STATE OF VERMONT
DEPARTMENT OF LABOR

Larry Bohannon

v.

Town of Stowe

Opinion No. 01-15WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-02061

OPINION AND ORDER

Hearing held in Montpelier, Vermont on June 10 and 13, 2014
Record closed on September 5, 2014

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
John Leddy, Esq., for Defendant

ISSUES PRESENTED:

1. Does the statute of limitations bar Claimant from asserting a claim for workers' compensation benefits arising out of his October 1, 2007 work injury?

2. If not, is Claimant entitled to permanent total disability benefits as a consequence of his October 1, 2007 work injury?

EXHIBITS:

Claimant's Exhibit 1:	Deposition of Julie Charonko, March 25, 2014
Claimant's Exhibit 2:	Deposition of Melvin Wells, October 11, 2012
Claimant's Exhibit 3:	Deposition of Patricia Boyle, July 25, 2013
Claimant's Exhibit 4:	AIG short-term disability application, October 29, 2007
Claimant's Exhibit 5:	AIG short-term disability application, as amended by Ms. Gann, October 29, 2007
Claimant's Exhibit 6:	Claimant's letter of resignation, October 30, 2007
Claimant's Exhibit 7:	Letter from Claimant, October 30, 2007
Claimant's Exhibit 8:	Letter from Claimant, November 4, 2007
Claimant's Exhibit 9:	Notice and Application for Hearing (Form 6), October 8, 2010
Claimant's Exhibit 10:	First Report of Injury (Form 1), January 31, 2007 work injury
Claimant's Exhibit 11:	Time cards, October 2007
Claimant's Exhibit 12:	AIG disability packet, October 2007
Claimant's Exhibit 13:	Fax transmission from Ms. Gann to Ms. Boyle

Defendant's Exhibit A:	Dr. Sumner's *curriculum vitae*
Defendant's Exhibit B:	Dr. Sumner's IME report, March 7, 2014
Defendant's Exhibit C:	Dr. Keith's out of work note, February 3, 2005
Defendant's Exhibit E:	Claim for short-term disability, February 9, 2005
Defendant's Exhibit F:	Dr. Keith's out of work note, April 14, 2005
Defendant's Exhibit G:	Fax from Ms. Gann to Mr. Logston, April 14, 2005
Defendant's Exhibit H:	Dr. Abdu's return to work note, July 5, 2005
Defendant's Exhibit I:	Fax from Ms. Gann to Mr. Logston, July 5, 2005
Defendant's Exhibit J:	Letter from AIG, May 13, 2005
Defendant's Exhibit K:	First Report of Injury (Form 1), January 1, 2007 work injury
Defendant's Exhibit M:	First Report of Injury (Form 1), February 5, 2007
Defendant's Exhibit N:	Letter from Ms. Boyle, February 13, 2007
Defendant's Exhibit O:	Dr. Keith's out of work notes, October 4 and 11, 2007
Defendant's Exhibit P:	Dr. Keith's out of work note, October 16, 2007
Defendant's Exhibit W:	Employer's disability insurance form, October 30, 2007
Defendant's Exhibit X:	Letter from AIG, November 2, 2007
Defendant's Exhibit Y:	AIG Disability Approval Form, November 6, 2007
Defendant's Exhibit Z:	Letter from Ms. Gann, December 17, 2007
Defendant's Exhibit AA:	Letter from DCF, July 22, 2008
Defendant's Exhibit BB:	Employer statement, March 16, 2009
Defendant's Exhibit CC:	Letter from Ms. Bushey, November 24, 2009
Defendant's Exhibit DD:	Fax from Ms. Gann, December 2, 2009
Defendant's Exhibit EE:	Letter from Attorney McVeigh, November 4, 2010
Defendant's Exhibit FF:	Letter from Attorney McVeigh, December 6, 2010

CLAIM:

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

FINDINGS OF FACT:

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

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

3. Claimant is currently 47 years old. When he was in the eighth grade he broke his back in a snowmobile accident. As treatment for this injury, his L1 through L3 vertebrae were fused. His recovery process was very long, lasting for more than a year and a half. Claimant chose not to return to school thereafter, and did not pursue a GED. Instead he went to work for his father in the firewood business.

4. Claimant worked for Defendant, on a year-round, full-time basis, from 2001 or 2002 until October 2007. He operated a road grader and a dump truck, and also performed maintenance. Claimant experienced pain related to his prior back injury during the entire period that he worked for Defendant.

