

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Jennifer Bartlett

Opinion No. 02-18 WC

v.

By: Beth A. DeBernardi, Esq.  
Administrative Law Judge

Trapp Family Lodge, Inc.

For: Lindsay H. Kurrle  
Commissioner

State File No. EE-59035

**OPINION AND ORDER**

Hearing held in Montpelier on October 20, 2017

Record closed on December 11, 2017

**APPEARANCES:**

Jennifer Ciarlo Pacholek, Esq., for Claimant

Erin J. Gilmore, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant permanently and totally disabled as a consequence of her January 27, 2013 compensable work injury?

**EXHIBITS:**

Joint Exhibit I: Medical and vocational rehabilitation records

**CLAIM:**

Permanent total disability benefits pursuant to 21 V.S.A. §§ 644 and 645; and 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 her employer as those terms are defined in the Vermont 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 a 40-year-old woman who resides in Hardwick, Vermont, with her husband and their youngest son. She left high school during her senior year and has held a variety of jobs. Prior to working for Defendant, she worked as a homemaker, a day care facility

operator and a housekeeping services provider. She has also worked behind the counter at Brooks Drugstore and McDonald's.

4. In 2012, Claimant was hired by Defendant to work as a laundry attendant at its lodge.

*Claimant's Left Wrist Injury and Subsequent Medical Course*

5. On January 27, 2013, Claimant was at her work table when the telephone rang. She turned to her left to answer it, tripped on a floor mat, and fell. She does not recall hitting her left arm when she fell, but it was painful when she got up and swollen by day's end. After work, her husband took her to Copley Hospital in Morrisville.
6. X-rays at the hospital ruled out any wrist fracture or dislocation, and hospital staff diagnosed her with a wrist strain. She was told to ice and elevate her wrist, stay out of work for a few days, and wear a splint. Claimant followed up at Mansfield Orthopedics, where staff diagnosed her with a mild wrist sprain and referred her for physical therapy.
7. Although the injury appeared minor, Claimant's condition did not improve, and in fact her pain worsened. She tried to return to work for one day, but after a few hours she was in so much pain that she left early. She has not attempted to work since that day.
8. In March 2013, Claimant followed up with Eric Mullins, MD, at Mansfield Orthopedics. He identified soft tissue changes in her left hand and arm and thought she might have sympathetic dystrophy (also known as complex regional pain syndrome or CRPS). He referred her to the Dartmouth-Hitchcock Pain Clinic for evaluation.
9. Claimant underwent electromyography (EMG) testing and nerve conduction studies with neurologist Geoffrey Starr, MD, in April 2013, but the EMG portion of the testing was technically limited due to her pain complaints. The nerve conduction studies were normal, but the limited EMG testing suggested a severe diffuse neuropathic process, possibly left brachial plexus palsy or a cervical spine lesion.<sup>1</sup>
10. Claimant visited the Dartmouth-Hitchcock Pain Clinic on May 2, 2013. Nurse Practitioner Lillian Mandl prescribed several medication trials, recommended a stellate ganglion block, and took her out of work until such time as diagnostics were finished and a treatment plan was underway. Claimant credibly testified that she tried fentanyl, morphine, methadone and other narcotics, but none of them significantly improved her pain.
11. In May 2013, Claimant reported to her primary care provider, Nurse Practitioner Maria Calderwood of Northern Counties Health Care, that her knees ached and walking was difficult. She also reported anxiety and depression, as well as a "great deal of stress" stemming from her vocational rehabilitation counselor's intent to return her to work.

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<sup>1</sup> Because the EMG was limited, the Dartmouth-Hitchcock Pain Clinic later scheduled another EMG to be performed under sedation. Claimant cancelled that EMG, telling the provider that she did not feel she could do it.

