

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kevin Holbrook

Opinion No. 07-18WC

v.

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

Kennametal, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. Y-60018

OPINION AND ORDER

Hearing held in Montpelier on January 8, 2018

Record closed on February 15, 2018

APPEARANCES:

Ronald A. Fox, Esq., for Claimant

Erin J. Gilmore, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a consequence of his March 8, 2007 compensable work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Vocational rehabilitation records

Claimant's Exhibit 1: First Report of Injury (Form 1)

Claimant's Exhibit 2: Agreement for Temporary Total Disability Compensation (Form 21), approved November 16, 2007

Claimant's Exhibit 3: *Curriculum vitae*, Jack Bopp, MS, CRC, CLCP

Claimant's Exhibit 4: Photograph of radio-controlled toy car controller

Claimant's Exhibit 5: Photograph of radio-controlled toy car controller

Claimant's Exhibit 6: Earnings statement from Quality Motors Inc. for pay date August 25, 2017

Defendant's Exhibit 1: Surveillance video

Defendant's Exhibit 2: Surveillance report

Defendant's Exhibit 3: *Curriculum vitae*, John May, MA, CAGS, CRC, F/ABVE

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 his 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 52-year-old man who resides in St. Johnsbury, Vermont. He graduated from high school and has worked as a meat packer, a garbage truck driver, a taxi driver and, for several employers, as a machinist. In 2004, he began working for Defendant as a machinist.
4. Claimant has smoked cigarettes since he was 17 years old and has been obese throughout his adult life. He is right-hand dominant.

Claimant's Right Wrist Injury and Subsequent Medical Course

5. On March 8, 2007, Claimant was trying to loosen a recessed spindle nut on a lathe machine at work. As he tugged on the wrench, he felt a "pop" and a "pull" behind his thumb and on the inside of his right wrist. His wrist began to swell, and he reported the incident to his foreman.
6. Claimant continued to work full time for Defendant after the injury, with restrictions on the use of his right wrist. Work made his wrist feel swollen and uncomfortable.
7. Although the wrist injury seemed minor at first, Claimant's condition worsened over time and came to include numbness and tingling. He sought treatment from multiple doctors and underwent nerve conduction studies, electrodiagnostic studies and MRIs, but there was no consensus about his diagnosis. His physicians variably diagnosed him with wrist sprain, carpal tunnel syndrome, flexor or extensor tenosynovitis, De Quervain's tenosynovitis and radial sensory nerve neuritis.
8. On August 17, 2007, orthopedic surgeon Christian Bean, MD, performed surgery on Claimant's right wrist to address what he diagnosed as De Quervain's tenosynovitis and carpal tunnel syndrome. Claimant missed several weeks of work following surgery and then returned to light-duty, full-time work for Defendant. He credibly testified that his symptoms were worse following surgery, with pain and swelling encompassing his whole hand "like a glove."

9. In addition to surgery, Claimant has tried rest, ice, physical therapy, electrostimulation, massage, acupuncture, a Marcaine injection and a stellate ganglion block, all without obtaining significant symptom relief. He has been taking opioid pain medication since 2007, again without obtaining significant relief.
10. In June 2008 Claimant's primary care physician, Lloyd Thompson, MD, recommended that he stop working, to see whether rest would improve his wrist condition. Claimant stopped working then and has never returned to regular employment. His condition did improve somewhat, but his wrist continued to swell and ache with activity.
11. On September 4, 2008, Claimant's surgeon, Dr. Bean, placed him at end medical result for his wrist injury. On October 13, 2008, occupational medicine physician William Boucher, MD, performed an independent medical examination at Defendant's request. Dr. Boucher agreed that Claimant was at an end medical result for his wrist injury. He assessed an eleven percent whole person impairment under the *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.) (the "AMA Guides").
12. In May 2009, at the request of Claimant's attorney, physical medicine and rehabilitation physician Daniel Wing, MD, performed an impairment rating. He assessed a ten percent whole person impairment referable to Claimant's right wrist injury.
13. Claimant continued to see his primary care physician, Dr. Thompson, for refills of his opioid pain medication. In October 2009 Dr. Thompson noted his "mild wrist swelling and wrote that he did not know what to make of it. In April 2010, the last time Claimant saw him, Dr. Thompson wrote: "I don't know what to do as far as [his wrist] is concerned except to give him pain medication." *Joint Exhibit I*, at 217.
14. In December 2010 Claimant began seeing a new primary care physician, Albert Hebert, MD. Dr. Hebert assumed responsibility for prescribing opioid pain medications from Dr. Thompson.
15. Although there is no agreement about the actual diagnosis, Claimant's physicians agree that he has chronic pain and swelling in his right wrist that has not responded well to treatment. His only treatment since 2008 has been opioid pain medication. As of the hearing date, he was taking ten milligrams of hydrocodone twice a day. Even with this medication Claimant's wrist becomes swollen and painful with activity.

