity (ability to make rapid and accurate movements with one's hands);

- Below average (1st and 2nd percentiles) spatial relations and hands-on spatial perception;

- Very slow typing speed (4 words per minute), with only fair accuracy (78 percent);

- Spinal injury with significant limitations;

- Attention and concentration issues.

33. In sum, although he perceived that Claimant was highly motivated to return to work, Mr. Gray doubted whether this would be possible. His past work experience does not provide him with any directly transferable skills. His upper extremity limitations exclude production work, and his deficient computer skills exclude computer-based occupations. His age and physical limitations alone pose significant challenges to competitive job placement, and maintaining the level of concentration and work productivity generally required at the competitive work level likely would be extremely difficult for him. For these reasons, in Mr. Gray's opinion substantial questions existed as to Claimant's ability to sustain competitive employment. I find this analysis extremely credible.

34. Should consideration be given to competitive employment, Mr. Gray recommended at a minimum that Claimant attempt a volunteer placement first, in a setting where he might work in a supportive environment, on his own schedule and at his own pace. In addition, Mr. Gray suggested that a social worker might assist Claimant to access appropriate social and recreational opportunities in the community, which would be beneficial in terms of both quality of life and mental health. I find these to be sensible recommendations, though based on the contents of Mr. Gray's report I question whether they would lead ultimately to competitive employment even if implemented.

35. Following Mr. Gray's vocational assessment, in May 2012 Claimant underwent a final functional capacity evaluation, which confirmed that both his part-time sedentary work capacity and his functional restrictions remained unchanged. *See* Findings of Fact Nos. 16-18, *supra.* Ms. Plaisted did not make any attempt subsequently either to secure a volunteer placement for Claimant, as Mr. Gray suggested, or to explore other vocational possibilities. Instead, in June 2012 she filed a vocational rehabilitation closure report with the Department of Labor. As grounds for the closure, Ms. Plaisted asserted that Claimant's disability was too severe to allow for a return to either suitable or gainful employment.

36. In her formal hearing testimony, Ms. Plaisted explained the rationale behind her decision to abandon any further attempts at vocationally rehabilitating Claimant. First, efforts to transition him to a more independent living situation, the initial step contemplated by her preliminary Return to Work Plan, had proven unsuccessful. More importantly, his functional capacity restricted him to sedentary work, but he lacked the job skills necessary for most sedentary occupations in this area, such as typing with speed and accuracy, working with his hands and following directions. To further complicate matters, his balance and gait issues would require accommodation, and his fall risk posed a safety hazard. Last, because his deficits were a consequence of his physical and cognitive limitations, they were unlikely to improve with further training. For all of these reasons, Ms. Plaisted concluded that Claimant could not reasonably be expected to be able to resume either suitable or even gainful employment. I find this analysis persuasive.

37. On cross examination, Ms. Plaisted asserted that Claimant's mental health issues, which resulted in a suspension of vocational rehabilitation services from November 2010 until September 2011, did not affect her ultimate decision to close his file in any respect. Even the initial Return to Work Plan contemplated only vocational exploration; his prospects for actual re-employment were always guarded. In fact, from Ms. Plaisted's observation Claimant appeared both more stable and more engaged in the vocational rehabilitation process after his mental health issues had subsided than he had previously. In her opinion, however, the physical and cognitive barriers to re-employment remained insurmountable. I find this reasoning credible.

38. Defendant's vocational rehabilitation expert, Dennis King, disagreed with Ms. Plaisted's analysis. Mr. King holds a master's degree in rehabilitation counseling, and has more than 35 years' experience in the field. At Defendant's request, he reviewed Claimant's medical records, Ms. Plaisted's vocational rehabilitation progress reports, various deposition transcripts (including both Claimant's and Ms. Plaisted's) and surveillance video. He did not personally interview or meet with Claimant.

39. Using information gleaned from the source materials he reviewed, Mr. King completed a Vocational Diagnosis and Assessment of Residual Employability, or VDARE, analysis. This is an objective process in which a person's physical capacities and transferable skills are matched to occupations classified in the Dictionary of Occupational Titles to identify suitable jobs. Mr. King then conducted labor market research to identify suitable employment opportunities in the Keene, New Hampshire area, where Claimant lives. In all, Mr. King identified 14 current job openings that in his opinion were consistent with Claimant's part-time sedentary work capacity, including Walmart greeter, car lot attendant, shuttle bus driver, various sales clerk and cashier positions, greeting card merchandiser, dental office receptionist, security guard and hospital food service host.