12. In September 2013, at Defendant's request, Claimant was examined by physical medicine and rehabilitation physician Scott Benjamin, MD. Dr. Benjamin confirmed the diagnosis of CRPS in her left arm based on her medical history and his physical examination. He also noted pain complaints in her legs but no physical findings at that time. He suggested a rapid high-dose steroid pulse to reduce the inflammation associated with CRPS, but Claimant never underwent that procedure. She did undergo a stellate ganglion block in September. The block provided no pain relief, and she suffered seizures during the procedure, making it inadvisable to try it again.
13. In December 2013, Claimant underwent an initial physical therapy evaluation with Kate Simone at Copley Hospital. She reported leg pain, gait instability and frequent falls. She also told Ms. Simone that she was able to bear weight while walking only on her metatarsal heads. When Ms. Simone evaluated her, Claimant was unsteady and lost her balance multiple times. However, Ms. Simone noted that when Claimant entered the satellite clinic to try various assistive devices, she was observed to have full foot contact during left lower extremity weight bearing. Claimant declined any physical therapy services that day, including aquatic therapy. Ms. Simone thus discharged her from physical therapy after the initial evaluation.
14. In January 2014, Claimant reported to the Dartmouth-Hitchcock Pain Clinic that her chronic pain had progressed to her right leg as well.
15. Not long thereafter, Claimant tried nasal ketamine spray to relieve her pain, and was planning to undergo ketamine infusion therapy, but the spray caused her to hallucinate. Accordingly, she discontinued the spray and did not undergo the infusion.
16. As early as May 2013, Claimant's health care providers recommended a spinal cord stimulator trial for her. She underwent the pre-trial psychiatric exam and planned to undergo the spinal cord stimulator trial, but never followed through. At the hearing, she testified that she considered a spinal cord stimulator but decided that she "didn't agree with it."
17. Claimant's providers have also recommended physical therapy to her on multiple occasions. She testified that she attended two physical therapy appointments, one in Hardwick and one in Morrisville, but decided not to follow through either time because she found physical therapy painful. Further, during the initial evaluation in Morrisville, physical therapist Kate Simone recommended aquatic therapy; Claimant testified that she did not pursue aquatic therapy because she "can't stand the water."
18. Claimant suffered from anxiety and depression prior to her injury and has suffered from them since. In April 2014, licensed clinical social worker Callia Zimmerman evaluated her<sup>2</sup> and diagnosed depressive disorder due to chronic pain. Claimant has received mental health counseling at various times during her treatment and has tried medications for her mood disorder. These treatments appear to be beneficial to her.

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<sup>2</sup> Claimant began therapy with Ms. Zimmerman as a requirement of her court-ordered probation stemming from a 2013 criminal conviction. *See* Ms. Zimmerman's April 14, 2014 diagnostic assessment.

19. Claimant's only treatment now is for pain management, including medications and counseling. On October 19, 2015, Nurse Practitioner Jeri Wohlberg of the Hardwick Area Health Center noted that Claimant had received a thorough evaluation by the Dartmouth-Hitchcock Pain Clinic and that she was intolerant to all pain medications. Ms. Wohlberg therefore concluded that Claimant had reached an end medical result for her work-related injury.
20. On May 8, 2017, Ms. Wohlberg summarized Claimant's status as follows:

We had an extensive discussion regarding management of her CRPS. We have tried multiple medications and the pain has been refractory to all treatments. She remains on Gabapentin as well as Cymbalta, which have been marginally effective. She is working closely with psychiatry in order to manage depression and anxiety. I highly encouraged her to consider physical therapy and occupational therapy, as she has an extremely sedentary lifestyle and I fear that ongoing deconditioning will worsen her long-term outcomes and put more pressure on her family members who care for her. At this point she continues to be resistant to engaging in these activities.
21. In August 2017 Ms. Wohlberg noted that Claimant has done much better since she began seeing a behavioral health counselor weekly. She also recommended alternative therapies including chair yoga, meditation and relaxation techniques. On August 29, 2017, Ms. Wohlberg wrote: "Suspect that we can titrate down or discontinue many of her medications, which I doubt are helping her, if she is truly engaged in her treatment plan and improving her situation."

