

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

KEVIN F. KELLEY)	State File No. D-7666
CLAIMANT)	
)	By: David Blythe, Esq.
v.)	Hearing Officer
)	
CHATHAM PRECISION, INC.)	For: Barbara G. Ripley
DEFENDANT)	Commissioner
)	
)	Opinion No. 29-93WC

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF COMMISSIONER

This matter came on for hearing on September 13, 1993 before David J. Blythe, hearing officer and designee of the Commissioner of Labor and Industry (hereinafter, "Commissioner"). The claimant, Kevin Kelley (hereinafter, "claimant") was present and was represented by Attorney Marsha Smith Meekins. The defendant/employer, Chatham Precision, Inc. (hereinafter, "defendant") and its workers compensation insurance carrier, St. Paul Fire and Marine Insurance Co., were not present but were represented by Attorney William A. O'Rourke, III.

Based upon evidence properly before the Commissioner, matters stipulated to by the parties and matters of which judicial notice is taken, the Commissioner makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

I. JUDICIAL NOTICE TAKEN

Judicial notice is taken of the following document's in the Department's files:

- (a) Form 1: Employer's First Report of Injury;
- (b) Form 5: Notice of Injury and Claim for Compensation.
- (c) Form 25: Wage Statement.
- (d) Form 10: Certificate of Dependency.
- (e) Form 21: Agreement for Temporary Total Disability Compensation.
- (f) Form 28: Notice of Change in Compensation Rate dated August 20, 1991.

- (g) Form 11: Report of Extended Disability Rate dated October 21, 1991.
- (h) Form 27: Notice of Intention to Discontinue Payments dated May 22, 1992, together with medical report of Dr. Gates (8% left hand, 8% right hand).
- (i) Form 22: Agreement for Permanent Partial Disability Compensation.
- (d) Form 6: Notice and Application for Hearing.

II. EVIDENTIARY EXHIBITS

The following evidentiary exhibits are accepted and entered into the record in this case:

CLAIMANT'S EXHIBITS

- A. Dr. Gordon Ahlers' office notes from October 3, 1990 through April, 1993; Dr. Ahlers' January 23, 1991 letter to St. Paul Insurance Co.; bills for period May 8, 1992 to April 15, 1993; physical therapy referral dated April 7, 1993; letter to Dr. Ahlers dated March 15, 1993; left shoulder MRI report dated February 19, 1993; office notes of Dr. John F. Lawliss III, Associates in Orthopedic Surgery, P.C., dated March 16, 1993, April 7, 1993 and May 10, 1993.
- B. Dr. Andres Roomet, Neurological Associates of Vermont, February 11, 1993 and March 11, 1993 reports, including results of upper extremity; February 19, 1993 cervical spine MRI; report of June 7, 1989.
- C. Dr. James V. Mogan, office notes from October 29, 1990 through June 10, 1991; Dr. Mogan's December 17, 1992 letter regarding treatment.
- D. Claimant's job analysis dated January 10, 1991.
- E. Functional Capacity Evaluation Report dated March 25, 1991.
- F. Medical Center Hospital of Vermont occupational therapy referral, including data base information, circuit training,

flow sheets and clinical records for the period February 21, 1991 to March 1, 1991.

- G. Dr. Charles H. McLean's letter to Dr. Grzyb of the New England Spine Institute dated March 21, 1991 and Dr. McLean's March 21, 1991 letter to St. Paul Insurance Co.; Dr. McLean's letter to Attorney Stuart Bennett dated March 18, 1991 with appended chart notes; Dr. Dorothy E. Ford letter dated February 28, 1991 to the St. Paul Insurance Co.; Dr. Ford's letter to St. Paul dated August 5, 1992 (the above being part of Dr. Ford's deposition).
- H. Dr. Nancy E. Binter's letter dated April 1, 1992 to Dr. Ahlers and Radiology report regarding Kevin Kelley's lumbar spine.
- I. Deposition of John F. Lawliss III, M.D., dated September 7, 1993.
- J. Physical Therapy Records.
- K. Medical bills submitted.
- L. Report of Philip Gates, M.D., dated April 10, 1992.
- M. Letter from claimant to Dr. Gates dated October 14, 1991.
- N. Vocational Rehabilitation materials.

