

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

)	State File No. J-21997
Sarah Yefchak)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
)	For: Steve Janson
Orange)	Commissioner
Supervisory Union)	
)	Opinion No. 09-00WC

Hearing held in Montpelier on October 6 and October 7, 1999.
Record Closed on November 16, 1999.

APPEARANCES:

Steven P. Robinson, Esq. for the claimant
Keith J. Kasper, Esq. for the employer

ISSUES:

1. Did claimant's current medical condition and physical capacities arise out of her work injury and entitle her to benefits pursuant to 21 V.S.A. § 644?
2. In the alternative, is claimant entitled to ongoing temporary total disability benefits if she is not at a medical end result?

EXHIBIT LIST:

Joint Exhibit I: Medical Records

Claimant's Exhibit 1:	Settlement agreement dated 8/19/98 (agreed to in April 1998)
Claimant's Exhibit 2:	Letter dated 10/22/98 from Attorney Kasper to Dr. Fenton
Claimant's Exhibit 3:	Curriculum vitae of Myron Smith
Claimant's Exhibit 4:	Curriculum vitae of Robert Haile, M.D.
Claimant's Exhibit 5:	Curriculum vitae of Carol Talley, M.D.
Claimant's Exhibit 6:	Curriculum vitae of Diane Aja
Defendant's Exhibit A:	Transcript of deposition of David Phillips, M.D.
Defendant's Exhibit B:	Curriculum vitae of Louise Lynch
Defendant's Exhibit C:	Curriculum vitae of Jonathan Fenton, M.D.
Defendant's Exhibit D:	Curriculum vitae of Mark J. Bucksbaum, M.D.
Defendant's Exhibit E:	Curriculum vitae of John E. Wagner

STIPULATION:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act) at all relevant times.
2. Defendant was an employer within the meaning of the Act at all relevant times.
3. Transamerica International Group (TIG) was the workers' compensation insurance carrier for defendant at all relevant times.
4. On March 27, 1996 claimant suffered a personal injury by accident arising out of and in the course of her employment with defendant.
5. On December 23, 1998, a Form 27 was filed alleging that claimant had reached a medical end result for her work-related injuries with a permanent partial impairment rating of 5% whole person for her spinal injury and 7% whole person for her upper extremity injury.
6. Claimant has been approved for Social Security Disability benefits.
7. The issues for resolution are: (1) do claimant's current medical condition and physical capacities entitle her to benefits pursuant to section 644 arising out of her work injury; (2) in the alternative, is claimant entitled to ongoing temporary total disability benefits if she is not at medical end result?
8. Claimant seeks permanent total disability benefits, all reasonable and necessary medical treatment related to her work injury, and if successful, attorney fees and costs of the formal hearing process.
9. The parties agree that the Department may take judicial notice of any and all forms or agreements between the parties in its files in this matter, specifically including, but not limited to, the agreement reached between the parties in April of 1998.
10. There is no dispute as to the qualifications of any of the claimant's treating or examining health care professionals.

FINDINGS OF FACT:

1. Stipulations 1 through 6 are accepted as fact. The exhibits are admitted into evidence. Judicial notice is taken of the Department forms and agreements in this case.
2. The parties have stipulated that (1) claimant sustained a work-related injury on March 27, 1996, and (2) claimant's back and shoulder conditions are "work-related and compensable."
3. Prior to the stipulated work injury, claimant was without any back or shoulder problems. In addition, claimant had not suffered in the past from any symptoms associated with a diagnosis of fibromyalgia.
4. At the time of the initial injury, the Chelsea School District employed claimant as a full-

time Instructional Aide. On Wednesday, March 27, 1996, during recess, claimant bent over to pick up a ball. While she was in the bent over position, a 70-pound child jumped from a play gym six feet in the air and directly onto claimant's back and shoulder. Claimant testified that she immediately felt pain and spasms in her head, neck and back. She reported the incident at the school office, put ice on the affected areas, and lay on the floor until the end of the work day.

