

R. C. V. Mack Molding, Inc.

(July 3, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. C.

Opinion No. 16-07WC

v.

By: Rebecca L. Smith
Staff Attorney

Mack Molding, Inc.

For: Patricia Moulton Powden
Commissioner

State File No. M-25723

OPINION AND ORDER

Hearing held in Montpelier, Vermont on October 24 and 25, 2006

Record closed on November 29, 2006

APPEARANCES:

Stephen Robinson, Esq. and Jennifer Ciarlo Pacholek, Esq. for the Claimant
Keith J. Kasper, Esq. and David Berman, Esq. for Defendant Mack Molding, Inc.

ISSUE PRESENTED:

Is the Claimant permanently and totally disabled as a consequence of his work injury of November 30, 1998?

EXHIBITS:

Joint Exhibits

Joint Exhibit I: Medical Records on CD
Joint Exhibit II: Additional Medical Records
Joint Exhibit III: Stipulation

Claimant's Exhibits

Claimant's Exhibit 1: Resume of George Fotinopoulos
Claimant's Exhibit 2: March 25, 2005 report of Daisy Wojewoda
Claimant's Exhibit 3: Resume of Louise Lynch
Claimant's Exhibit 4: Discovery Deposition of Victor Gennaro, M.D., January 13, 2004
Claimant's Exhibit 5: Vocational Assessment by John May, May 12, 2006

Defendant's Exhibits:

Defendant's Exhibit A: Video surveillance of Claimant December 12, 2005 and January 10 and 12, 2006
Defendant's Exhibit B: Supplemental report of John May
Defendant's Exhibit C: C.V. of John May

Notice is taken of all forms and reports filed and prior formal opinions and orders issued in this claim, and all stipulated facts are adopted.

CLAIM:

Permanent total disability benefits under 21 V.S.A. §644 (b).
Attorney's fees and costs under 21 V.S.A. §678.

FINDINGS OF FACT:

1. On November 30, 1998, the Claimant was an employee of the Defendant, Mack Molding, Inc. within the meaning of the Vermont Workers' Compensation Act (the Act).
2. On November 30, 1998, Mack Molding, Inc. was the Claimant's employer pursuant to the Act.
3. On November 30, 1998, the Claimant suffered a compensable injury to his back arising out of and in the course of his employment with the Defendant.
4. The Claimant is a native Bosnian, 36 years old at the time of the hearing, for whom English is a second language. He testified at the hearing with the occasional assistance of a translator. The Claimant graduated from high school in Bosnia and has worked at a variety of jobs in retail, food service, manufacturing and truck driving. He currently resides in Hooksett, New Hampshire, near Manchester.
5. On November 30, 1998, while employed by Mack Molding of Cavendish, Vermont, the Claimant suffered a herniated disc and facet joint injury at the L4-5 level of his spine, and strained lower lumbar muscles. Dr. Rudolph performed an L4-5 disc excision with left L-5 nerve root decompression on August 26, 1999. Following this surgery the Claimant was released to work, initially part time and then on a full time basis with activity restrictions. He first returned to Mack Molding, but in May 2000 obtained a position at Pike Industries, Inc. in New Hampshire.
6. Thomas J. Kleeman, M.D., an orthopedic surgeon with the New Hampshire Spine Institute, placed the Claimant at Medical End Result on November 8, 2000 and assessed 10% permanent impairment.

