STATE OF VERMONT
DEPARTMENT OF LABOR

Eric Schwartz	Opinion No. 08-21WC
v.	By: Stephen W. Brown Administrative Law Judge
Aviatron, Inc.	For: Michael A. Harrington Commissioner
	State File No. HH-163

OPINION AND ORDER

Hearing held via Microsoft Teams on October 19, 2020
Record closed on December 14, 2020

APPEARANCES:

William Skiff, Esq., for Claimant
James O'Sullivan, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a result of his May 9, 2013 workplace injury?

EXHIBITS:

Joint Medical Exhibit ("JME")
Vocational Rehabilitation Exhibit ("VRE")
Preservation Deposition of Eric Schwartz ("Schwartz Deposition")
Preservation Deposition of Colleen Kearon ("Kearon Deposition")

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §§ 644 and 645
Costs and Attorney Fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms in the Department's file for this claim.

2. Claimant is a 56-year-old man who completed the eleventh grade but did not receive a high school diploma. At age seventeen, he went into the United States Army, where he became proficient in vehicle maintenance. After leaving the Army, he worked in multiple automotive service positions. Later, he worked for construction equipment rental companies where he worked with machinery including concrete rollers, compactors, chain saws, and other equipment.

3. In 2005, Defendant hired Claimant as a technician to work on airplane air conditioners. That role required pre-employment testing and Federal Aviation Administration certification. Claimant enjoyed this work and progressed through the company's ranks to become an inspector responsible for officially certifying the airworthiness of machinery. He eventually became a shop floor manager responsible for supervising approximately seven other employees. As of early May 2013, he was in good health.

4. On May 9, 2013, an air compressor exploded at work and released highly pressurized air and a metal cap that knocked Claimant ten to fifteen feet backward with great force. He landed on his back and struck his head on an asphalt surface. His coworkers found him unresponsive and described him as "ashen" to medical personnel at the scene. (JME 10). He sustained catastrophic injuries as a result.

5. Claimant was taken by ambulance to the University of Vermont Medical Center ("UVMMC"), where he remained in intensive care for five days. His diagnoses included multiple fractures including to the skull and ribs; subarachnoid and subdural hemorrhages; contusions and edema in multiple parts of the brain; abrasions to the shoulders, head, back; petechia on the abdomen; and vomiting blood. (*See* JME 58-123). He was discharged from the hospital on May 15, 2013 and sent home with instructions to follow up with multiple specialists. (JME 646-651).

6. He returned to UVMMC's emergency room approximately two weeks later with complaints of continued headaches that he could not control. (JME 659-661). Later that month, a CT scan revealed encephalomalacia involving the lateral aspect of his temporal lobe and the ventral aspect of the frontal lobe, and a complex fracture involving the right temporal, parietal, and occipital bones. (JME 674).

7. The next month, Claimant presented to a neurosurgery inpatient clinic, where he reported improvement with his headaches but continued problems with vertigo and losing his balance, resulting in an inability to drive. (JME 675-676).

8. By August 2013, he returned to work part time for Defendant but continued to suffer from headaches as well as episodes of ear pain. (*See* JME 763). He still could not drive and had to be driven to and from work. Although he gradually increased his hours to 40 hours per week, he was unable to keep up with the demands of his job.

9. From late 2013 through 2017, Claimant continually sought medical care for headaches and was treated with gabapentin and amitriptyline, which in turn caused mood swings. (*E.g.*, JME 819). Medical records throughout this period reflect a "constellation of symptoms" accompanying his headaches, including confusion, disorientation, and difficulties with focus and balance stemming from his workplace brain injury. (*E.g.,* JME 819, JME 999) They also reflect intake of caffeine in the form of Mountain Dew every morning, alcohol intake including up to five beers per day, and Excedrin three times per day for headaches. (*E.g.,* JME 808-819). At least two of his providers

recommended in 2015 that he taper his caffeine use and reduce or eliminate alcohol. (*See* JME 806, 821).

10. In September 2016, following an evaluation at Dartmouth-Hitchcock Medical Center's ("DHMC's") traumatic brain injury ("TBI") clinic, Claimant's nurse case manager took him out of work because of his "fall risk and cognitive deficits," noting in the same document that Claimant suffered from "multi-trauma s/p skull fractures, head bleed, whiplash injury, head injury." (JME 1002-03).

11. After he left employment, Claimant continued to experience constant head pain that made it difficult for him to focus. He credibly described experiencing mood swings, irritability, short-term memory loss, and balance problems. (*See* Schwartz Deposition, pp. 22-24). His medical records corroborate his testimony in this regard, reflecting continued difficulties with attention, concentration, balance, and memory, as well as post-traumatic chronic migraines and medication-induced headaches related to his Excedrin use. (*E.g.*, JME 1014, 1034-36, 1045, 1165).