Medical Treatment

5. Claimant sought medical treatment the same day from Dr. William Nolan's office, where she complained of right upper back pain with some radiation to the shoulder.
6. Claimant took Thursday and Friday off from work, rested over the weekend, then returned to work on the following Monday. She worked until the school's April break when she "just rested."
7. Two days after the playground incident, claimant began treating with Pamela Milosevich, D.C. Over the next seven months, claimant saw Dr. Milosevich for treatment 62 times. At all but four of those visits, the claimant noted that her pain was either the same or improved.
8. Claimant testified that anything she did with her right arm worsened the pain. However, she worked until May 12, 1996, when she said her shoulder and spine pain was too severe to continue her job at any level. Claimant has not returned to work since May 12, 1996.
9. On May 22, 1996 claimant returned to Dr. Morgan for follow-up treatment for hypertension and asthma. Dr. Morgan noted that her back was bad recently.
10. In her note of August 1, 1996, Dr. Morgan noted that claimant continued to have significant back pain and that she had followed up with Dr. Davignon.
11. In March 1997, claimant was referred to Dr. Edward S. Leib for a fibromyalgia evaluation. Dr. Leib examined claimant on March 24, 1997, and diagnosed claimant with myofascial pain syndrome in the spine and shoulder area. Dr. Leib then saw claimant again on June 18, 1997, stating that he believed claimant presented symptoms more consistent with fibromyalgia.
12. In a June 6, 1997 note, Dr. Morgan described claimant's complaints of back pain, which the doctor noted, was of questionable etiology. At that time, claimant was doing routine chores, although cleaning her swimming pool exacerbated the pain.
13. In July 1997, claimant participated in a study of light treatment for fibromyalgia with Dr. Karen Nepveu of Fletcher Allen. During the study, claimant was formally diagnosed with fibromyalgia.
14. In November 1997, claimant began to treat with Carol A. Talley, a physiatrist at Fletcher

Allen Health Care. Dr. Talley's initial assessment was chronic back pain and right shoulder girdle pain with the subsequent onset of fibromyalgia that complicates claimant's treatment and recovery.

15. In December 1997, an MRI confirmed disc herniations at levels T8-9, T9-10 and perhaps at T10-11, the location where the child had landed. Those herniations were minor ones for which surgery was not recommended.
16. In December 1997, Michael Haile, M.D., Chief of Rehabilitation Medicine at Maine Medical Center examined claimant. Dr. Haile specializes in the treatment of chronic pain, and more particularly fibromyalgia. Dr. Haile evaluated claimant, and after a thorough review of claimant's relevant medical records, confirmed the diagnosis of fibromyalgia. Dr. Haile further opined, to a reasonable degree of medical certainty, that claimant's fibromyalgia symptoms were triggered by the March 1996 work injuries.
17. Since November 1997, Dr. Talley has worked to decrease claimant's back and shoulder pain in an effort to increase claimant's functional capacity. Treatments have included TENS Unit, brace, massage therapy, physical therapy, pool therapy and trigger point injection therapy. Most recently, claimant is going back for another round of injection therapy. Claimant continues to treat with Dr. Talley.
18. The parties have stipulated that claimant's spine and shoulder conditions are work-related and compensable. Claimant testified that, despite ongoing treatment she has been unable to mitigate the pain and restrictions associated with these conditions. She testified that claimant's back and shoulder pain is constant, although its severity varies. There is no evidence that these conditions will significantly improve in the future. In fact, the claimant believes that her condition has continued to worsen.
19. Claimant is also suffering from fibromyalgia, which, Dr. Talley testified, involves migratory changing symptoms. Those symptoms include generalized muscle tenderness and soreness, stiffness, fluctuating energy levels, irritable bowel syndrome, intolerance to heavy or repetitive work, sleep disturbances and blunting of cognitive function. While sleep disturbance is one of those symptoms, claimant's testified that her sleep is clearly affected by her spine and shoulder pain as well.
20. Claimant testified that her flare-ups with fibromyalgia are always precipitated by increased pain in her back and shoulder. In other words, fibromyalgia symptoms are only present after a flare-up of the stipulated back and shoulder pain. Her attempt to differentiate fibromyalgia pain from the shoulder and spine pain was not convincing.

Typical Day

21. Claimant testified in detail about her current daily activities. She gets dressed alone and feeds herself alone. She cooks family meals with help from her elderly mother. During the day, she awakens around 6:00 a.m. and lays flat on her back until 7:00 a.m. when she gets out of bed. She then goes downstairs for breakfast, which she prepares for herself. At about 9:00 she goes back upstairs, lies down and prays for an hour. Then she does back stabilization and isometric exercises, leg lifts, and uses a pulley for arm exercises.

She spends no more than a half-hour total on those exercises.

