**STATE OF VERMONT**
**DEPARTMENT OF LABOR AND INDUSTRY**

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| | ) | State File No. K-06673 |
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| | ) | By: Margaret A. Mangan |
| LeRoy Bostwick | ) | Hearing Officer |
| | ) | |
| v. | ) | For: R. Tasha Wallis |
| | ) | Commissioner |
| Mt. Anthony Union High School | ) | |
| | ) | Opinion No. 05-02WC |

Hearing Held in Montpelier on July 2, 2001
Record Closed on August 23, 2001

**APPEARANCES:**

Peter Lawrence, Esq. for the claimant
Jeffrey Spencer, Esq. for the defendant

**ISSUES:**

1. Is the claimant permanently totally disabled?

2. If the claimant is not permanently and totally disabled, what, if any, vocational rehabilitation benefits are due?

**EXHIBITS:**

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| Joint Exhibit I: | Medical Records |
| Joint Exhibit II: | Employer contact sheets |
| Joint Exhibit II: | Sandi Mann's Reports |
| Joint Exhibit IV: | Transcript of deposition of John C. Bouillon, M.D. |
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| Defendant's Exhibit A: | Letter from Wagner Rehabilitation to Dr. Thatcher 4/1/99 |
| Defendant's Exhibit B: | VR Closure Report 3/28/00 |
| Defendant's Exhibit C: | VR Plan Amendment approved 1/11/00 |
| Defendant's Exhibit D: | VR Report 12/6/99 |
| Defendant's Exhibit E: | Claimant's resume |
| Defendant's Exhibit F: | IWRP approved 8/24/99 |
| Defendant's Exhibit G: | Vocational Assessment 2/24/98 |
| Defendant's Exhibit H: | Letter from Dr.Kinley to Workers' Risk. 12/18/96 |

**FINDINGS OF FACT:**

1. At all relevant times the claimant was an "employee" and Mt. Anthony Union High School his "employer" within the Vermont Workers' Compensation Act and Rules.

2. On September 23, 1996 in the course of his employment as a maintenance person at Mt. Anthony Union High School, the claimant fell and injured his left shoulder. The accident occurred when he was walking on some stairs, carrying empty garbage bags in his back pocket. He slipped on one of the bags, and then fell onto his left shoulder.

3. Next, claimant went to the emergency department where Dr. Manindra Ghosh treated and released him. The doctor recommended physical therapy, exercise and stretching. Claimant returned to work with his left arm in a sling. Conservative treatment was not successful and eventually the claimant had two surgical procedures.

4. On November 1, 1996 the claimant first saw Dr. John Bouillon, a board certified orthopedic surgeon in Pittsfield, Massachusetts. Dr. Bouillon has extensive experience performing employment disability evaluations.

5. At a December 18, 1996 IME, Dr. Donald Kinley determined that the claimant was unable to lift his left arm above his shoulder, but that he had full use of his right (dominant) arm. Dr. Kinley diagnosed the claimant with adhesive capsulitis and chronic inflammatory disease after contusion to the elbow and shoulder. Dr. Kinley opined that the claimant could perform light duty work but that light duty should be restricted to work with his right arm. The claimant told Dr. Kinley that he was not in favor of trying light duty work.

6. On January 24, 1997 Dr. Bouillon performed closed shoulder manipulation under anesthesia, freeing the claimant's "frozen" shoulder with aggressive movements. On May 23, 1997 Dr. Bouillon performed an acromioplasty, removing a portion of the bone at the tip of the shoulder blade to prevent impingement on the rotator cuff.

7. On August 19, 1997 Dr. Bouillon concluded that the claimant had reached a medical end result.

8. On September 30, 1997 Dr. Bahnson performed an IME and concluded that the claimant had reached medical end result.

9. Based on previous medical notes, on October 14, 1997 Dr. Bouillon concluded that the claimant had a left upper extremity disability of 50%.

10. On December 6, 1997 Dr. Mark Bucksbaum also performed an IME on the claimant. He determined that the claimant had reached medical end result with a 29% whole person impairment rating. Based on that conclusion, the carrier paid the claimant permanency compensation for 117.45 weeks.

