

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Michael Hall

Opinion No. 09-19WC

v.

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

Safelite Group, Inc.

For: Lindsay H. Kurrle  
Commissioner

State File No. FF-58850

**OPINION AND ORDER**

Hearing held in Montpelier on February 1, 2019  
Record closed on April 26, 2019

**APPEARANCES:**

Charles L. Powell, Esq., for Claimant  
James M. O'Sullivan, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant permanently and totally disabled as a consequence of his January 8, 2014 compensable work injury?

**EXHIBIT:**

Joint Exhibit I: Medical and vocational rehabilitation records

**CLAIM:**

Permanent total disability benefits pursuant to 21 V.S.A. § 645  
Costs and attorney fees pursuant to 21 V.S.A. § 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. I take judicial notice of all forms and correspondence in the Department's file relating to this claim. I also take judicial notice of the Commissioner's opinions in *Hall v. Safelite Group, Inc.*, Opinion No. 10-16WC (July 15, 2016) (*Hall I*) and *Hall v. Safelite Group, Inc.*, Opinion No. 06-18WC (March 28, 2018) (*Hall II*).

Claimant's 2014 Work Injury and Subsequent Medical Course

3. Claimant is a 49-year-old man who lives in southwestern New Hampshire. He worked for Defendant as a windshield installer for 15 years. During his last few years of work for Defendant, he also performed some managerial duties.
4. On January 8, 2014, Claimant was lifting a heavy windshield off a rack when he strained his left elbow. Defendant accepted his injury as compensable and began paying workers' compensation benefits accordingly.
5. Claimant treated his injury conservatively, but his symptoms, which included both constant aching and occasional sharp pains, persisted. After consulting with an orthopedist and a physiatrist, Claimant was referred in October 2014 to a pain specialist, Mark Horton, MD.
6. In December 2014 Dr. Horton diagnosed Claimant with Complex Regional Pain Syndrome (CRPS) Type 1 causally related to his work injury. Dr. Horton based his diagnosis on the Budapest criteria, which consider both objective signs and subjective symptoms evidencing abnormal changes in the affected limb that no other diagnosis can explain. Dr. Minsinger, an orthopedic surgeon, and Dr. Gellis, a pain management specialist, have also confirmed Claimant's CRPS diagnosis. I find that this diagnosis accurately characterizes Claimant's condition.
7. Dr. Horton performed a series of nerve blocks to treat Claimant's CRPS. The first block, in July 2015, provided significant relief, but subsequent blocks in early 2016 provided only minimal and temporary relief. Claimant has tried other treatments as well, including opioid medications, compounded topical ointments and scrambler therapy. None of these treatments provided lasting relief. Moreover, his CRPS is progressive, having now spread to his entire left upper extremity, his gastrointestinal system and his organs.
8. Claimant currently treats his condition with a combination of non-narcotic prescription medications, over-the-counter medications and medical marijuana. His treating physician has also recommended hot baths to ease his pain. Claimant takes hot baths three to four times per day and finds that they provide some relief. He also recently engaged in a group-based cognitive behavioral therapy program that helped him accept his chronic pain condition and learn to deal with it on a day-to-day basis.
9. There are other treatments available that Claimant could try, including ketamine infusion and a spinal cord stimulator. He is not interested in those treatments at present because they pose significant risks which, in his estimation, outweigh the potential benefits. Mark Bucksbaum, MD, is a pain management physician who performed an independent medical examination of Claimant.<sup>1</sup> In Dr. Bucksbaum's opinion, Claimant's decision not to try those treatments now is a reasonable one. In particular, he testified that the spinal cord stimulator is "plagued by complications and

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<sup>1</sup> See Finding of Fact No. 13 *infra*.

maintenance.” Dr. Horton also supports Claimant’s decision to forego these treatments at present, and there is no expert medical testimony that his decision is unreasonable. I accept the opinions of Dr. Bucksbaum and Dr. Horton on this issue as persuasive.<sup>2</sup>

*Claimant’s Current Condition and its Impact on his Activities*

10. Claimant credibly testified that his chronic pain encompasses his entire left arm, hand and fingers, and sometimes the left side of his neck. His arm also feels heavy, “like I’m carrying around a bunch of bricks.”
11. He also experiences unbearable flares of more severe pain that “take my breath away” on a daily basis. These flares happen “just out of the blue” and are not necessarily associated with activity, although activity also produces them. Claimant described these flares of intense pain as “electric jolts” that run through his arm and up into his left ear, lasting anywhere from a few minutes to an hour. The flares are accompanied by headache, mental foginess, abdominal pain and gastrointestinal distress.
12. Claimant testified that it is hard to plan activities such as grocery shopping or visiting friends because his pain flares are severe and unpredictable. He generally goes shopping late at night or early morning so he can move slowly and not worry about another shopper jostling him. Even going for a walk is problematic because a single misstep can cause jarring pain. The unpredictable nature of his condition has also isolated him socially. I find this testimony credible in all respects.