Claimant's Other Health Conditions

16. Claimant's primary care physicians have expressed concern about his health, including his morbid obesity, sedentary lifestyle and status as a cigarette smoker. Dr. Thompson has talked to him on multiple occasions about undergoing bariatric surgery to reduce his weight. In October 2009 Dr. Thompson wrote:

I really think if he doesn't do something as far as smoking or obesity, he's going to have some kind of catastrophe at some point. Discussed stopping smoking. He can't do it.

Joint Exhibit I, at 204.

17. Dr. Thompson last saw Claimant in April 2010. He noted that Claimant's weight had increased to 368 pounds and that he was smoking one and a half packs of cigarettes per day. Dr. Thompson worried that he might develop chronic obstructive pulmonary disease (COPD) or throat cancer.
18. Claimant has an asthmatic condition that sometimes causes wheezing and shortness of breath, for which he occasionally uses a rescue inhaler. However, he does not take any medications for COPD. A diagnosis of COPD requires pulmonary function testing, which he has never undergone. In October 2014 Dr. Hebert described his respiratory condition as "very mild" asthma, which was well-controlled with medication on an as-needed basis. *Joint Exhibit I*, at 234. At the hearing, Claimant credibly testified that he had not used his inhaler in two months.
19. Claimant broke his ankle while sledding in 2001 or 2002. It still troubles him "sometimes," but he does not take any medication for ankle discomfort.
20. In December 2008 Claimant fell on a patch of ice, hitting his left knee and causing sporadic, intermittent knee pain. In the winter of 2011, he underwent knee surgery to repair a meniscal tear, which improved his condition.
21. None of these health conditions interfered with Claimant's ability to work for Defendant prior to his wrist injury.

Claimant's Home and Leisure Activities

22. Before his injury, Claimant used to go snowmobiling and four wheeling, but he no longer engages in either activity.
23. Since his injury, Claimant has continued to hunt and fish.¹ He rides along with a friend who has a tow truck, just to get out of the house. He uses his home computer for up to two hours per day to send and receive emails and browse the Internet. He mows his lawn with a riding mower and does laundry. He cleans his house often, including sweeping, mopping, vacuuming, dusting and cleaning the bathroom.
24. On winter Saturdays, Claimant races radio-controlled toy cars on an indoor track from 1 p.m. until 7 p.m. A race day includes four separate races, each lasting about four minutes. During each race, Claimant holds the radio controller in his left hand to operate the throttle, and steers the car with three fingers of his right hand on a small foam steering

¹ Claimant goes fishing once a week when the weather is good, but he can only actively reel in fish for 20 minutes at a time before his wrist bothers him.

wheel. The steering wheel is two inches in diameter; each time he wants to steer the car, he moves the wheel fractions of an inch.

25. There is a break between each race lasting from one to two hours. During the breaks, Claimant charges his car battery, makes minor adjustments to his car with various tools, and socializes with the other racers. Claimant's car weighs just over two pounds, and he can readily lift it with either hand. Claimant credibly testified that his wrist is swollen the day after racing, but he does it anyway because he loves the sport and has always done it. He is a successful racer and wins trophies in his division.

Claimant's Work Activities

26. Since January 2017 Claimant has been driving cars for the Quality Motors dealership in a practice known as a dealer swap. When Quality Motors needs to pick up a car at another dealership, it will send two people together in one car. One person will then drive the same car back and the other person will drive the new car back.² Claimant earns ten dollars per hour making these dealer swaps. A typical trip takes two to three hours each way. Usually Claimant is the passenger on the trip out and a driver on the return trip, but he has driven round trip and indicated no problem doing so. From January through August 2017, he earned a total of \$877.50 from employment at Quality Motors.
Claimant's Exhibit 6.

27. Claimant has no fixed work schedule. He might make two trips in one week or two trips in three weeks. The most he has worked is three trips in one week. If Claimant has not heard from Quality Motors for a few days, he will call them to see if they have any cars he can deliver. The amount of time that Claimant spends driving is largely a factor of the amount of work available, rather than his ability to tolerate driving. When he drives, he operates the car with his left hand and rests his right hand on top of the steering wheel. Although his right wrist swells after driving, it does not limit the amount of driving he can do.
28. Before working for Quality Motors, Claimant drove dealer swaps for another dealer, but that work dried up when that dealer went out of business.

Functional Capacity Evaluations and Vocational Rehabilitation Efforts

29. Claimant has undergone several functional capacity evaluations and has worked with two vocational rehabilitation counselors since his March 2007 injury.

A. Functional Capacity Evaluations

30. Claimant underwent three functional capacity evaluations, as follows:

August 2008 Evaluation by Benjamin McCormack, P.T., CEES

² The practice works in reverse as well: Claimant and a fellow employee drive separately to another dealership and drive back together in the same vehicle.