11. A Functional Capacity Evaluation (FCE) was performed on January 21 and 22, 1998 at the Southwestern Vermont Medical Center. At the time of that evaluation, the claimant expressed his desire to retire when he turned 62, which would have been in October of that year. The evaluator determined that the claimant self limited his performance and that he worked at a light to medium physical demand level while performing tasks bilaterally. The evaluator concluded, "he can work at all levels with his RUE [right upper extremity] on a constant basis. His ideal work level for his LUE [left upper extremity] is from thigh to chest on a constant basis. He can work on his knees or in the prone position on an occasional basis. He has no restrictions with walking, standing or sitting. He reports that he can drive with his R [right] without restriction."

12. Dr. Bouillon disagreed with the FCE in several respects. First, he does not believe that this claimant should do any work on a constant basis. Second, he characterized the statement that the claimant can drive with his right arm as simplistic and misleading since it ignores safety, time limitations and work pressures involved in any type of driving employment.

13. On February 24, 1998 a Vocational Assessment was performed by Iris Banks, M.S., CRC who recommended that the claimant return to his original position with modification. She also suggested alternative occupations in protective services, especially in light of the claimant's past experience working independently.

14. In response to a December 9, 1998 letter from John May, Rehabilitation Counselor in which Mr. May asked if he agreed with the FCE, Dr. Bouillon wrote that the claimant had "total disability permanent, 10 # [pound] lifting, sit/stand 30' [minutes] alternatively."

15. On April 9, 1999 another IME was done, this time by Dr. Jon Thatcher to clarify the claimant's functional abilities. Dr. Thatcher examined the claimant and reviewed the medical records and FCE.

16. Dr. Thatcher testified that the claimant's shoulder problems are common, though worse than average. He opined that the claimant is not permanently totally disabled, but that he should avoid repetitive use of his left arm and should limit lifting of that arm to 5 to 10 pounds with no lifting above chest height.

17. In June 1999 Vocational Rehabilitation began with the assistance of Sandi Mann, M.A., a certified Vocational Rehabilitation Counselor. She determined that the claimant had the aptitudes necessary to obtain and retain a job. An Individual Written Rehabilitation Plan (IWRP) was developed and signed by the claimant, Ms. Mann, Mr. Hoy and John Kuncz, Commissioner's designee. That plan set the level of service at a Level 2: to return to a different employer in a modified or different job requiring the application of rehabilitation services. Claimant's work-capacity was identified as light-medium with restricted use of his left arm. Specific jobs listed on the form were: 1) Protective Service Occupations including School-Crossing Guard, Flagger, Gate Guard, Security Guard and Shopping Investigator; 2) Occupations in the Elemental Mechanical Interest Group, including Central Service Technician and Key Cutter; 3) Occupations in the Industrial Interest Group including inspector, extruder operator, filer and sander and sanding machine tender. All jobs listed were rated at a light duty of level of physical demands according to the U.S. Department of Labor Standards.

18. Returning the claimant to his job at Mt. Anthony High School was not a part of the vocational rehabilitation plan.

19. At first the claimant told the counselor that he was interested in part-time work to avoid interference with social security, but he changed the form to state his interest in obtaining full-time work. It was specified that the plan would begin on the claimant's return from a month-long trip to Germany that summer.

20. By terms of the IWRP the counselor agreed to conduct and document vocational research and exploration and provide vocational counseling and job search assistance regularly "to aid the claimant in securing suitable employment." The rehabilitation goal was to obtain suitable employment. The claimant agreed to conduct and document vocational research on vocational exploration records and employer contact on employer contact sheets. He agreed to contact a minimum of 5 to 10 employers per week, to submit job applications as directed by the counselor, to follow up on all job leads within 2 business days and to attend job interviews.

21. Three months later a plan amendment was approved. The second job listed was changed to occupations in the mechanical interest group, including building superintendent, quality assurance inspector and shipping checker. On the form was clear documentation that the claimant had not been offered employment.

22. The claimant's overall vocational rehabilitation course was trying. Ms Mann determined that the claimant was "not engaged" in the process as evidenced by his minimal follow-up with job leads and his repeatedly contacting the same employer despite having been told that there were not openings.

