

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Terrance Bortell

Opinion No. 37-10WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Vermont Composites, Inc.

For: Valerie Rickert  
Acting Commissioner

State File No. X-02179

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on May 3<sup>rd</sup>, May 4<sup>th</sup> and September 1<sup>st</sup>, 2010  
Record closed on October 28, 2010

**APPEARANCES:**

James Dingley, Esq., for Claimant  
James O'Sullivan, Esq., for Defendant

**ISSUES PRESENTED:**

1. Is Claimant permanently and totally disabled as a result of his October 11, 2005 work-related injury?
2. If yes, to what workers' compensation benefits is he entitled?

**EXHIBITS:**

Joint Exhibit I: Medical records  
Joint Exhibit II: Supplemental medical records  
Joint Exhibit III: Addendum medical records, University Disability Consortium  
Joint Exhibit IV: Village Primary Care records  
Joint Exhibit V: Supplemental medical records (Drs. Wing and Hearst)

Claimant's Exhibit 1: *Curriculum vitae*, John Howland, M.D.  
Claimant's Exhibit 2: *Curriculum vitae*, Daniel Wing, M.D.  
Claimant's Exhibit 3: *Curriculum vitae*, Erin Boxer  
Claimant's Exhibit 4: *Curriculum vitae*, David Mellinger, Psy.D.  
Claimant's Exhibit 6: Deposition of Jack Bopp, M.S., April 23, 2010 (exhibits attached)  
Claimant's Exhibit 8: Work Capacity Rating (Dr. Howland), April 26, 2010  
Claimant's Exhibit 9: Work Capacity Rating (Dr. Mellinger), April 22, 2010

Defendant's Exhibit A: *Curriculum vitae*, Brian Mercer, M.D.  
Defendant's Exhibit B: *Curriculum vitae*, Hyman Glick, M.D.  
Defendant's Exhibit C: *Curriculum vitae*, Melvyn Lurie, M.D.  
Defendant's Exhibit D: *Curriculum vitae*, Clayton Prinson  
Defendant's Exhibit E: Vocational Rehabilitation Assessment Report, July 1, 2010

**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 Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Defendant manufactures carbon fiber materials and components for use in the automotive industry. Claimant worked as a lay-up technician on the Corvette fender line. One aspect of the job involved loading large, heavy parts onto an autoclave cart, then wheeling the cart by hand to another area on the factory floor. When loaded, the cart weighed thousands of pounds. It had grocery cart-type wheels that allowed it to be pushed forwards and backwards, but it was difficult to maneuver in any other direction.

*Claimant's Work Injury and Subsequent Medical Course*

4. On October 11, 2005 Claimant was assisting his team leader to guide an autoclave cart to the offloading area. As he was pushing the cart, Claimant observed that it was dangerously close to hitting an employee who was working nearby. Claimant pulled hard on the cart to stop it from doing so. He felt a sharp, stabbing pain in the front part of his right shoulder and deep under his right armpit.
5. Claimant reported the injury to his supervisor and the next day, sought medical treatment. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.
6. Almost from the moment the injury occurred, Claimant experienced severe pain in and about his right shoulder. As one early treatment provider reported, any movement at all would bring tears to his eyes and "drop me to my knees." Claimant could not get comfortable in any position, had difficulty sleeping and required assistance with such activities of daily living as bathing, dressing and cooking.

7. Initially Claimant treated conservatively with physical therapy, injections, narcotic pain medications and muscle relaxants. When his symptoms failed to respond, in May 2006 he underwent arthroscopic surgery to repair a partial thickness rotator cuff tear and both superior and anterior labral tears.
8. Claimant's pain failed to abate post-surgery. To the contrary, despite additional courses of physical therapy, various joint injections and numerous nerve blocks, in the four years since it has continued virtually unchecked.
9. Neither Claimant's treating physicians nor Defendant's independent medical examiners are fully able to explain the source of his intractable pain. All agree that there likely is a neuropathic component to his injury. Some have questioned whether there might still be some internal derangement or other structural damage in or around Claimant's shoulder, but diagnostic testing has not revealed any. Claimant has undergone numerous specialist evaluations, including one by orthopedic surgeons at Brigham and Women's Hospital in Boston and one by an orthopedic surgeon at Dartmouth Hitchcock Medical Center, and all have concluded that there is no surgical solution for his problem.
10. Following an independent medical evaluation with Dr. Ross, an orthopedist, in April 2008 Claimant was declared to be at an end medical result for his work injury. On those grounds, the Department approved Defendant's discontinuance of temporary total disability benefits effective November 10, 2008.