Claimant's Prior Work History

5. When Claimant was eighteen, he left his father's employ. In the ensuing years prior to commencing his job for Defendant, he worked for various employers at various jobs, including paving, lumber mill work, truck driving and operating heavy equipment. All of these jobs were very demanding physically, and Claimant was in a significant amount of pain while he did them. Nevertheless, he was able to work full-time and full-duty throughout.

Claimant's Prior Medical History

6. In 1995 Claimant began treating with Dr. Keith, his primary care physician, to control his back pain. In 2003 he suffered a heart attack; this condition was not work-related. In January 2005 he began complaining of constant and severe pain in his low back and radiating down his left leg. This condition also was not work-related. Claimant tried epidural steroid injections, but these were ineffective. Ultimately, in May 2005 he underwent an L5-S1 decompression. Unfortunately, this treatment as well provided only temporary relief.

7. Claimant was disabled from working as a result of his increased back pain from mid-April 2005 until early July 2005. During this period Defendant paid him short-term disability benefits.

8. During 2006 and early 2007 Claimant continued to have chronic low back pain with left leg radiculopathy. He managed his symptoms with narcotic medications. At one point he underwent an epidural steroid injection at L5-S1, but that provided no relief.

9. In May 2007 Claimant saw Dr. Braun, an orthopedic surgeon at the Spine Institute of New England. At that time, he reported that his low back pain, which he rated as an eight out of ten on the analog scale, was constant, and radiated from his buttock into his posterior thigh, calf and foot. For diagnostic and treatment purposes, Dr. Braun suggested a left sacroiliac joint injection, following which surgery might be appropriate.

10. In June 2007 Claimant experienced an episode where he could barely get out of bed on a Saturday. He saw Dr. Sampson at Stowe Family Practice, who diagnosed him with acute left-sided mid-back pain. As treatment, Dr. Sampson prescribed pain medications.

11. In September 2007 Claimant returned to see Dr. Abdu, the orthopedic surgeon who had performed his 2005 decompression. Claimant credibly reported that the pain in his lower back had increased, with "shooting" pain down his left leg. Dr. Abdu reviewed Claimant's imaging studies and, finding no evidence of nerve root compression or facet arthropathy, concluded that his pain generator remained unclear. For that reason, Dr. Abdu advised against any further surgical intervention.

Claimant's Work Injury and Subsequent Medical Treatment

12. On October 1, 2007 Claimant and his coworkers were resurfacing the North Hill Road in Stowe. Claimant erected construction signs, and then began shoveling gravel on top of the fabric that had been laid. After working at this task for about an hour, he threw a shovel full of gravel and immediately experienced severe pain in his lower back. Claimant credibly recalled that the pain was so severe that it brought him to his hands and knees, and that his legs went numb.

13. Claimant managed to get on the road grader and drive himself back to the town garage. He credibly testified that he informed both his supervisor, Steve Bonneau, and a coworker, Melvin Wells, that he had just hurt his back. Mr. Wells corroborated this testimony. He recalled Claimant telling him on a nice fall day that he had been hurt while working on the North Hill Road project. Mr. Wells did not remember the year, but Defendant's records indicate that project occurred on October 1, 2007.

14. Claimant first sought treatment for his injury on October 4, 2007, with Dr. Keith. He reported that his pain was excruciating and that he had trouble performing his usual work duties. Dr. Keith noted that Claimant had been struggling for the past couple of years to work with his pain, and that narcotic medications were not helping. For that reason, he recommended that Claimant apply for long-term disability benefits.

15. Claimant next saw Dr. Keith on October 11, 2007 and reported that he wanted to attempt to return to work. Dr. Keith released him to do so, but with restrictions against lifting, twisting, climbing or shoveling. Claimant's return to work was not successful, however. On October 14, 2007 Dr. Keith determined that he was totally disabled from working "until further notice." Claimant has not returned to any type of employment since that time.

16. Claimant's low back pain and left leg pain continued to be severe. He completed several courses of land and aquatic physical therapy with little relief. He underwent medial branch blocks in 2008, which provided some relief from his pain. During 2009 he received bilateral sacroiliac joint injections, which offered him some relief as well. He also underwent radio frequency ablation procedures at several vertebral levels, including L4, L5 and S1. Again, these procedures provided some relief, but he could not afford to continue them.

17. During 2010 Claimant's course of treatment consisted of narcotic pain medications and a TENS unit. His pain never abated and no surgical option existed. As a result, he continued on his narcotic regimen. Claimant credibly testified that he needed help performing activities of daily living and was very depressed given his level of pain and the fact that he could not do what he used to do.