23. During late 1999 the claimant's employer contact sheets became increasingly sparse and indicated that nearly every employer was either not hiring or not accepting applications.

24. The relationship between Sandi Mann and the claimant became strained. Ms. Mann requested more written documentation from the claimant and he responded with antagonistic remarks. Ms. Mann told the claimant that he was free to choose another counselor, but he did not do so.

25. Claimant's continual list of employers who were not hiring or who were not accepting applications led Ms. Mann to question the veracity of his reports.

26. At the claimant's request, a second Vocational Assessment was done in December 1999 by Daisy Wojewoda, M.S. CRC, CVE. Ms. Wojewoda determined that the claimant's aptitudes were rated as average to high overall.

27. The claimant 's primary problems today are: lack of full mobility of the left shoulder, pain on a daily basis exacerbated by the slightest activity. Dr. Bouillon has imposed a 5 to 10 pound lifting limit with no overhead lifting on the left. He advised that the claimant not lift with both hands and not drive for more than an hour at a time to avoid more shoulder stiffness and a potential frozen shoulder.

28. Dr. Bouillon opined that the claimant should not do any work that requires him to use both arms in any way. He should not engage in activities involving repetitive motions in his left arm. And he should not work using only his right arm for more than two hours a day because of the risk of compensatory stiffness on his left side. These limitations are described as what the claimant "should not" do because he is actually capable of performing such tasks and in an emergency could do them. But Dr. Bouillon strongly advises against such activities because of the likelihood of further problems.

29. In response to question regarding specific jobs, Dr. Bouillon opined that using a telephone for employment purposes is not realistic because he could only use the phone on his right, non-injured, side and therefore would not be able to take notes or do other physical limitations with his left side. He also opined that carrying a clipboard or pad of paper for inventory work for an hour would be a problem because the claimant would need another half hour to recover. He ruled out pizza delivery driver work and store clerk work as unrealistic for this claimant because of the frequent changes in movement, such as in and out of a car, and the need to use both hands.

30. Claimant cannot drive for more than one-half hour to 45 minutes without experiencing physical problems and aggravating his shoulder. Attempts to exceed that time are likely to result in a painful, stiff and frozen shoulder.

31. Dr. Bouillon's opinion that the claimant is permanently and totally disabled is based on: the claimant's history, long-term follow-up and evaluation; the presence of chronic rotator cuff tendonitis, a partially failed acromioplasty, daily pain with exacerbation, sensitivity to slight activities, sensitivity to temperature differentials, inability to sleep on the left shoulder, lack of endurance, and the need for class three narcotic use.

32. His conclusion that the claimant cannot work safely because of narcotic pain medication is not supported by pharmacy and other records, including the claimant's testimony, that indicate the absence of narcotic medications in this claimant's care.

33. The claimant has poor endurance, tires easily and has stiff, sore and knotted muscles in his shoulder.

34. Claimant is 64 years old, has a 9th grade education and has worked primarily, but not exclusively, in jobs requiring physical labor. At the time of his injury he was in what he considered a well-paying job within a reasonable commuting distance from home.

35. In the past, the claimant worked as the Production Supervisor for Hunter Outdoor Products/Mohawk Industries for 13 years. He also worked as the Plant Manger for E.L. Ellis Curtain Manufacturing and supervised over 30 employees.

36. Claimant told Ms. Mann at an early meeting with her that he wished to retire. And he filled out retirement papers at Mt. Anthony School.

37. Claimant has traveled to Germany, Rhode Island and Florida since he stopped working. He and his wife travel to Crown Point, New York on summer weekends.

38. Claimant submitted evidence of his fee agreement with his attorney, statement of 68.85 hours expended on this case and $2,156.19 in disbursements.

**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 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as a causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. 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 inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. A claimant is entitled to permanent total disability benefits if his injury is within the enumerated list in 21 V.S.A. § 644 or it has as severe an impact on the earning capacity as one of the scheduled injuries. Under the non exclusive list of injuries in § 644 (a) the following shall be deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrists; 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.