22. Next, claimant rests and showers, then rests and gets dressed. She prepares and has lunch, then rests. At 2:00 p.m. she lies on her bed and listens to music. At about 3:00 p.m. she returns to the kitchen where she and her mother plan and prepare dinner. Her husband returns from work at 5:00. The family eats dinner at 6:00. In the evening, she watches television, does her exercises at 10:30 and retires at about 11:00.
23. Claimant drives herself to physical therapy visits about 30 to 45 minutes from her home. She also drives to swim therapy in Berlin and to her doctor visits. She has no special controls on her car and does not have handicap plates.

Work Capacity

24. Claimant testified that the last three functional capacity evaluations (FCEs), discussed below, were conducted while she was not suffering from fibromyalgia symptoms. Yet such a differentiation is not consistent with testimony that suggests that her fibromyalgia symptoms are always present.
25. Claimant has also been diagnosed with bilateral carpal tunnel syndrome, clearly unrelated to work. In fact its etiology is unknown. While the condition certainly can impair a person's ability to work, claimant maintains that there is no evidence to suggest that her carpal tunnel syndrome is presently disabling.
26. In September 1997, eighteen months post-injury, Diane Aja, OTR, evaluated claimant for a functional capacity evaluation (FCE). Ms. Aja found claimant to have no substantial work capacity based on claimant's ability to work 1.5 hours a day, 3-5 days a week. Ms. Aja further opined that claimant's attendance would be erratic. Significantly, Ms. Aja noted that claimant's right shoulder pain created particular problems. Although attempts were made to support the shoulder as a means of reducing pain so that claimant could use her right hand productively, Ms. Aja was unable to find an adequate support in the clinic. In her note following that evaluation, she specifically wrote that she did "not know of any other equipment that would provide her with more significant right shoulder support than I was able to provide ... and still be able to use her right arm for any functional tasks."
27. In January 1999, Ms. Aja saw claimant again to update the earlier FCE. She found that claimant's work capacity -- at 2 hours a day, one day a week -- was even more limited than demonstrated in September 1997. One difference was that the limitation in claimant's right upper extremity had increased. Ms. Aja also noted that claimant had continued to lose strength and endurance due to escalating pain. Ms. Aja performed a final update on September 29, 1999, confirming her past findings of no substantial work capacity. In Ms. Aja's opinion, claimant participated fully in that evaluation. The close similarity in the 1997 and 1999 test results indicated to her that claimant "was giving her best effort in these functional capacity tests and [that the September 1999] assessment should be viewed as a good reflection of her current work capacity."
28. On September 8, 1999, claimant was seen by physical therapist Louise Lynch at the carrier's request for an FCE. It should be noted that the claimant objected to Ms. Lynch's FCE for a variety of reasons, most notably because of what she anticipated would be a

medical setback following the examination. The employer insisted the FCE was necessary to determine claimant's work capacity. The Department agreed and ordered the evaluation.

29. Ms. Lynch was asked to opine if claimant had any functional capacity. According to Ms. Lynch, claimant is currently able to work for up to two hours per day in activities which require intermittent fine motor handling, writing, reading and verbal communications. Ms. Lynch expressed her belief that claimant could increase those abilities to more than two hours per day in the future.
30. Ms. Lynch recommended supporting claimant's right arm while performing work activities. While working, claimant would have to be reclined and would need to change positions as needed. With these accommodations, Ms. Lynch anticipated an increase in claimant's ability to work on a day-to-day basis. Over a four to six month period, with claimant getting used to the effort involved, she should be able to work up to a forty hour work week. It would take the claimant's body time to get used to the activities because her muscles are very deconditioned at this point. However, Ms. Lynch testified that by performing work activities, claimant would increase her ability to perform more work activities. This work hardening would be a self-conditioning program which Ms. Lynch suggested claimant could achieve by performing work activities on a day-to-day basis.
31. Ms. Lynch was never asked nor did she render an opinion in her report if claimant could return to gainful employment. The only job or job classification analyzed was claimant's prior position as an Instructional Aide. Claimant could not perform any of the job's physical requirements. Although Ms. Lynch saw no evidence that claimant was altering or exaggerating the test results, she noted a lack of consistency of effort.
32. During cross-examination, Ms. Lynch conceded that claimant lacked even a sedentary work capacity. Ms. Lynch went on to say that even if claimant improved, as suggested in her report, claimant would still lack a meaningful work capacity, the same conclusion reached by Ms. Aja.
33. While Ms. Lynch's opinion may appear at odds with Ms. Aja's on its face, the substance of their conclusions about claimant's ability to return to gainful employment are the same. Both agree that claimant has no meaningful work capacity. In summary, the evidence offered by both parties confirms that claimant lacks a meaningful work capacity. Despite the carrier's finding of functional capacity, both experts agree that claimant lacks a substantial work capacity, and is not likely to regain one in the future.