12. Records from March 2017 reflect that his TBI symptoms were not improving and that his functional balance was worsening. (*E.g.,* JME 1165). That same month, Claimant's clinical psychologist Laurence Thompson, MS, diagnosed him with an adjustment disorder with depressed mood and noted that he had been reporting worsening symptoms over the course of the previous year. (JME 1170).

13. In November 2017, Mr. Thompson noted that Claimant experienced problems with comprehension and memory, "often going from one task to the other being unable to see any to completion." (JME 1336). He also noted that Claimant experienced problems with social cues and misunderstanding people's comments and intentions. (*Id.*).

14. Beginning in November 2017, Claimant began treating with Austin Sumner, MD, an occupational medicine physician at Central Vermont Medical Center, as his primary care physician. Dr. Sumner noted during his intake evaluation that Claimant reported daily headaches with weekly severe exacerbations, and that he was "unable to control his extremities and the movement affects both upper and lower extremities. When he gets up to walk he does have a very spastic gait…He is unable to stand on 1 leg for really any period of time." (JME 1340). Among other things, he diagnosed Claimant with a spastic movement disorder related to his trauma and intractable chronic post-traumatic headache. In Dr. Sumner's opinion, these issues were "permanent sequalae" from his brain injury, noting that "other explanations h[ad] been ruled out." He also noted at that time that Claimant was "probably" permanently and totally disabled from employment but indicated that further evaluation would be necessary to make that determination definitively. (JME 1339-1342).

15. In January 2018, occupational and environmental medicine physician Karen Huyck, MD of DHMC expressed a concern that based on the severity of Claimant's injury and his problems with balance and risk of falling, he was "not safe at home." (JME 1372). She recommended a home safety evaluation and an assessment for inpatient

rehabilitation; she also expressed a likelihood that Claimant would require long-term assistive living. (*Id.*).

16. Later that month, personnel at UVMMC performed a home assessment and concluded that Claimant could live at home with weekly checks to monitor safety and check problem solving methods. That evaluation also found that Claimant "may succeed in supportive employment with a job coach and get to regularly scheduled valued community activity…[and] would benefit from supervision in the community due to decreased balance in new environments." (JME 1405-1408).

17. In September 2018, Claimant was evaluated by Tarama Rimash, MD, of UVMMC's Division of Otolaryngology for complaints of lost sense of smell and taste. Dr. Rimash noted that Claimant had a "five-year history of anosmia confirmed with objective testing," noted this was likely secondary to his traumatic brain injury, and stated that a lack of smell greater than two years was "unlikely to respond to treatment." (JME 1546).

Treating Providers' Opinions as to Causation and Permanent Total Disability

18. In November 2018, Dr. Sumner diagnosed Claimant with a "chorea type movement disorder associated with and directly caused by his traumatic brain injury" as well as impaired cognitive function.

19. At that time, he opined that Claimant's combination of chorea-like movement and cognitive dysfunction "with a reasonable degree of medical certainty has permanently and totally disabled him from work." (JME 1585-1586). I find this opinion to be credible and well-supported by the weight of the evidentiary record, including Claimant's credible testimony and the totality of the JME.

20. Claimant's treating neurologist, Joran Paulson, MD, of DHMC, also opined that Claimant's neurological issues with abnormal movements could be traced to his workplace injury "with greater than 50% certainty." (JME 1644). I find this opinion equally credible and well-supported.

Functional Capacity Evaluation

21. In November 2019, Louise Lynch, PT conducted a functional capacity evaluation ("FCE") of Claimant and concluded that he "**d[id] not have a work capacity** based on the Department of Labor Guidelines as outlined in the Dictionary of Occupational Titles." (JME 1707) (emphasis in original).

22. She found that Claimant did not meet the strength of positional requirements of either sedentary work or light work, as his endurance was poor and he both mentally and physically fatigues after ninety minutes to two hours of sustained activity. (*Id.*).

23. Based largely on Claimant's difficulty concentrating, risk of falls, and persistent need for supervision, Ms. Lynch found that Claimant did not have work capacity even for

part-time work. (JME 1708). I find her opinions credible, persuasive, and well-supported in all regards.

Vocational Rehabilitation Testimony

24. Claimant presented the testimony of Coleen Kearon, a licensed vocational rehabilitation ("VR") counselor employed by the State of Vermont with twenty years of experience in that field. (Kearon Deposition, pp. 5-6).

25. Ms. Kearon provided VR services to Claimant for approximately one year, from December 2017 to December 2018. Based on her experience working with Claimant, she concluded that he would not be able to compete for gainful employment because of the severity of his symptoms following his workplace injury. This was in large part due to Dr. Sumner's medical reports indicating that because of Claimant's movement disorders, headaches, and other medical concerns, he could not provide Claimant with a work release. (Kearon Deposition, 10-13).

