STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. S-01902
Philip W. Hepburn	)	
	)	By: George K. Belcher
V.	)	Hearing Officer
	)	
Concrete Professionals, Inc./	)	For: Michael S. Bertrand
Traveler's Insurance Co.	)	Commissioner
	)	
	)	Opinion No. 16-03WC

Hearing held in Montpelier, Vermont On January 8, 2003
Record Closed on February 12, 2003

APPEARANCES:

Dennis O. Shillen, Esq., for the Claimant
William J. Blake, Esq., for the Defendant

ISSUE:

Is the Claimant entitled to temporary partial or total disability benefits for the period between December 28, 2001 and the date of the hearing?

EXHIBITS:

Claimant's Exhibit A:	Five Tab Medical Record Exhibit
Defendant's Exhibit B:	Seven Tab Medical Record Exhibit
Defendant's Exhibit C:	Letter from Paul A. LaPadula, dated December 28, 2001
Judicial Notice:	Two Form 6 applications for hearings and attachments, and Form 27 termination of benefits

STIPULATED FACT:

On August 18, 2001 Philip Hepburn was an "employee" as defined in the Workers' Compensation Act (hereinafter the "Act"). On that same date Concrete Professionals, Inc was an employer as defined in the Act and the Traveler's Insurance Company was its insurer within the meaning of the Act. The claim arises out of a work related accident, which occurred on August 16, 2001, which was incurred in the scope of the Claimant's employment with the Defendant. The Defendant has accepted the compensability under the Workers Compensation insurance of the insurer of the Claimant's shoulder injury as being causally related to the August 16, 2001 accident.

FINDINGS OF FACT:

The Medical History

1. On August 16, 2001 the Claimant was working removing concrete forms upon a building in which a ten (10) foot wall had recently been erected. One of the metal forms broke loose and fell upon him from above. The falling form cut his head and he was thrown to the ground. His shoulder was hurt.

2. On the same day as the accident the Claimant was taken to the Castleton Health Center for evaluation. He was treated by Dr. David Delaney and released. On August 27, 2001 he returned for a follow-up visit and was sent to Dr. Melbourne D. Boynton for further evaluation. Dr. Boynton suspected that there was some internal injury to the shoulder, but he wanted confirmation. Dr. Boynton sent him for an MRI, which was done on October 15, 2001. The MRI showed some impingement to the shoulder.

3. On November 2, 2001 the Claimant again saw Dr. Boynton. It was resolved that the Claimant might need surgery but that Dr. Boynton would allow him to use his left arm and shoulder and see if things improved during the next six (6) weeks. (See Exhibit A (5)(D), Note of Dr. Boynton on Nov. 2, 2001) Mr. Hepburn was released to work with the restriction that he "try moderate use of left shoulder and arm". Id. On January 28, 2002 Dr. Boynton again saw the Claimant and found the shoulder injury was "markedly improved". The Claimant was then released with no work restrictions as to the shoulder injury. (See Exhibit A (5)(D), Work injury tracking form, dated January 28, 2002).

4. On January 9, 2002 Mr. Hepburn went to the Emergency Room at the Rutland Regional Hospital and saw Physician's Assistant Robert Berrick who reported that Mr. Hepburn complained of increasing lower back pain, which started about two weeks ago. The report goes on to say, "He has been putting up quite a bit of wood lately. Apparently, he sells cord wood as well." His back pain was severe and was preventing him from most tasks of daily life. Mr. Berrick diagnosed a low back strain and referred the Claimant to Dr. Michael Scovner. On January 28, 2002 when the Claimant was seeing Dr. Boynton for his shoulder he complained about his back and a referral was made to Dr. Joseph H. Vargus, III. Dr. Vargus evaluated the Claimant on February 6, 2002 and secured an MRI of the back on February 11, 2002. The MRI showed a herniated disc at level L-5, S-1. After several efforts of steroid injections, which were unsuccessful, a discectomy was scheduled for May 17, 2002 at which time Dr. Vargus operated upon the Claimant. That operation was successful and the Claimant was released to work with no restrictions, which related to the back on September 10, 2002. (See Exhibit A (5)(O))