7. On July 31, 2001, while at Pike Industries, the Claimant suffered another incident with his lower back. He improved somewhat with physical therapy and, despite ongoing complaints of left leg and lower back pain, resumed working and continued working under additional restrictions until he was laid off in early January 2002.
8. In the fall of 2001, Dr. Kleeman offered L4-5 fusion surgery, which the Claimant had initially declined on the basis of Dr. Rudolph's opinion that he first attempt conservative treatment. After his layoff in early January 2002, the Claimant elected to proceed with the second surgery and underwent L4-5 fusion performed by Dr. Kleeman on January 24, 2002.
9. The New Hampshire Department of Labor found that the need for the 2002 surgery was not due to the Claimant's employment at Pike Industries (Case Number 37208 July 3, 2002). This Department and the Vermont Supreme Court concurred, finding Mack Molding liable for a recurrence of the 1998 injury. See Opinion No. 16-04WC (April 9, 2004) and 179 Vt. 602 (January 13, 2006). This finding was based on the similarity of MRI studies before and after July 31, 2001, the facts that the Claimant still had pain and lifting restrictions and wore a back brace prior to July 31, 2001, and several medical opinions that the Claimant returned to "baseline" following a brief flare-up of symptoms on July 31st.
10. The Claimant's average weekly wage at the time of the recurrence of his injury was \$885.92, resulting in an initial compensation rate of \$590.92.
11. Following the 2002 surgery and physical therapy, Dr. Kleeman released the Claimant to part time work with restrictions on August 6, 2002. Dr. Kleeman noted at that time that the Claimant was working out three times per week and that his pain and functioning were better than before the surgery. Jason Butters, PTA, assessed the Claimant at a light physical demand classification with occasional lifting of 20-25 pounds and frequent lifting of 10-12 pounds.
12. Shortly after the surgery, the Claimant complained of pain and discomfort initially radiating into his right leg, and later into his left leg as well, in addition to lower back pain. In his testimony at hearing and in his reports to at least one medical provider, the Claimant equated the pain he experienced after the surgery to the pain he felt prior to the surgery. N.H. Spine Institute physical therapy note of May 8, 2002.
13. Dr. Kleeman could not find an objective cause for the Claimant's subjective pain complaints. He placed the Claimant at medical end result in June 2004 and assessed a cumulative 22% whole person impairment to the spine.
14. The Claimant's temporary total disability benefits were discontinued in July 2004 on the basis that he had reached medical end result. The Claimant has been paid permanent partial disability benefits.

15. Richard P. Hockman, M.D. is an orthopedic surgeon with New Hampshire Orthopaedic Surgery, P.A. In January 2004, a lumbar myelogram recommended by Dr. Hockman showed no herniation at L4-5, but did show a disc bulge one level lower at L5-S1, with apparent left impingement and probable right impingement. Dr. Hockman discussed the possibility of discectomy and fusion at L5-S1 if pain symptoms persisted. The Claimant has not undergone this surgery and is reluctant to do so because of the limited chance of a favorable outcome.
16. The Claimant filed for permanent total disability benefits in February 2006.
17. Since the second surgery in January 2002, the Claimant has not returned to sustained employment. He testified that Pike Industries could not accommodate his restrictions; on three occasions during 2003-2004 he worked briefly at a cleaning business, at painting and at installing glass, but gave up each attempt within a week or two due to pain.
18. The Claimant cares for his two children, aged nine and four at the time of hearing, on what he describes as a full time basis. In addition, he does housework, cooks, and shops, including driving. He describes that he occasionally lifts his daughter, who weighs 30 pounds, but also gets help from neighbors. Surveillance video, totaling less than half an hour over three days, shows the Claimant walking, bending at the waist, assisting a child in and out of a car, driving, entering and exiting stores and carrying single shopping bags.
19. The Claimant testified that he works out at a gym two or three times a week. His workout includes one or two circuits of 10-15 repetitions lifting 15-30 pounds, depending on how he feels. He testified that he “feels better” after he works out.
20. Active vocational rehabilitation services did not commence for this Claimant until late in 2004.