*Claimant's Current Condition*

11. Having been determined to be at end medical result, since 2008 Claimant has been left with pain management as the only viable means of restoring function to his shoulder. Unfortunately, these efforts have been strikingly unsuccessful. Claimant takes high dosages of narcotic pain medications, but still experiences constant pain, which increases in severity with virtually any activity. Claimant avoids moving his right shoulder or arm for any purpose. As a result, he has begun to experience pain from overuse in his left shoulder, elbow and hand.
12. Claimant's injury also has inflicted a severe psychological toll. Claimant now suffers from a major depressive disorder, with psychotic features that include occasional auditory and/or visual hallucinations. He regularly experiences feelings of overwhelming anxiety, helplessness, hopelessness and despair. He is socially isolated. He has panic attacks. He admits to suicidal ideation. His sleep is disturbed, to the point where at best he sleeps for only one or two hours at a time; during a severe pain cycle he might go days without sleeping at all.

13. As treatment for the psychological consequences of his injury, Claimant is actively engaged in cognitive behavioral therapy with Dr. Mellinger, a psychologist. Until September 2009 he also saw a psychiatrist, Dr. Howland, for periodic evaluations and medication checks. As Dr. Mellinger described, the purpose of his therapy is to identify self-defeating behaviors and promote more functional ones instead. The rub, however, is that what feels better psychologically in the moment – getting out of the house and going shopping, for example – often has the effect of triggering an acute physical pain cycle. This in turn leads back to increased frustration, stress and despair.
14. Both Claimant and Lisa Ellis, his fiancée since 2003, testified credibly as to his pre-injury lifestyle. Prior to the injury Claimant was both mentally and physically healthy. He engaged regularly in a variety of recreational activities, including weight lifting, fishing, swimming, hiking, playing softball and jet-skiing. He enjoyed his job and often worked overtime. He maintained a healthy intimate relationship with his fiancée, who described him as energetic, active, happy and social. He showered and shaved daily.
15. Since the injury Claimant's lifestyle has changed dramatically. He spends most of every day lying on his back on the couch. He has gained weight, and his stamina is greatly diminished. He cannot stand, sit or walk for any period of time without worsening pain. He needs help to bathe and dress, and cannot prepare his own food. He opens his mail with his teeth. He often has nightmares, and literally dreams about being able to work. He and his fiancée have sex only rarely, if at all. His medications make him "loopy" and lethargic.
16. In addition to his pain control medications, Claimant also uses a surgically implanted spinal cord stimulator for pain relief. The device is most effective when he is lying flat on his back. Even with the stimulator turned up, however, Claimant's pain is only minimally controlled. At the formal hearing, Claimant described being in constant severe pain all day, every day, to the point where "it can drive you nuts." He described not being able to do anything for himself, and "having nothing but your head for company."
17. The formal hearing involved two and a half days of testimony, and thus the hearing officer had ample opportunity to observe Claimant's presentation and demeanor. His appearance was disheveled and unkempt. He spoke with little affect and avoided all eye contact. He sat with an unusual posture, his head tilted to the right and his left hand cradling his right arm close to his chest at all times. He appeared to be in severe pain throughout the proceedings, frequently moaning, grimacing, closing his eyes and mopping his face with a paper towel. At times he bent forward in his chair, covered his face with his left hand and rocked back and forth as if he were crying. Many of Claimant's medical records document similar behaviors and observations.

### Claimant's Work Capacity

18. In March 2008 Claimant underwent a functional capacities evaluation (FCE) with Erin Boxer, an occupational therapist. An FCE measures a person's ability to engage in the physical movements and postures that are common to a variety of work environments. The measurements are then analyzed with the aid of a computer program, the parameters of which have been substantiated by reliability and validity research. The end result is an assessment of the individual's physical work capacity that can be categorized according to accepted guidelines for different job levels, whether sedentary, light, medium or heavy.
19. Although Claimant's abilities as tested during the FCE were generally consistent with a sedentary work capacity, his tolerance for sitting was sufficient for only "occasional" use (defined as up to one-third of a full work day). As many sedentary level jobs require either frequent (from one-third to two-thirds of a full work day) or constant (more than two-thirds of a full day) sitting, this limitation has significant ramifications. It makes it unlikely that Claimant would be able to sustain full-time sedentary employment.
20. Both Claimant and Defendant offered expert medical evidence as to Claimant's ability to work. Testifying on Claimant's behalf were Dr. Wing, a physiatrist, Dr. Howland, his most recent treating psychiatrist, and Dr. Mellinger, his current treating psychologist. All stated, to a reasonable degree of medical certainty, that as a result of his injury Claimant is now permanently incapable of working. Physically, Claimant's injury has left him with intractable pain, and further improvement is unlikely. Functionally, the pain precludes him from using his right (dominant) arm in any capacity, and severely limits his ability to sit, stand and walk. High dosages of narcotic pain medications affect his ability to focus, and acute pain cycles further disrupt his sleep and prevent him from maintaining any sort of predictable routine. Emotionally, the pain has sapped his mental energy, instilled a sense of hopelessness and despair, and eroded his ability to manage even mild stress. Taken together, Claimant's experts concluded, these limitations render Claimant incapable of engaging in regular gainful employment at even the part-time sedentary level suggested by the FCE.
21. Defendant's medical experts – Dr. Mercer, a neurologist, Dr. Glick, an orthopedist, and Dr. Lurie, a psychiatrist – together evaluated Claimant in the context of a joint independent medical evaluation in February 2009, then later supplemented their opinions after reviewing additional medical records in August 2010. All three concluded that while Claimant has only a sedentary work capacity, he is capable of working full-time.
22. In formulating their opinions, Defendant's experts acknowledged that Claimant is restricted from lifting more than ten pounds with his left upper extremity, and is able to use his right upper extremity only as a passive counterweight or stabilizer. They disregarded Claimant's FCE results, which indicated that he has limited sitting tolerance and therefore is capable of only part-time sedentary work. It is unclear on what basis they did so.