18. Ultimately Claimant opted to discontinue his pain medications because they were "killing his stomach." Currently he struggles on a daily basis, naps frequently and is generally inactive.

Claimant's Ex-Wife's Observations of His Condition

19. Claimant and his wife, Darcie Bohannon, met in 2001 and married in 2002. At the time they married, Ms. Bohannon knew of his back condition, that he was always in pain and that Dr. Keith treated him for that pain. Ms. Bohannon credibly testified that from the time they met until October 1, 2007 Claimant always worked in pain. However, aside from the period surrounding his 2005 decompression surgery, he always managed to work full-time and full-duty.

20. After the October 1, 2007 injury, Ms. Bohannon credibly described a profound change in Claimant. He now had a pronounced limp and could not sit still or get comfortable. His sleep patterns became "all messed up." Most important, much as he wanted to, he could not physically return to work due to his pain.

21. According to Ms. Bohannon, Claimant's emotional health changed dramatically as well after the work injury. He was angry and depressed all the time. He turned away from people and became an entirely different person. This brought a wedge between them and they divorced in 2012. Ms. Bohannon was credible in all respects in this testimony.

Claimant's Work Capacity

22. Charles Alexander, an occupational therapist, testified by deposition. At Claimant's request, he performed the first of two functional capacity evaluations in February 2011. According to Mr. Alexander's clinical observation, Claimant exhibited full physical effort during the evaluation, though he demonstrated a possible tendency to over-report his pain. As for work capacity, Mr. Alexander concluded that Claimant was capable of performing light duty work on a part-time (four hours per day) basis. He was not capable of squatting or bending over while working, and would need to change his position every 15 to 20 minutes.

23. Mr. Alexander noted that Claimant's work history was primarily at manual labor, and that he had attained only an eighth grade education. He deferred to a vocational rehabilitation professional as to how these factors, when considered in light of his diminished work capacity, would impact Claimant's employability.

24. Claimant's second functional capacity evaluation occurred on April 14, 2014. While he gave full effort and was willing to perform the tests, at initial intake his pulse and blood pressure were both elevated. Upon learning that Claimant (a) had a cardiac history; (b) had not seen his cardiologist in some time; and (c) had self-terminated his cardiac medications, Mr. Alexander determined that it would be unsafe to have him undergo a full evaluation. Therefore, he did not have him perform any of the lifting or material handling tasks that are necessary for a functional capacity determination.

25. Based on the observations he was able to make, Mr. Alexander concluded that Claimant was not well suited for sedentary work. His standing tolerance had declined since his 2011 evaluation, and he demonstrated limitations with sitting as well. However, as was the case with his 2011 evaluation, Mr. Alexander left the issue of employability to a vocational rehabilitation professional. I find this analysis credible.

26. Claimant did not undergo a formal vocational rehabilitation assessment, and did not introduce any evidence from a vocational rehabilitation professional regarding his employability.

Independent Medical Evaluations

(a) Dr. Bucksbaum

27. At Claimant's request, Dr. Bucksbaum conducted an independent medical examination on December 27, 2013. Dr. Bucksbaum is board certified in physical and rehabilitative medicine, and is certified as an independent medical examiner. He also has training in interpreting functional capacity evaluations. Prior to testifying in this matter, Dr. Bucksbaum reviewed all of Claimant's pertinent records.

28. Dr. Bucksbaum diagnosed Claimant with an L2 burst fracture, L5 herniated disc, lumbar-sacral facet syndrome and multilevel lumbar spondylosis, and also with depression secondary to these conditions. In Dr. Bucksbaum's opinion, Claimant suffered an aggravation of his underlying lumbar disease while he was shoveling gravel for Defendant on October 1, 2007. He based this opinion primarily on the fact that although Claimant had suffered from pre-existing, chronic low back pain with radiculopathy prior to that time, his condition had been stable, and he had been able to work full-time and full-duty (though not pain-free) for virtually all of his adult life. After the shoveling incident, however, his ability to compensate for his pain dramatically decreased, with a corresponding decline in his ability to work. Thus, despite the fact that Dr. Bucksbaum did not identify specific damage to a particular anatomical structure, he found sufficient evidence in Claimant's markedly increased pain and severely decreased ability to function, with no return to baseline since, to support his conclusion that an aggravation of the underlying condition had occurred. I find this analysis credible.

29. Dr. Bucksbaum determined that Claimant had reached an end medical result as of the date of his examination, with a 25 percent whole person permanent impairment referable to his work injury.