Medical

Dr. Kleeman

21. Dr. Kleeman followed the Claimant for 18 months after the 2002 surgery. Initially, the Claimant reported that he was doing much better in that left leg numbness and pain were gone, but reported right lower back pain radiating into the leg. At six weeks post-op, Dr. Kleeman noted that the Claimant had done very little at home other than sitting and that needed to get mobilized and strengthened. At three months post-op, Dr. Kleeman released the Claimant for part time work with a 25-pound maximum lifting restriction. At four months post-op, the Claimant was unhappy because of his pain symptoms, but Dr. Kleeman could find no significant impingement by CT scan. At six months, Claimant reported that his back pain, leg pain and function were all better than before treatment. Dr. Kleeman released him for full-time work with a 25-pound lifting restriction. At nine months post-op, Claimant was "somewhat satisfied" that his back and leg pain were better, but still had symptoms of right leg pain. At twelve months, after additional imaging, Dr. Kleeman reported that CT scan showed a solid fusion and that MRI showed very mild degeneration and slightly asymmetrical bulge to the left at L5-S1. Dr. Kleeman did not see any evidence of nerve impingement on the right to account for the Claimant's symptoms. In August 2003, Dr. Kleeman noted continued complaints of back and leg pain despite solid fusion. He had no solution because he found no evidence of impingement. He noted that the Claimant "looks much better than he says he feels," and advised that the Claimant do the best he can to get back to work.
22. In a June 28, 2004 letter to the carrier's adjuster, Dr. Kleeman stated, "he remains symptomatic despite evidence of a solid fusion and without objective findings to correlate his symptoms." He noted a 25 pound maximum lifting and restrictions on positioning, found medical end result and assessed 22% impairment.

Dr. Hockman

23. Richard P. Hockman, M.D. is an orthopedic surgeon in Manchester, N.H. who first saw the Claimant in December 2003, on referral from his primary care provider. Dr. Hockman noted minimal back pain, persistent right leg pain since the 2002 surgery, and "some" left leg pain. Upon review of an MRI, Dr. Hockman felt the fusion was solid but was concerned that one of the pedicle screws on the right side might be partly in the neural foramen and impinging the nerve root on that side. He ordered a CT/myelogram to determine placement of the pedicle screws. A January 15, 2004 lumbar CT myelogram found all pedicle screws well-seated, but found a small broad based disc protrusion at L5-S1, causing a mild mass effect on the left S1 and probably to a lesser degree the right S1 nerve root.

24. On January 26, 2004 Dr. Hockman reviewed the myelogram results with the Claimant. He noted a probable herniated disk at the untreated L5-S1 level, pressing on the left S1 nerve root with a little bit of mass effect at the right nerve root. If the Claimant found his function too impeded by pain, Dr. Hockman recommended a discogram to verify that this is the symptomatic level. If verified, he suggested discectomy and fusion at L5-S1, with an extension of the fusion down from L4-5.
25. Dr. Hockman's final medical note in the record is dated April 6, 2005. The note of that visit records complaints of "a little pain in the right leg and the Achilles tendon area," near-constant tingling and burning in the left leg and numbness in the lateral three toes of the left foot upon standing longer than 20 minutes. Dr. Hockman found pain in the distribution of S1 root on the left side consistent with the CT myelogram findings. Dr. Hockman found full range of motion in the back, negative straight leg raise and equal reflexes at the knees and ankles. Dr. Hockman recommended that surgery not be considered without the presence of a positive discogram, which the claimant had not determined to undergo. No further appointments were to be scheduled until the Claimant decided about having the discogram.

Dr. Gennaro

26. Victor Gennaro, D.O. is an orthopedic surgeon who first performed a medical records review and then examined the Claimant for the Defendant in November 2003 in the context of determining liability for the 2002 surgery. In deposition taken January 13, 2004, without having reviewed any additional medical records, Dr. Gennaro opined that the Claimant at that time had no work capacity, or a capacity below sedentary.
27. On February 16, 2006, he performed another examination of the Claimant for the Defendant, including review of new medical notes, Louise Lynch's FCE report, the surveillance videos and a January 5, 2004 MRI. Dr. Gennaro noted that the lumbar fusion appeared appropriate and well healed with no evidence of non-union and that a mild broad based disc bulge at L5-S1 did not significantly indent the thecal sac or exit a nerve root. He surmised that the Claimant's functional level was probably higher than the Claimant alleged because the radicular complaints were not specifically verified by diagnostic studies or physical examination. He speculated that the Claimant had, at a minimum, a sedentary full-time work capacity given the ability to change positions, stand and walk.
28. On July 3, 2006, after reviewing Timm DuMoulin's FCE report, Dr. Gennaro opined that Mr. DuMoulin's findings were consistent with his own. Dr. Gennaro modified his opinion to say that Claimant's sedentary work capacity was probably part-time initially, but suggested benefit from a rehabilitation plan emphasizing work hardening. Dr. Gennaro did not find sufficient evidence to support total disability.

