

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

)	State File No. L-19977
)	
Gail Votra)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Mack Molding, Inc.)	Commissioner
)	
)	Opinion No. 44-02WC

Hearing Held in Montpelier on September 12, 2002
Record closed on September 25, 2002

APPEARANCES:

Kerry G. Spradlin, Esq. for the Claimant
Keith J. Kasper, Esq. for the Defendant

ISSUE:

Is the Claimant entitled to temporary total disability benefits for any period of time between July 19, 2001 and August 5, 2002?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Transcript of deposition of Jeffrey C. Gundel, M.D.
Claimant's Exhibit 2:	Transcript of deposition of Donald Wehrung
Claimant's Exhibit 3:	Fax from Dr. Bucksbaum's office

STIPULATION OF UNCONTESTED FACTS:

1. On April 8, 1998 claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (Act).
2. On April 8, 1998 Defendant was the employer of claimant within the meaning of the Act.
3. On April 8, 1998 Liberty Mutual Insurance Company was the workers' compensation insurer for Defendant.

4. On April 8, 1998, Claimant suffered a work-related injury arising out of and in the course of her employment with Defendant.
5. At the time of her injury, Claimant's average weekly wage was \$442.00 resulting in an initial compensation rate of \$294.64.
6. At the time of her injury, and at all times thereafter, Claimant had no dependents within the meaning of the Act.
7. Defendant filed a Form 27 terminating Claimant's temporary total disability benefits effective July 19, 2001 on the basis of Dr. Bucksbaum's report of May 23, 2001 finding Claimant to be at medical end result with a permanent impairment of 6% whole person for her work-related injury.
8. The Department approved Defendant's Form 27.
9. Defendant paid Claimant her permanency benefits in weekly installments.
10. Claimant underwent additional surgery for the removal of a nodule on her right wrist on August 5, 2002.
11. Liberty Mutual accepted Claimant's surgery as compensable and related to her work injury and began paying Claimant temporary total disability benefits again as of August 5, 2002.
12. The Claimant is at medical end result for her left upper extremity.

FINDINGS OF FACT:

1. The stipulated facts are accepted as true and the exhibits are admitted into evidence. Judicial notice is taken of all Department forms.
2. Claimant incurred a repetitive trauma injury to both upper extremities in 1998. Afterwards, Dr. James Whittum treated her conservatively until 2000 when she underwent surgical procedures for her carpal tunnel syndrome in her left wrist on September 19, 2000 and on her right wrist on October 31, 2000.
3. Postoperative medical notes show that Claimant had good pain relief after the surgery on both sides.
4. After her surgery, Claimant has physical and occupational therapy for approximately three months.
5. A functional capacity evaluation on February 12, 2001 assessed Claimant's strength as normal in the right hand and above normal in the left.

6. In March of 2001, Dr. Whittum noted that Claimant could return to work in a light or sedentary job with lifting limited to 20 pounds. However, Claimant undertook no job search for a year.
7. Claimant reported to Dr. Whittum that surgery improved her left wrist, but not the right. She reported numbness and pain extending from her wrist into her upper arm, ending at the shoulder. She also noticed a loss of grip strength in her right hand and restricted movement with repetitive tasks such as lifting, pushing and pulling.
8. On April 4, 2001, Dr. Whittum, who had treated Claimant since 1998, found that Claimant's condition was unchanged and opined that Claimant had not quite reached maximal medical improvement.
9. On May 23, 2001, Dr. Mark Bucksbaum performed an examination of the Claimant for the insurer. His examination revealed normal or above normal strength as well as a normal objective measure of sensation, although she still had pain in her hands. Claimant did not have a nodule on her right hand at that time. Dr. Bucksbaum determined that she had reached medical end result. He did not believe that any further medical treatment would significantly alter Claimant's condition, which he assessed as stable. Based on Claimant's residual complaints of pain, Dr. Bucksbaum determined that she had a 6% whole person impairment.
10. At the hearing Dr. Bucksbaum explained that a later appearance of a nodule would not alter his medical end result determination. A nodule is related to scar tissue, which would not affect any of the tests performed in May of 2001 because sensation, range of motion and strength are not limited by its presence.
11. After she saw Dr. Bucksbaum, Claimant returned to Dr. Whittum who noted that Claimant appeared depressed, but that her wrist showed good range of motion and had normal appearance. He did not think that she needed more occupational therapy. He noted that she was capable of some work, if lifting and repetitive work was limited.
12. In July of 2002, Dr. Jeffrey Gundel noted that Claimant was more symptomatic than she had been before her surgeries. He noted that she had well healed scars and that her examination was negative. He attributed her symptoms to an incomplete release of the carpal tunnel or to an intraoperative injury. He opined that she had not reached medical end result. Dr. Gundel recommended nerve conduction studies, which were normal. Dr. Gundel then recommended a six-week course of occupational therapy, twice a week, for desensitization and upper arm strengthening. Next, he referred her for physical therapy where she progressed. He did not believe that she could return to her job at Mack Molding.