31. In August 2008 Claimant underwent a functional capacity evaluation with certified ergonomic evaluation specialist and physical therapist Benjamin McCormack of Lyndonville, Vermont.
32. During testing, Claimant tolerated both sitting and standing for 30 minutes without complaint but showed poor cardiovascular tolerance for exercise. Mr. McCormack measured Claimant's lifting ability at a medium level from floor to waist and at a light level from chest height and above. He also found that Claimant's ability to manipulate objects with his right hand was poor. *Joint Exhibit I*, at 155, 161. Mr. McCormack found consistency between Claimant's physical examination and his functional outputs, observing some right wrist swelling as the testing progressed.
33. Based on these test results, Mr. McCormack recommended that Claimant seek a sedentary position limiting the use of his right hand for handling weights of ten pounds or less to a maximum of 25 minutes per day. *Joint Exhibit I*, at 161.

April 2010 Evaluation by John Lane, OTR/L

34. In April 2010 Claimant underwent a functional capacity evaluation with occupational therapist John Lane of Workfit Rehabilitation Services in Littleton, New Hampshire.
35. Mr. Lane's testing indicated that Claimant put forth his maximum voluntary effort during the evaluation. He further documented right wrist swelling associated with the testing process.
36. Mr. Lane found that Claimant has a light physical work capacity for his right upper extremity and a light-to-medium physical capacity for his left upper extremity. He also noted that Claimant's functional capacity was impacted by a prior right ankle injury unrelated to his employment. Residual weakness from that injury decreased his tolerance for standing, walking and lifting from lower levels.
37. Mr. Lane concluded:

[Claimant] has no restrictions for sitting, and for repetitive use of left upper extremity. He is capable of lifting and carrying 35 pounds with his left non-dominant hand or 13 pounds bilaterally.

Due to poor overall activity tolerance and deconditioned state, [he] does not currently possess a full-time capacity other than at a sedentary physical demand level. Because of a history of a significant right lower extremity injury (not related to this claim), he should be excluded from the demands of "walk or stand to a significant degree, and push/pull of leg controls."

Joint Exhibit I, at 215.

August 2015 Evaluation by John Lane, OTR/L

38. In August 2015 Claimant underwent another functional capacity evaluation with occupational therapist John Lane, now at Weeks Medical Center in Lancaster, New Hampshire. Vocational rehabilitation counselor Fran Plaisted requested this evaluation to determine specifically Claimant's capabilities for using a keyboard.
39. Mr. Lane determined that Claimant could use a keyboard for 20 to 30 minutes without a break and provided some ergonomic recommendations for his home computer set-up. He noted that Claimant's skill at operating his Dragon Dictate speech software program was improving.
40. Mr. Lane summarized his findings as follows:

[Claimant] demonstrates a sedentary/light capacity with right hand manual lifting tasks. The left hand is essentially unrestricted; however, being his non-dominant hand, fine motor coordination activities will be slower and less accurate. . . . Avoid one-handed lifting of greater than 8 pounds with right thumb and hand. Maximum lifting of 18 pounds from floor and 12-inch height. Maximum lifting of 13 pounds to shoulder height. No restrictions for left-handed only carrying. Keyboarding activities should be performed with frequent breaks and an ergonomic evaluation of his home computer work station should be performed.

Joint Exhibit I, at 242.

41. Based on the 2008 and 2010 functional capacity evaluations, I find that Claimant has a full-time sedentary work capacity with some restrictions. Based on the 2015 functional capacity evaluation, I find that those restrictions include avoiding one-handed lifting of greater than eight pounds with his right hand, lifting no more than 18 pounds from the floor and 12-inch height, and lifting no more than 13 pounds to shoulder height. He further requires frequent breaks from keyboarding activities.

B. Vocational Rehabilitation Efforts

42. Claimant received vocational rehabilitation services from October 2008 through May 2016.

2008 – 2011: Kenneth Yeates, CRC

43. In October 2008 certified rehabilitation counselor Kenneth Yeates found Claimant entitled to vocational services. Mr. Yeates performed transferable skills and labor market analyses, and arranged for certified rehabilitation counselor Iris Banks to perform a complete assessment. Ms. Banks performed the assessment in January 2009 and wrote in her report:

[Claimantø] demonstrated performance on measures related to learning ability suggests that he can readily understand higher level verbal, technical, mechanical and mathematical ideas and concepts. He therefore has a high likelihood of success in either a practical hands-on setting, as well as in post-secondary academic programs.

Joint Exhibit II, at 35.