40. While I do not dispute that the jobs Mr. King identified are all appropriately classified as part-time sedentary, I find from other evidence in the record that Claimant likely would not be a suitable candidate for most of them. For example, four of the positions require operating a cash register and handling money, tasks that would be difficult given the manual speed and dexterity deficits that were documented in Mr. Gray's vocational assessment, *see* Finding of Fact No. 32 *supra*. Three others require shelving, carrying or straightening merchandise, and one requires preparing and delivering food trays, all tasks that conceivably would be problematic given Claimant's need to keep one hand free for balance and support, *see* Finding of Fact No. 17 *supra*. One likely requires some degree of typing proficiency, which again, Claimant lacks, *see* Finding of Fact No. 32 *supra*.

41. Given Claimant's strongly voiced desire to return to work, and finding no absolute barriers to his ability to do so, Mr. King concluded that Claimant likely was capable of engaging in regular, gainful employment. Again, viewing the record as a whole I find the evidentiary support for his opinion in this regard lacking.

Expert Opinions as to Permanent Total Disability

42. The parties each presented expert medical testimony as to whether Claimant is permanently and totally disabled. Dr. Glassman, a board certified physiatrist, conducted an independent medical evaluation at Defendant's request in December 2012. Based on his findings, which he described as consistent with those documented in the three functional capacity evaluations referenced in Finding of Fact Nos. 16-19 *supra*, he concluded, to a reasonable degree of medical certainty, that Claimant has a part-time sedentary work capacity and therefore is not permanently and totally disabled.[4]

43. In reaching this conclusion, Dr. Glassman noted that Claimant had maintained good strength in both his upper and lower extremities, and that he could ambulate, sit and stand. Considering the 14 job prospects that Mr. King had identified in his vocational assessment, Finding of Fact No. 39 *supra*, Dr. Glassman stated that with the possible exception of cashiering work, all were viable employment opportunities.

[4] As noted above, Finding of Fact No. 20 *supra*, at least as of her December 2011 deposition Dr. Johnson, Claimant's treating physiatrist, also concluded that he had a part-time sedentary work capacity. She did not specifically state an opinion as to whether he was or was not permanently totally disabled, however.

44. Dr. Glassman rejected the notion that Claimant might pose a danger to himself or others in a work environment by virtue of his impaired balance and consequent risk of falling. According to his review of the medical records, Claimant had not suffered any recently documented falls. In fact, however, the medical records document at least two specifically reported falls since October 2010,[5] as well as numerous references by various treatment providers identifying Claimant as a fall risk.[6]

45. Claimant's expert medical witness, Dr. Huyck, sharply disagreed with Dr. Glassman's assessment as to work capacity. In her opinion, the results of the three functional capacity evaluations must be interpreted in an appropriate context. Physical limitations such as impaired gait and balance take on added significance in light of Claimant's apparent tendency to overestimate what he can and cannot do, and in a person with his extensive medical issues even a minor injury could have far-reaching consequences. I find this analysis convincing.

46. As part of her clinical practice, Dr. Huyck certifies patients to return to work, and safety – for both the patient and for his or her co-workers – is a primary concern. Considering Claimant's limitations from a common sense perspective rather than in a controlled functional capacity testing environment, in her opinion there was "no way" he could safely return to work, in any setting and with any accommodation. For that reason, she concluded with certainty that he is permanently and totally disabled.

Opinions as to Claimant's Ability to Live Independently

47. Prior to his work injury, Claimant had resided in his own home, located in Antrim, NH. Unfortunately, at some point in the days following his accident the house became flooded due to frozen and bursting pipes. Because he was hospitalized at the time, Claimant was either unaware of or unable to tend to the damage, with the result that the home became infested with mold and was rendered uninhabitable. Ultimately the bank assumed ownership of the property. As a consequence of this ill-fated circumstance, even if Claimant were to be discharged from The Woodward Home (the assisted living facility in which he has resided since 2009), currently he has no home to return to.

(a) Kim Patten

[5] As documented in The Woodward Home care staff progress notes, the first incident occurred in October 2010, when Claimant fell while walking to the bathroom. In May 2011, he fell as he was trying to get up from his bed to use the bathroom.

