



CLAIMS:

1. Temporary total disability benefits.
2. Permanent partial disability benefits.
3. Medical benefits.
4. Attorney's fees.

EXHIBITS:

CLAIMANT'S EXHIBITS:

1. Medical/vocational records notebook containing records from:
  - a. Dr. Chard, M.D.;
  - b. Dr. Coffey, M.D.;
  - c. Dr. Tortolani, M.D.;
  - d. Dr. Sy, M.D.;
  - e. Dr. Leffert, M.D.;
  - f. Dr. Jones, D.C.;
  - g. Dr. Birch, Ph.D.;
  - h. Physical therapy records;
  - i. Work-hardening records;
  - j. Vocational rehabilitation records;
  - k. Comprehensive Rehabilitation, Inc.'s records.
2. Dr. Robert Tortolani's medical bill in the amount of \$386.00 (claim is being made solely for worker's compensation related charges).
3. Dr. Jeremy Birch, Ph.D.'s bill in the amount of \$560;
4. Dr. Marcy Jones, D.C.'s bill in the amount of \$289.86;
5. Affidavit of Michael Hertz, Esq., detailing fee arrangement with David E. Smith and hours expended in this case.

DEFENDANT'S EXHIBITS:

- A. The AMA Guide to Evaluation of Permanent Impairment, page 42;
- B. Ruth Thomson, A.S.C.W., note;
- C. Ruth Thomson, A.S.C.W., notes clarifying illegible sections contained in Defendant's Exhibit B.

FINDINGS OF FACTS:

1. In April 1989, claimant, David E. Smith, was an employee as defined by the Vermont Workers' Compensation Act.
2. In April 1989, defendant, The Book Press, was an employer as defined by Vermont Workers' Compensation Act.
3. The claimant began his career at The Book Press in 1964 and worked there more or less continuously until 1989.
4. At The Book Press the claimant worked primarily upon a case-making machine which manufactured book covers and required him to hand feed material into the machine. The claimant worked long hours at this physically demanding job, frequently working overtime and voluntarily foregoing vacation time.
5. Although the claimant developed an expertise in operating his machine, and even devised a method of manufacturing covers more efficiently and with less waste, he experienced difficulty with management personnel at times. He was, however, a good employee.
6. In 1979 or 1980 the claimant caught his right arm in his machine where it was caught for several minutes before being freed. The claimant suffered a crushing injury to his right forearm as a result of this incident but did not break any bones; his right forearm did swell and he sought minor medical treatment at a local hospital before resuming work that same evening.
7. As a result of this incident, the claimant suffered a decompression and indentation of the muscles in his right forearm.
8. Several years after this work incident, the claimant began experiencing pain in his right forearm and the more strenuous his work the greater the incidents of pain.
9. Although the claimant sought medical treatment for this right arm pain condition from his primary care physician, Dr. Tortolani, the claimant continued working at The Book Press until April 1989. In April 1989, the claimant's machine jammed frequently on one particular evening forcing him to vigorously pull and jerk the machine to free the jam. Although the claimant had alerted The Book Press about this jamming problem about a month prior to this evening, the machine had not been repaired and continued to jam.