29. Dr. Gennaro was scheduled to testify at the hearing but became unavailable on short notice. The Claimant requested that the record reflect that Dr. Gennaro could not be cross examined about his 2006 opinion, and offered Dr. Gennaro's 2004 deposition transcript into evidence. The weight given Dr. Gennaro's opinion of work capacity reflects the lack of cross-examination regarding the basis for the changes in his opinion.

Functional Capacity Examinations

Louise Lynch

30. Louise Lynch, P.T. is a licensed physical therapist who has performed functional capacity examinations (FCEs) within the Vermont workers' compensation system since 1989, at a current rate of about ten per year. She performed an FCE of the Claimant on June 2 and 3, 2005 at the request of vocational rehabilitation counselor George Fotinopoulos. Ms. Lynch prefers to perform an FCE over a two-day period, and did so in this instance, in order to better gauge the effects of the first day's testing and the examinee's ability to sustain activities. The June 2005 FCE assessed the Claimant's capacities to lift, carry, push and pull, sit, stand, climb stairs, balance, twist, bend and stoop, forward reach, grasp, pinch, and his fine finger dexterity.
31. Ms. Lynch concluded that the Claimant could perform at a light physical strength level with walking as his primary job function. She opined that he could sustain this type of employment activity for up to 4-6 hours per day on 2-4 days per week if he did not work more than two days in a row. However, his productivity would be limited by pain and the need to take frequent walks and stretch breaks unless these were incorporated into his work activity. He would be best suited for work that requires walking and moving with intermittent rest breaks to sit. The Claimant should be able to control his symptoms if not required to sustain static positions, handle materials, bend or twist. She noted good manual dexterity and sufficient upper extremity strength to perform bench tasks 1-2 hours at a time with sit/stand options.
32. However, Ms. Lynch also concluded that the Claimant does not have a work capacity according to the Dictionary of Occupational Titles/Department of Labor guidelines for regular gainful employment on an uninterrupted basis for full-time work.

Timm K. DuMoulin

33. Timm K. DuMoulin is a licensed physical therapist who has performed FCEs according to the Blankenship forensic FCE system since the 1980s. He currently performs an average of two FCEs per month. Mr. DuMoulin performed an FCE of the Claimant on March 7, 2006 at the request of the Claimant's primary care doctor. The evaluation addressed lifting in various positions, carrying, bending, squatting, kneeling, stair climbing, crawling, sitting, standing, walking, forward and overhead reaching, balancing, arm, leg and fine hand control. Mr. DuMoulin observed that the Claimant gave reports of high pain levels, but felt that the Claimant's actions did not jibe with these reports, leading him to conclude that the Claimant was not giving full effort. Mr. DuMoulin assessed a light-medium strength level and opined that the Claimant was able to work at a light-medium physical demand level for four hours per day, five days per week, with frequent position changes while sitting or standing, and infrequent lifting, twisting or bending.
34. Mr. DuMoulin posited that the Claimant might benefit from a rehabilitation program emphasizing strength, endurance and proper body mechanics with the goal to increase the Claimant's workday to 8 hours at the light-medium physical demand level.