[6] For example, Dr. Johnson reported in May 2010 that Claimant was at an increased fall risk according to a recent physical therapy re-evaluation. During a May 2011 in-patient hospitalization, he was identified as a fall risk, having reported three falls in the previous six months. All three functional capacity evaluations (March 2010, September 2010 and May 2012) categorized him as a moderate fall risk according to the Berg Balance Scale, and a physical therapy assessment in June 2011 put him at a high risk of falls according to the Timed Up-And-Go Test.

48. As noted above, Findings of Fact Nos. 24-26 and 29-30 *supra*, Kim Patten, an occupational therapist, first evaluated Claimant's ability to live independently in July 2010, and then again in September 2011. On both occasions she concluded that he would need life skills training and assistance to do so safely.

49. In August 2012 Ms. Patten conducted a third independent living assessment. As with the prior evaluations, this one took place at The Woodward Home. Among her pertinent observations:

- Claimant was not receiving any rehabilitative therapies, and despite physical therapy recommendations was not routinely engaged in an ongoing exercise program;
- He continued to have difficulty managing his complex medical situation independently, and needed assistance with both discrete tasks, such as medication management, and broader tasks, such as medical self-advocacy;
- He was independent in basic self-care, such as showering and toileting, with assistive devices;
- He was independently mobile with the use of a seated walker and cane, but his mobility was limited by pain and decreased endurance and was not sufficient for independent function in the community;
- With ongoing staff monitoring his hoarding behaviors had decreased significantly;
- He continued to struggle with using his calendar and keeping scheduled appointments; and
- He continued to exhibit memory and concentration issues, and had functional difficulties staying focused and on task.

50. According to Ms. Patten's analysis, Claimant's pre-injury life skills were marginal, as exemplified by hoarding behaviors, a non-existent social support network and minimal home management routines and responsibilities. Nevertheless, they were adequate to meet his needs, because he had structured his life around a job that kept him on the road and away from home much of the time. Since his work injury his level of function has changed significantly, however. The demands of his life now need to be met in the context of complicated medical issues, chronic pain, decreased mobility and increased executive function deficits. In Ms. Patten's opinion, Claimant lacks the ability to safely manage these demands independently.

51. Chief among Ms. Patten's safety concerns is the increased fall risk presented by Claimant's effortful gait, narrow stance and abnormal posture. Having to focus so much of his attention on getting his arms and legs to move leaves little time to react to unforeseen obstacles or hazards, such as uneven ground or household clutter. Ms. Patten also feared that certain of the restrictions noted in Claimant's functional capacity evaluations – for example, that he avoid lifting any weight from floor to waist, or that he always leave one hand free for support and balance – would be problematic when performing such tasks as laundry or cooking in a home environment. Because he does not appear to fully understand the functional implications of his quadriparesis, he might undertake such activities in an unsafe manner, without recognizing the risks involved.

52. In her formal hearing testimony, Ms. Patten expressed doubt that a pre-planned schedule of services (provided by some combination of home health aide, personal care attendant and/or visiting nurse) would afford Claimant the level of assistance necessary for him to safely live independently in a private home setting. His symptoms vary from day to day, and his fall risk is by nature unpredictable. Beyond that, whether provided in a private home setting or in a facility such as The Woodward Home, in Ms. Patten's opinion the assisted living level of care Claimant requires must include access to skilled nursing services, on a fairly frequent rather than intermittent basis, to assess his symptoms, manage his medications and accompany him to medical appointments. Without this component, he is at risk for further decline physically.

53. I find Ms. Patten's analysis and opinions well supported by the record and credible in all respects.

(b) *Lisa Tateosian*

54. Lisa Tateosian, the director of nursing at The Woodward Home, also testified as to Claimant's need for an assisted living level of care. Ms. Tateosian is a registered nurse. She interacts daily with Claimant and therefore is well acquainted with both his capabilities and his limitations.

55. As a licensed assisted living facility, The Woodward Home provides cooking, housekeeping and laundry services, assistance with personal care and opportunities for social interaction. Because it is not a skilled nursing facility, care staff can assist with medication management, but cannot administer medications themselves. Likewise, care staff can assist with medical assessment and advocacy issues, but the facility is not required to maintain skilled nursing coverage on a 24-hour basis.

56. Ms. Tateosian corroborated Ms. Patten's observations as to Claimant's limited mobility, impaired balance and risk of falling, though she acknowledged that he consistently has demonstrated the ability to negotiate a flight of stairs independently during routine fire drills at the facility. She acknowledged as well that Claimant is independent with most of his personal care and hygiene. She doubted whether he would be able to manage his own medications consistently without assistance.