10. As a result of his work activity of freeing this jammed machine, claimant suffered severe pain in his right arm which extended from his fingers up into his neck. He left work that evening to seek medical care for this condition.
11. After initially treating with Dr. Tortolani, the claimant treated with Dr. Chard, an orthopaedic surgeon, who diagnosed the claimant's problem as over-use syndrome of the right arm and also suspected an underlying median nerve entrapment syndrome.
12. Subsequent to this initial treatment, the claimant returned to work at The Book Press but increased right-arm pain forced him to stop work again.
13. On June 19, 1989, Dr. David Coffey, M.D., conducted an electroneuromyography on the claimant from which he opined that the claimant suffered from median nerve entrapment in the right wrist.
14. To address the claimant's right arm and wrist pain, Dr. Chard performed carpal tunnel surgery on August 10, 1989. The claimant slowly recovered from this surgical intervention.
15. After several follow-up visits, Dr. Chard released the claimant for work and placed him at a medical end result on November 17, 1989. In Dr. Chard's view the claimant's physical capability and attitude towards The Book Press, made it unlikely that he would return to work there.
16. After his carpal tunnel surgery the claimant still complained of right arm pain; Dr. Chard eventually suggested that the claimant undergo evaluation at the Pain Clinic in Keene, New Hampshire.
17. On April 2, 1990, Dr. Walker Sy, M.D., examined the claimant at the Pain Clinic and felt that the claimant's original injury caused direct muscle trauma with scarring. He also stated that "certainly there may be some nerve damage and entrapment there, possibly even some small fiber regeneration causing the chronic pain." He also thought that the claimant suffered from "a mild form of myofibrositis with arthralgias both secondary to his original injury ten years ago and its associated stress." Finally, Dr. Sy stated that "his present clinical depression is part in partial of long-term chronic pain resulting from his injury and his [sic] associated with the form of fibromyocyst that is seen in this patient."

18. Dr. Sy recommended that the claimant start a treatment regimen of low level antidepressant medication which, if not alleviating the claimant's pain syndrome, would be increased to antidepressant levels.
19. Dr. Sy saw the claimant again on May 10, 1990, and October 10, 1990, after which he discharged the claimant from his care. His final diagnosis was "chronic pain in the right wrist and arm secondary to industrial injury associated with loss of muscle, fibrosis, and nerve damage."
20. On May 1, 1990, the claimant had a follow-up appointment with Dr. David Coffey, M.D., who performed another electroneuromyography on the claimant's right arm and noted that in comparison with the same test performed almost a year earlier, the claimant had "a very substantial improvement in the condition of the right median nerve with no significant interval change in the right ulnar nerve conduction."
21. In a subsequent permanency examination on July 28, 1992, Dr. Coffey did not note any significant decrease in right median nerve activity but nonetheless rated the claimant's permanent partial impairment of the right upper extremity at 61 percent. He based this rating on the claimant's complaint of pain, noting that he would "rate the median nerve below the mid-forearm at 40 percent less of function due to sensory deficit or pain." Dr. Coffey then translated this loss of function into a 61 percent permanent partial impairment of the upper right extremity.
21. On February 28, 1993, Dr. Coffey wrote to Attorney Hertz to clarify his previous opinion and directly relate the claimant's impairment rating to his work injury of April 1989.
22. On August 28, 1990, the claimant met with Dr. Robert Leffert, M.D., for an independent medical examination. Dr. Leffert concluded that the claimant suffered from a chronic problem in his right arm as a result of his crushing injury at The Book Press. He found that the crush injury, and its likely involvement of the superficial radial nerve, caused the tenderness in the claimant's forearm and the loss of sensation on the dorsum of his hand; and that the claimant's palm discomfort was a result of an injury to the cutaneous branch of the median nerve which Dr. Leffert believes was injured during the carpal tunnel surgery.
23. Dr. Leffert noted that the permanent impairment caused by the claimant's physical problems were slight in terms of

numerical values. He thought, however, that the claimant's depression coupled with these physical impairments produced a state of chronic disability and prevented him from returning to work at a physically demanding job. Rather, Dr. Leffert thought the claimant should be trained for lighter duty employment.