5. During the recovery period following the back operation, the Claimant returned to Dr. Boynton concerning his shoulder. He still had pain when he made certain motions. (See Exhibit A (5)(D), Note of Dr. Boynton dated August 30, 2002) An independent medical examination confirmed the need for the shoulder surgery. (See Exhibit A (5)(M)) Shoulder surgery was scheduled and performed on September 3, 2002. The shoulder surgery repaired the "slap joint" and excised the A.C. joint. On October 14, 2002 Dr. Boynton released the Claimant to extreme light duty work with no use of the shoulder. On December 2, 2002 he was released to light duty work, including the ability to drive and do paperwork.

6. As of the date of the hearing, the Claimant was still released to light duty by Dr. Boynton who predicted maximum medical improvement would occur in September of 2003. The work restrictions, which Dr. Boynton placed upon the Claimant on December 2, 2002, were "No heavy work, Desk work or driving OK". He would not be able to do the heavy work, which he was doing for Concrete Professionals. He could not do heavy lifting. He did not have the unrestricted use of his left arm. (See Exhibit A (5) D, Note of Dr. Boynton dated 12/2/02) The claimant was not under a work restriction concerning his back since September 10, 2002.

Employment History

7. The Claimant is a 35-year-old high school graduate who has basically worked in construction jobs after graduating from high school. He has also operated a firewood and snowplowing business, as well, which started several years before the accident in question. The firewood and plowing business is a sole proprietorship. It is the goal of the Claimant to turn the firewood and snowplowing business into a full time operation. In the past, he would often work both construction and the firewood/plowing business. He was doing that at the time of the work accident on August 16, 2001.

8. Immediately after the injury on August 16, 2001, the Claimant was unable to work. When he was released to light duty in November of 2001, the employer had no light duty jobs for him. During this time (September-December 2001) the Claimant was doing the best he could to keep the firewood/plowing business going. He could work the logsplitter lever and drive the truck for firewood deliveries. He hired some people to help him with the business and he also used the labor of his sons who were minors. In essence, Mr. Hepburn has not returned to full time or part time employment with any other employer since his shoulder injury of August 16, 2001. He has worked some period of time in his own firewood/plowing business but it is unclear how often or how much he has worked at that.

9. Mr. Hepburn was collecting temporary total benefits during the Fall of 2001. In November he received a letter from the Workers' Compensation Insurer advising him that he had been released to work with restrictions and that his employer had no work which allowed those restrictions. He was informed that he had to perform a "good faith work search". The letter (dated November 8, 2001 from Joyce Colby) told him that he should submit a weekly job search log of at least ten employers "[i]n order to be eligible for future temporary disability benefits". (See Exhibit A (2)(A)) A second letter was sent on December 4, 2001. That letter said in part, "In order to be eligible for future temporary disability benefits, you must conduct a good faith work search and submit a weekly job search log". (See Exhibit A (2) B) The Claimant did not file a job search log and on December 21, 2001, the carrier filed a Form 27 Notice of Intention to Discontinue Payments on the grounds that the Claimant had refused to make a reasonable effort to find suitable work. The request was approved by the Department of Labor and Industry and the benefits stopped on December 28, 2001.

10. Following the termination of temporary total benefits, on January 21, 2002, the Claimant filed a list of 10 people he contacted. (See Exhibit A (2)(C)) On February 5, 2002 he filed another list of names, which included eight (8) additional names, and the original ten names that he first submitted. (See attachment to Form 6 filed on February 5, 2002) According to this second submission the Claimant was contacting one employer each day and he was looking for work in logging, paving, equipment, welding, drywall, blasting, cleaning, etc., between November 26 and December 13, 2001. There was no other evidence submitted of job searching. (Attorney Schillen argued that Mr. Hepburn continued to document his ongoing efforts to find work and these logs were faithfully forwarded to the carrier, but there was no evidence of these submitted at the hearing.) The letters advising of the duty to search for work included no forms for the job search data and the letters were not explained by any personal contact when they were received. The Claimant testified that he was confused when he received the letters, thinking that he had to contact "concrete contractors" rather than any employer. This testimony seems incredible since the letters are quite clear about the duty to job search and there is no indication that the search should be limited. It is also interesting to note that the job search log filed on February 5, 2002 showed that he visited one potential employer each day between November 26, 2001 and December 13, 2001. If he had been actually visiting these employers during this time, this would be totally inconsistent with his being "confused" as he later testified.