26. Ms. Kearon therefore filed a VR-5 closure report with the Department of Labor with a closure code of 7, meaning "disability too severe." (*Id.*, pp. 12-15) The Department of Labor approved the Form VR-5 closure on December 14, 2018. Ms. Kearon then terminated Claimant's VR services. (*Id.*).

27. I find Ms. Kearon's testimony credible in all respects, and I find that her closure of VR services was well-supported and justified.

28. Defendant has presented no vocational rehabilitation expert with any opinion contrary to Ms. Kearon's.

Independent Medical Examination ("IME") by Amin Sabra, MD

29. Defendant retained neurologist Amin Sabra, MD, of New England Baptist Medical Staff in Boston, Massachusetts to perform an IME of Claimant. Dr. Sabra examined and interviewed Claimant in his office in February 2016. He reviewed a limited set of medical records that were available to him. However, at that time, he did not have the vast majority Claimant's records from after August 2013 and before May 2015. (*See* JME 985).

30. Dr. Sabra stated in his February 2016 report that he had "difficulty explaining worsening of headaches after a concussion or traumatic head injury[,]" because "[i]n general, headaches and postconcussive syndrome improve with time." (JME 974). He also placed great weight on the medical records that showed Claimant returned to work. (*Id.*). At the time of his first report, Dr. Sabra attributed Claimant's headaches to his intake of caffeine, Excedrin, and alcohol, as well as life stressors such as his divorce.

31. In May 2016, after having reviewed Claimant's medical records from between 2013 and 2015 that he did not have at the time of his original report, Dr. Sabra prepared an

addendum to his IME report. In that addendum, he acknowledged that these medical records showed that Claimant "continued to complain of headaches, mood changes, and at times confusion. These medical records were not available to me when I performed the independent medical examination dated February 18, 2016." (JME 985). He went on to note that "[t]his is a complicated case as Mr. Schwartz did have a significant trauma to his head with contusions to the right temporal lobe, subdural hematoma, and complex fracture to the right temporal, parietal, and occipital bones." (*Id.*).

32. Dr. Sabra noted in his May 2016 addendum that Claimant was taking several medications including narcotics, tramadol, and Excedrin Migraine between 2013 and 2015, and that Claimant also had a significant intake of caffeine and alcohol, along with a "stressful social situation" including a divorce and the sale of his home during that period. In his addendum, Dr. Sabra opined as follows:

> …all of the above have contributed to his complaints of headaches, mood changes, irritability, and at times confusion. ***It is impossible for me to decide how much each factor is contributing to his current complaints.*** I can say that after a head trauma with postconcussive syndrome the symptoms improve with time and do not get worse. The fact that he is getting worse suggests that there are other factors mentioned above not related to his injury at work that are playing a role in his mental and physical deterioration.

(JME 985) (emphasis added).

33. Subsequently, in July 2017, Dr. Sabra issued a third opinion based on an updated review of medical records, but without having reexamined Claimant. (JME 1266-1270). In his third report, Dr. Sabra opined that Claimant's neurological, cognitive, and movement changes suggested alcoholic damage to the brain, and that to a reasonable degree of medical certainty, Claimant's "progressive neurological deterioration consisting of frequent falls with ataxic gait, tremulousness in the hands, loss of weight, right wrist drop, and the worsening cognitive function is not causally-related to his injury at work dated May 9, 2013." (JME 1270). In Dr. Sabra's updated opinion, these neurological symptoms that had worsened over the previous two years were "due to a separate neurological disease." (*Id.*).

34. Dr. Sabra's opinions in his third report are contrary to the overwhelming and well-supported consensus among Claimant's treating providers. While I find the opinion in Dr. Sabra's May 2016 addendum that Claimant's cognitive problems and headaches likely had multiple contributing causes well-supported, I do not find that Dr. Sabra has advanced any convincing argument for the proposition that Claimant's May 2013 head trauma was not the primary contributing cause of Claimant's neurological and cognitive decline since that time. The weight of all credible evidence supports exactly the opposite conclusion.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see 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 Under Vermont's Workers' Compensation Act

2. Under Vermont's workers' compensation statute, claims for permanent total disability benefits are governed by 21 V.S.A. § 644, which, at the time of Claimant's injury, provided as follows:

> (a) In case of the following injuries, the disability caused thereby shall be deemed total and permanent:
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> (1) the total and permanent loss of sight in both eyes;
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> (2) the loss of both feet at or above the ankle;
>
> (3) the loss of both hands at or above the wrist;
>
> (4) the loss of one hand and one foot;
>
> (5) an injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and
>
> (6) an injury to the skull resulting in incurable imbecility or insanity.[1]
>
> (b) 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 additional guidance on permanent total disability. The applicable rule in effect at the time of Claimant's injury provided as follows:

[1] Effective July 1, 2014, the language "incurable insanity or imbecility" in 21 V.S.A. § 644(a)(6) was replaced with "severe traumatic brain injury causing permanent and severe cognitive, physical, or psychiatric disabilities." *See* 2014 Vermont Laws No. 96 (S. 27).