24. On April 26, 1991, Dr. Kuhrt Wieneke, M.D., performed an independent medical examination on the claimant and concluded that he suffered a 6 percent permanent partial impairment on the upper right extremity. He also noted that the claimant's major problem was depression and that he was capable of working.
25. At the hearing, where Dr. Wieneke testified by telephone, he disagreed with Dr. Coffey's 61 percent permanent partial impairment rating for the upper right extremity noting that Dr. Coffey's own nerve conduction studies did not correlate to a 61 percent permanent impairment and that at most the studies showed a mild slowing of the right median nerve.
26. Dr. Wieneke also testified that even an unsuccessful carpal tunnel surgery would result in an 18 to 20 percent permanent partial impairment at most. While he acknowledged that the pain would affect the permanency rating and that the claimant did not evince pain during the Wieneke examination, he also testified that no objective findings substantiated the claimant's history of pain symptoms.
27. On November 1, 1991, Marcy Jones, D.C., performed a permanency examination on the claimant in which he assessed a 10 percent permanent partial impairment to the claimant's upper right extremity, a 3 percent permanent partial impairment to the claimant's upper left extremity and a 2 percent permanent partial impairment to the claimant's right lower extremity.
28. Although Dr. Jones renders a 3 percent permanent partial impairment to the claimant's upper left extremity, he does not specify how this impairment is related to the claimant's work.
29. Further, in rendering all of his permanent impairment evaluations Dr. Jones merely cites the A.M.A. Guides generally without specific references.
30. The defendant provided vocational rehabilitation services to the claimant. He participated in and completed a work hardening program in August 1990, which demonstrated that he had a medium physical level work capacity.

31. Despite completing the work hardening program, the claimant's attempts to actually find a job ran into numerous obstacles. First, at the state level the claimant was reassigned to several different counselors for various reasons. Next, a trusting relationship between the claimant and the private vocational rehabilitation counselors assigned to help him never appears to have developed. Also, the claimant's vocational direction seemed to shift, as did Dr. Birch's support for some job placement efforts; changes which were not communicated to the vocational rehabilitation specialists.
32. It also appears that the claimant was reluctant to engage in a sustained job search as demonstrated by the amount of time it took him to compose and then type his resume.
33. Dr. Birch related the claimant's difficulties with his job search to a fear of rejection and failure, particularly since the claimant's job options changed from blue collar employment to a white collar one.
34. Although the claimant's efforts to cooperate with his vocational rehabilitation counselors, who tried to provide effective, appropriate help, was less than commendable, it does not arise to the level of an intentional failure to cooperate, particularly in light of his psychological condition.
35. In March 1987, the claimant began treating with Ruth Thomson, A.C.S.W. for difficulties with depression, personal relationships, and other personal issues. For the one year period during which he treated with Ms. Thomson, the claimant saw her approximately once a week but at times saw her more frequently. The claimant's therapy sessions with Ms. Thomson ended on March 31, 1988.
36. On April 3, 1991, the defendant terminated the claimant's temporary total disability compensation for failure to cooperate with vocational rehabilitation efforts.
37. In February 1990, the claimant began treating with Dr. Jeremy Birch, Ph.D., upon referral from his attorney, Michael Hertz. Dr. Birch diagnosed the claimant's psychological condition (injury) as depression and pain. Dr. Birch described the claimant's symptoms of depression as including difficulty sleeping, constantly feeling tired, inability to concentrate on written material, mood swings, anger without cause, inconsistent eating habits, and a reduced sense of sexuality. He also described the claimant as constantly suffering pain in his arm and elsewhere.
38. Dr. Birch noted that the claimant had always been an overachiever and hard worker, that his identity and self-

esteem were entwined with his physical capability which included his ability to perform his physically demanding and rigorous job.