57. Ms. Tateosian admitted that many of the services Claimant receives at The Woodward Home could be provided in a private home setting as well. In her opinion, this would not be a safe environment for him given the amount of supervision she believes he requires. I find this opinion credible, though at the same time I acknowledge the possibility that her assessment has been colored, whether consciously or otherwise, by her employer's direct financial interest in maintaining Claimant as a resident.

(c) April Pettengill

58. April Pettengill is a registered nurse and certified nurse life care planner. At Defendant's request, she reviewed Claimant's medical records, various depositions and the formal hearing testimony of both Claimant and Ms. Tateosian. She also met with Claimant and conducted a functional/home assessment at The Woodward Home in February 2013.

59. Ms. Pettengill used two published, well-recognized indexes to measure Claimant's ability to live independently. The Katz scale measures the ability to perform basic activities of daily living, or ADLs – bathing, dressing, toileting, transferring, continence and feeding. The Lawton scale measures so-called higher order or instrumental ADLs – using the telephone, shopping, food preparation, housekeeping, laundry, transportation, medication management and handling finances.

60. According to Ms. Pettengill's rating, Claimant's score on the Katz scale indicated that he was independent in all basic ADLs. His score on the Lawton scale was more difficult to measure, because The Woodward Home had assumed responsibility for many of the higher order tasks included. Based in part on Claimant's own estimation of his abilities, Ms. Pettengill identified medication management, transportation, meal preparation and housekeeping as possible areas of concern.

61. In Ms. Pettengill's opinion, Claimant does not require full-time assisted living care to accommodate his limitations in any of the problem areas she identified. Managing his medications might require skilled nursing oversight, but were he equipped with an automatic pill dispenser this could be accomplished with only weekly (or even monthly) visits. Non-skilled care providers could offer whatever additional assistance he might need.

62. On cross examination, Ms. Pettengill acknowledged that she could not predict how much assistance Claimant would require in a private home setting until he actually became situated in one. For example, when asked whether he could safely use a vacuum given his impaired balance, she demurred, stating that until she watched him attempt it she could not say whether he would be able to do so or not. When asked if his fall risk might make it unsafe for him to live alone, her response was that the alternative – full-time supervision – was "cost-prohibitive." While I appreciate the candor of these responses, they render Ms. Pettengill's opinion altogether too nebulous for me to credit.

(d) Drs. Johnson, Glassman and Huyck

63. Drs. Johnson, Glassman and Huyck all stated opinions as to Claimant's ability to live independently. Drs. Johnson and Glassman both asserted that aside from needing assistance with medication management Claimant likely could safely live independently. According to Dr. Johnson, he had done so successfully before his work injury despite somewhat limited executive functioning skills, and the injury had not changed these in any respect. According to Dr. Glassman, skilled nursing services could assist with in-home medication administration, and a home health aide could help with cooking, cleaning and laundry.

64. Dr. Huyck strongly disagreed. Her concerns for Claimant's ability to safely live independently were based on a number of factors, including his below-average scores on Ms. Patten's AMPS testing, *see* Finding of Fact Nos. 29-30 *supra*, his passivity with respect to medical self-advocacy, *see* Finding of Fact No. 10 *supra*, the fall risk presented by his gait and balance issues, and his apparent lack of insight as to his capabilities and limitations. Not having a job to assist in maintaining routine and structure in his life had caused his executive function deficits to become more problematic, and preexisting behaviors such as hoarding now posed heightened safety risks. For all of these reasons, in Dr. Huyck's opinion it was "abundantly clear" that he could not live independently. I find her analysis persuasive.

65. Dr. Huyck acknowledged that it might be possible for Claimant to receive appropriate assisted living services in a private setting rather than in a facility such as The Woodward Home, though she doubted whether this would be a cost-effective alternative. The assistance he would need likely would depend at least in part on environmental factors, such as stairs, in whatever home he chose.

(e) *Claimant's Self-Evaluation and Stated Preference for Independent Living*

66. In his formal hearing testimony, Claimant expressed his desire to live in a more independent setting, perhaps at a senior housing complex with home health aide assistance as necessary. He handles his own finances, does his own shopping and can use a cell phone. He has been cleared to drive without restriction since 2010, though since his 2011 car accident he no longer has a serviceable vehicle. He believes himself capable of preparing his own meals, doing his laundry and managing his medications. He acknowledged that if he falls, he sometimes needs assistance getting up. Notably, he admitted that he has fallen down the stairs while evacuating for fire drills at The Woodward Home, but has not reported the incidents "because they make a big deal about it."