Vocational Rehabilitation

34. Claimant consulted with Myron Smith M.S., C.A.S., certified life care planner and rehabilitation counselor for the purpose of determining her ability to re-enter the workplace. After consultation over many months, Mr. Smith concluded that claimant lacked sufficient functional capacity to return to gainful employment. That opinion is supported by the functional capacity evaluations of Ms. Aja and Ms. Lynch, as well as claimant's treating physician, Dr. Talley.

35. Mr. Smith did not create a vocational rehabilitation plan because claimant's capacities were too limited. The same holds true for a self-employment plan. Claimant simply lacked the functional capacity to make any plan workable or cost-effective.
36. The employer retained John Wagner of Wagner Rehabilitation, Inc. to speak to claimant's ability to work. He has been working in this field for twenty years. His company provides vocational and rehabilitation services to injured people and assists them in returning to work. Mr. Wagner opined that under the hierarchy of services in Vermont for vocational rehabilitation for this claimant, he would first look at her former job or occupation and attempt to modify it. He gave as an example of an accommodation, a drag and dictate or voice-modified computer program.
37. If she were not capable of returning to her prior employment, in Mr. Wagner's opinion, other types of jobs are available. With her transferable skills, a BA in education and above average intelligence, he believes claimant could work in occupations such as a counselor for the state, data entry, work with families, or telephone work.
38. In a letter dated September 2, 1999, Mr. Wagner suggested that claimant could return to work. First, he wrote, "to engage in employment in today's work force (thanks to technology), one does not need to have a physical capacity." Then he cited as examples, persons who have paraplegia or quadriplegia who have returned to gainful employment. He concluded that claimant's "medical impairments do not limit her from engaging in employment due to her education, training, aptitudes and transferable skills."
39. The question not addressed by either Mr. Wagner's letter or Ms. Lynch's report is whether claimant has sufficient physical capacities to rejoin the work force on a competitive level. In other words, can claimant resume gainful employment?
40. Next, Mr. Wagner stated that claimant's medical condition did not limit her ability to work. Yet those who did the numerous functional capacity evaluations, as well as the physician who has treated her, found significant limitations that limit her work capacity. In fact, claimant's pain severely limits her work capacity.
41. More importantly, at the hearing, Mr. Wagner conceded that claimant lacked the ability to return to gainful employment, and could not identify any job that claimant could perform, much less perform on an uninterrupted basis. Mr. Wagner did suggest, however, that if claimant engaged in a work-hardening program, she might regain an ability to work. Given the years of unsuccessful treatment designed to improve claimant's functional capacity, Mr. Wagner's suggestion is pure speculation. Moreover, Mr. Wagner's opinion is contradicted by the employer's other expert, Ms. Lynch, who testified that claimant would not regain a substantial work capacity in the future.
42. To accept Mr. Wagner's recommendation, would mean that claimant would not be at maximum medical improvement in which case temporary total disability benefits would be reinstated.