39. In relating the claimant's psychological condition to his April 1989, work injury, Dr. Birch stated that prior to the injury the claimant if he'd been impaired at all, had only been impaired mildly, whereas after the injury the claimant suffered from a moderate 50 percent impairment.
40. Dr. Birch acknowledged that the claimant had long struggled with anger, troubled personal relationships, and a troubled perception of authority figures prior to his April 1989, injury. Dr. Birch also noted that despite personal set backs such as the claimant's divorce and a fire which caused extensive damage to a garage and destroyed tools the claimant intended to start a bicycle repair business with, the claimant had previously carried on whereas after the April 1989, he hadn't.
41. Dr. Birch also described that although the claimant probably suffered an indeterminate level of depression prior to the April 1989 injury, he had always been able to function and maintain his employment. The April 1989 work injury, however, aggravated these past problems. Additionally, various vocational rehabilitation specialist who worked with the claimant noted his difficulty in accomplishing even simple tasks such as updating and printing his resume.
42. Dr. Birch treated the claimant from February 1990, until November 13, 1991, when the claimant reached a medical end result for his psychological injury.
43. Utilizing his clinical judgment and the A.M.A. Guides, Dr. Birch rated the claimant as suffering from a moderate 50 percent permanent partial impairment for his psychological injury.
44. At the hearing, the defendant offered the claimant the 6 percent partial impairment Dr. Wieneke had rendered on the claimant's upper right extremity; this finding is made solely for the purposes of properly evaluating the claimant's claim for attorney's fees.
45. I also find that neither the claimant nor his attorney have caused any delay in the resolution of this matter.
46. Judicial notice shall be taken of any and all pleadings and forms filed with the Department of Labor and Industry.



CONCLUSIONS OF LAW:

1. The claimant has the burden of establishing all facts essential to the rights he or she asserts under the Workers' Compensation Act. McKane v. Capital Hill Quarry Company, 100 Vt. 45 (1926); Goodwin v. Fairbanks, Morse and Co., 123 Vt. 161 (1963).
2. The claimant also has the burden of establishing with sufficient competent evidence the character and extent of the injury and disability and the causal connection between the injury and his or her employment. Rothfarb v. Camp Awanee, 116 Vt. 172 (1949), overruled on other grounds; Shaw v. Dutton Berry Farm, Opinion No. 92-267, June 11, 1993.
3. The evidence presented must create more than a mere possibility, suspicion, or surmise in the trier of fact's mind that the incident complained of caused the injury and that the inferences from the proven facts must be the more probable hypothesis. Jackson v. True Temper Corporation, 151 Vt. 592, 596 (1989); Burton v. Holden and Martin Lumber Company, 112 Vt. 17 (1941).
4. When the claimant's injury is an obscure one so that a lay person could have no well grounded opinion as to its causation or duration, expert medical testimony is the sole means of laying the foundation for an award. Jackson v. True Temper Corporation, 151 Vt. 592, 596 (1986); Egbert v. The Book Press, 144 Vt. 367 (1984); Lapan v. Berno's Inc., 137 Vt. 393 (1979).
5. Although claimant may suffer from a pre-existing condition, if a work-related injury aggravates that pre-existing condition or accelerates its manifestation, the claimant is entitled to compensation for any disability which that aggravation or acceleration causes. See Campbell v. Savelberg, Inc., 139 Vt. 31, 35-36 (1980); Marsigli Estate v. Granite City Auto Sales, Inc., 124 Vt. 95, 103 (1964); Weaver v. Agway, Inc., Opinion No. 67-81 WC, dated January 6, 1981.
6. Permanent total disability means that the claimant, because of a work injury can no longer earn wages in any work which a person of his or her mental and physical ability could perform. Fleury v. Kessel-Duff Construction Company. 148 Vt. 415 (1987); Gimbert v. United Parcel Service, Opinion No. 22-88, dated February 27, 1991.
7. Whether or not a claimant is permanently totally disabled under Vermont's Workers' Compensation Act, depends upon the degree of actual impairment, either physical or

psychological, and does not turn on individual employability factors such as age, education, or experience. Bishop v. Town of Barre, 140 Vt. 564 (1982); Gimbert v. United Parcel Service, supra. at 15.