11. Despite his "confusion" concerning the letters, he had been trying to arrange a meeting with the vocational rehabilitation counselor, Jeffrey Rigmont. Mr. Rigmont had been assigned to the case on November 20, 2001 but had difficulty in meeting with the Claimant. Mr. Rigmont finally met with the Claimant on December 27, 2001. During that meeting the Claimant testified that he explained to Mr. Rigmont that he was not currently interested in vocational rehabilitation because he was waiting for his injury to heal. According to the Claimant, he told Mr. Rigmont that he would be interested in vocational rehabilitation at some later time and was not interested at the current time. Mr. Rigmont apparently did not get the same understanding because he made a report indicating that the Claimant said that he would have his shoulder surgery in the summer when his firewood business had slowed. The report also indicated that the "IW [injured worker] wants to manage his firewood and snowplowing business-may seek part time work if benefits are suspended". (See Exhibit B, Tab 7, pages C500-600, dated January 3, 2002) That same report indicated that he would likely be found entitled to Vocational Rehabilitation Services, but that he might possibly refuse. When Mr. Rigmont filed his final report in March of 2002, Mr. Rigmont again stated that the Claimant had said that, "He [Claimant] originally stated that he was not interested in vocational services at the time of the face to face interview." In that report the Claimant was found not to be entitled to services because he had been released to work. Mr. Rigmont's report indicates that a copy of it was sent to Mr. Hepburn. Mr. Hepburn denied that he had ever received a copy of the report. He later testified that he was aware of Mr. Rigmont's opinion "at that time". There was no evidence presented that he has contested the denial of eligibility for vocational services. He testified that he has no "qualms about working with a vocational rehabilitation counselor" at the present time.

12. At the hearing, the Claimant was asked whether he had been trying to find work, which fit his capability. He indicated that he had not, but rather, he was waiting to be cleared to work without restriction so that he could go to work full time for a logger, Andrew Usher. Mr. Usher is a logger in the area of the Claimant's home. He offered the Claimant a job as a logger, however he must be fit and able to work. The offer of a job by Mr. Usher was made in September of 2002. It would be full time employment, possibly as an independent contractor. Mr. Hepburn was not able to do this full time work at this time because of the limitations on his shoulder and fear of re-injuring his back. The following exchange occurred during the hearing in January of 2003:

Atty. Blake: Q. But you haven't been looking for anything in that regard [referring to light duty work like driving or paperwork]; you're choosing to wait until you are completely, one-hundred per cent back to where you feel you can go back and do what you were doing before?

Claimant: A. Yes. Andy doesn't have a position for me doing paperwork or just driving a vehicle but he is ready to give me full time work as soon as I am recovered.

Atty. Blake: Q. So you haven't been looking for any other jobs. You are just waiting for Dr. Boynton to give you full clearance.

Claimant: A. Yes.

Atty. Blake: Q. And then you can go back to work for Andy Usher [....]

Claimant: A. Yes. When I am recovered and supplement that full time work with my wood business.

It appears that the Claimant was not doing any sort of search for work, but rather he was waiting for clearance for full time work as a logger, despite being told by his doctor that he was capable of doing limited work. He continued to do his partial work with his firewood and plowing business.

13. For the twelve-week period prior to the Claimant's shoulder surgery on September 3, 2002, he was not employed by any employer and he had no income except for his firewood business.

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). There must be created in the mind of the trier of fact something more than a mere possibility, suspicion, or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 VT. 17 (1941). Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 VT. 393 (1979). Similarly, expert testimony is required to establish the scope of the injury. See *Watson v. N. E. Graphic Machine and Engineering*, Opinion No.48-95 WC (August 21, 1995).