Claimant's Expert Medical Opinions

43. At the hearing, Dr. Haile, who specializes in the treatment of patients with fibromyalgia, testified for the claimant. He confirmed his written opinion that claimant's "fibromyalgia and aggravation of degenerative changes in her mid back are directly and causally related to her work injury of 3/27/96." Dr. Haile noted how treatment of fibromyalgia is complicated by claimant's primary spine and shoulder injuries. Dr. Haile also noted that approximately 80% of his fibromyalgia patients return to work, a finding that claimant argues supports her theory that fibromyalgia is not the primary debilitating condition in this case, but rather a secondary condition that interferes with the treatment and recovery from her primary conditions. Dr. Haile also opined that chronic pain patients who are out of work for one year are unlikely to return. Claimant has not worked since May 1996.
44. Dr. Haile concurred with all of the other testifying medical providers in this matter in agreeing that no one knows the exact cause of fibromyalgia. Yet he testified that it has been "clearly documented that physical trauma can trigger fibromyalgia." He then unequivocally explained that he uses the term "trigger" to mean a temporal relationship between trauma and fibromyalgia, that is that fibromyalgia follows trauma in some individuals.
45. In his report, Dr. Haile emphasized the importance of gradually increasing exercise for the treatment of patients with fibromyalgia. He recommended that the goals of an exercise program be achieved over one year, beginning with a low level that could be tolerated by the patient and consistently increased in small steps. For example, he suggested that with swimming, a patient begin with one lap of a pool, then adding one lap a week. To allow for adequate rest between treatments, Dr. Haile recommended that patients have one or two days a week of complete rest.
46. Dr. Haile concurred with the permanent impairment rating of 5% of the spine and 7% of the right upper extremity. With regard to chiropractic care, Dr. Haile observed that when he saw claimant in December 1997, she was receiving chiropractic treatment about once a week. He agrees that typically chiropractic care can benefit patients with fibromyalgia, but only on a limited basis that he defined as five to twelve treatments. In the instant case, the number of chiropractic treatments exceeded that recommendation.
47. Dr. Talley testified that claimant's spine and shoulder condition were the primary areas of ongoing treatment, and that those conditions significantly contributed to claimant's current inability to work. Dr. Talley acknowledged that claimant has fibromyalgia, but was unable to separate the two conditions. In her opinion the fibromyalgia affected claimant's FCE results, claimant's belief to the contrary notwithstanding. While acknowledging that both the physical trauma and the fibromyalgia contributed to claimant's disability, Dr. Talley was unsure as to the degree of each to the total disability. Dr. Talley also testified that claimant had made some improvements in controlling her fibromyalgia, but the repeated efforts to reduce the spine and shoulder symptoms had been unsuccessful.
48. Dr. Talley agreed the claimant remained at a medical end result for her work-related back and shoulder injuries with a 5% impairment of the spine and 7% of the upper extremity. In fact all the doctors who offered opinions in this case agree with those ratings. The employer therefore argues that the rest of claimant's impairment must be due to her

fibromyalgia or what it describes as "other non-compensable conditions."

49. Dr. Talley agreed that no medical evidence exists to prove that fibromyalgia is caused or aggravated by work trauma, that at most there exists only a temporal relationship between trauma and the syndrome. She agrees that it is not possible to say that the claimant's fibromyalgia was caused by or aggravated by work trauma.

Fibromyalgia

50. Fibromyalgia is a condition associated with low serotonin levels. In some individuals, it creates a vicious downward spiral. The associated pain, itself not a sign of any physical harm, convinces the fibromyalgia patient that she cannot do much. The resultant inactivity causes deconditioning. Deconditioning results in signs of physical exertion even when one is not active. For example, at her functional capacity evaluations, claimant had an increase in her heart rate even with no exercise. Deconditioning further lowers one's pain threshold. Exercise then causes pain that does not physically harm the patient, but which deters her from being active. Inactivity spawns further inactivity which compounds the deconditioning and makes even minimal exertion painful. Ironically, the only successful treatment for fibromyalgia is aerobic activity, which is believed to raise serotonin levels.

Employer's Independent Medical Exams

51. Claimant's first IME was in November 1996. John J. Pizzo D.C., prescribed aggressive physical therapy, gave the claimant a 4 hours/day work capacity, and opined that claimant would be at maximal medical improvement (MMI) by the year's end and the rating would be 2% whole person.
52. On February 8, 1997, Patricia Schricker, D.C., saw claimant who at that time complained of her T3, 5 and 8 ribs popping out; inability to use her right arm; and back and shoulder pain. Dr. Schricker referred claimant to Dr. Leib for a fibromyalgia evaluation. In March 1997, claimant was sent to her third IME with Steven Mann, Ph.D., who indicated that claimant was remarkably emotionally healthy given her pain and the ongoing struggle with the workers' compensation carrier.
53. In March 1997, claimant was sent to Jonathan Fenton, D.O., who assessed the claimant as having myofascial pain with severe pain amplification syndrome and a thoracic strain/sprain. Dr. Fenton also opined that claimant "did not meet criteria for fibromyalgia." After that he saw her two more times and ultimately diagnosed severe fibromyalgia, as well as thoracic strain/sprain, chronic pain syndrome, small disk herniation and right rotator cuff pain. He opined that claimant's fibromyalgia was not caused by her work injury. In his opinion, based on his knowledge of the scientific literature on this subject, there is merely a temporal, not a causal, relationship between trauma and fibromyalgia.
54. At his last visit with claimant in 1998, Dr. Fenton found that claimant was at medical end result. Nothing in the records he has reviewed since then has altered that earlier opinion about medical end result with an impairment of 5% of the spine and 7% of the right upper

extremity. Dr. Fenton believes that claimant has a work capacity that is sedentary, but with several functions below sedentary work capacity. He believes that she can work if accommodations are made for her physical condition. Such a conclusion ignores the obvious findings from the functional capacity evaluations and the specific conclusion drawn by Ms. Aja that the attempted accommodation for her shoulder pain failed outright. Dr. Fenton opined that claimant's current primary limiting factor is her fibromyalgia and fatigue.