23. Defendant's experts also discounted the psychological impact of Claimant's pain and depression, stating that while his pain is a physically limiting factor, his depression in and of itself is not disabling. Given the severity of Claimant's depression, which Defendant's experts acknowledged includes both psychotic features and suicidal ideation, it is difficult to understand the basis for this assertion.

Expert Vocational Rehabilitation Opinions

24. Claimant and Defendant each offered expert testimony as to Claimant's employability from the vocational rehabilitation perspective. That perspective evaluates such claimant-specific factors as an individual's work capacity and transferable skills in the context of the applicable labor market in order to determine whether he or she can likely secure and maintain competitive employment.
25. Jack Bopp, a certified rehabilitation counselor, testified on Claimant's behalf. Mr. Bopp met with Claimant and evaluated his employability on two occasions, first in May 2008 and then again in April 2010. On both occasions Mr. Bopp concluded that Claimant has no reasonable prospect of becoming regularly and gainfully employed.
26. In formulating his opinion Mr. Bopp considered a number of factors. He reviewed Claimant's prior education and employment history, so as to determine the extent of his transferable skills. He considered the severity of Claimant's pain profile and the extent to which pain interferes with his activities of daily living. He took into account not only Claimant's age, which at 45 is a neutral factor in terms of employment potential, but also his extended time out of work, which does negatively impact his ability to compete for jobs. Last, he evaluated Claimant's capacity for what he characterized as "Critical Vocational Behaviors" – such traits as regular attendance, punctuality, work pace and persistence, frustration tolerance, personal presentation and interpersonal relationships – at the level generally required by employers in the regular labor market.
27. To assess Claimant's employability Mr. Bopp created both a transferable skills analysis and an unskilled employability analysis under two different scenarios. In each scenario Mr. Bopp endeavored to extract from the medical records information as to Claimant's work capacity. In the first scenario, he did so primarily with reference to the March 2008 FCE. In the second scenario he relied exclusively on the limitations that Defendant's independent medical examiners had acknowledged in their February 2009 report. Mr. Bopp considered each scenario in the context of the southern Vermont labor market area in which Claimant resides. The goal was to determine whether a viable labor market exists for an individual with Claimant's capabilities and limitations, both physical and psychological, as estimated under either scenario.

28. Mr. Bopp's analysis did not yield a single occupation, either skilled or unskilled, that matched Claimant's vocational profile under the first scenario. Under the second scenario, he identified fewer than thirty jobs that (a) were likely to exist in the southern Vermont labor market; and (b) for which in his professional judgment Claimant realistically might compete.<sup>1</sup> In Mr. Bopp's opinion, this number of jobs does not constitute a viable labor market for a person with Claimant's vocational profile.
29. Mr. Bopp could not identify any additional vocational rehabilitation services that, if provided, would likely allow Claimant to return to regular gainful employment, either full- or part-time.
30. At Defendant's request, Clayton Prinson, a vocational consultant, met with Claimant in June 2010 to assess his employability. In his report, Mr. Prinson described Claimant's strong work ethic and team leader skills as among his vocational strengths. He acknowledged Claimant's inadequately controlled pain, concentration deficits, panic attacks, anxiety and depression as vocational barriers.
31. Mr. Prinson assessed Claimant's transferable skills and then conducted a limited labor market survey to identify sedentary level positions in which Claimant might be employed. In all he identified six occupations that he considered appropriate for an individual with Claimant's transferable skills and limitations – telephone sales, activities assistant, dispatcher, host, telephone operator and companion. Within these occupations, Mr. Prinson identified five current job openings within a 50-mile radius of Claimant's home for which he thought Claimant might successfully compete. Two of the five openings are for positions at the Equinox Hotel, a high-end resort in Manchester, Vermont.
32. Mr. Prinson acknowledged that Claimant probably was not ready to return to work immediately, and likely would benefit from vocational counseling in order to conduct an effective job search. He also theorized that Claimant might require some accommodation in order to successfully maintain employment, though he did not specify what that might entail. With these caveats, however, Mr. Prinson concluded that Claimant has the "potential" to be gainfully employed.
33. Mr. Prinson's optimism notwithstanding, I find that Claimant is an unlikely candidate for any of the positions identified, either now or at any time in the foreseeable future. From observing Claimant's presentation at the hearing, and as corroborated by the medical evidence, it is highly unlikely that he would be able to compete for or maintain employment as, for example, a host at the Equinox Hotel. I find the other vocational options Mr. Prinson proposed to be equally unrealistic.