*Claimant's Complex Regional Pain Syndrome and its Impact on her Activities*

22. Claimant has been diagnosed with complex regional pain syndrome in her left upper extremity and now has chronic pain in her lower extremities, too. She testified that her CRPS has "gone into my stomach now," but her medical records indicate that her chronic abdominal pain predates her work injury. Moreover, the records do not reflect any doctor having diagnosed her abdominal issues as CRPS. *See, e.g.,* Hardwick Area Health Center record dated October 19, 2017.
23. Claimant credibly described her typical day as follows: She wakes up at 10 a.m. and buzzes her husband. Mr. Bartlett helps her into her wheelchair, takes her to the bathroom, and helps her dress. He moves her to the living room, where she transfers to her electric recliner chair. She spends the day there watching television and talking with friends on Facebook or on the telephone. Mr. Bartlett prepares her meals and helps her shower every other day. Around 7 p.m. every evening, Mr. Bartlett helps her get undressed and into bed. Claimant describes her pain as always being at level ten on a scale of one to ten, and she does not sleep well.
24. Claimant leaves the house a few times per week with her husband. They shop, go for drives, and sometimes attend their youngest child's sporting events. When she goes out,

Claimant covers herself with a blanket because the breeze causes pain on the surface of her skin. She also wears a splint on her left wrist most of the time.

25. Claimant testified that at the time of her work injury she weighed 150 pounds, and at the time of the hearing she weighed 247 pounds. However, her medical records document a significantly higher weight around the time of her injury.<sup>3</sup>

Vocational Rehabilitation Efforts

26. In May 2013, vocational rehabilitation counselor William Schick began an assessment to determine whether Claimant was entitled to services. He interviewed her regarding her medical status, education and work history. Claimant reported pain and numbness in her left hand, poor sleep, and an inability to drive while taking her medications.
27. In June 2013, Claimant told Mr. Schick that she was afraid that her chronic pain might migrate and that she might not be able to return to work; she also expressed concern that she might develop overuse syndrome in her unaffected arm. She nevertheless expressed interest in operating a home day care facility.
28. In July 2013, Mr. Schick performed a skills analysis using the Dictionary of Occupational Titles and online labor market information. He identified skills that Claimant possessed and determined that she would benefit from services focused on finding and obtaining employment, job training, and obtaining her GED.
29. In October 2013, Mr. Schick received a report from Dr. Benjamin stating that he did not feel that Claimant could work until the possible treatment modalities for her complex regional pain syndrome have been exhausted. Claimant had an upcoming evaluation for a spinal cord stimulator, and Mr. Schick decided to suspend preparation of her return to work plan until her treatment was completed. Claimant completed a career assessment inventory for Mr. Schick at their October meeting, but he did not score or interpret her responses because vocational services were suspended at that time.
30. Mr. Schick filed his next report in March 2014, noting that he had spoken with Claimant on February 6, 2014 and that she had started receiving social security disability benefits in January 2014. He wrote:

[Claimant] still did not feel that she could participate in VR at this time. We agreed that I would contact principals and discuss further suspension of services. I spoke with [Claimant] on 02/24/2014 and she had no objection to the continuation of the suspension of services. I attempted to reach [Claimant's attorney] and on 02/27/2014, I received an email from her noting that she agrees with the continued suspension of VR services.

*Mr. Schick's March 12, 2014 report.*

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<sup>3</sup> See, e.g., July 19, 2012 medical record documenting her weight at 240.5 pounds and March 15, 2013 medical record documenting her weight at 235.7 pounds.

31. In April 2014, Mr. Schick wrote:

During this past reporting period, there has been no change in [Claimant's] medical status. I have discussed case closure with [Defendant's adjuster], [Claimant's attorney], and [Claimant] and all agree with the case closure, as she is unable to participate in VR services at this time. [Claimant] feels that if her condition improves that she might contact VTDOL to get her VR services reinstated.