30. With respect to future medical treatment, in Dr. Bucksbaum's opinion Claimant requires a home exercise program and periodic follow-up for pain management. When his condition flares, as is likely to occur from time to time, Dr. Bucksbaum recommended a short course of physical therapy, consisting of two or three visits. For the depression related to his chronic back pain, Dr. Bucksbaum recommended therapy and perhaps an antidepressant. I find these treatment recommendations appropriate.

31. Regarding Claimant's work capabilities, Dr. Bucksbaum imposed the following restrictions:

- Avoid extremes in lumbar range of motion and prolonged lumbar positions;
- Allow for a five minute break every 30 minutes;
- Avoid frequent lifting, bending, twisting, crawling, stooping, squatting, kneeling, long standing and sitting and exposure to cold or humid environments; and
- Avoid the use of vibration-causing tools and exposure to unprotected heights.

32. With these restrictions in mind, in Dr. Bucksbaum's opinion the cumulative effect of Claimant's multiple orthopedic conditions has rendered him incapable of returning to full-time uninterrupted reliable vocationally relevant competitive work. He might be able to sustain part-time work (up to three hours per day), but only on a limited basis and in a sheltered environment where pace, quality and productivity are not significant criteria for his success. I find this analysis credible in all respects.

(b) *Dr. Sumner*

33. At Defendant's request, in February 2014 Dr. Sumner, who is board certified in preventive and occupational medicine, performed an independent medical evaluation of Claimant. Prior to testifying, he reviewed all of the relevant records.

34. Dr. Sumner diagnosed Claimant with chronic lumbar back pain with left leg pain. In his opinion, the October 1, 2007 work incident caused Claimant to suffer a temporary flare of his chronic back pain, which returned to its baseline at the end of October 2007. The medical basis for Dr. Sumner's opinion was as follows:

- Claimant's pre-existing, chronic condition was not stable at the time of his work injury, as evidenced by the fact that he had pursued additional treatment as recently as one month prior thereto; and
- No physician had yet placed Claimant at end medical result for his prior condition.

35. Dr. Sumner agreed that Claimant had been experiencing ongoing chronic pain since his 1984 snowmobile accident. In addition, he conceded that he had no knowledge of Claimant's functional capacity at the time of the work incident, particularly that Claimant had been working full-time and full-duty for many years prior. Dr. Sumner agreed that this was an important fact to know before rendering an opinion, and I agree. Thus, although I concur that Claimant's condition appeared to be worsening even before October 1, 2007, I cannot ignore the fact that the work injury resulted in significantly increased pain, with a correspondingly dramatic decrease in function. I find that Dr. Sumner's failure to account for these changes undermines his opinion.

36. I find that Dr. Sumner's opinion is flawed in other respects as well. I can find no support for his conclusion that Claimant had returned to baseline by the end of October, for example. As for Claimant's work capacity, although Dr. Sumner acknowledged it was very limited, again, his opinion that this was not as a direct result of the work injury itself lacks evidentiary support. For these reasons, I find his analysis lacking.

37. Dr. Sumner did not rate the extent, if any, of the permanent impairment referable to Claimant's October 1, 2007 work injury.

Claimant's Separation from Defendant's Employ

38. Claimant credibly testified that on October 1, 2007 he told his supervisor, Steve Bonneau, that he hurt his back while shoveling gravel at the North Hill Road work site. Claimant believes he filled out paperwork for a workers' compensation claim back at the town garage that same day and gave the paperwork to Mr. Bonneau.

39. Mr. Bonneau is Defendant's highway superintendent. His duties include, *inter alia*, filing First Reports of Injury with human resources personnel. Mr. Bonneau credibly testified that he had no recollection of Claimant sustaining an October 2007 work injury or of Claimant giving him a completed work injury form for that injury. No First Report of Injury was ever filed in this case. Thus, while I find that Claimant in fact notified Mr. Bonneau of his work injury on the day it occurred, from the credible evidence I cannot find that he filled out a First Report of Injury and gave it to Mr. Bonneau to take care of.

40. Dr. Keith did not release Claimant to return to work after his October 4, 2007 office visit. After Claimant requested a release at his October 11, 2007 return visit, Dr. Keith issued one with restrictions, but Claimant managed to work for only a few days prior to being taken out of work again.