Vocational Rehabilitation

George Fotinopoulos

35. George Fotinopoulos, M.A., is a vocational rehabilitation counselor certified with the State of Vermont, who has worked primarily as a VR counselor for some six years. Mr. Fotinopoulos performed an entitlement assessment of the Claimant on December 12, 2004 and determined that the Claimant was entitled to VR services because he was unable to return to suitable employment using his previous training or experience. He identified the Claimant's work capacity, limited transferable skills, English language skills and extended time out of the workforce as negatively impacting the Claimant's return to suitable and gainful employment. Mr. Fotinopoulos then provided VR services to the Claimant until closing the file on January 4, 2006.
36. Mr. Fotinopoulos had not previously worked in the Manchester, N.H. area or placed anyone in employment there in the past. However, Mr. Fotinopoulos noted that there were many job opportunities in the greater Manchester, N.H. area for someone with a meaningful full time capacity.
37. Mr. Fotinopoulos performed a manual transferable skills analysis, in which he considered the skills required for jobs the Claimant had done in the past 15 years and the Claimant's current physical limitations. Although two of the Claimant's prior jobs, waiter and produce clerk, are classified by the Dictionary of Occupational Titles (DOT) as requiring a light level of physical demand, Mr. Fotinopoulos concluded that the Claimant was no longer capable of performing them. He did not approach either Mack Molding or Pike Industries about possibilities of reemployment for the Claimant, nor did he consider child care work as a vocational option for the Claimant.

38. In his February 14, 2005 progress report, Mr. Fotinopoulos reported, “[the Claimant’s] pain symptomatology precludes him from having a current functional work capacity.”
39. Daisy Wojewoda, M.S., of New Hampshire Easter Seals performed a vocational evaluation of the Claimant in March 2005 on referral from Mr. Fotinopoulos. The evaluation included educational and occupational history, review of the Claimant’s disability, assessment of his functional reading skills, math abilities, mechanical reasoning, spatial perception, visual speed and accuracy, and vocational interests. Ms. Wojewoda noted difficulty in generating occupational goal recommendations because of the Claimant’s low English language skills and pain behaviors, but suggested several types of occupations as a broad starting point, including retail sales in the Bosnian community, inventory work, security guard/watchman and usher/ ticket taker. She recommended that the Claimant have a flexible schedule, possibly part-time to start, sedentary lifting demands with flexible positional demands, and strongly advised ESL training. She identified sources of English-language instruction in the Claimant’s geographical area.
40. Mr. Fotinopoulos considered the physical requirements for each of the job suggestions made by Ms. Wojewoda and rejected all of them because he did not think that the Claimant could do light duty work, although he could not recall at hearing that any medical provider had placed the Claimant at below a light duty work capacity at the time he performed his analysis.
41. On April 25, 2005 Mr. Fotinopoulos suspended VR services pending a functional capacity examination to assess work capacity before identifying a suitable return-to-work goal.
42. On June 17, 2005 Mr. Fotinopoulos reported that an FCE had been scheduled and that ESL classes were not available until August. He noted that the Claimant had traveled to Bosnia for family reasons and was expected to return in August. Consequently, development of a return-to-work plan was further deferred.
43. On August 15, 2005, Mr. Fotinopoulos reported that the FCE showed the Claimant not to have a work capacity for regular gainful employment according to the DOT. He set goals of determining the existence of a suitable return-to-work position and enrolling the Claimant in ESL classes.
44. On September 20, 2005 Mr. Fotinopoulos reported successfully enrolling the Claimant in intermediate ESL class with the Manchester Community Resource Center (MCRC), attempts to enroll him in a beginners course at another facility having been unsuccessful. Mr. Fotinopoulos accompanied the Claimant to the state employment security office for vocational exploration and job search instruction, but the single referral made, for apple picking, was not within the Claimant’s limitations. Mr. Fotinopoulos became aware that the Claimant’s computer illiteracy inhibited his ability to use state job-search services, but did not seek approval for computer training for the Claimant because “they scare him.”