*Mr. Schick's April 12, 2014 report.*

32. Claimant testified that she participated in vocational rehabilitation services with Mr. Schick for almost a year. They discussed jobs that she liked, did a survey, and then decided there were no jobs out there for her. Based on Mr. Schick's reports, I find her testimony to be an inaccurate summary. In particular, I find that they did not determine that there were no jobs for her, but rather services were suspended while she pursued additional medical treatment. Due to the suspension of services, Mr. Schick did not complete his vocational assessment, and Claimant has received no additional assessments or services.

#### Expert Opinions

*(a) Stuart Glassman, MD*

33. Defendant presented expert medical testimony from Stuart Glassman, MD, as to whether Claimant currently has a work capacity.
34. Dr. Glassman graduated from the Stony Brook University School of Medicine in 1989 and completed an internship and residency in physical medicine and rehabilitation at the NYU Medical Center's Rusk Institute for Rehabilitation Medicine. He is board certified in physical medicine and rehabilitation and sees patients at his medical practice, Granite Physiatry, in Concord, New Hampshire. Dr. Glassman is also the medical director of Occupational Health Services at Concord Hospital.
35. Dr. Glassman has extensive experience in occupational health, including functionality and job task analyses. He helps to determine the work capabilities of disabled people and coordinates with vocational rehabilitation counselors to identify appropriate job placements for them. His work includes reviewing numerous job descriptions, analyzing what is required to perform those jobs, assessing his patients' medical status and abilities, and determining appropriate accommodations for them.
36. At Defendant's request, Dr. Glassman performed independent medical examinations of Claimant on January 3, 2014 and May 20, 2015, and he assessed her for permanent impairment on March 15, 2016. His process included reviewing her medical records, taking a history from her, and physically examining her on all three occasions.
37. At the January 2014 examination, Dr. Glassman determined that Claimant met the diagnostic criteria for CRPS of her left arm, as set forth in the *AMA Guides to the*

*Evaluation of Permanent Impairment* (5<sup>th</sup> ed.) (the "AMA Guides"), based on her pain reports and her numerous skin and soft tissue changes. He opined that she had the capacity to perform sedentary work four hours per day, three days per week using her right arm only. He further opined that she could return to work with Defendant as a switchboard operator if she used a headset and entered data into the computer with her right hand. I find his analysis credible.

38. At the May 2015 examination, Dr. Glassman noted that Claimant's chronic pain appeared to have spread to both legs and that her decreased range of motion impaired her ability to perform activities of daily living. Dr. Glassman wrote that her present work capacity was for sedentary level work using her right arm only, for two hours per day, three days per week to start, with the potential to increase her hours once she returned to work. Dr. Glassman believed that a vocational rehabilitation counselor could help to identify jobs that would be an appropriate fit for her, and he recommended a vocational re-evaluation. I find this analysis credible as well.
39. At the March 2016 permanency evaluation, Claimant reported that her pain was at a level of ten out of ten and her left-hand fingers were "locked." She further reported that she could not move her left upper extremity more than a few degrees and could not move her wrist or fingers. Dr. Glassman wrote: "Her physical examination was very limited today because of her inability to tolerate any active motion or even any limited sensory assessment of her skin." *March 2016 Permanency Evaluation*, at 3. Dr. Glassman wrote:

This claimant has documented complex regional pain syndrome of the left arm, which apparently has spread to the right and left legs. The left arm is her dominant arm. Please note that a peripheral nerve has not been identified as the cause of her complaints.

*Id.* He then referred to the *AMA Guides*, Section 13.8 (Criteria for Rating Impairments Related to Chronic Pain) to assess her impairment. He determined that her upper extremity impairment and lower extremity impairments both fit into class four based on her reports that she cannot use her left arm for self-care and cannot stand without an assistive device. Accordingly, Dr. Glassman assessed her with an 84 percent whole person impairment.