44. In March 2009 Mr. Yeates devised a Return to Work Plan (RTWP) with a short-term goal of improving Claimantø computer skills. The Department approved the plan on May 18, 2009. Claimant enrolled in a course to learn left-handed keyboarding, and Mr. Yeates researched voice-activated software.
45. In April 2009 Mr. Yeates began work on a more detailed RTWP, with a stated goal of light courier delivery, automotive service estimator, general sales or production technology supervision. The Department approved this second plan on October 20, 2010.
46. Unfortunately, Mr. Yeatesøefforts to find Claimant suitable employment were hampered by his relatively high pre-injury wage and the limited job opportunities in the St. Johnsbury area, made worse by the economic recession of 2007 through 2009. He explored opportunities for Claimant to work as an auto salesman or auto service manager but found few employers that were hiring. He also considered self-employment as a taxi driver but concluded that such employment was expensive to start up and not economically viable.
47. In the winter of 2011, Claimant was approved for social security disability benefits. Although he continued to cooperate with vocational services, Mr. Yeates eventually concluded that there was no work for him in the St. Johnsbury labor market that would approach his relatively high pre-injury wage. He recommended closing vocational services in July 2011.

2011-2016: Fran Plaisted, CRC

48. In November 2011 Claimant filed a *Notice of Intent to Change Vocational Rehabilitation Provider* (VR Form 8), resulting in a referral to certified rehabilitation counselor Fran Plaisted. Ms. Plaisted began work on a new RTWP with a goal of working as an electromechanical design technician or a bus driver. However, demand for the former

turned out to be low and Claimant's doctor recommended against bus driving. Thus she did not finalize the plan.

49. In December 2012 Ms. Plaisted began developing a new RTWP with a goal of working as a dispatcher, freight broker or health care information technician. Claimant needed a computer applications class for this plan, but he needed to take a remedial English class first. He completed the English class in the spring of 2013 and tried to enroll in the computer applications class in the summer of 2013; however, when he went to enroll, an unpaid account balance from the spring derailed his enrollment.
50. In July 2013 Ms. Plaisted began to focus her efforts on a certificate program offered by the Community College of Vermont for a health information specialist career. When Defendant objected to the proposed plan, she revised it to state goals of working as a health information specialist, technical support specialist or database administrator. This revised plan included the computer applications course, an internship and the purchase of Dragon Dictate voice recognition software, along with tutoring in the use of that software. In August 2013 Ms. Plaisted distributed this RTWP (Claimant's third) to the parties, and they agreed that the plan was appropriate. The Department approved the plan on February 11, 2014.
51. Claimant tried to enroll in the computer applications course in January 2014, only to discover that his account at the Community College of Vermont still had an outstanding balance of \$9.00 from the spring 2013 semester. This glitch moved his enrollment back to May 2014. By that time, he could not enroll in the course due to a bout of kidney stones, and his enrollment was moved back to September 2014.
52. In June 2014 Ms. Plaisted provided Claimant with Dragon Dictate voice-activated software, along with a tutor to help him learn to use it. In August 2014 Claimant felt that he needed additional tutoring before beginning his computer applications class, and his enrollment was delayed again. In January 2015 Ms. Plaisted noted that the RTWP was on hold due to a dispute regarding whether Claimant required additional tutoring in Dragon Dictate.
53. In April 2015 Ms. Plaisted submitted a revised RTWP, which the Department approved on May 1, 2015. This plan, Claimant's fourth, had a goal of employment as a technical support specialist or data base administration manager. The plan included the computer applications class at the Community College of Vermont, an internship, and one more class that would provide Claimant with college credit for life experience, called Assessment of Prior Learning. The plan also provided for another functional capacity evaluation, specifically directed at Claimant's ability to use a keyboard.
54. Claimant received additional tutoring on Dragon Dictate in the summer of 2015 and underwent the functional capacity evaluation in August 2015. He successfully completed

the computer applications course in the fall of 2015, despite having some technical difficulties with his Dragon Dictate microphone.³

55. Claimant's RTWP provided for him to take his final class, Assessment of Prior Learning, in the spring of 2016, but a health issue in January interrupted that schedule. On January 25, 2016, Ms. Plaisted wrote in her progress report:

[Claimant] has a full time sedentary to light work capacity and he has been engaged in vocational rehabilitation for an extended period of time. At this time, we either move forward providing him with training to return to work or close his file. I will meet with him this month to review this. If he wants to move forward vocationally, we will amend his [return to work plan].

Joint Exhibit II, at 239.

56. On May 27, 2016 Ms. Plaisted wrote in her progress report:

At this time, we either move forward providing him with training to return to work or close his file. I will meet with him this month to review this. [Claimant] and this writer agreed that at this time provision of additional rehabilitation services would not restore him to suitable work and as a result we agreed that I would close his file.

Joint Exhibit II, at 242. Ms. Plaisted filed the closing report on May 27, 2016. *Joint Exhibit II*, at 243. There is nothing in her report indicating a reason for closing services, other than her January 2016 statement that Claimant had been "engaged in vocational rehabilitation for an extended period of time." In fact, her January 2016 report indicates that Claimant has a "full time sedentary to light work capacity" and that he can receive more training to return to work "if [he] wants to move forward vocationally." *Joint Exhibit II*, at 239.