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 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.[2]

Medical Causation

4. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

5. It is a brave claimant who asserts a claim as consequential as one for permanent total disability benefits and relies entirely on the medical records to speak for themselves on the issue of causation.

6. However, in this case, Drs. Sumner and Paulson left treatment records containing well-supported and well-reasoned opinions that, together with the entirety of the well-documented medical chronology in this case, convince me that Claimant's May 2013 workplace injury caused his cognitive decline and balance problems. Indeed, there is nothing in Claimant's *treatment* records seriously suggesting any contrary view.

[2] Effective August 1, 2015, the Workers' Compensation Rules were amended and renumbered. The current rules governing odd lot permanent total disability claims are Rules 10.1700 through 10.1217. Rule 10.1710 currently 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. The Department has noted that this additional language merely "codifies preexisting Department precedent as determined under the prior rule." *See Bartlett v. Trapp Family Lodge*, Opinion No. 02-18WC (January 31, 2018) (citing *Bohannon v. Town of Stowe*, Opinion No. 01-15WC (January 5, 2015)).

7. Nor is there any serious suggestion in his treatment records that Claimant's conditions in these regards are likely to improve. I find Dr. Sumner's opinion that Claimant's cognitive and balance problems are permanent sequelae of his workplace injury to be credible and well-supported.

8. By contrast, I find insufficient evidence in the medical treatment records for me to attach any weight to Dr. Sabra's opinions that Claimant's decline results primarily from his intake of alcohol, caffeine, and/or Excedrin, or his psychosocial factors rather than from his brain injury. While Claimant's intake of alcohol and caffeine may be higher than optimal, and some of his providers recommend limiting such intake, there is simply no credible evidence that these factors are the cause of his disability. I find it particularly perplexing that Dr. Sabra, more than a year after concluding in his second report that the complexity of Claimant's case *prevented* him from determining the extent to which each of several factors contributed to Claimant's cognitive and neurological decline, would affirmatively opine that Claimant's workplace injury *did not* cause his ongoing cognitive and balance problems, especially without even re-examining Claimant.

9. Even if some non-occupational factors contributed to Claimant's cognitive and neurological decline following his injury, the evidence is more than overwhelming that the May 2013 workplace injury was the primary and precipitating event that led to Claimant's cognitive and balance problems. Based primarily on the first, third, and fourth *Geiger* factors, I credit the causation opinions of Drs. Sumner and Paulson over that of Dr. Sabra.

Extent of Claimant's Disability

10. Claimant made a good faith effort to return to work. That return was unsuccessful, as evidenced by his nurse case manager taking him out of work because of cognitive deficits and the risk of falling. Ms. Lynch's 2019 FCE found that he had no work capacity, even for light, sedentary, or part time work. The conclusions of that FCE were well-supported, and Defendant presented no FCE with a contrary conclusion.

11. Claimant's VR counselor Ms. Kearon closed his file because Claimant's injuries were too severe for him to have any realistic chance of competing for regular gainful employment. The Department approved that closure, and Ms. Kearon's explanations for her determination that Claimant was unlikely to find regular gainful employment were credible and well-supported. Defendant has presented no evidence that Claimant has any meaningful work capacity. Moreover, the credible opinions of Dr. Sumner convince me that Claimant's lack of work capacity is permanent. *See* Findings of Fact Nos. 18-28, *supra.*

12. By presenting Ms. Lynch's FCE and Ms. Kearon's testimony, Claimant has satisfied the evidentiary thresholds required by the version of Workers' Compensation Rule

11.3100 in effect at the time of Claimant's injury[3] to make out a case for "odd lot" permanent total disability under 21 V.S.A. § 644(b). Based on the evidence presented, I conclude that Claimant's May 2013 workplace injury rendered him permanently and totally disabled under the standard articulated in that statute.

ORDER:

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

1) Permanent total disability benefits pursuant to 21 V.S.A. §§ 644(b) and 645; and

2) Attorneys' fees and costs pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 27th day of April 2021.

_____
Michael A. Harrington
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.

[3] This evidence also satisfies the thresholds set forth in current Workers' Compensation Rules 10.1700 through 10.1217. *Cf.* Conclusion of Law No. 3 and fn. 2, *supra*.