*Dr. Bucksbaum’s Description of Claimant’s Condition and his Impairment Rating*

13. At Claimant’s request, Mark Bucksbaum, MD, performed an independent medical examination of him in October 2017. Dr. Bucksbaum graduated from St. George’s University School of Medicine in 1984 and completed a residency in physical medicine and rehabilitation. He is board certified in physical medicine and rehabilitation and in pain management. Dr. Bucksbaum is also certified in functional capacity evaluation and has substantial experience in the assessment of disability. Finally, he is a board-certified independent medical examiner.
14. Dr. Bucksbaum credibly described CRPS as a “horrific pain condition” caused by a traumatic event to the body’s sympathetic nervous system. He identified four stages of CRPS: In stage one, the patient experiences swelling, warmth or coolness in the affected area, sensitivity to touch, and pain and joint stiffness. In stage two, those symptoms become more pronounced and persistent, with throbbing, burning or aching. In stage three, CRPS may affect the patient’s bones, muscle tissue and organs, including the stomach and bowel. It may also cause headaches, memory problems and cognitive issues. Dr. Bucksbaum described this stage as “extremely painful” and “very, very, very difficult to treat.” Finally, he explained that in the fourth stage,

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<sup>2</sup> Dr. Bucksbaum emphasized that it would still be reasonable to try these treatments if Claimant’s CRPS worsens to the point that, in Claimant’s estimation, the potential benefits outweigh the risks.

severe pain makes some patients so desperate that they request the amputation of their affected limbs.

15. Dr. Bucksbaum characterized Claimant's condition as "early stage three" based on his cognitive issues and organ involvement. Further, in his opinion, Claimant's CRPS is still spreading and worsening. I find this testimony well supported and credible.
16. In October 2017 Dr. Bucksbaum determined that Claimant had reached an end medical result for his condition unless he wished to try additional treatments, like ketamine infusion or a spinal cord stimulator.<sup>3</sup> *Joint Exhibit I at 579*. He assessed a 45 percent whole person impairment for Claimant's left elbow condition complicated by CRPS, based on the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.). *Joint Exhibit I at 580*.
17. With the Department's approval, Defendant discontinued Claimant's temporary total disability benefits in March 2019, based on Dr. Bucksbaum's finding of end medical result, and began paying permanent partial disability benefits based on his assessed whole person impairment.

#### Claimant's Current Work Capacity

##### *(a) Functional Capacity Evaluation*

18. At his attorney's request, Claimant underwent a functional capacity evaluation with Charles Alexander in October 2017. Mr. Alexander is an occupational therapist and a certified work capacity evaluator.
19. Mr. Alexander found that Claimant made "near full" levels of physical effort throughout the testing process, although he was unable to perform most left upper extremity tasks due to severe pain. Further, Claimant's subjective reports matched well with Mr. Alexander's objective findings, and there was no evidence of symptom magnification.
20. Claimant's pain increased significantly over the course of the five-hour evaluation. Moreover, he was unable to function the next day due to severe pain, nausea, headache and fatigue. As he reported to Mr. Alexander in a follow-up email, he was unable even to shower or assemble a meal the next day.
21. Mr. Alexander found that Claimant is best suited for unilateral, right hand only, part-time, light or sedentary capacity work. Further, given his reliance on medical marijuana for pain control, he would be better suited to working from home. Mr. Alexander concluded that whether it was feasible for Claimant to find employment within his outlined work capacity would be an appropriate subject for a vocational rehabilitation professional's opinion. I find this analysis well supported and credible.

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<sup>3</sup> Claimant does not wish to try those treatments at this time. *See* Finding of Fact No. 9 *supra*.