DEFENDANT'S EXHIBITS

- 1. Deposition of Dorothy Ford, M.D., dated August 16, 1993.
- 2. Letter from Stanley E. Grzyb, M.D. to Gordon Ahlers, M.D., dated May 8, 1991, with clinical notes attached thereto.
- 3. Letter from Martin E. Flanagan, M.D., to Dr. Ahlers, dated April 3, 1991.
- 4. Employee's Report of Injury (on St. Paul form) dated October 27, 1990.

III. THE CLAIM

THE CLAIMANT SEEKS:

- (A) Temporary total disability compensation under 21 V.S.A. § 648 from May 29, 1992 to the date on which claimant's shoulder injuries reach or have reached a medical endpoint.
- (B) Permanent partial disability compensation under 21 V.S.A. § 648 for claimant's injury to his lumbar spine.
- (C) Medical and hospital benefits under 21 V.S.A. § 640.
- (D) Vocational rehabilitation benefits under 21 V.S.A. § 641.
- (E) Attorneys fees and costs under 21 V.S.A. § 678(a).

IV. FINDINGS OF FACT

A. BACKGROUND

1. On October 2, 1990 claimant was employed by defendant as a CNC mill operator.
2. Defendant was claimant's employer within the meaning of the Workers' Compensation Act on October 2, 1990.
3. Claimant suffered a personal injury when hand tapping training handles on a manual Bridgeport mill machine.
4. Claimant's injury arose out of and in the course of his employment with defendant, although the extent of that injury is a matter of dispute between the parties.
5. The St. Paul Fire and Marine Insurance Company (hereinafter, "carrier") was the workers' compensation carrier for defendant on October 2, 1990.
6. Claimant's average weekly wage for the twelve weeks preceding the accident was \$513.79 from this employer, resulting in a weekly compensation rate of \$342.53 (plus \$10.00 for each dependent); during the twelve weeks prior to the accident the claimant worked 9 hours a day, 5 days a week.
7. On October 2, 1990 claimant had two dependents under the age of 21, identified as:
 - 1) Shane R. Kelley

2) Justin C. Kelley

8. At the time of the injury, claimant was 36 years of age, and married. His current mailing address is P.O. Box 244, Shelburne, Vermont 05482.
9. On October 12, 1990, defendant filed a first report of injury.
10. On October 27, 1990, claimant filed a Notice of Injury and Claim for Compensation.
11. On January 30, 1991, claimant and defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) in which defendant agreed to pay claimant \$342.53 a week, including dependency benefits of \$20.00, beginning on October 5, 1990.
12. On July 1, 1991, claimant's compensation was increased under 21 V.S.A. § 650(d) to \$382.73 (paid August 14, 1991 to August 20, 1991).
13. On May 29, 1992, defendant discontinued temporary total disability compensation being paid to claimant on the basis that claimant had reached a medical end point. A Form 27, Notice of Intention to Discontinue Payments, was mailed to claimant on May 22, 1992.
14. When compensation ceased on May 29, 1992, defendant or its insurer had paid an undetermined amount in compensation benefits, and \$1,580.00 in medical benefits.
15. On May 5, 1993, claimant filed a Notice and Application for Hearing.
16. Claimant's position as a CNC Milling Machine Operator in defendant's employ involved the repetitive use of claimant's hands and wrists. Claimant worked at defendant's shop five days per week, nine hours a day. The physical demands of claimant's job as a CNC Milling Machine Operator for defendant required continuous reaching below claimant's shoulder (67 to 100 percent of an eight hour work day) and occasional reaching at or above shoulder level (1 to 33 percent of an eight hour work day). (See claimant's Exhibit D entitled "Job Analysis").
17. On October 2, 1990, claimant suffered a personal injury to his wrists and hands while claimant was "hand tapping" training handles on a manual Bridgeport milling machine. Claimant's injuries to his wrists and hands arose out of and in the course of his employment with the defendant. (See, Form 1; Form 4).