45. On October 21, 2005 Mr. Fotinopoulos reported that the Claimant had a difficult time focusing and participating in his ESL classes due to pain. Further, he reported that the state vocational rehabilitation office had limited resources to assist injured workers return to work, such that it outsourced job search assistance to outside vendors.
46. On November 18, 2005 Mr. Fotinopoulos reported that the Claimant's ESL instructor did not believe the Claimant would benefit from ESL classes "as offered at the MCRC level," and had yet to accomplish even a conversational level.
47. Ultimately, Mr. Fotinopoulos did not develop an Individual Written Rehabilitation Plan (IWRP) for the Claimant because he determined the Claimant's disability was too severe to permit a likelihood of finding regular suitable gainful employment within the Claimant's limitations. He did not explore part time employment opportunities because he determined that the limitations included in Ms. Lynch's FCE made the vocational rehabilitation goal of 80% of pre-injury wages unlikely. After concluding that an IWRP was not feasible, Mr. Fotinopoulos closed the Claimant's vocational rehabilitation file because the Claimant would not benefit from his services. Mr. Fotinopoulos does not think that the Claimant has the capacity to return to regular gainful work.

John May

48. John May, M.A. has been a Vermont-certified vocational rehabilitation counselor since 2001. He performed a forensic vocational evaluation of the Claimant's case in May 2006. Mr. May reviewed Ms. Lynch's and Mr. DuMoulin's FCE reports, Dr. Gennaro's February 16, 2006 note, and Mr. Fotinopoulos' vocational rehabilitation reports, in addition to surveillance videos of the Claimant from December 2005 and January 2006 and this Department's 2004 hearing decision regarding this Claimant.
49. Issues arose regarding Mr. May's written reports. Mr. May initially distributed a report dated May 12, 2006 that contained several pages which clearly pertained to an individual other than this Claimant. When the Defendant brought this error to Mr. May's attention, he sent out a second report, dated May 16, 2006, in which the erroneous pages were replaced with ones pertaining to this Claimant; however, in so doing, two pages pertaining to this Claimant that had been included in the May 12th report were apparently omitted. This hearing officer is satisfied that these were genuine and harmless errors and that the complete contents of Mr. May's report may be extracted from the admitted exhibits.
50. Mr. May performed a computer-generated transferable skills analysis, adjusted for a light physical demand capacity and the Claimant's limited English skills, that identified several hundred occupations within the DOT for which the Claimant has direct or generally transferable skills, or which are considered unskilled. The identification of a particular title does not indicate that such a job is available in all labor markets. However, Mr. May concluded that viable vocational options within the Claimant's current level of functioning exist in his labor market. As an example, Mr. May identified the occupation of Food Assembler, for which an employment increase is anticipated in the Manchester/Bedford, N.H. labor market.

51. Mr. May rendered his professional opinion that the Claimant is capable of returning to regular gainful employment for which viable options exist in the labor market, with or without further vocational rehabilitation services. He concluded that the Claimant did not receive the full benefit from rehabilitation services, and recommended additional services such as job development and placement within the structure of an individual written rehabilitation plan that targeted specific occupations and/or employers, consideration of an individual tutor for English language skill development, and development of other job-specific skills such as computer applications. Mr. May concurred with Mr. DuMoulin's recommendation for a conditioning program, agreeing that it might lead to increased physical abilities.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). He must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the work 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941).

2. Claimant alleges he is permanently totally disabled pursuant to 21 V.S.A. § 644 (b), the Odd Lot Doctrine, which is defined in Vermont Workers' Compensation and Occupational Disease Rule 11.3100:

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.

Defendant contends that the Odd Lot Doctrine is not applicable, as the claim for permanent total disability relates to an injury which occurred in 1998, before the July 2000 amendment of § 664(b). If the Odd Lot Doctrine is inapplicable, permanent total disability would require that the Claimant meet the enumeration of 21 V.S.A. §644(a).