40. At the hearing, Dr. Glassman testified that Claimant has a work capacity for two hours per day, three days per week. He viewed this capacity as a starting point to see what she can do and testified that she could potentially increase her working hours beyond that level. In his opinion, a vocational rehabilitation counselor could work with her to identify jobs that were an appropriate fit. Dr. Glassman based his opinions on his review of her medical records, his physical examinations of her, and his observation that her right arm has a well-preserved range of motion and well-preserved strength.
41. As a physical medicine and rehabilitation physician and as director of an occupational health services program, Dr. Glassman deals with work injuries and return to work issues every day. Since 1997, he has been working with patients who have work injuries, focusing on issues of functionality, appropriate accommodations, job descriptions and job task analyses, and ultimately making medical recommendations to return those patients to

work. Although he testified that he is not a certified vocational rehabilitation counselor, Dr. Glassman's experience and training provide a sound basis for him to evaluate Claimant's work capacity, and I find his opinion on her work capacity to be clear, helpful and well-founded on his experience and training.

(b) *Charles Alexander, Occupational Therapist*

42. Occupational therapist Charles Alexander performed a functional capacity evaluation of Claimant at her attorney's request on October 5, 2015. The parties included his report in their Joint Exhibit, but he did not testify.
43. Mr. Alexander's evaluation included an intake interview and a series of standardized tests. However, he terminated the testing early due to Claimant's subjective pain complaints. In particular, she reported that she was in too much pain to perform any testing with her left upper extremity. *Functional Capacity Evaluation*, at 3.
44. According to Mr. Alexander's clinical observations, Claimant exhibited good physical effort with her right arm, but she declined to exert any effort with her left arm. His evaluation included a battery of tests designed to assess the dependability and accuracy of a patient's subjective pain reports. Based on these objective tests, Mr. Alexander concluded that Claimant's "subjective ratings of pain matched poorly with distraction-based clinical observations." *Functional Capacity Evaluation*, at 12. He noted elsewhere that she stated she could not move her left-hand fingers at all, but he observed her moving those fingers when she removed her wrist splint. *Functional Capacity Evaluation*, at 16.
45. Mr. Alexander's report also recorded Claimant's stated vocational goals:

I really don't have any goals. I guess my goal is to get this workers' compensation done. I think my pain level will go down once I get this settled is all. I am afraid that I am being watched. I feel like I have to be careful if I go out.

*Functional Capacity Evaluation*, at 9.

46. Mr. Alexander's findings are set out in his report:

[Claimant] does not currently have a work capacity based on the Dictionary of Occupational Titles as she is not able to perform any lifting from a standing position to be able to even meet the 10 pound requirements of Sedentary level work. She does have some residual functional capabilities for Sedentary level work provided that work was only performed with her right (non-dominant) hand.

*Functional Capacity Evaluation*, at 5.

He further wrote that Claimant had limitations that would need to be accommodated for her to return to sedentary work on a part-time basis. These

limitations included the inability to perform tasks with her left hand, poor balance and mobility issues. He specifically noted that she could not propel her wheelchair independently and would need to obtain a motorized chair to navigate a work environment.<sup>4</sup>

47. In concluding his report, Mr. Alexander noted that Claimant “has undoubtedly assumed a role of being disabled.” He also qualified his report by noting that it was difficult to assess her functional abilities due to her hypersensitivity to any activity or touch of her left upper extremity or lower extremities. He summarized:

Though I am not a vocational expert it appears that her ability to attend regular employment is poor due to the limitations with her dominant arm as well as lack of independence to be able to transfer or move within the work area. . . . Her residual capacity is a part-time, one arm (non-dominant), Sedentary work capacity.

*Functional Capacity Evaluation*, at 6.

48. Mr. Alexander did not testify to support or elaborate on his opinions. Further, his evaluation was done two years ago, before Claimant obtained her motorized scooter; the effect of her increased mobility on his opinions is unknown. Although these factors render Mr. Alexander’s opinion less clear than it otherwise might have been, I still find his opinion helpful.