Claimant's Testimony about his Vocational Rehabilitation

57. Claimant testified that he has fully cooperated with his vocational rehabilitation counselors, and I find his testimony credible. Although he could have taken a more active role, he essentially complied with whatever was asked of him. He took a computer applications class at the Community College of Vermont, during which he learned to use the Excel and Word programs, earning an A-minus grade. He also spent time learning how to keyboard with his left hand and use voice-activated software. As to these efforts, he testified that keyboarding with his left hand "didn't work out" and that his attempt to use voice recognition software failed as well because of "something with the computer." *Claimant's Testimony, Hearing Transcript*, at 92.

³ Claimant's microphone would stop working after ten minutes of use. Ms. Plaisted got him a new one, but the problem persisted.

Expert Opinions from Physicians and Vocational Rehabilitation Counselors

58. Claimant presented expert testimony from his former primary care physician and from vocational rehabilitation counselor Jack Bopp as to whether he is permanently and totally disabled. Defendant presented expert testimony from Dr. Kenosh and vocational rehabilitation counselor John May.

A. Medical Expert Testimony

Albert Hebert, MD

59. Claimant presented expert medical testimony from Albert Hebert, MD. Dr. Hebert practiced family medicine for 41 years. He was Claimant's primary care physician from December 2010 until his retirement in 2016. In preparation for his testimony, Dr. Hebert reviewed Claimant's medical records, Dr. Kenosh's deposition, Claimant's deposition and the vocational assessment prepared by certified rehabilitation counselor Jack Bopp.

60. Claimant's wrist injury occurred years before Dr. Hebert became his primary care physician. Dr. Hebert credibly testified that he does not know why Claimant's wrist continues to swell and that his wrist condition has defied any accurate diagnosis.

61. In Dr. Hebert's opinion, Claimant's obesity, cigarette smoking and deconditioned state are all health risks, but they do not significantly affect his work capacity. Only the wrist injury affects his work capacity. Dr. Hebert offered this opinion:

After I would visit with [Claimant] I would think that "okay, there's got to be something that this man could do for work. It would be nice if we could all work." But I have come to the conclusion, reviewing these documents, six years of taking care of him, that he really has limited, if any, use of his right wrist, it swells after, you know, a minimal amount of activity, so I have come to the conclusion based on the wrist injury that I cannot come up with any meaningful type of occupation that [he] could do and, therefore, he probably is permanently disabled.

Dr. Hebert's Testimony, Hearing Transcript, at 126.

62. Dr. Hebert did not explain the basis for his opinion that Claimant is permanently disabled as a result of wrist swelling beyond his statement that he personally cannot think of a meaningful occupation that Claimant can do. As a family physician, he lacks formal training in evaluating functional capacity and applying it to real-world vocational options. I find that these limitations significantly weaken his opinion.

Michael Kenosh, MD

63. Defendant presented expert medical testimony from Michael Kenosh, MD, as to Claimant's current medical condition and disability. Dr. Kenosh graduated from the Medical College of Ohio in 1992 and completed his residency in physical medicine and rehabilitation in 1996 at the University of Washington. He is board certified in physical medicine and rehabilitation and practices as a rehabilitation physician and orthopedist at the Rutland Regional Medical Center.
64. Defendant hired Dr. Kenosh to perform a medical records review in September 2017, *Joint Exhibit I*, at 247, and to testify at the hearing. In Dr. Kenosh's opinion, Claimant is not permanently and totally disabled as a result of his wrist injury. Dr. Kenosh identified other significant co-morbidities and psychosocial factors that impact Claimant's functional abilities and further opined that, even considering these other factors, he is not permanently and totally disabled.
65. The co-morbidities that Dr. Kenosh identified include Claimant's morbid obesity, cigarette smoking, sedentary lifestyle and chronic opioid use, all of which are putting his overall health in jeopardy. As a rehabilitation physician, Dr. Kenosh's goal is to identify each patient's barriers to recovery, whether medical or otherwise, and help the patient return to the activities that will make him or her as healthy as possible. In Dr. Kenosh's opinion, Claimant's co-morbidities present a greater limitation on his functional capacity than his wrist injury. He opined that Claimant could improve his functionality by addressing his obesity and other health issues, which would "absolutely" help him return to work.
66. Nevertheless, even if he does not improve his overall health, Claimant has a current work capacity. Dr. Kenosh based this opinion on his education, training and experience as a rehabilitation physician and on the functional capacity evaluations that found that Claimant has a full-time sedentary work capacity. In Dr. Kenosh's opinion, not only does Claimant have the capacity to work, but doing so will improve his health, longevity and quality of life.
67. I find Dr. Kenosh's testimony regarding Claimant's current work capacity to be credible, based on his education, training and experience as a rehabilitation physician. I further find credible his testimony that improving Claimant's overall health would assist him in returning to work. Although he is not a certified vocational rehabilitation counselor, Dr. Kenosh's experience and training as a rehabilitation physician provide a sound basis for him to evaluate Claimant's work capacity and vocational potential, and I find his opinion on these issues to be clear, helpful and well-founded.

