

*Ross v. New England Air Systems, Inc. (April 2, 1995)*

STATE OF VERMONT

DEPARTMENT OF LABOR AND INDUSTRY

*Eric Ross* ) *File No. E-17883*  
 )  
*v.* ) *By: Jill Broderick*  
 ) *Hearing Officer*  
*New England Air Systems, Inc.* )  
 ) *For: Mary S. Hooper*  
 ) *Commissioner*  
 )  
 ) *Opinion No. 6-95WC*

*Heard in Montpelier, Vermont on October 28, 1994*  
*Record Closed: December 17, 1994*

APPEARANCES

*Attorney for Claimant - Beth DeBernardi, Esq.*  
*Attorney for Defendant - Harold Eaton, Jr., Esq.*

ISSUE

*Was the Claimant temporarily totally disabled from October 21, 1993 to February 14, 1994?*

THE CLAIMANT SEEKS

- 1. Temporary total disability compensation for the period from October 21, 1993 to February 14, 1994.*
- 2. Attorney fees and costs.*

STIPULATIONS

*The parties have entered into the following stipulations:*

- 1. The Claimant was employed by the Defendant on March 26, 1992.*
- 2. The Defendant was an employer within the meaning of the Act on such date.*
- 3. The Hanover Insurance Company was the workers' compensation insurance carrier on such date.*
- 4. The Claimant's injury to his right upper extremity arose out of and in the course of his employment by the Defendant.*
- 5. The Claimant's average weekly wage as of March 26, 1992 was \$340.44, and the corresponding compensation rate (including dependency allowance for two children) was \$246.96. On July 1, 1992, this amount was updated to \$253.85. On July 1, 1993, this amount was updated to \$266.48 (again including \$20.00 for two dependents.)*

#### *EXHIBITS*

- Joint Exhibit 1            Claimant's medical records*
- Joint Exhibit 2            Employee Termination Authorization*
- Claimant's Exhibit 1      Letter from Roger Kohn, Esq. to Michael Provost dated November 10, 1993.*
- Claimant's Exhibit 2      Statement of Attorney's Fees*

#### *FINDINGS*

*Based on the above stipulations, exhibits and the evidence and testimony presented at the hearing, I find:*

- 1. The exhibits listed above are admitted into evidence.*
- 2. The stipulations set forth above are true.*

3. *The Claimant was employed by the Defendant as a sheet metal journeyman and apprentice.*
4. *The Claimant underwent surgery on his right upper extremity in June, 1992 and again in April, 1993.*
5. *Following the 1993 surgery the Claimant returned to work full time for the Defendant with light duty restrictions.*
6. *Both Michael Provost, the vice president of operations, and Don Chartrand, the shop manager, were aware of the Claimant's light duty work restriction.*
7. *The Defendant regarded the Claimant as a talented and valuable employee and made light duty work available to him. Don Chartrand told the Claimant that if any job was too physically demanding, he should inform him and he would find other work for the Claimant to do.*
8. *From April, 1993 through October 21, 1993, the Defendant made light duty work available to the Claimant, and the Claimant performed a variety of tasks including general yard work, lawnmowing, trucking and some work using the shop fabricating equipment.*
9. *The Claimant saw Dr. Benoit, his attending physician, on June 24, 1993, approximately 2 1/2 months after his second surgery. At that time Dr. Benoit stated that the Claimant should "resume normal activities."*
10. *The Claimant next saw Dr. Benoit on August 31, 1993. Dr. Benoit noted that the Claimant had some "post-surgical incision pain" and gave him an injection, but did not state anything about light duty restrictions.*
11. *The Claimant next saw Dr. Benoit on October 7, 1993. Dr. Benoit stated that the Claimant "should return to work as tolerated by his elbow" and with light duty restrictions.*
12. *On October 21, 1993 the Claimant quit his job with the Defendant.*
13. *The Employee Termination Authorization completed by Michael Provost on*

October 22, 1993, stated that the Claimant "left on his own accord--  
concerned  
about his arm" and that "work is available to him, but he chose to leave."

14. The Defendant had light duty work available for the Claimant on  
October  
21, 1993.

15. The Claimant did not seek medical treatment again until January 4,  
1994,  
when he saw Dr. Benoit, who stated in his progress notes: "I believe, at this  
point, he is unable to continue with his work, as he has been off since  
October 21st. Even light duty at the New England Air Systems, seems to  
involve lifting and repetitive motion, which are not indicated for him . . .  
I will see him back in approximately four to six weeks to reassess how he's  
doing and, at that point, we may consider him at a medical end-point."

16. At Dr. Benoit's recommendation the Claimant underwent a course of  
physical therapy between January 4, 1994 and February 14, 1994.

17. When the Claimant returned to Dr. Benoit on February 14, 1994, Dr.  
Benoit noted that the therapy had little effect on the Claimant's pain and  
stated that there was no other treatment he could offer the Claimant.

## CONCLUSIONS

*Based on the foregoing findings of fact, I conclude the following:*

1. *In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. King v. Snide, 144 Vt. 395 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise, that the incident complained of was the cause of the injury. Burton v. Holden and Martin Lumber Company, 112 Vt. 17 (1941).*
2. *A claimant is entitled to temporary total disability compensation when she or he is totally disabled from work, and temporary total disability compensation terminates when the claimant reaches a medical end result or successfully returns to work. Merrill v. Town of Ludlow, 147 Vt. 186 (1974).*
3. *Dr. Benoit stated on January 4, 1994 that the light duty work for the Defendant "seems to involve lifting and repetitive motion, which are not indicated for (the Claimant.)" However, it is not clear from the record that*

*Dr. Benoit understood the Defendant's willingness and ability to accommodate the Claimant and to make a variety of light duty tasks available to him. Based on the record, therefore, Dr. Benoit's statement regarding the Claimant's ability to perform light duty work for the Defendant is not persuasive. Dr. Benoit also stated on January 4, 1994 that after four to six weeks of physical therapy he "may consider" the Claimant to be at a medical end point. However, Dr. Benoit never stated that the Claimant was, in fact, temporarily totally disabled on January 4, 1994 or at any other point since he returned to work after his April, 1993 surgery. The Claimant voluntarily left his employment with the Defendant on October 21, 1993 without a medical opinion that he was temporarily totally disabled and no longer able to perform light duty work, and did not seek medical treatment for another two and a half months. Under these circumstances the Claimant is not entitled to temporary total compensation. Taylor v. National Hangar, Opinion 7-93 WC State File No. B-7978 (claimant released for light duty work who refused an offer of suitable light duty work without a reasonable explanation was not entitled to temporary total disability compensation).*

*4. Since the Claimant has not prevailed, he is not entitled to an award of attorney's fees.*

#### *ORDER*

*Therefore, based on the foregoing CONCLUSIONS and FINDINGS the Claimant's claim for temporary total disability benefits is DENIED.*

*Dated at Montpelier, Vermont this \_\_\_\_\_ day of April, 1995.*

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*Mary S. Hooper  
Commissioner*