#### Consistency and Credibility

49. There is no dispute that Claimant’s complex regional pain syndrome is causing disability. However, credibility issues exist concerning the degree of her pain and immobility. Mr. Alexander and Ms. Simone both made observations that were inconsistent with her reports of pain and immobility. Finding of Fact Nos. 13, 44 *supra*. Claimant’s testimony about her weight at the time of injury is not supported by the medical records. Finding of Fact No. 25 *supra*. Further, she told Mr. Alexander that she thought her pain level would go down once her workers’ compensation claim was settled and that she had to be careful when she went out because someone might be watching her. Finding of Fact No. 45 *supra*. These findings cause me to question whether the true extent of her physical capabilities has been accurately assessed.

#### **CONCLUSIONS OF LAW:**

1. In workers’ compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment, *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the

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<sup>4</sup> Claimant has since obtained a motorized scooter.

injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993). A claimant cannot meet his burden of proof with speculative testimony. *Daignault v. State of Vermont Economic Services Division*, Opinion No. 35-09WC (September 2, 2009).

2. Claimant asserts that, as a result of her January 2013 work injury, she is permanently and totally disabled under the odd lot provision of 21 V.S.A. §644(b). Defendant counters that the functional capacity evaluation determined that she has a work capacity and that she has not exhausted the vocational rehabilitation resources that might return her to regular, gainful employment. Therefore, she has not met her burden of proof.

### Permanent Total Disability

3. 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 21 V.S.A. §644(a), such as total blindness. 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.

4. The Workers' Compensation Rules provide additional guidance on permanent total disability. The applicable rule in effect at the time of Claimant's injury provided:

#### Rule 11.3100 Permanent Total Disability ó Odd Lot Doctrine

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.<sup>5</sup>

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<sup>5</sup> Rule 11.3100 was amended and re-numbered as Rule 10.1700 *et seq.*, effective August 1, 2015. Rule 10.1710 now provides that "[u]nless the extent to which an injured worker's functional limitations preclude regular, gainful work is so obvious that formal assessment is not necessary, an odd-lot permanent total claim should be supported by a functional capacity evaluation and a vocational assessment. Although the quoted phrase is new, it merely codifies preexisting Department precedent as determined under the prior rule. *See, e.g., Bohannon v. Town of Stowe*, Opinion No. 01-15WC (January 5, 2015).

5. A finding of odd-lot permanent total disability is not to be made lightly. *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011). Such a finding should not be made until first, the injured worker's functional capabilities are accurately assessed, and second, all corresponding vocational options are comprehensively considered and reasonably rejected. *Id.*, at 13.
6. A threshold consideration is whether Claimant's alleged preclusion from regular, gainful work is so obvious that a formal assessment is unnecessary. I conclude that it is not. The record here comprises subjective reports of pain and immobility, with little in the way of measurable objective findings. Moreover, the record includes some pain and disability reports that are inconsistent with Claimant's observed abilities. *See, e.g.*, Finding of Fact No. 49 *supra*. On the record before me, I cannot conclude that Claimant is obviously precluded from regular, gainful employment.
7. Under Workers' Compensation Rule 11.3100, Claimant should thus support her claim with both a functional capacity evaluation and a vocational assessment concluding that she is not reasonably expected to be able to return to regular, gainful work.