41. Towards the end of October, Claimant and his wife met with Susanne Gann, Defendant's human resources coordinator, to advise her that due to his back injury he was unable to return to work. Ms. Gann gave Claimant an application for short-term disability benefits. Over the course of the next few days, Claimant and his wife met more than once with Ms. Gann. At one such meeting, Claimant presented Ms. Gann with both a letter of resignation, dated October 30, 2007, and the completed short-term disability application. Claimant indicated on the application, which he signed on October 29, 2007, that he expected to return to work, but wrote "unknown" as to when. He did not check either of the boxes to indicate whether his injury was work-related or not.

42. Ms. Gann made three changes to Claimant's short-term disability application prior to submitting it to Defendant's insurer. First, she crossed out the word "unknown" where Claimant had written it, and instead checked the box indicating that he would not return to work. Second, she checked the box to indicate that Claimant's injury was not work-related. Last, she added a dependent to the form. Ms. Gann credibly testified that she made these changes based solely on her understanding of the information Claimant provided when he came to the office to give her the completed form. As will be seen *infra*, Finding of Fact No. 44, she did not review Dr. Keith's accompanying physician's statement in order to verify whether in fact her understanding as to the non-work-related cause of Claimant's injury was correct.

43. Given her position as Defendant's human resources coordinator, and her familiarity with both workers' compensation and short-term disability programs, I find that Ms. Gann likely understood that one consequence of checking the "not work-related" box on the short-term disability form would be to disqualify Claimant from receiving workers' compensation benefits. In contrast, I find that Claimant likely did not understand the ramifications of Ms. Gann's actions.

44. Dr. Keith provided the required physician's statement for Claimant's short-term disability application. In it he stated that Claimant's back injury was work-related. Although the application as Ms. Gann submitted it included Dr. Keith's statement, she did not take notice of it. Ms. Gann credibly testified that if she had, she would have investigated the circumstances of Claimant's injury as a workers' compensation claim.

45. In addition to suggesting that Claimant apply for short-term disability benefits, Ms. Gann also recommended that he request leave from Defendant's leave bank, which, if granted, would provide him with some income while he waited for a decision on his short-term disability application. This prompted Claimant to submit a second letter of resignation, also dated October 30, 2007, in which he requested leave from the leave bank. A few days later, on November 4, 2007 he wrote a third letter of resignation. In this letter, he indicated that his last day of work would be January 18, 2008. This date reflected twelve weeks of leave that Defendant had granted him from its leave bank.

46. During one of their interactions with Ms. Gann, Claimant's wife asked her about workers' compensation. Ms. Bohannon credibly testified that Ms. Gann did not directly respond to this query. Claimant, his wife and Ms. Gann were interacting on a variety of topics at the time, including Claimant's short-term disability application and the possibility that he might access Defendant's leave bank. Amidst the many questions Claimant and his wife were asking about these programs, I find it likely that Ms. Bohannon's workers' compensation inquiry simply got lost in the shuffle.

47. Ms. Gann also credibly testified that (a) she never asked Claimant if the October 1, 2007 work incident was a workers' compensation injury; (b) she never undertook to follow up regarding a workers' compensation claim on Claimant's behalf after October 2007; and (c) neither Claimant nor his wife contacted her after October 2007 to inquire about the possibility of filing for workers' compensation benefits.

48. In March 2009 Claimant and his wife asked Ms. Gann to assist them with Social Security Disability paperwork. Ms. Gann completed the form and Claimant currently receives disability income.

Filing the Workers' Compensation Claim

49. Julie Charonko, a workers' compensation specialist with the Department, testified by deposition. She is an acquaintance of Claimant's. On September 28, 2010 she encountered Claimant on her way home. In the course of their conversation, Claimant indicated that his back had been hurting for a long time. Ms. Charonko inquired if he had hurt it at work, to which Claimant replied, "Yes." She then asked if he was receiving workers' compensation benefits, to which he replied, "No." Ms. Charonko told Claimant she would look into it the next day at work.

50. On September 29, 2010 Ms. Charonko sent an email to Patricia Boyle, Defendant's workers' compensation insurance adjuster, inquiring whether a claim involving Claimant existed. Ms. Boyle responded that she was aware of a January 31, 2007 claim in which Claimant had strained his back while pulling on a compressor. He did not lose any time from work nor did he need medical treatment. The Department had a file on that incident but it was closed in February 2007.

51. On her way home from work that evening, Ms. Charonko gave Claimant a Notice and Application for Hearing (Form 6). Claimant's wife completed the form, and Claimant signed it on October 8, 2010. Claimant gave the form to Ms. Charonko that same day and she brought the form to work with her. She date stamped it and then gave it to a colleague to handle, as she felt it necessary to recuse herself from further involvement in the claim. I find Ms. Charonko's testimony credible in all respects.