*(b) Work Restrictions and Opinion of Dr. Horton*

22. Mark Horton, MD, is a board-certified anesthesiologist and pain management physician affiliated with the Dartmouth Hitchcock Medical Center. Dr. Horton graduated from the University of Vermont's College of Medicine and completed an anesthesiology residency and a chronic and interventional pain fellowship at the University of Michigan. He is Claimant's treating physician.
23. In January 2018 Dr. Horton completed a questionnaire to support Claimant's claim for social security disability benefits. *Joint Exhibit I at 591-96*. He documented constant, moderate to severe pain in Claimant's left arm with severe flares related to activity, as well as gastrointestinal upset and depression. In response to a specific question as to whether Claimant would need to take unscheduled work breaks, Dr. Horton wrote that he would need a 15-minute break every hour and would also need to lie down at work frequently. In his opinion, Claimant "has no reliable and safe work capacity. His complex regional pain syndrome has affected every aspect of his life which severely limits his ability to perform any sort of steady occupation." *Joint Exhibit I at 476*. Further, his pain is frequently severe enough to interfere with his attention and cognition. In Dr. Horton's opinion, even if Claimant could sit comfortably sometimes, it is unreasonable to think that he could sustain that for any significant duration, given his frequent, severe pain flares.
24. Dr. Horton's opinions are based both on his treatment of Claimant over the past four years and on his professional training and experience as a pain management physician. I find his analysis well supported and persuasive.

*(c) Opinion of Dr. Bucksbaum*

25. Dr. Bucksbaum performed an independent medical examination of Claimant in October 2017 and considered whether he was able to perform regular, gainful work. *See Finding of Fact No. 13 supra*.
26. Dr. Bucksbaum was familiar with the residual work capacity that Mr. Alexander identified during his functional capacity evaluation. However, he noted that Claimant experienced not just increased, but debilitating pain, headache and nausea the day after that evaluation. He also noted that Claimant had trouble focusing his attention, remembering things and writing; he could not handle cold weather, loud noises, making plans or socializing. Further, CRPS impaired his ability to sleep, eat, dress, shower, cook, drive, walk or maintain a positive outlook. Although Claimant might be able to do some things for short periods of time, he could not reliably engage in any activities. Accordingly, in Dr. Bucksbaum's opinion, Claimant is unsuitable for competitive, regular employment, where pace, productivity and predictability are essential.

27. Dr. Bucksbaum further explained the effect of stage 3 CRPS on work capacity:

When [CRPS] starts affecting the organs, . . . it becomes extremely difficult [to work] because it's so random. You could be anywhere and all of a sudden have the equivalent of an irritable bowel situation, and it becomes overwhelming . . . . The cognitive factors, the internal organ factors, the risk factors of casual contact, it's just not somebody who is going to be reliable. When [Claimant] . . . got into trying to do focused learning, where he was working with a computer, it was overwhelming, and he couldn't do it.

*Dr. Bucksbaum's February 1, 2019 Hearing Testimony.*

28. As a physiatrist and a certified functional capacity evaluator, Dr. Bucksbaum has substantial experience with rehabilitation medicine and the assessment of disability. His opinion that Claimant is unsuitable for competitive regular employment is well grounded in his training and experience, and I find his analysis persuasive.

*Vocational Rehabilitation Efforts*

29. Claimant worked with certified rehabilitation counselor Brittany McKenna, MS, for over three years in an effort to return to work after his injury. Ms. McKenna has a master's degree in vocational evaluation and rehabilitation counseling and eight years' experience in the field.
30. Ms. McKenna initially relied on information from Claimant's treating physician, Nancy Johnson, MD, about his work capabilities as of October 2014. Those capabilities included a work capacity of four hours per day with no use of his left upper extremity.
31. Ms. McKenna developed a return to work plan focused on building Claimant's computer skills for future employment. She provided him with a computer and speech recognition software in March 2017, and he began using a free online resource to become familiar with computer use. Although Ms. McKenna did not have a specific job goal in mind, computer skills would be an important first step for any job Claimant was likely to get within his work restrictions.
32. Ms. McKenna credibly testified that Claimant made a "really great effort," but computer use increased his headaches, nausea, dizziness and fatigue. Of greater concern, he had difficulty concentrating and was not retaining the information he was exposed to. Accordingly, Claimant's efforts to develop basic computer skills were not successful.
33. In January 2018 Dr. Horton prepared his report setting forth Claimant's work restrictions. *See Finding of Fact No. 23 supra.* Those restrictions were much greater than the ones Ms. McKenna had been working with, and they changed her understanding of what Claimant could do vocationally. In particular, Ms. McKenna

noted that Claimant's pain, headaches and nausea would prevent him from being a dependable and productive employee. Further, Dr. Horton's opinion that Claimant would need to take hourly breaks and also lie down frequently during the day would necessitate that he work from home. However, without computer skills, working from home was not a realistic option. Ms. McKenna therefore concluded that Claimant had no reasonable prospect of employment, and she suspended vocational rehabilitation services in March 2018.