18. Prior to claimant's October 2, 1990 injury, he had been experiencing problems with his hands. Claimant had been diagnosed as suffering from bilateral carpal tunnel syndrome affecting claimant's hands and wrists in June of 1989. At that time claimant was examined by Andres Roomet, M.D., a neurologist. Claimant did not have at that time any symptoms above his elbows or in his neck and shoulder area. (See claimant's Exhibits B and C.) Claimant was, however, complaining of numbness and tingling into his fourth and fifth fingers, with these symptoms spreading up to his elbows at times. Because of these symptoms, (i.e. the numbness and tingling in claimant's hands) it was suggested by Dr. Roomet that claimant might have some degree of underlying thoracic syndrome as well as bilateral carpal tunnel syndrome. (See Exhibit #3 of claimant's Exhibit I and claimant's Exhibit B).
19. In July of 1989, claimant received treatment for his carpal tunnel symptoms from Dr. James V. Mogan. Dr. Mogan injected both claimant's carpal tunnels with celestone and recommended that claimant wear wrist splints. Claimant also underwent physical therapy at this time. Claimant's mild/borderline carpal tunnel syndrome did not cause an interruption in claimant's employment in 1989. (See, claimant's Exhibit C).

B. SHOULDER CONDITION

20. On October 2, 1990, the pain and numbness in claimant's hands and wrists prevented claimant from maintaining a grip on the Bridgeport milling machine and/or the training handles which were being milled thereon. (See, Form 4). claimant had been experiencing increasing difficulty in gripping materials and performing the fingering, handling and reaching demands of his job as a CNC Milling Machine Operator. In order to lessen the pain in his hands and wrist, but still perform the physical demands of being a CNC Milling Machine Operator, claimant testified that he adjusted his body mechanics so that he was using his shoulders and elbows more. As a result of these body adjustments, claimant testified that he developed shoulder pain as well as hand and wrist pain. (See, claimant's Exhibit A; i.e. Dr. Ahlers' January 23, 1991, letter and defendant's Exhibit 1 (Dr. Ford's February 28, 1991, letter)). During the three days immediately preceding the October 2, 1990 work related injury, claimant was continually adjusting his body mechanics in order to hand tap the training handles on a manual Bridgeport milling machine. During this three day period, claimant began to increasingly lose grips on the materials and also began

experiencing pain and discomfort in his shoulders as well as his hands, wrists and elbows.

21. Claimant completed his shift on October 2, 1990. He sought treatment with Dr. Gordon Ahlers at the conclusion of his shift on October 3, 1990. Dr. Ahlers previously had treated claimant for his carpal tunnel symptoms in 1989. Prior to October 3, 1990, claimant had never complained to Dr. Ahlers of pain his shoulders. (See claimant's Exhibits A and B).
22. Claimant's principal complaint to Dr. Ahlers on October 3, 1990 was bilateral shoulder pain which radiated into his elbows and caused tingling down his fingers. Claimant advised Dr. Ahlers that he had been unable to maintain a grip on materials. Dr. Ahlers recommended that Plaintiff do light duty work for one week. According to claimant, there was no light duty work available to him at Chatham Precision. Claimant continued to work at Chatham Precision from October 2, 1990 until October 24, 1990, at which time Dr. Ahlers directed claimant to discontinue work until further evaluation by Dr. Mogan. An evaluation with Dr. Mogan was scheduled for October 29, 1990. (See claimant's Exhibits A and C).
23. Claimant had also been referred by Dr. Ahlers for a physical therapy evaluation which was done by Timberline Physical Therapy. Claimant was evaluated by Timberline Physical Therapy on October 19, 1990. This evaluation revealed positive tincl sign bilaterally and positive phalens tests bilaterally. Additionally, this evaluation revealed that the passive range of motion with over-pressure was painful on claimant's left shoulder, but mobility was within normal range. The evaluation also revealed pain with internal rotation of the bilateral shoulders with over pressure. Claimant's shoulders displayed muscular imbalances and weakness primarily in the lower and middle trapezius and it was noted that there was possible rotator cuff irritation and possible thoracic outlet syndrome as well. (See claimant's Exhibit J).
24. Dr. James V. Mogan evaluated claimant on October 29, 1990 for his bilateral carpal tunnel symptoms. Dr. Mogan concluded that claimant did have carpal tunnel syndrome, which was worsening. Dr. Mogan recommended surgery on claimant's carpal tunnel because the claimant had not benefitted from the previous injections. Dr. Mogan was also of the opinion that the carpal tunnel surgery might not completely solve claimant's problems due to the underlying possibility of thoracic outlet syndrome. Notwithstanding the possibility that the carpal tunnel surgery might not completely solve claimant's problem, Dr.

Mogan believed it was worth the surgical effort. Dr. Mogan did not treat claimant for his thoracic outlet symptoms. (See, claimant's Exhibit C).