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. The parties have raised two disputed issues. First, is Claimant barred by the statute of limitations from bringing a claim for benefits arising out of his October 1, 2007 injury? Second, is Claimant entitled to permanent total disability benefits under the "odd lot" doctrine?

Statute of Limitations

3. Vermont's workers' compensation statute imposes both a limitations requirement and a notice requirement on an injured worker who seeks to claim workers' compensation benefits. As to notice, 21 V.S.A. §656(a) states:

> A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury.[1]

4. The statute, 21 V.S.A. §660(a), allows for an injured worker to be excused from the six-month notice requirement under certain circumstances, as follows:

> Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent, or representative had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice.

5. In the present case, I have found from the credible evidence that Claimant reported his injury to Mr. Bonneau, his supervisor, on the day it occurred. Regardless of whether a First Report of Injury was actually completed, I conclude from this evidence that Defendant had notice of the accident. The six-month notice requirement does not in itself bar the current proceedings, therefore.

[1] The "date of the injury" is defined as "the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent." 21 V.S.A. §656(b).

6. The limitations requirement presents a larger hurdle, however. Immediately after the language quoted in Conclusion of Law No. 4 above, §660(a) imposes a statute of limitations, as follows:

> Proceedings to initiate a claim for a work-related injury pursuant to this chapter may not be commenced after three years from the date of injury.

7. Claimant's injury here occurred on October 1, 2007, which means that the three-year limitations period expired on October 1, 2010. However, the earliest date upon which I can find that he commenced proceedings to initiate his claim was October 8, 2010, when he filed his Notice and Application for Hearing (Form 6) with Ms. Charonko. I thus conclude that his claim falls outside the applicable statute of limitations.

8. Claimant does not assert any earlier date as the moment when he began proceedings to initiate his claim. Instead, he asserts that because Defendant did not use "clean hands" in its dealings with him, equitable principles preclude it from using the statute of limitations to avoid responsibility now.

9. As the Vermont Supreme Court has instructed, "[t]he burden is generally on the party seeking relief to take some affirmative action in order to protect his or her rights." *Longe v. Boise Cascade,* 171 Vt. 214, 225 (2000); *Smiley v. State of Vermont,* Opinion No. 12-12WC (April 15, 2012). If it fails to do so, thereby letting the statute of limitations expire, then "absent a legal disability or circumstances sufficient to invoke the doctrines of equitable estoppel or equitable tolling," there is no right to relief. *Longe, supra* at 226.

10. The doctrine of equitable estoppel promotes fair dealing and good faith "by preventing 'one party from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.'" *Beecher v. Stratton Corp.*, 170 Vt. 137, 139 (1990), quoting *Fisher v. Poole*, 142 Vt. 162, 168 (1982). In the workers' compensation context, estoppel applies "when the conduct or statements of an employer or its representatives lull the employee into a false sense of security, thereby causing the employee to delay the assertion of his or her rights." *Freese v. Carl's Service*, 375 N.W.2d 484, 487 (Minn. 1985), quoted in *Longe, supra* at 224.

11. Whether in the context of a workers' compensation claim or otherwise, a party who seeks to invoke the doctrine of equitable estoppel has the burden of establishing four essential elements:

(1) The party to be estopped must know the facts;

(2) The party being estopped must intend that its conduct shall be acted upon, or the acts must be such that the party asserting the estoppel has a right to believe it is so intended;

(3) The party asserting the estoppel must be ignorant of the true facts; and

(4) The party asserting the estoppel must rely on the conduct of the party to be estopped to its detriment.

Beecher, supra at 140, citing *Fisher, supra*. Applied to the circumstances of this case, the question is whether by reasonably relying on Defendant's actions, Claimant delayed asserting his right to claim workers' compensation benefits until after the statute of limitations had run.

(a) Did Defendant have "knowledge of the facts?"

12. I have already found that Claimant reported his work injury to his supervisor, Mr. Bonneau, on the day it occurred, *see* Finding of Fact No. 38 *supra*.[2] Having thus received "notice or knowledge" of a claimed work-related injury, Defendant had an affirmative duty, under Workers' Compensation Rule 3.0700, "to promptly investigate and determine whether or not compensation is due." This it failed to do.