34. Ms. McKenna testified at the hearing that she has explored and exhausted all reasonable vocational rehabilitation avenues for Claimant without identifying appropriate work for him. Therefore, in her opinion, he is unable to perform regular, gainful work. I find her analysis clear and well supported.

Expert Opinion as to Employability

35. In February 2018 Jack Bopp, MS, performed an employability assessment of Claimant at his request. Mr. Bopp holds a master's degree in rehabilitation counseling and has been a certified vocational rehabilitation counselor since 1998.
36. Mr. Bopp reviewed Claimant's medical and vocational rehabilitation records and conducted an in-person interview to obtain information about his educational and employment history, day-to-day functioning, and medical treatment. He also reviewed Mr. Alexander's functional capacity evaluation report and reports from Dr. Horton and Dr. Bucksbaum. Finally, he performed some general aptitude testing. Mr. Bopp's goal was to determine whether Claimant has the ability to perform regular, gainful employment or alternatively, whether he is permanently and totally disabled.
37. Mr. Bopp described Claimant as a well-adjusted individual with a steady work history, work ethic, and satisfaction with his employment prior to his work injury. However, his ability to work has been impacted by his injury and associated functional limitations, which include moderate to severe pain that is increased by physical activity, creating a limited exertional positional tolerance, poor activity tolerance and fatigue. In Mr. Bopp's opinion:

Based upon medical provider input, the FCE findings, [Claimant's] reports of his pain and functional limitations, and my vocational analysis, [Claimant's] employability and placeability are so significantly limited that he cannot reasonably be expected to meet basic employer expectations and requirements to achieve job stability.

*Joint Exhibit I at 630.*

38. In Mr. Bopp's opinion, no additional vocational rehabilitation efforts would increase Claimant's employability. Further, he could not be expected to participate in the competitive labor force now or in the future, not even home-based employment. In Mr. Bopp's opinion, if Claimant were hired by an employer, he would not be able to produce sufficient work to meet production standards, nor would he be reliable in

terms of attendance and punctuality. I find Mr. Bopp's opinions concerning Claimant's vocational prospects to be thorough and 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, see, e.g., *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

### Permanent Total Disability

2. The disputed issue here is whether Claimant's January 2014 work injury has rendered him permanently and totally disabled. 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 paraplegia. In addition, § 644(b) provides:

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

3. The Workers' Compensation Rules provide further guidance. The rule in effect at the time of Claimant's injuries<sup>4</sup> provided:

#### Rule 11.3100 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 claimant's

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<sup>4</sup> Rule 11.3100 was amended and re-numbered as Rule 10.1700 *et seq.*, effective August 1, 2015. Rule 10.1710 similarly requires that, unless the extent to which an injured worker's functional limitations preclude regular gainful employment is so obvious that formal assessment is not necessary, a claim for odd-lot permanent total disability should be supported by a functional capacity evaluation and a vocational assessment.

physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

4. 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).
5. Although Mr. Alexander’s functional capacity evaluation identified a limited, part-time work capacity, Dr. Horton’s work restrictions and Dr. Bucksbaum’s description of Claimant’s CRPS condition convincingly establish that Claimant has no reliable and safe work capacity. Further, Mr. Bopp and Ms. McKenna testified that Claimant has exhausted vocational rehabilitation services and cannot reasonably be expected to return to regular, gainful employment. No vocational rehabilitation professional testified to the contrary, and I accept the opinions of Ms. McKenna and Mr. Bopp as persuasive.
6. I conclude that Claimant has sustained his burden of proving that as a result of his work injury he is unable to successfully perform regular, gainful work. This circumstance is unlikely to change even with the provision of further vocational rehabilitation services. Claimant is therefore permanently and totally disabled.

#### Costs and Attorney Fees

7. 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 the date when temporary disability benefits ended in accordance with 21 V.S.A. § 645, with credit for any permanent partial disability benefits paid thereafter, in accordance with 21 V.S.A. § 648(a)<sup>5</sup>; and
2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. § 678.

**DATED** at Montpelier, Vermont this 14<sup>th</sup> day of May 2019.

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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.

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<sup>5</sup> See *Harmon v. Central Vermont Council on Aging*, Opinion No. 01-17WC (February 1, 2017).