2. This matter was heard on an expedited basis. When the Claimant was denied temporary total benefits due to failure to submit proof of a good faith job search, he filed a Form 6 request for hearing on February 5, 2002. The request for hearing was accompanied by a job search log. (The request for hearing was based upon the late submission of the job search log following termination of benefits due to his initial failure to provide evidence of job search.) Later, following the Claimant's shoulder surgery on September 3, 2002, the Claimant filed another form 6 request for hearing because the Claimant was at that time under total disability due to his shoulder surgery, but the Insurer had refused coverage for the shoulder surgery because there was no income during the twelve week period before the shoulder surgery. The Claimant's request for hearing was filed on September 23, 2002.

3. The issue, which was identified by the hearing officer before the hearing, was whether the Claimant is entitled to temporary disability by reason of the shoulder injury. The parties made it clear that there was no claim being made at this hearing that the back injury was a compensable injury, which arose by reason of the initial accident. In short, the back injury, surgery, and rehabilitation from the back surgery was not being litigated. Notwithstanding that, Attorney Schillen had made it clear that the Claimant was seeking temporary total benefits due to alleged improper termination in December of 2001. In argument concerning his Motion for Expedited hearing, he indicated that the hearing had been requested ever since the temporary benefits had been terminated. The issue of the termination of benefits in December of 2001 was integral to the basic issue of the case.

4. Under Vermont Law, a worker who is injured at work may collect temporary disability benefits depending upon his actual capacity to work during the period that he is healing, until such time as he or she reaches maximum medical improvement. See. 21 VSA Sec. 642. Once maximum medical improvement is reached, the permanent disability is rated, usually based upon functional impairment of the body. Temporary disability is total when the injured employee is not able to perform any type of available work. It does not mean that the injured employee is not able to do the same type of labor, which he was doing at the time of his injury. *Sivret v. Knight*, 118 VT. 343 (1954). Temporary partial benefits are awarded when the present earning capacity, considering the injured workers impaired working capacity, is not total. 21 VSA sec. 646; *Orvis v. Hutchins*, 123 VT. 18 (1962).

5. During a period of temporary partial disability, the employee has an obligation to search for work, which fits his or her partial incapacity if he or she has been released to light duty work. See Workers Compensations Rule18.13 concerning termination of temporary disability compensation. Essentially, the employee must (1) be released to return to work, with or without restrictions, (2) be notified of his release to work, and (3) be notified of his obligation to search for work. Id. The Employer/Insurer has a duty to give proper tutelage concerning attempts to secure light duty work. *Sawyer v. Mount Snow, Ltd.* Op. No. 22-97WC (Aug. 13, 1997). The failure to make an arbitrary number of job contacts cannot be the basis of termination without reference to the claimant's specific circumstances. See *Renaud v. Price Chopper*, Op. No. 22-98 WC (May 5, 1998). Under the facts of the present case, however, there was a proper termination because of the Claimant's failure to establish a good faith job search. First, the Employer gave to Claimant two notices of the obligation to search. (Exhibit A (2)(B) and (C)). The notices advised that eligibility for future temporary disability benefits was dependent upon the job search. The letters described a method by which the Claimant could establish the record of job search. The first letter advised that if the Claimant had questions, he could call the author of the letter at her toll free number, which was listed. While the Claimant testified that he was confused about his obligations, he neither called the adjuster, nor did he initiate any action to clear up his confusion. He testified that he was going to clear up the confusion with the vocational rehabilitation specialist when he met with him, but there was no evidence that the Claimant was trying to expedite that meeting. The only evidence presented showed that the Claimant's job search contacts were performed before the meeting with the vocational rehabilitation specialist. (Job searches between November 26 and December 13, 2001.) The Claimant's testimony on this point was not credible. The letters were not confusing. If he had been making these job contacts during the time in question, it would seem that he would document what he had been doing in response to the letters threatening termination. It does not appear that any evidence of job search was submitted to anyone until the hearing was requested following termination of benefits. It is the Claimant who has the burden of proving his good faith effort to secure suitable, available employment. *Taylor v. Hanger*, Op. No. 7-93 WC (July 6, 1993). Here, the Claimant's proof fails and the termination was proper in December of 2001.