8. Under Vermont's Workers' Compensation Act, a claimant has the obligation to cooperate with and undergo reasonable medical treatment and vocational rehabilitation efforts; a claimant's failure to meet this obligation can result in the termination of benefits. Luther v. General Electric, Opin. No. 9-93WC; Nadeau v. Atlas Van Line, Opin. No. 12-93Wc.
9. A pre-existing, dormant psychological condition which is aggravated, accelerated, or activated by a work-related physical injury is compensable under Vermont's Workers' Compensation Act when the claimant establishes a causal connection between the physical work-related injury and the subsequent psychological condition. Luther v. General Electric, supra at 7; Carpenter-Cushing v. Hutchinson Leasing, Inc., Opin. No. 2-92WC at 8-9; Gimbert v. United Parcel Service, Opin. No. 22-88 at 14; Weaver v. Agway, Opin. No. 67-81WC at 8.

I. PERMANENT TOTAL DISABILITY.

10. The claimant argues that based on his physical and psychological impairment he is permanently totally disabled from any type of work suitable to his physical and mental capabilities. The evidence does not support the claim for permanent total disability compensation. Claimant has pursued rehabilitation efforts, including class work in accounting which demonstrates an aptitude for work, and he has presented no expert medical or psychological testimony supporting his claim that he is permanently totally disabled from working. Compare Gimbert supra. In fact, Dr. Birch, the claimant's psychologist, assesses the claimant as a 50 percent permanent partial impairment for a psychological injury, not a total disability.
11. For these reasons, the claimant's claim for permanent total disability compensation is denied.

II. TEMPORARY TOTAL DISABILITY COMPENSATION.

12. The claimant seeks temporary total disability compensation from April 3, 1991, through November 13, 1991, when Dr. Birch placed him at a medical end result. The defendant terminated temporary total disability benefits on

April 3, 1993, because the claimant allegedly failed to cooperate with vocational rehabilitation efforts.

13. Based on the evidence presented, I find that the defendant should not have terminated the claimant's temporary total disability benefits for non-cooperation. While the claimant appears to have been a challenging, if not difficult, client for his vocational rehabilitation specialists, his behavior does not rise to the level necessary to find that he unreasonably failed to cooperate in vocational rehabilitation efforts. In addition, his psychological condition contributed to his behavior which further reduces any intentional failure to cooperate.
14. Therefore, the claimant is entitled to temporary total disability compensation from April 4, 1991, through November 13, 1991, when Dr. Birch placed him at a medical end result.

III. PERMANENT PARTIAL DISABILITY BENEFITS.

A. Permanent Partial Impairment to the Upper Left Extremity.

15. Despite Dr. Jones' permanency rating at 3 percent for the upper left extremity, there is scant, if any, evidence establishing the necessary causal connection between the claimant's employment and his injury.

16. Therefore, the claimant's claim for permanent partial impairment to the upper left extremity shall be denied.

B. Permanent Partial Impairment to the Upper Right Extremity.

17. Claimant seeks permanent partial disability benefits for his upper right extremity and, in reliance upon Dr. Coffey's assessment, he claims that the impairment he suffered is 61 percent of the upper right extremity for his neurological injury. He also claims 10 percent permanent partial impairment, based on Dr. Jones' opinion for his orthopaedic injury to the upper right extremity. In contrast, relying upon Dr. Wieneke's examination and testimony, the defendant argues that the claimant has suffered a 6 percent permanent partial impairment to the upper right extremity.
18. Based on the evidence presented, I find that the claimant has suffered a 6 percent permanent partial impairment of the upper right extremity.
19. I find Dr. Wieneke's opinion more persuasive for several reasons. First, Dr. Coffey's May 1, 1990, report notes

vast improvement in the claimant's right median nerve function and specifically notes that "by comparison with previous studies, there has been very substantial improvement in the conduction in the right median nerve with no significant interval change in right ulnar nerve conduction . . . . The mild abnormalities noted in EMG report include borderline latency of the right median sensory action potential and a very slight delay of the right median motor terminal latency with some decrease in the amplitude of the CMAP." In his July 28, 1992, letter detailing the claimant's permanency evaluation, Dr. Coffey notes no significant worsening of the claimant's symptoms.