13. I also have found that in her position as Defendant's human resources coordinator, Ms. Gann likely knew that by altering Claimant's short-term disability application to reflect that his injury was not work-related, she was essentially negating his right to claim workers' compensation benefits. *See* Finding of Fact No. 43 *supra*. Last, I have found that while Ms. Gann had access to Dr. Keith's accompanying physician's statement, she failed to notice that he had identified Claimant's injury as work-related, and that if she had, she would have undertaken an additional investigation. *See* Finding of Fact No. 44 *supra*.

[2] Although a First Report of Injury was never subsequently filed, *see* Finding of Fact No. 39 *supra*, this was Defendant's omission, not Claimant's. *See* 21 V.S.A. §701 and Workers' Compensation Rule 3.0500 (requiring the employer to report claimed work-related injuries to the Commissioner within 72 hours after occurrence).

14. Between Mr. Bonneau and Ms. Gann, Defendant had knowledge of the circumstances surrounding not only Claimant's October 1, 2007 work injury but also his application for short-term disability benefits. I also impute to it knowledge of its obligation to investigate whether he might have been entitled to workers' compensation benefits instead. I thus conclude that it had "knowledge of the facts" sufficient to establish the first element necessary for invoking the principle of equitable estoppel.

(b) Did Defendant intend that its conduct be acted upon, or were its acts such that Claimant had a right to believe it so intended?

15. By her acts and omissions, Ms. Gann more than adequately demonstrated her intent that Claimant seek short-term disability benefits rather than workers' compensation benefits on account of his October 1, 2007 injury. Most notably, she altered Claimant's short-term disability application to reflect that his condition was not work-related, and then submitted the application without noting that the accompanying physician's statement in fact indicated a work-related cause. *See* Finding of Fact Nos. 42 and 44. From these facts I conclude that Defendant intended to divert Claimant away from workers' compensation and towards short-term disability as his best option for obtaining the financial support he needed now that he could no longer work.

(c) Was Claimant ignorant of the "true facts?"

16. I impute to Claimant the knowledge that his October 1, 2007 work injury caused his pre-existing condition to worsen dramatically, in terms of both increased pain and decreased ability to function. However, I consider the "true facts" here to be the ramifications of filing an application for short-term disability benefits rather than pursuing entitlement to workers' compensation benefits instead. As to these facts, I have found that through no fault of his own, Claimant was ignorant. *See* Finding of Fact No. 43 *supra*. The third required element for invoking equitable estoppel is established, therefore.

(d) Did Claimant rely on Defendant's conduct to his detriment?

17. As a direct consequence of Defendant's actions Claimant was diverted away from asserting his right to workers' compensation benefits and induced instead to seek short-term disability. Consider what would have happened had Defendant not shirked its responsibility, under Workers' Compensation Rule 3.0700, to properly investigate the circumstances of his injury in a timely manner. It would have made a prompt determination as to compensability. If his claim was denied, he would have been seasonably notified and afforded an appropriate opportunity to appeal. Had he not done so within the applicable limitations period, his current claim would likely be time-barred.

18. That this is not what occurred is as a direct result of Defendant's conduct. I conclude that the final element essential for invoking equitable estoppel – Claimant's detrimental reliance – is thus established.

19. To summarize, I conclude that Claimant has established all of the essential elements necessary to invoke the doctrine of equitable estoppel against Defendant. I therefore conclude that Defendant is precluded from asserting the statute of limitations as a defense to his claim for permanent total disability benefits.

Permanent Total Disability

20. Claimant asserts that the barriers posed by his injury-related physical limitations, when considered in conjunction with his age, education, training and experience, render him permanently unemployable under the odd lot doctrine. In response, Defendant first asserts that Claimant suffered at best a flare of his back condition, which returned to its baseline at the end of October 2007. Therefore, it argues, there is no causal relationship between the work injury and his current ability to perform regular, gainful work. Second, it asserts that no valid, current functional capacity evaluation was provided, nor was a vocational assessment performed. Therefore, it argues, Claimant's claim for permanent total disability benefits is fatally flawed under Workers' Compensation Rule 11.3100.

(a) Nature and Extent of Claimant's Work Injury

21. On the issue of the nature and extent of Claimant's work injury and its effect on his ability to perform regular gainful work, the parties presented conflicting medical opinions. In such cases, 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).