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<sup>1</sup> Mr. Bopp used both labor market and population distribution statistics to derive the estimated number of *jobs* in each of the occupations he identified as matching Claimant's vocational profile that likely exist in southern Vermont. Presumably, the number of job *openings* currently available is significantly less.

## CONCLUSIONS OF LAW:

1. 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 quadriplegia. 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.

2. The workers' compensation rules provide further guidance. Rule 11.3100 states:

### 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 Capacities Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonable expected to be able to return to regular gainful employment.

3. A finding of odd-lot permanent total disability is not to be made lightly. *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008). For that reason, and as Rule 11.3100 makes clear, typically there must be evidence to establish first, what the injured worker's functional capabilities are, and second, that no viable vocational options exist within those capabilities. *Id.*; *Hankins v. Fred's Plumbing and Heating*, Opinion No. 13-10WC (April 5, 2010); *Prescott v. Suburban Propane*, Opinion No. 42-09WC (November 2, 2009).
4. Here, the parties presented somewhat conflicting evidence as to what Claimant's functional capabilities are. Claimant's medical experts assert that his physical and psychological limitations are so significant as to preclude even part-time sedentary work. Defendant's medical experts contend that Claimant is capable of full-time sedentary work, albeit with significant functional restrictions.



5. 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 (September 17, 2003).
6. I conclude that the opinions of Claimant's medical experts are the most credible, with respect to both his physical and his psychological limitations. As to the impact of Claimant's work injury on his physical capabilities, Claimant's expert opinions were based not only on quantifiable data gleaned from the March 2008 FCE, but also on such factors as inadequate pain control, high dosages of narcotic medications and frequently prolonged sleep disturbances. As to the injury's psychological toll, by virtue of the long-term nature of their relationship with him Claimant's experts were familiar with how his chronic intractable pain has affected him emotionally, and testified credibly as to the severity of his depression. In both respects, Claimant's expert opinions were clear, thorough, objectively supported and comprehensive.
7. In contrast, it is unclear to me on what basis Defendant's experts reached their conclusions as to Claimant's physical limitations, particularly with respect to his ability to sustain full-time sedentary work. As applied to Claimant's functional limitations from the psychological perspective, furthermore, the attempt by Defendant's experts to distinguish between his pain and his major depression is unpersuasive. What matters is that the psychological impact of Claimant's injury has crippled him emotionally; whether that be due to pain or to the resulting depression or to some combination of both is irrelevant.
8. Even were I to accept, as Defendant's experts contend, that despite both his physical and psychological limitations Claimant is still somehow capable of full-time sedentary work, I am convinced by the expert testimony that no viable vocational options exist for him. Mr. Bopp's analysis in this regard was remarkably thorough and credible in all respects. In contrast, by its focus on Claimant's "potential" to be gainfully employed in jobs that realistically he has no prospect of either procuring or maintaining, Mr. Prinson's assessment completely missed the mark.
9. I conclude that Claimant has sustained his burden of proving that his work injury has rendered him permanently incapable of performing regular gainful work, and that therefore he is permanently and totally disabled.
10. Claimant has submitted a request for costs totaling \$14,982.41 and attorney fees totaling \$21,978.92. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find that they are appropriate here and therefore these are awarded as well.

**ORDER:**

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

1. Permanent total disability benefits in accordance with 21 V.S.A. §§644 and 645, commencing on November 10, 2008, with credit for any permanent partial disability benefits paid after that date;
2. Interest on the above amounts as appropriate in accordance with 21 V.S.A. §664;
3. Costs totaling \$14,982.41 and attorney fees totaling \$21, 978.92 in accordance with 21 V.S.A. §678.

**DATED** at Montpelier, Vermont this 29<sup>th</sup> day of December 2010.

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Valerie Rickert  
Acting 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.