B. Vocational Expert Testimony

Jack Bopp, CRC

68. John (Jack) Bopp is a certified rehabilitation counselor affiliated with Rehabilitation Services Associates of Henniker, New Hampshire. For the past twenty years, he has worked primarily as a forensic expert in the areas of employability, earning capacity and life care planning, including testifying as an expert in social security disability proceedings. Throughout that time, Mr. Bopp has not returned any injured workers to employment in Vermont.
69. In September 2016 Claimant engaged Mr. Bopp to perform an employability assessment. Mr. Bopp interviewed Claimant and reviewed his medical and vocational rehabilitation records, his social security records and the surveillance video. Mr. Bopp then performed a transferable skills analysis and a labor market analysis using data from various sources including the *Dictionary of Occupational Titles*.⁴ In Mr. Bopp's opinion, there is no regular gainful employment that matches up with Claimant's profile.⁵ He further opined that additional vocational rehabilitation services would not improve his employability.
70. Mr. Bopp took into consideration that Claimant has been out of the workforce for a substantial length of time. He also felt that Claimant's right-hand symptomology might negatively impact his ability to work efficiently and meet deadlines and that his chronic pain might affect his work attendance. He opined that Claimant's pain would be prohibitively distracting and would prevent him from concentrating on any work activity.⁶ Mr. Bopp believed, when he conducted his analysis, that Claimant had been diagnosed with COPD and that he could no longer participate in his hobbies.
71. I find Mr. Bopp's opinion unpersuasive for several reasons. His reliance on the *Dictionary of Occupational Titles* to identify work that Claimant can do unnecessarily limited the scope of his analysis to jobs that require the use of both hands. See Finding of Fact No. 76 *infra*. He also made incorrect assumptions about Claimant's pain, respiratory health and ability to participate in his hobbies. These factors significantly weaken his opinion.

⁴ U.S. Department of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991).

⁵ In performing his analysis, Mr. Bopp intentionally overstated some of Claimant's physical abilities in an effort to open up the range of occupations that might be available to him. For example, he stated that Claimant can climb "constantly," when, in fact, he cannot. This was not a mistake, but rather an intentional strategy for casting a wider net.

⁶ This assumption was not supported by Claimant's testimony. Claimant testified:
[Claimant's counsel]: "When [your wrist] swells like that and it's so painful, how does it affect your ability to just focus and concentrate and read, for example?"
[Claimant]: "It always lets me know it's there." *Claimant's Testimony, Hearing Transcript*, at 105.

John May, CRC

72. In September 2017 Defendant engaged John May to perform a vocational records review. Mr. May is a certified rehabilitation counselor and a Fellow of the American Board of Vocational Experts. He has 25 years of experience in the vocational rehabilitation field, currently spending 25 percent of his time as a forensic expert and 75 percent of his time providing direct services to injured workers. He has provided services to about 1,500 injured workers since 2003, including workers with upper extremity injuries and multiple challenges.
73. Mr. May reviewed Claimant's medical records, vocational rehabilitation records and functional capacity evaluations and prepared a statement for Defendant's use in mediation. *Joint Exhibit II*, at 282-93. Defendant did not engage Mr. May to conduct his own vocational assessment, but he did review Mr. Bopp's employability assessment.
74. In Mr. May's opinion, Claimant is capable of performing regular, gainful work. He based his opinion on several factors, including the functional capacity evaluations finding that Claimant has a full-time sedentary work capacity with some right upper extremity restrictions. Even though Mr. May did not perform his own vocational assessment, he was confident that jobs exist in the St. Johnsbury labor market that Claimant could perform. He emphasized that appropriate jobs for Claimant are available even if he does not undergo any further vocational rehabilitation efforts.
75. Mr. May further based his opinion on Ms. Plaisted's Return to Work Plan. He testified that, in his opinion, the 2015 plan would more likely than not have led to "regular, gainful employment." He cited Ms. Plaisted's note in the record that "we either move forward providing him with training to return to work or close his file" as indicating that the plan could have gone forward if Claimant wanted it to. I find this a reasonable inference from her notes. More broadly, it is Mr. May's opinion that Claimant has not exhausted his vocational rehabilitation opportunities, as he is capable of full-time sedentary work, and "certainly not every occupation at a sedentary level was exhausted or considered." *Mr. May's Testimony, Hearing Transcript*, at 152.
76. Mr. May disagreed with Mr. Bopp's conclusion that Claimant had lost all access to the labor market. He explained that Mr. Bopp employed the *Dictionary of Occupational Titles* to determine that there was no work that Claimant could do within his right upper extremity restrictions. However, in Mr. May's opinion, the *Dictionary of Occupational Titles* does not accurately describe the availability of employment for individuals with restrictions on the use of one hand. The *Dictionary* assumes that all jobs involving any reaching, handling or fingering require two hands to perform; it therefore excludes from consideration any such jobs that could be performed with one hand (or one hand with assistance). By excluding from consideration all jobs that require any reaching, handling or fingering, even if such jobs could be performed with one hand, Mr. Bopp's analysis is too limited.