20. As Dr. Wieneke's report and testimony demonstrate, it appears that Dr. Coffey's own objective findings do not support the significant permanency rating he assessed to the claimant.
21. Next, although he did not determine a specific degree of numeric permanent partial impairment, Dr. Leffert also concluded that the claimant's permanent impairment of the upper right extremity "would not be very great" numerically. This assessment, while not numerically specific, aligns more nearly with Dr. Wieneke's opinion than with Dr. Coffey's.
22. For these reasons, I find that Dr. Wieneke's permanency rating of 6 percent of the claimant's upper right extremity is the more persuasive and credible one.

IV. PERMANENT PARTIAL IMPAIRMENT FOR PSYCHOLOGICAL INJURY.

23. Finally, the claimant seeks a 50 percent permanent partial impairment for a psychological injury suffered as a result of his April 1989 work injury. The defendant's basic opposition to this claim rests upon the claimant's previous history of psychological counseling with Ms. Thomson, of which Dr. Birch was unaware, and Dr. Birch's qualifications and treatment of the claimant in that Dr. Birch is not a physician and did not perform certain psychological tests on the claimant.
24. Despite the defendant's argument, I find that the claimant's work injury of April 1989, aggravated a pre-existing psychological condition for which the claimant is entitled to compensation. Physical work-related injuries which aggravate pre-existing psychological conditions are clearly compensable under Vermont's Workers' Compensation Act. See Gimbert, supra; Weaver, supra.

25. Defendant's cite to Mazut v. General Electric, Opin. No. 3-89WC for the proposition that "'mental injuries are compensable only when caused by actual conditions at work,'" is inapplicable here because Mazut concerned a "mental-mental" claim in which the claimant alleged that work stress caused a mental or psychological injury. Here, like in Weaver and Gimbert, the claimant suffered an actual physical work injury which aggravated a pre-existing psychological condition. Under these cases, work conditions need not cause the mental injury, the work injury does.
26. Although the claimant underwent counseling for depression and other problems prior to his April 1989 injury, his pre-existing psychological condition did not substantially interfere with his ability to function or work, and any counseling with Ms. Thomson ended in March 1988, more than a year prior to the claimant's April 1989, injury. During this year the claimant maintained his work schedule.
27. After the injury, which exacted a psychological toll on the claimant, his psychological condition worsened. This injury aggravated the claimant's prior psychological problems and undermined his self-image, which was greatly dependent upon his physical abilities and his job, in such a manner that he could no longer work at the Book Press.
28. For these reasons, I find that the claimant has sustained his burden of demonstrating that he suffered a 50 percent permanent partial impairment for his psychological injury as the result of his April 1989 work injury.
29. Further, although apportionment of permanent partial impairment may be appropriate in some circumstances, the Department is not required to apportion permanency partial disability compensation. See Stamper v. University Apartments, Inc., 147 Vt. 552, 554 (1986). Therefore, any permanent partial impairment the claimant may have been suffering from prior to this work injury, will not reduce the degree of permanent partial impairment for which he is entitled to compensation.

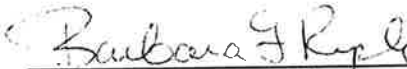
ORDER

Therefore, the Defendant is Ordered:

1. To pay claimant temporary total disability compensation from April 3, 1991, through November 13, 1991;
2. To pay the claimant for a 6 percent permanent partial impairment of the upper right extremity (10.5 weeks of compensation), as a result of his work-related injury;

3. To pay the claimant for a 50 percent permanent partial impairment (165 weeks of compensation), for the psychological injury suffered as a result of his work injuries.
4. To pay of Dr. Tortolani's bill in the amount of \$386, and Dr. Birch's bill in the amount of \$560; and
5. Since claimant has substantially prevailed, to pay the claimant attorney's fee in the amount of 20 percent of this compensation awarded not to exceed \$3,000. and expenses in the amount of \$1,010.58.

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

  
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Barbara G. Ripley  
Commissioner