67. I have no reason to doubt Claimant's ability to be independent with some of the activities listed above, for example, managing his finances, communicating on a cell phone or even doing light grocery shopping. However, based on the record as a whole I remain unconvinced that he is capable of managing his own medications, that his gait and balance deficits do not pose a significant fall risk, or that he is capable of safely cooking and cleaning without regular assistance.

CONCLUSIONS OF LAW:

1. The disputed issues in this claim are, first, whether Claimant is permanently and totally disabled, and second, whether Defendant is obligated to pay for his continued residence in an assisted living facility such as The Woodward Home. As to the first issue, Defendant asserts that Claimant has failed to sustain his burden of proving entitlement to permanent total disability benefits, because he has a work capacity and has not yet exhausted his vocational rehabilitation options. As to the second issue, Defendant asserts that Claimant's residence in an assisted living facility is not medically necessary, because the limited nursing and/or home health assistance he requires could be provided in a private home setting instead.

Permanent Total Disability

2. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

> The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

3. The workers' compensation rules provide further guidance. Rule 11.3100 states:

> Permanent Total Disability – Odd Lot Doctrine
>
> A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.
>
> A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

4. I acknowledge that as recently as May 2012 a functional capacity evaluation rated Claimant with a part-time sedentary work capacity. The parties presented conflicting expert testimony as to whether Claimant was or was not permanently and totally disabled notwithstanding that assessment. With emphasis on the safety issues posed by Claimant's impaired balance and gait, Dr. Huyck concluded that he was. Relying in part on Mr. King's labor market survey, Dr. Glassman concluded that he was not.

5. 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).

6. Neither Dr. Huyck nor Dr. Glassman were treating physicians; both examined the pertinent records, conducted comprehensive evaluations and were well qualified to express opinions regarding the nature and extent of Claimant's disability. However, whereas Dr. Huyck's opinion included consideration of such factors as Claimant's documented fall risk and tendency to overestimate his capabilities, Dr. Glassman's analysis did not. For this reason, I conclude that her opinion is the most credible.

7. Dr. Glassman's opinion was rendered unpersuasive by his reliance on Mr. King's vocational assessment and labor market analysis. Mr. King focused on a few specific jobs for which Claimant conceivably could apply, but disregarded how improbable it would be, given his age, education, experience, physical and mental limitations and chronic pain, for him actually to be hired. In contrast, with these factors in mind, and with Mr. Gray's vocational testing as support, Ms. Plaisted assessed Claimant's ability to compete successfully for jobs within his physical capabilities in a more realistic manner. Might someone with a part-time sedentary work capacity be hired for a cashier or receptionist job? Perhaps. But would that person be hired if he or she lacked the manual dexterity necessary to type more than four words per minute or to make change for a dollar? Almost certainly not.

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

9. 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. Claimant is permanently and totally disabled.

Compensability of Care in Assisted Living Facility

10. Under 21 V.S.A. §640(a), an employer is required to furnish "reasonable surgical, medical and nursing services and supplies to an injured employee." In keeping with the liberal construction to be given Vermont's workers' compensation law, *see St. Paul Fire & Marine Insurance Co. v. Surdam*, 156 Vt. 585, 590 (1991), the Vermont Supreme Court has broadly interpreted the term "nursing services." Depending on the circumstances it can include not only skilled nursing care such as that delivered by a registered nurse, but also unskilled care for such tasks as bathing, dressing and 24-hour safety supervision. *Close v. Superior Excavating Co.*, 166 Vt. 318 (1997); *see generally* 5 *Larson's Workers' Compensation Law* §94.03[4] and cases cited therein.

11. The claimant in *Close* suffered a severe head injury, as a result of which he required 24-hour monitoring and, at times, either skilled or unskilled nursing care as well. These services were all provided by his spouse, who sometimes performed household chores while she was "on call" for him. The employer sought to limit its responsibility for the cost of the spouse's services solely to the times when she was providing nursing care. The Court rejected this approach. Noting that the claimant's serious medical problems necessitated continuous, 24-hour coverage, it affirmed the commissioner's decision to award compensation for the spouse's "on call" time as well. In doing so, it endorsed a "flexible, case-by-case approach" to interpreting the parameters of §640(a). *Close*, *supra* at 324.