6. It is uncontested that the Claimant became totally disabled again on September 3, 2002 when he had his shoulder surgery. It is uncontested that the shoulder surgery was directly and causally related to the work injury. The Claimant was totally disabled until December 2, 2002 at which time he was released to light duty work with restriction by Dr. Boynton. He was released to doing deskwork or driving, but no heavy lifting. (See Exhibit B (4) Dr. Boynton's Work Injury Tracking Form dated December 2, 2002) The Employer/Insurer refused to pay any compensation because there were no wages for the period of twelve weeks before the surgery of September 3, 2002. Generally, benefits are calculated for the period twelve weeks preceding the injury. See 21 VSA Sec. 650(a). In this case the parties agreed before the hearing that the back injury and surgery were not at issue. There was no agreement or stipulation as to what caused the back problem. It may have been related to the injury; it may have been caused by the Claimant's pursuit of his firewood business; it may have developed without any cause. In any event, it appears that the back problem should not be used to deny the Claimant a period of disability from the shoulder injury which was clearly caused by the accident. If the shoulder surgery had been scheduled in December of 2001, it clearly would have created a period of compensability. The only reason it was delayed was due to an intervening medical situation, which had to be addressed first. In this sense it is analogous to *Wood v. Fletcher Allen Health Care*, 169 VT. 419 (1999). The Employer cites the case of *Plante v. Slalom Skiwear, Inc.* Op. No. 19-95WC for authority that the amount of disability should be measured twelve weeks before the shoulder injury. The case stands for the proposition that the twelve-week period should from the date of the injury or "the date upon which the injury became disabling". Under either test, the date of measurement is August 16, 2001. The Claimant is entitled to temporary total disability benefits for the period of September 3, 2002 until December 2, 2002.

7. At trial there was much information presented about the Claimant's firewood business, which he operated at reduced levels throughout his employment with the Defendant and during his disability. It was clear that he was doing some work in the firewood business, at a reduced level, but he never clearly established what level of income he secured by reason of his self-employment with the firewood business. It appears that with the light duty restriction given by Dr. Boynton on December 2, 2002, the Claimant can still drive the truck for deliveries and still operate the lever on the splitter. Since the Claimant is able to work at some level in his firewood/plowing business, he has not demonstrated entitlement to total disability benefits. Concerning partial disability benefits, he has failed to satisfy his burden of proving inability to secure employment following a good faith work search.

8. The Claimant asserts that it was fruitless to continue a job search and that he was relieved of a duty to search where there was no meaningful prospect of employment existing. Citing *Gee. V. City of Burlington*, 120 VT. 472 (1958). There was no convincing evidence that the Claimant had looked for work which was suitable to his restrictions for any sustained length of time following the initial release to light duty in November of 2001 or following the release to light duty in December of 2002. There was no evidence that the Claimant had requested more rehabilitation services or a resumption of the process that had started on December 27, 2001. It did not appear that he had sought to unravel the confusion, which he created when he told the rehabilitation specialist that he did not want services. While he may be entitled to rehabilitation services following his shoulder surgery, he must establish entitlement and cooperate with the provider. See *Watson v. N. E. Graphic Machine and Engineering* Op. No 48-95 WC (Aug. 21, 1995).

9. The Claimant has not substantially prevailed. Attorney fees are discretionary. Workers' Compensation Rule 10-13. Since the Claimant has not substantially prevailed, the request for attorney's fees is denied.

ORDER:

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Claimant's claim is denied except that the Claimant is entitled to temporary total disability benefits from September 3, 2002 to December 2, 2002. This decision is without prejudice as to future vocational rehabilitation benefits or temporary partial or total disability benefits which might be established in the future by the Claimant if the Claimant cannot find light duty work and such facts are properly established by the Claimant.

Dated at Montpelier, Vermont this 14th day of May 2003.

_____
Michael S. Bertrand
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 of questions of law to the Vermont Supreme Court. 21 V.S.A. Se. 670, 672.