4. The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

5. In support of his opinion that he is entitled to permanent partial disability benefits, the claimant relies on the unequivocal opinion of Dr. Bouillon that he is permanently and totally disabled. Dr. Bouillon has been consistent with that opinion since at least December of 1998 when he responded to a letter from Dr. May. He bases the permanent total disability determination on the claimant's report of pain, limitation of movement, belief that the claimant had tried but was unable to find work, 5 to 10 pound lifting restriction, inability to do constant work, advice that he not drive for more than a half hour to forty-five minutes without aggravating the shoulder, prohibition against doing work that requires both hands.

6. Claimant argues that when his age, education and experience are added to the reasons given by Dr. Bouillon, the inescapable conclusion is that he is permanently totally disabled.

7. In reliance on the opinion of Dr. Thatcher, the defendant argues that the claimant is not permanently totally disabled and that he has received all the permanency benefits to which he is entitled. Dr. Thatcher based his opinion on the functional capacity evaluation, which specified limitations on the claimant's left arm in terms of lifting height and weight restrictions and the total lack of restrictions on the right. Defendant contends that Dr. Thatcher's opinion together with claimant's vocational rehabilitation experience with Ms. Mann and the successful work experience he had in the past leads to the inevitable conclusion that the claimant is capable of working regardless of his age and educational level.

8. The parties agree that the claimant has weight (5 to 10 pounds) and height (not above chest level) restrictions on his left arm and no restrictions on the right. Dr. Thatcher and Dr. Bouillon disagree as to ultimate conclusion, but not significantly as to clinical findings. One confusing element to this case is that the claimant has said that he can do more than what his own doctor said he should be doing. But Dr. Bouillon clearly explained that while the claimant is physically capable of performing many tasks with his left arm and shoulder, he should not be doing so because he would risk reinjuring the shoulder.

9. However, his physician's bases for concluding that the claimant is not able to work do not place the claimant within the meaning of § 644 (a). Chronic tendonitis, sensitivity to light and temperature, lack of endurance and inability to sleep on the left shoulder do not combine to form an injury comparable to those listed.

10. Nor can I conclude that the claimant is permanently totally disabled under the odd lot doctrine codified in § 644(b) in 1999. That doctrine provides that the claimant's age, experience, training, education and mental capacity be considered in determining whether one is permanently totally disabled. Although the doctrine does not apply to this case because both the claimant's injury and his medical end result occurred before the 1999 amendment, the claimant would not be able to meet the standard. Although his age may affect employment, his experience, training and mental capacity certainly do not. In fact, they enhance his potential to find a job.

11. Clearly complicating the case is the unfortunate experience the claimant had with the vocational rehabilitation counselor. Claimant was frustrated with the experience of a job search and stopped trying. His entries on the job search logs were undoubtedly pro forma and inaccurate. His search was not in earnest.

12. However, his lack of effort must be viewed in light of the restrictions his treating doctor imposed. For example, through the IWRP he agreed to jobs his physician now opines are not consistent with his physical problems. The failure in this case is with an inconsistency between the vocational rehabilitation plan and the physician's advice, although this does not seem to be through any fault on the part of the counselor. The IWRP needs to be amended to conform more closely to the treating doctor's limitations.

13. The credible evidence presented supports the continuation of vocational rehabilitation, but not a finding of permanent total disability.

14. Pursuant to 21 V.S.A. § 678 a prevailing claimant is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. This claimant has prevailed on a portion of his claim, but not on the major permanent total portion. Therefore a discretionary award of fees based on 20 hours at $70.00 per hour pursuant to Workers' Compensation Rule 10.000 is appropriate. From the list of disbursements submitted, I am unable to determine which costs were necessary for success on the vocational rehabilitation portion of the claim. For that reason, the claimant has 30 days from the date this opinion is mailed to submit a revised claim for costs with justification.

**ORDER:**

Based on the Foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. Claimant's claim for permanent total disability benefits is DENIED.
2. The defendant must resume vocational rehabilitation services;
3. The defendant must pay attorney fees and costs as outlined above.

Dated at Montpelier, Vermont this 6th day of February 2002.

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R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.