77. I find Mr. Mayø testimony well-founded and credible. Although he did not perform his own vocational assessment, his 25 yearsø experience in the field qualifies him to offer an opinion about Claimantø ability to perform regular, gainful work based on his knowledge and training and based on his personal experience in returning injured workers to employment.

Video Surveillance

78. Defendant hired Veracity Research Company to undertake video surveillance of Claimant on March 25, 2017. *Defendant's Exhibit 2.*
79. The surveillance video shows Claimant engaged in radio-controlled toy car racing. The video depicts a total of one hour and 16 seconds of Claimantø day, between 12:41 p.m. and 8:03 p.m. Claimant is seen racing his radio-controlled car on an indoor track, making minor adjustments to the car while seated at a workbench, taking a practice run, and standing around the track talking to other people. The video shows him participating in two races, each about five minutes long. It also shows him spending about five minutes testing his car on the track. At the end of the video, Claimant is awarded a trophy and photographs are taken.
80. Operating the toy car involves holding a large radio controller in the left hand and turning a small foam steering wheel with the right hand. Claimant is able to do this without apparent difficulty. The video also depicts him making adjustments to his car while seated at a work bench and while standing, each time holding the car in his left hand and making adjustments with his right hand. One time he makes an adjustment by repeatedly twisting or rotating a tool with his right hand. *Defendant's Exhibit 1*, at 2:36:47 p.m. The video also shows him lifting and carrying his car in his right hand without difficulty. At several points, the video shows Claimant lifting his car off the track, making adjustments to the bottom, and returning the car to the track, all with his right hand. *Defendant's Exhibit 1*, at 1:48:51 p.m., 1:51:46 p.m. At other times during the day, Claimant carries a folding chair, mops his face with a handkerchief and drinks a bottled beverage. He accomplishes each of these actions with his left hand.
81. Nothing depicted on the surveillance video contradicts Claimantø testimony about his participation in radio-controlled car racing. *See Finding of Fact Nos. 24-25 supra.* However, the 2008 functional capacity evaluation found that he lacked fine motor skills in his right hand. Claimantø ability to steer his radio-controlled car and to make adjustments with a rotating tool suggests that he possesses at least some fine motor skills in his right hand.

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 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).
2. Claimant alleges that his March 2007 wrist injury has rendered him permanently and totally disabled under the odd lot provision of 21 V.S.A. §644(b). Defendant counters that Claimant has a current work capacity and has not exhausted vocational rehabilitation services and therefore has not established permanent total disability.

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 further guidance. The 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.

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.

5. Under Workers' Compensation Rule 11.3100, therefore, Claimant must support his claim with both a functional capacity evaluation and a vocational assessment concluding that he is not reasonably expected to be able to return to regular, gainful employment.⁷
6. A finding of odd-lot permanent total disability should not be made lightly. In 2011 the Commissioner wrote:

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 will probably never work again. As Rule 11.3100 makes clear, 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.

Rowell v. Northeast Kingdom Community Action, Opinion No. 17-11WC (July 6, 2011), at 13.

⁷ Rule 11.3100 was amended and re-numbered as Rule 10.1700 *et seq.*, effective August 1, 2015. Rule 10.1710 similarly requires that an odd-lot permanent total disability claim be supported by a functional capacity evaluation and a vocational assessment.