3. The Department has traditionally held that the odd-lot doctrine does not apply when both the date of injury and the date of medical end result predate the amendment to §644(b). See, e.g. *Sargent v. Town of Randolph Fire Department*, Opinion No. 37-02WC (November 5, 2002); *Bostwick v. Mt. Anthony Union High School*, Opinion No. 05-02WC (February 6, 2002); *Courchaine v. Dubois Construction*, 38-03WC (September 5, 2003). Here, although the Claimant's initial injury occurred in 1998, he suffered a recurrence of that injury in 2001 and reached medical end result for that recurrence in 2002. Further, if *Longe v. Boise Cascade*, 171 Vt. 214 (2000) were interpreted to mean that a claim for permanent total disability is distinct and separate, the operative date would be the date that the PTD claim was made, in 2006. Therefore, this claim is analyzed under the odd-lot doctrine.
4. 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. Rule 11.3100. 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. A claimant must have "no reasonable prospect for finding regular employment." 21 V.S.A. § 645. Regular and gainful work means work that is not casual or sporadic, work that is not charitable, where one earns wages. See *Rider v. Orange East Supervisory Union*, et. al. Op No. 14-03 (2003).
6. The evidence does not demonstrate that the Claimant is permanently and totally disabled as a result of his 1998 work injury. His treating surgeon has released him for full time work with lifting restrictions consistent with the capabilities assessed by both FCEs, and comparable to the weight the Claimant lifts at the gym. Although Dr. Gennaro assessed no work capacity in 2004, he did not have the benefit of current medical information at that time; in 2006, when provided with updated information, Dr. Gennaro revised his opinion. Dr. Hockman has not commented on the Claimant's work capacity. Mr. May opined that viable vocational options within the Claimant's current level of functioning exist in his labor market, and identified one of them.
7. Even PT Lynch assessed a part-time capacity involving light material handling. Her opinion that the Claimant does not have a work capacity is based on his present inability to sustain full time employment. However, § 644 does not require that a claimant have a full time work capacity to be capable of regular gainful employment. See *D.A. v. Central Vermont Hospital*, Opinion No. 20-06WC (April 21, 2006).

8. PT Lynch finds the Claimant's pain as his primary limiting factor. Subjective complaints of pain, when coupled with deficient objective physical evidence, cannot serve as a foundation for a permanent, total disability compensation award. *Severy v. The Brattleboro Retreat*, Op. No. 37-99 WC (1999). Although Dr. Hockman speculates that the disc bulge identified at L5-S1 is the probable source of Claimant's pain symptoms, this has not been verified by discogram.
9. Although the Claimant has been assessed as having limited English skills, he participated in the formal hearing with minimal assistance, and viable options for improving these skills, such as enrollment in a beginning ESL class or private tutoring, have not been explored. The Claimant's age is not an impediment to his employment. He has previously succeeded in finding work and working while enduring pain at levels he describes as comparable to what he presently experiences, and has sustained "full time" child care and housework activities for years. His work experience provides skills for which regular employment exists in the labor market.
10. I am persuaded by the collective testimony of Mr. May and Mr. DuMoulin that this Claimant has both a current capacity for regular, gainful—albeit part time—work and a prospect for improved circumstances with the combination of a comprehensive rehabilitation program and vigorous provision of vocational rehabilitation services including improvement of his English language skills.
11. The Claimant did not timely receive active vocational rehabilitation services, and the services that he did receive were not all that is reasonably necessary to restore the Claimant to his best opportunity for suitable employment. Because I find that adequate vocational rehabilitation services have not as yet been furnished, the Defendant is directed to provide them.

ORDER:

1. Claimant's claim for permanent total disability benefits is DENIED.
2. Because the Claimant has not prevailed, he is not entitled to an award of attorney's fees or costs under 21 V.S.A. § 678.
3. The Defendant is directed to reopen vocational rehabilitation services to the Claimant.

DATED at Montpelier, Vermont this 3rd day of July 2007.

Patricia Moulton Powden
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.