25. Claimant underwent carpal tunnel surgery on his left hand on November 28, 1990. Claimant underwent carpal tunnel surgery on his right hand on January 9, 1991. Drs. Ahlers and Mogan, in consultation with one another, agreed that it would be approximately 20 weeks following claimant's January 9, 1991 carpal tunnel surgery before he would be able to return to work or to be evaluated for return to work. (See claimant's Exhibits (Dr. Ahlers' January 23, 1991, letter) and C).
26. Defendant was provided copies of claimant's consultations with Dr. Mogan, claimant's Timberline physical therapy reports, claimant's x-rays and medical records as well as a history of claimant's treatment with Dr. Ahlers in a letter dated January 23, 1991. This letter informed defendant of Dr. Ahlers' diagnosis of claimant and the bases therefor. Dr. Ahlers informed the defendant "by history the job description at Chatham Precision would lead one to believe that [claimant's] injury was a low grade recurring injury syndrome with multiple repetitive activities involving a metal-working jig with tapping and threading of tool and dyes with an arm and shoulder position which would make [claimant] prone to this type of problem." Dr. Ahlers' diagnosis on October 3, 1990, was bilateral shoulder tendinitis with a question of thoracic outlet syndrome and bilateral carpal tunnel syndrome. (See, claimant's Exhibit A).
27. Claimant was examined by John F. Lawliss III, M.D., in connection with his shoulder problems. Dr. Lawliss, noting that claimant had not complained of shoulder pain prior to the October 2, 1990 injury, was not able to state with a reasonable degree of medical certainty that claimant's shoulder tendonosis was related to claimant's employment with defendant. (See claimant's Exhibit I).
28. Dr. Lawliss concluded that, based upon the work-history related to him by claimant and by Dr. Ahlers, the three days prior to the October 2, 1990 injury during which claimant adjusted his work activity to accommodate his wrist pain were not a sufficiently long enough period of time to have caused the shoulder problems experienced by claimant. (See claimant's Exhibit I at 45-46.).
29. Claimant was examined by agreement of the parties by Andres Roomet, M.D., neurologist. Dr. Roomet had previously examined claimant (unrelated to this claim) in June or July of 1989. At that time, Dr. Roomet made a "probable"

diagnosis of claimant as suffering from "concurrent thoracic outlet syndrome." It is uncontradicted that claimant suffered shoulder problems prior to his employment with defendant.

30. Dr. Roomet concluded that "with respect to the work-related incident in October 1990, clearly his thoracic outlet type symptoms . . . are not causally related . . ." (See claimant's Exhibit B).

C. BACK INJURY

31. Following his January 9, 1991, carpal tunnel surgery, claimant was referred to the Medical Center Hospital of Vermont's work hardening program by Dr. Mogan. It was claimant's understanding that Dr. Mogan had referred him to the work hardening program in order to receive training on a particular machine which was for the purpose of improving claimant's strength and fingering abilities in his hands. Claimant was, however, informed by the work hardening therapist that he was obligated to participate in the entire work hardening program. Claimant was admitted to the work hardening program on February 21, 1991 for a work capacity evaluation. The work hardening records indicate that claimant had decreased shoulder strength and impaired functional use of his arms in overhead positions. Following claimant's work capacity evaluation, claimant began participation in the work hardening program from February 25-28, 1991. Claimant discontinued participation in the work hardening program following his February 28, 1991 examination by Dorothy E. Ford, M.D. (See, claimant's Exhibit F).
32. Claimant was examined by Dr. Ford on February 28, 1991 at the request of defendant. Dr. Ford's examination focused on claimant's carpal tunnel complaints, i.e. his hands and wrists. Dr. Ford also checked the range of motion in claimant's shoulders and found it to be normal. Dr. Ford did not examine claimant's back on February 28, 1991. (See, defendant's Exhibit 1 at page 13).
33. Dr. Ford again examined claimant on July 30, 1992, at which time Dr. Ford took a history of claimant's complaints of back pain. (See, defendant's Exhibit 1 at pages 14-15, 18, 53-54).
34. Claimant testified that while participating in the MCHV work hardening program, he experienced the onset of sharp, searing back pain while he was performing lateral flexion exercises on a "Roman chair". The records of the work hardening program reveal that claimant used the Roman chair on February 27, 1991 and again on February 28, 1991.