22. Relying on the third factor, I conclude that Dr. Bucksbaum's opinion is the most persuasive. Dr. Bucksbaum's analysis was based on the difference between Claimant's objective functionality before and after his October 1, 2007 work injury. As Dr. Bucksbaum correctly noted, the evidence established that Claimant's ability to function on a daily basis, let alone to return to work, was severely compromised after the injury, whereas before he had always been able to work, despite his chronic back pain. The fact that his condition never returned to its pre-injury baseline justified its characterization as an aggravation rather than a flare-up, furthermore. I concur with Dr. Bucksbaum's interpretation of the facts, and for this reason I conclude that his opinion was the most compelling.

23. In contrast, Dr. Sumner's opinion was weakened by the lack of objective support for his conclusions. While I might agree that Claimant's pre-existing back condition was showing signs of worsening even before the work injury, nevertheless he was able to continue working, full-time and full-duty. That his functional abilities rapidly and permanently declined thereafter is both medically and legally significant. *See Badger v. BWP Distributors, Inc. and Maynard's Auto Supply, Inc.*, Opinion No. 05-11WC (March 25, 2011) (distinguishing *Stannard v. Stannard Co., Inc.*, 175 Vt. 549 (2003), and finding aggravation of pre-existing condition based on clear impact on claimant's pain and ability to function). Dr. Sumner failed to account for this decline. I cannot accept his unsupported assertion that Claimant had returned to his pre-injury baseline within a month after his work injury, furthermore. For these reasons, I must reject his opinion as unpersuasive.

24. While I thus conclude that Claimant's October 1, 2007 work injury caused an aggravation of his pre-existing chronic back condition, I emphasize the limited effect of this determination. Cases such as this are extremely fact-specific, and the line between merely exacerbated symptoms, on the one hand, and an aggravated condition, on the other, is often difficult to discern. *Stannard, supra* at 552. In another case, with different facts, exacerbated symptoms alone still may not be enough to establish causation. Nevertheless "the acceleration rule must be looked at in relation to the overall condition of the body, particularly as it relates to [a claimant's] ability to work and function." *Id.*, citing with approval *City of Burlington v. Davis*, 160 Vt. 183, 186 (1993) (Dooley, J., dissenting). That view is appropriate here.

(b) *The "Odd Lot" Doctrine*

25. Turning to the issue of permanent total disability, 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.

26. 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.

27. 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.

28. Nevertheless, a finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's physical capabilities are accurately assessed, and second, all corresponding vocational options are comprehensively considered and reasonably rejected. *Schaffer v. First Choice Communications*, Opinion No. 15-14WC (October 28, 2014); *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011); *Hill v. CV Oil Co., Inc.*, Opinion No. 15-09WC (May 26, 2009); *Hurley v. NSK Corporation*, Opinion No. 07-09WC (March 4, 2009); *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008).

29. In this case, Claimant is 47 years old and has only an eighth grade education. He has worked at manual labor for his entire life. He has not been employed since Dr. Keith took him out of work on October 14, 2007. His daily routine consists of struggling with his activities of daily living and napping frequently. He suffers from constant pain, but can no longer tolerate the side effects of narcotic pain medications.

30. Faced with these facts, and having imposed additional physical restrictions that severely limit Claimant's work capacity, Dr. Bucksbaum concluded that he was incapable of returning to full-time work in any relevant competitive job. His part-time work capacity was so limited as to be non-competitive as well, furthermore. I acknowledge that in forming his opinions on this issue Dr. Bucksbaum lacked both a current functional capacity evaluation and a formal vocational rehabilitation assessment. As Rule 11.3100 suggests, without such evidence in most cases his conclusion likely would not withstand scrutiny.

31. The language of the rule is suggestive, not mandatory, however, and the particular circumstances of this case justify a rare exception. *See, e.g., Prescott v. Suburban Propane*, Opinion No. 42-09WC (November 2, 2009). Although it is Claimant's burden of proof, Defendant has not proffered any evidence, either from a functional capacity evaluator or from a vocational rehabilitation professional, from which I might conclude that he in fact has any meaningful vocational options. I conclude that Dr. Bucksbaum's opinion is sufficient to establish first, that Claimant's functional abilities have been severely and permanently curtailed, and second, that he is unlikely ever to be able to sustain regular, gainful work. Claimant thus meets the criteria for permanent total disability.

32. I conclude that Claimant has sustained his burden of proving that he is permanently and totally disabled as a consequence of his October 1, 2007 work injury.

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

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant is hereby **ORDERED** to pay:

1. Permanent total disability benefits commencing on December 27, 2013 in accordance with 21 V.S.A. §645, with interest as calculated in accordance with 21 V.S.A. §664; and

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

DATED at Montpelier, Vermont this 5th day of January 2015.

_____
Anne M. Noonan
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.