13. At a follow up appointment in August of 2001, Dr. Gundel explained that Claimant was disabled, not due to her physical condition, but because of depression.
14. On April 24, 2002, Claimant began to work at a residential home for behaviorally challenged adolescents, but left that job after three days when she learned that she would be responsible for physically restraining residents.
15. Later she took a job at Catamount Glass at the recommendation of Don Wehrung in the vocational rehabilitation office. Claimant determined that the job required work that exceeded her physical abilities and left after three days.
16. Claimant's sister, Vicky Newman-Jones, observed difficulty claimant often had with her hands and sometimes helped her do what otherwise would have been simple chores.
17. Claimant developed a nodule on the surgical scar on her right hand, which grew between November 2001 and August 2002 when it was excised. In Dr. Gundel's opinion, the nodule was tender and precluded her from working until it was excised. Furthermore, he opined that Claimant has not yet reached medical end result for her right hand, and will not until she completes occupational therapy.
18. Dr. Gundel determined that Claimant had reached medical end result for her left hand on June 7, 2002.
19. In July 2002 Claimant took a six-week computer-training course.
20. Between September 2000 and August of 2002, Claimant applied for ten jobs.
21. Defendant voluntarily restarted temporary total disability benefits following the scar revision surgery on August 5, 2002.
22. Since the August 2002 surgery, Claimant has noted reduced numbness and increased strength and movement in her right upper extremity.
23. Claimant submitted evidence that her attorney worked 37.8 hours on this case and incurred \$167.00 in necessary costs. She seeks \$3,402.00 in fees or alternatively 20% of all past due temporary total disability benefits.

DISCUSSION:

1. Claimant seeks a determination that she is entitled to temporary total disability benefits from July 19, 2001 until she is found to be at medical end result for her right wrist condition following her August 5, 2002 surgery, or successfully returns to work. Claimant argues that she did not reach medical end result for the left upper extremity until June 7, 2002. Defendant argues that Claimant reached medical end result of the left upper extremity as of July 19, 2001.
2. The basis of the claim for an additional year of temporary total disability benefits is the nodule on the claimant's scar that caused her discomfort.

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 the 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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. The claimant is entitled to temporary total disability benefits under 21 V.S.A. § 642, while she is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume her former occupation or to procure remunerative employment at a different occupation suited to her impaired capacity. *Roller v. Warren*, 98 Vt 514 (1925).
4. Medical end result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment. WC Rule 2. The fact that some treatment such as drug or physical therapy continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).

5. "[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem); *Coburn*, 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. 626.
6. Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. *Id.* In this case, as in *Wood v. Hoiles* Opinion No. 30-02WC (2002), the evidence as a whole demonstrates that although the claimant had pain from her work related injury, the carpal tunnel syndrome had stabilized in both hands by the summer of 2001, if not sooner. Surgery had been performed almost nine months earlier. Physical examinations and all other objective tests were negative. Objective strength testing has consistently been above average since the spring of 2001. Nerve conduction studies were normal. Only the Claimant's subjective perceptions had changed; her underlying condition had not. Therefore, she had reached medical end result.
7. Consequently, the carrier was justified in terminating temporary disability benefits in July 2001. See, *Pacher*, 166 Vt. 626, 629; *Coburn*, 165 Vt. at 532.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, the claim for additional temporary total disability benefits and attorney fees and costs is DENIED.

Dated at Montpelier, Vermont this 22nd day of October 2002.

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.