Claimant described the Roman chair which he used at the work hardening program as a piece of exercise equipment that was bolted to the floor, which had no adjustments or settings which would restrict his range of motion. Claimant testified that he was instructed to cross his arms across his chest and bend laterally over the Roman chair as far as he could. Claimant testified that he was instructed to perform this exercise on the Roman chair by the physical therapist at the work hardening program. Claimant testified that when he performed the exercises on the Roman chair as instructed by the physical therapist he experienced sharp, stabbing, searing pain his lower back. (See claimant's Exhibits F, G & M).

35. Claimant discontinued the work hardening program on February 28, 1991 and informed the therapist of the discontinuance the next day. (See Exhibit F).
36. Following the discontinuance of the work hardening program, claimant began treating with Charles H. McLean, DC, a chiropractic physician. Dr. McLean had previously treated claimant for lower back pain in 1986 or 1987. Dr. McLean did not again treat claimant for low back pain or discomfort until March 8, 1991, when claimant sought treatment for lower back pain following his participation in the work hardening program. (See Exhibit G).
37. Claimant's symptoms as documented by Dr. McLean in March of 1991 were: pain in the lower back, limited range of motion, swelling and muscle spasms. Dr. McLean diagnosed claimant as suffering from an acute lumbar strain. Claimant was authorized by the defendant to receive ten intensive treatments from D.r McLean's office. Claimant, however, received only nine treatments from Dr. McLean's office, consisting of ultrasound therapy, low voltage muscle stimulations, traction therapy and manipulation therapy. Claimant was treated by Dr. McLean on March 8, 11, 12, 13, 14 ,15, 18, 19 and 20, 1991. Following the nine treatments, Dr. McLean advised claimant that further treatment by him would not result in significant improvement of his condition. Dr. McLean advised claimant to seek further evaluation from an orthopedist, and referred claimant to Dr. Stanley Grzyb by letter dated March 21, 1991. Dr. McLean also advised defendant, by letter dated March 21, 1991, of his referral of claimant to Dr. Grzyb, and of his opinion concerning claimant's prognosis.
38. Dr. McLean is of the opinion, to a reasonable degree of chiropractic certainty, that claimant's injury to his lumbar spine was caused by claimant's use of the Roman chair at the work hardening program. Based upon his March

1991 treatment of claimant as well as his previous treatment of claimant, Dr. McLean is of the opinion that claimant's 1991 back injury could not be considered an exacerbation or recurrence of claimant's 1986 or 1987 back injury. (See claimant's Exhibit G; Testimony of Dr. McLean).

39. Following claimant's last treatment with Dr. McLean and prior to his appointment with Dr. Grzyb, claimant was examined by Dr. Ahlers on March 21, 1991. Dr. Ahlers arranged for a CAT scan of claimant's lumbar spine. The CAT scan was performed on March 25, 1991.
40. The CAT scan of claimant's lumbar spine revealed a left asymmetric disk bulge or herniation at the L5-S1 level and some compression and displacement of the adjacent thecal sac. It was unclear whether there was significant impingement on claimant's nerve root. Claimant's CAT scan also revealed an asymmetric L4-5 disk bulge causing some mild flattening of the adjacent anterior aspect of the thecal sac. (See defendant's Exhibits 2 and 3).
41. Claimant was referred to Martin E. Flanagan, M.D., a neurosurgeon, by Dr. Ahlers following his CAT scan. The purpose of Dr. Flanagan's April 3, 1991, examination of claimant was to determine whether claimant needed back surgery at the time. Claimant had postponed his evaluation with Dr. Grzyb of the New England Spine Clinic pending the surgical consultation with Dr. Flanagan. Dr. Flanagan was of the opinion that claimant did not need back surgery and recommended that it would be reasonable for claimant to get into a program such as the Spine Institute of New England's program instead of a formal work back strengthening and work hardening program. Dr. Flanagan also noted that claimant was going to require a great deal of ongoing care. (See defendant's Exhibit 3).
42. Claimant, under the direction of Dr. Ahlers, participated in a physical therapy program from June of 1991 until February of 1992, which program involved swim therapy and other physical therapy with Leslie Bell of Timberline Physical Therapy. (See Exhibits A and J).
43. On October 14, 1991, Dr. Ahlers referred claimant to Philip E. Gates, M.D., an orthopedic surgeon, for an independent evaluation of claimant's lower back condition. Dr. Gates took a detailed history of claimant's complaint, including not only his lower back pain complaint, but also his carpal tunnel and upper extremity complaints. Dr. Gates' reported that claimant informed him that beginning in August or September of 1990 he was having problems relating to the repetitive use of his upper extremities. Claimant advised

Dr. Gates that following his repetitive use of his upper extremities, he began to have problems with numbness and tingling and pain in his hands. claimant told Dr. Gates he made adaptations such as getting other workers to do some of the very finest control work and was using his arms for the heavier work, but the pain continued and he had a progression of pain up into his upper arms and shoulder areas. Following his October 14 ,1991 examination of claimant, Dr. Gates recommended that claimant continue with his present treatment regimen.