#### Functional Capacity Evaluation

8. Mr. Alexander found that Claimant has a residual, part-time sedentary work capacity. *See* Finding of Fact No. 46 *supra*. In the absence of testimony setting forth his credentials and supporting his findings and conclusions, his opinion is not as helpful as Dr. Glassman's, but it does support a conclusion that Claimant's functional capacities do not necessarily preclude regular, gainful work.
9. In Dr. Glassman's opinion, Claimant has a sedentary work capacity for two hours per day, three days per week as a starting point; she might be able to work more than that, once she gets started. *See* Finding of Fact No. 40 *supra*. He also recommended a vocational re-evaluation. In his opinion, a vocational rehabilitation counselor might be able to identify jobs that would be appropriate for her. Dr. Glassman's testimony was clear, thorough and well-founded on his training and experience as a physical and rehabilitation medicine doctor, and I find his testimony persuasive.
10. Dr. Glassman assessed Claimant with a relatively high whole person impairment of 84 percent based on her reports of pain and disability in her left arm and both legs. *See* Finding of Fact No. 39 *supra*. Although a high impairment rating may correlate with permanent total disability, it does not in every case. For example, in *Hurley v. NSK Corp.*, Opinion No. 06-09WC (March 4, 2009), the claimant was assessed with a 57 percent permanent impairment attributable to complex regional pain syndrome. The Commissioner nevertheless found the claimant not permanently totally disabled based on observations of her engaging in activities inconsistent with her pain complaints and her failure to exhaust vocational rehabilitation. The same considerations apply here. Further, Dr. Glassman found that Claimant has a work capacity despite the relatively high impairment rating that he himself assessed.
11. I am persuaded by Dr. Glassman's testimony that Claimant has a current work capacity and that vocational rehabilitation resources might lead to an appropriate job placement

for her. Accordingly, I conclude that the functional capacity evaluations do not support her claim.

### Vocational Assessment

12. As set forth in Conclusion of Law No. 4 *supra*, Claimant's permanent total disability claim should also be supported by a vocational assessment. As the Commissioner found in *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011), a finding of permanent total disability should not be made until all vocational rehabilitation options consistent with the injured worker's functional capacities are comprehensively considered and reasonably rejected. *See also Hurley v. NSK Corp.*, Opinion No. 07-09WC (March 4, 2009) (finding of permanent total disability cannot be made until vocational rehabilitation has been thoroughly explored); *R.G. v. Norton Brothers Inc.*, Opinion No. 49-08WC (December 3, 2009) (greater effort must be made to return claimant to work before concluding he is unable to do so).
13. Vocational rehabilitation counselor William Schick began an assessment of Claimant in 2013 but, after determining that she would benefit from services, he suspended the assessment and never completed it. Finding of Fact Nos. 29-32 *supra*. Claimant has received no other vocational rehabilitation services at any time since her work injury. In particular, she has not received any services that made use of the functional capacity evaluations that were completed in 2015.
14. In evaluating her work capacity, both Mr. Alexander and Dr. Glassman specifically acknowledged that they are not vocational rehabilitation professionals, and neither one performed any vocational assessment. Dr. Glassman further testified that a vocational re-evaluation would be appropriate, but that has not taken place. In short, Claimant has not received any meaningful vocational rehabilitation services. Further, no vocational rehabilitation counselor has concluded that she is not reasonably expected to be able to return to regular, gainful employment, as set forth in Workers' Compensation Rule 11.3100. Accordingly, her claim is not supported by a vocational assessment, either.

### Conclusion

15. Claimant has the burden of proving that she has no reasonable prospect of finding and sustaining regular, gainful employment. *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011).
16. Both Charles Alexander and Dr. Glassman found that Claimant has a part-time sedentary work capacity with some restrictions. No vocational rehabilitation counselor has used those evaluations to explore what work she might be able to do. Thus, I am unconvinced that she has no reasonable prospect of finding and sustaining regular, gainful employment. *See, e.g., Kreuzer v. Ben & Jerry's Homemade, Inc.*, Opinion No. 15-03WC (March 21, 2003) (whether claimant is capable of gainful employment is dependent on vocational testing, which has yet to be performed).
17. I therefore conclude that Claimant has failed to sustain her burden of proving that she is permanently and totally disabled as a result of her January 2013 work injury. As

Claimant has failed to prevail on her claim, she is not entitled to an award of costs and attorney fees.

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for permanent total disability benefits is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 31<sup>st</sup> day of January 2018.

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Lindsay H. Kurrle  
Commissioner

**Appeal:**

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