12. In claims decided since *Close*, the commissioner has distinguished between care that requires "attendance in the nursing sense" and services that are "in essence housekeeping." *Larson's Workers' Compensation Law*, *supra* at §94.03[4][d]. Cooking, cleaning, laundry and errand services that are rendered outside the ambit of either skilled nursing care or medically necessary 24-hour attendance are not compensable, notwithstanding the extent to which they might promote an injured worker's general comfort and well-being. *See, e.g., Brunet v. Brunet*, Opinion No. 09-07WC (February 23, 2007) (personal errand services not compensable); *Hanson v. J. Graham Goldsmith*, Opinion No. 11-03WC (February 28, 2003), *aff'd*, 175 Vt. 644 (2003) (housekeeping services alone, with no aspect of nursing care, not compensable); *Patch v. H.P. Cummings Construction*, Opinion No. 49A-02WC (December 6, 2002) (housekeeping services alone, with no aspect of either nursing care or 24-hour attendance, not compensable).

13. Consistent with the holding in *Close*, the commissioner has recognized that a "middle ground" level of home health assistance – something less than skilled nursing care but more than mere housekeeping – is also compensable in appropriate circumstances. For example, in *Maurice v. Merchant's Bank*, Opinion No. 46-09WC (November 25, 2009), credible expert medical evidence established the injured worker's need for six to eight hours of home health assistance daily, for such purposes as medication management, transfers, toileting and fall prevention. The fact that the aide hired to perform these tasks undertook some cooking and limited housework as well did not render her presence medically unnecessary, and therefore did not merit any reduction in the number of hours deemed compensable under §640(a). *Cf. Anderson v. Access Design*, Opinion No. 41-09WC (October 26, 2009) (home health aide services not compensable because not medically necessary).

14. The parties offered conflicting expert testimony in the pending claim as to whether the services Claimant currently receives at The Woodward Home are medically necessary, and whether an appropriate level of care could be delivered effectively in a private home setting instead. According to Defendant's experts, Dr. Glassman and Ms. Pettengill, with skilled nursing care to assist with medication management, and some to-be-determined amount of home health assistance, Claimant likely could safely live in a private home setting. According to Dr. Huyck and Ms. Patten, however, he requires far more frequent oversight, to a degree that likely would not be cost effective if delivered in a private home setting.

15. Considering the *Geiger* factors again, *see* Conclusion of Law No. 5 *supra*, I conclude that the opinions of Claimant's experts are the most credible. I find the objective evidence as to the fall risk presented by Claimant's quadriparesis particularly compelling. By its very nature, the danger posed by such a risk is unpredictable, but the potential for serious further injury should a fall occur is impossible to ignore. When Claimant's tendency both to underestimate his limitations and to overestimate his capabilities is added into the mix, the result merits far more supervision of his daily living activities than what Defendant's experts envision.

16. Defendant asserts that it should not be required to pay for Claimant to reside in an assisted living facility because the fees charged for him to do so encompass not just medically necessary services but other conveniences, such as laundry, housekeeping and cooking, as well. As noted above, the commissioner has denied coverage for such services when provided alone, but that is not the case here. The determining factor here is that the constellation of Claimant's injury-related symptoms requires continuous, on-call monitoring as a medical necessity. Defendant is not absolved of responsibility merely because housekeeping and other ancillary services are being provided at the same time. *Close, supra; Maurice, supra.*

17. Indeed, it is a pointless exercise to argue whether Claimant could or could not receive an equally appropriate level of care in a private home setting rather than in an assisted living facility. Defendant might just as easily argue that if Claimant had sustained a different injury, he would not require any home health or nursing assistance at all. The fact is that Claimant has no private home in which to live. "If wishes were horses, beggars would ride," an old English proverb admonishes. The workers' compensation statute confers rights and responsibilities according to existing circumstances, not fictional alternatives.

18. I conclude that Claimant's continued residence in an assisted living facility is medically necessary, and therefore covered under §640(a).

19. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $18,908.58 and attorney fees totaling $45,501.00. Defendant shall have 30 days from the date of this decision within which to file any objections, following which allowable costs and fees will be awarded.

ORDER:

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

(a) Permanent total disability benefits pursuant to 21 V.S.A. §646 commencing on October 15, 2010, with interest on any unpaid amounts calculated in accordance with 21 V.S.A. §664;

(b) Medical benefits pursuant to 21 V.S.A. §640(a), including but not limited to coverage of the costs associated with Claimant's residence at The Woodward Home or other medically appropriate assisted living facility; and

(c) Costs and attorney fees in amounts to be determined.

DATED at Montpelier, Vermont this 14th day of August 2013.

_____
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.