44. Claimant was examined by Dr. Gates on April 10, 1992 at the request of the defendant. The purpose of this examination was to determine whether claimant had reached an medical end result. Dr. Gates' report following his April 10, 1992 examination of the claimant indicates that claimant continued to have problems with numbness and tingling in his upper extremities and pain in the hands and up into the shoulder areas. Dr. Gates' impression was that claimant could reasonably be considered to be at an medical end result; therefore, claimant is found to have reached a medical endpoint as of April 10, 1992. Dr. Gates assessed claimant with an 8% impairment of each hand. Claimant does not dispute Dr. Gates permanency rating of eight (8%) percent for each of his hands. Additionally, Dr. Gates assessed a twelve (12%) percent impairment claimant's whole person due to claimant's loss of motion in his lumbar spine. Utilizing the 1958 AMA conversion tables, Dr. Gates converted the twelve (12%) percent impairment of the whole person to a twenty (20%) percent impairment of claimant's spine. Dr. Gates did not comment on whether claimant had permanent physical impairment to his upper extremity/shoulders in his April 10, 1992 report. (See Exhibit L).
45. On May 29, 1992, the defendant terminated claimant's temporary total disability benefits on the ground that the claimant had reached an medical end result. defendant, however, only paid claimant the eight (8%) percent permanency assessed by Dr. Gates on each of claimant's hands and did not pay claimant the twenty (20%) percent impairment of claimant's spine. (See Exhibit L).
46. Drs. Ahlers and McLean were of the opinion that claimant's injury to his lumbar spine was caused by claimant's participation in the work hardening program. The medical evidence and other evidence corroborates their opinions as to the cause of claimant's back injury. Both Drs. Ahlers and McLean testified that they each had clear recollections of claimant informing them that his back pain occurred while he was using the Roman Chair, regardless of the fact

that their office notes do not make mention of claimant's disclosure. (See Exhibits A and G).

V. CONCLUSIONS OF LAW

A. GENERAL CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to support his claim. Goodwin v. Fairbanks, Morse, and Company, 123 Vt. 161 (1963). The claimant must establish by sufficient competent evidence, the character and extent of the injury and disability as well as the casual connection between the injury and the employment. Rothfarb v. Camp Awanee, 116 Vt. 172 (1949) (overruled on other grounds). An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of employment placed claimant in the position where the claimant was injured. Shaw v. Dutton Berry Farm, ___ Vt. ___, 4 Vt. L. W. 216 (!993); Miller v. IBM, ___ Vt. ___, Docket No. 92-636, slip op. at 2-3 (12/10/93).
2. An injurious event need not be instantaneous to be compensable. Campbell v. Savelburg, 139 Vt. 31 (1980). An aggravation or acceleration of a pre-existing condition can constitute a personal injury under the Vermont Workers' Compensation Act. Campbell v. Savelburg, supra. If the claimant meets the burden of proof that claimant suffered an injury as a result of work, or proves that work accelerated a previously existing condition, the injury is compensable.
3. Where the claimant's injury is obscure and a layman could have no well-grounded opinion as to its causation, expert testimony is the sole means of laying a foundation for an award, Lapan v. Berno's, Inc., 137 Vt. 390 (1979), and such expert medical testimony is required to remove the final decision from the realm of speculation. Marsigli's Estate v. Granite City Auto Sales, Inc., 124 Vt. 95 (1963).
4. In claims involving pre-existing injuries, there must be created in the minds 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 from the facts proved must be the more probable hypothesis. Burton v. Holden and Martin Lumber Company, 112 Vt. 17 (1949); Lapan, supra. A new injury occurs where the aggravation of the pre-existing condition is at least partly precipitated by the last incident causing the claimant's disability. See Doyle v. G.P.I. Construction Company, Opinion No. 19-89 WC (May 22, 1991). For the purpose of 21 V.S.A. § 662(c), the last event may be

considered an aggravation of a pre-existing condition if the last accident partly contributes to the claimant's current disability. Vermont has long recognized aggravation of a pre-existing condition as a personal injury by accident. Morrill v. Charles Bianchi, 107 Vt. 80 (1935).