Claimant's Functional Capacity

7. Claimant underwent three functional capacity evaluations. The first two found that he has a full-time, sedentary work capacity with some right upper extremity limitations. The third evaluation further delineated his right upper extremity limitations. Finding of Fact No. 41 *supra*. I accept these evaluations as accurately reflecting Claimant's capabilities.
8. The parties' medical experts also testified about Claimant's ability to work. In Dr. Kenosh's opinion, Claimant has a work capacity, and working would improve his overall health and quality of life. See Finding of Fact Nos. 64-66 *supra*. His opinion is based on his training and experience as a rehabilitation physician, and he cited the functional capacity evaluations as an additional basis for his opinion.
9. In contrast, Dr. Hebert testified that Claimant has limited, if any, use of his wrist and is therefore "probably permanently disabled." Finding of Fact No. 61 *supra*. He based his opinion on his own inability to think of a meaningful job that Claimant could do.
10. 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 medical records; (3) the clarity, thoroughness and objective support underlying the expert's 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).
11. Analyzing the medical testimony under the *Geiger* factors, I find Dr. Kenosh's opinion more persuasive than Dr. Hebert's. Although Dr. Hebert was a treating physician, his specialty was family practice, not rehabilitation medicine. Accordingly, he does not have the knowledge, training or experience necessary to determine what type of work Claimant is able to perform. Further, Dr. Hebert was not involved in treating Claimant's wrist beyond prescribing opioids. Finally, his methodology of personally trying to think of a meaningful job for Claimant was unpersuasive, and his opinion that Claimant was probably permanently disabled did not address whether his disability was total or partial.⁸ As an experienced rehabilitation physician, Dr. Kenosh is better qualified by his training and experience to offer an opinion on Claimant's ability to perform regular, gainful work. He also took the functional capacity evaluations into account.
12. I therefore conclude that Claimant's physical impairments and resulting functional restrictions are not themselves so severe as to render him unable to perform regular, gainful work.

⁸ Dr. Hebert did not testify that Claimant was permanently *and totally* disabled. As the term suggests, there are two separate prongs to a permanent total disability determination. First, the disability must be permanent, as opposed to temporary. Second, it must be total, as opposed to partial. *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011).

Vocational Rehabilitation

13. Claimant's claim must also be supported by a vocational assessment that considers his injury-related functional restrictions in the context of other vocationally relevant factors to determine whether it is reasonable to expect that he will be able to return to regular, gainful employment. 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).
14. The parties presented conflicting testimony from two vocational rehabilitation counselors as to whether Claimant is capable of performing regular, gainful work. Claimant's expert, Mr. Bopp, testified that there is no regular, gainful employment available to him and that further vocational rehabilitation would not improve his employability. Finding of Fact No. 69 *supra*. Defendant's expert, Mr. May, testified that there are many occupations that fit within Claimant's functional capabilities. Further, in his opinion, if Claimant had completed the 2015 Return to Work Plan, he more likely than not would have returned to regular, gainful employment. Finding of Fact Nos. 74-75 *supra*.
15. Unlike Mr. Bopp, Mr. May has substantial experience in returning injured workers to work in Vermont. He also drew well-founded inferences from Ms. Plaisted's reports concerning the continued viability of Claimant's Return to Work Plan. For his part, Mr. Bopp's analysis was limited by his failure to consider occupations involving reaching, fingering or handling that do not require the use of both hands. Further, he mistakenly assumed that Claimant is unable to engage in any hobbies or to concentrate on any work activity due to wrist pain. His assumptions are inconsistent with Claimant's testimony about his hobbies and his demonstrated ability to concentrate on activities like toy car racing, driving for Quality Motors and completing his computer applications class. For these reasons I find Mr. May's opinion to be the more persuasive.
16. Further, although Ms. Plaisted closed vocational rehabilitation services in May 2016, her closure cited only the fact that Claimant had been receiving services for "an extended period of time." Her reports are rife with one minor technical delay after another, but no indication that Claimant's approved Return to Work Plan was no longer viable. Her statement in her closing report that Claimant is not reasonably expected to be able to return to regular, gainful employment is conclusory at best and contradicts her statement that the plan could continue if Claimant "want[ed] to move forward vocationally." Finding of Fact Nos. 55-56 *supra*.

17. Thus, although vocational rehabilitation services have not yet resulted in Claimant's return to regular, gainful work, I find that such services have not been exhausted, as required for a finding of permanent total disability. *See, e.g., Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011); *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011). Claimant repeatedly asserts, and I have found, that he has done everything that has been asked of him. However, a successful return to work requires active engagement in the vocational rehabilitation process, not mere passive compliance. Claimant allowed his community college enrollment to be delayed for an entire semester due to an unpaid account balance of nine dollars, rather than taking proactive steps to solve the problem and move forward with his education. Similarly, his testimony that his efforts to use Dragon Dictate did not work out due to "something with the computer" shows a lack of active engagement with the process.
18. In short, there are additional vocational rehabilitation services that may benefit Claimant, but only if he engages fully, and participates actively, in the process. To the extent he is entitled to further assistance, a reasonable Return to Work Plan should emphasize this.

Conclusion

19. Claimant has the burden of proving that he has no reasonable prospect of finding and sustaining regular, gainful employment and that he is therefore permanently and totally disabled. *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011).
20. Based on his work capacity and his failure to exhaust vocational rehabilitation, I am unconvinced that Claimant has no reasonable prospect of finding and sustaining regular, gainful employment. I therefore conclude that he has failed to sustain his burden of proving that he is permanently and totally disabled as a result of his March 2007 wrist injury. As Claimant has failed to prevail on his claim, he 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 ____ day of May 2018.

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.