B. BACK INJURY

5. Claimant has satisfied his burden of proof that: (1) the injury to his spine occurred during his participation in the work hardening program; (2) his participation in the work hardening program was occasioned and necessitated solely by the undisputedly work-related and compensable injury to his wrists; and, (3) that therefore the injury to claimant's spine arose out of and within the course of his employment with defendant. The evidence is uncontroverted that claimant sustained a 20% permanent impairment to his lumbar spine, which impairment is attributable to his employment with defendant and for which defendant is liable. Claimant is therefore entitled to 66 weeks of permanent partial disability benefits due to the injury to his lumbar spine.

C. SHOULDER INJURY

6. Claimant has not met his burden of establishing a causal relationship between his bilateral shoulder injury and his employment with defendant. Neither claimant's principal expert witness on this issue, Dr. Lawliss, nor claimant's examining neurologist, Dr. Roomet, were able to testify to a reasonable degree of medical certainty that claimant's work-related activities were causally related to the shoulder condition. A causal connection cannot be inferred from the facts as the most probable hypothesis, either. The circumstantial evidence, while suggestive of a possible causal connection, does not rise to the level of proof required by the Act and the Rules. Therefore, claimant has not established his entitlement to compensation in connection with his shoulder condition.

D. VOCATIONAL REHABILITATION BENEFITS

7. Claimant has requested vocational rehabilitation benefits under 21 V.S.A. § 641 and Rule 27. § 641 provides, in pertinent part, that:

When as a result of an injury covered by this chapter, an employee is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services .

. . as may be reasonably necessary to restore him to suitable employment.

The provisions of Rule 27 are similar. Claimant has established his entitlement to vocational rehabilitation benefits under § 641 and Rule 27, and defendant is liable therefor.

E. MEDICAL BENEFITS

8. Claimant is entitled, under 21 V.S.A. § 640, to those reasonable medical benefits related to the injury to his spine and the injury to his wrists.

F. ATTORNEYS FEES

9. Claimant has prevailed in his claim for benefits in connection with the injury to his spine, and he is therefore entitled to attorneys fees under 21 V.S.A. § 678 and Rule 10.

G. INTEREST ON AWARD

10. Claimant also seeks interest on the benefits awarded hereunder. The Commissioner has the discretionary authority to award interest prior to the date of an award of benefits. However, such an award is only made "to enforce against a workers' compensation defendant its obligation to adjust a workers' compensation claim expeditiously and efficiently and to pay the benefits it knows are due in a reasonably prompt fashion." Luck v. Bets Truck Leasing, Inc., Opinion No. 13-92 WC, dated May 1992 (quoting Blaine v. St. Johnsbury Trucking, Opinion No. 19-91 WNC, dated October 10, 1991). Similar to the defendant in Luck, defendant Chatham Precision believed it had a good faith basis for its view that the back injury was not compensable. defendant's carrier had paid claimant substantial compensation for the carpal tunnel condition in connection with this claim. Therefore, the circumstances of this claim do not justify an award of pre-judgment interest.


VI. ORDER

1. Claimant's request for temporary total disability compensation in connection with his shoulder condition is DENIED.
2. Defendant shall pay to claimant, as permanent partial disability benefits, an amount equal to 66 weeks of compensation at the statutorily adjusted compensation rate. Because more than 66 weeks have passed since the date upon

which claimant became entitled to PPD benefits, this entire amount is due and payable.

3. Defendant shall comply with its obligation to provide vocational rehabilitation benefits as provided for in Rules 26-32. Pursuant to Rule 28(b), defendant shall file a Vocational Rehabilitation Referral (Form VR-1) with the Workers Compensation Division with 15 days of receipt of this Order. Defendant shall thereafter comply with the provisions of Rule 29, and this claim shall remain open in connection with the vocational rehabilitation benefits ordered.
4. Claimant's attorney failed to submit evidence of the amount and reasonableness of attorneys fees in accordance with the rule, therefore no fees are awarded.
5. Defendant shall pay past medical benefits in connection with claimant's spinal injury and shall be liable for future medical benefits reasonably related to said injury.

DATED in Montpelier, Vermont this 29th day of December, 1993.



Barbara G. Ripley
Commissioner