55. Over claimant's objection, the employer had her travel to Portland, Maine to see their fibromyalgia specialist, Dr. David Phillips. In February 1998, after a brief examination, Dr. Phillips opined that claimant in fact had fibromyalgia and the condition pre-existed the work-related injury. According to Dr. Phillips, claimant's condition existed in her subconscious before the work injury. Dr. Phillips went on to say that fibromyalgia can become "symptomatic at the time [fibromyalgic patients] are recovering from a post-traumatic event."
56. Next, the employer asked Mark J. Bucksbaum, M.D., to opine about fibromyalgia in general. Dr. Bucksbaum reviewed claimant's medical records. He never examined the claimant or was even asked to render an opinion specific to the claimant. He was merely asked to rebut the connection between trauma and fibromyalgia. He testified that in his rehabilitation practice he has seen at least 1,000 patients with fibromyalgia. He has diagnosed the syndrome and treated patients with it. He also testified about the inability to identify the cause of fibromyalgia. Dr. Bucksbaum was never asked and did not offer to give an opinion on claimant's actual condition. His testimony focused on fibromyalgia generally, a condition he defined as a collection of various clinical entities, not a disease in its own right. The most significant issue for most patients is muscle pain, although they also suffer from fatigue, insomnia, joint pain, numbness, cramps, nervousness and depression. In addition, they have chronic fatigue, temporomandibular joint syndrome, carpal tunnel syndrome, hyperthyroidism, hypothyroidism, non-restorative sleep, irritable bowel syndrome, and other medical entities. In his opinion, fibromyalgia is not a disease and not an injury. It is a collection of separate entities, each of which must be treated in its own right.
57. After reviewing the literature, Dr. Bucksbaum concluded that it is not possible at this point in time to causally link work trauma to fibromyalgia. He testified that the scientific information indicates no more than a temporal relationship between fibromyalgia and trauma. Dr. Bucksbaum opined that any opinion to the effect that a work injury caused or exacerbated fibromyalgia would be a personal, not a scientific, opinion.

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, Morse Co.*, 123 Vt. 161 (1962). 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. Claimant alleges that as a result of her work-related injury on March 27, 1996, she is

entitled to permanent and total benefits pursuant to 21 V.S.A. §644 or, in the alternative, that she is entitled to on-going temporary total disability benefits in accordance with 21 V.S.A. § 642. As such, claimant has the burden to create 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. Martin Lumber Co.*, 112 Vt. 17 (1941). Where the injury is obscure and a lay person would have no well-grounded opinion as to the causation, expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

3. It is also well settled that an employer takes each employee as is and is thus responsible under our worker's compensation law for an accident or trauma which disables one person but which might not disable another. *Morrill v. Bianchi*, 107 Vt. 80 (1979).

Permanent Total Disability and Causation

4. Claimant argues that while the medical community debates the underlying cause of fibromyalgia, the evidence is sufficient to establish a causal link between her primary conditions and the aggravation of her fibromyalgia. She contends that it is more likely than not that the onset of her fibromyalgia symptoms were triggered by either the initial injury and/or the subsequent back and shoulder conditions. The employer argues that fibromyalgia is not a work-related condition. The experts are in unanimous agreement that the relationship between this claimant's trauma and fibromyalgia is at most a temporal one. And it is well established in Vermont that "because something comes into existence after the fact, standing alone, does not justify a conclusion that it came into existence because of the fact." *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983). Even Dr. Haile, a strong supporter of this claim, was unable to establish more than the temporal connection. Consequently, claimant has not proven the necessary causal link between her fibromyalgia and the trauma she suffered in the playground incident in 1996.
5. Nevertheless, based on the evidence presented, claimant contends that she prevails regardless of whether her fibromyalgia was caused by the work-related accident. In other words, she believes that the Department need not address the questions of her fibromyalgia in order to award her permanent total disability benefits. She characterizes as "overwhelming" the evidence that she is totally disabled from gainful employment as a natural consequence of her back and shoulder conditions, which the parties have agreed, are compensable.
6. Claimant takes the position that she is permanently totally disabled pursuant to 21 V.S.A. § 644. To qualify for permanent total disability benefits, the claimant's injury must either fit one of those categories enumerated in § 644 ¹, or be proportionate to those enumerated. *Bishop v. Town of Barre*, 140 Vt. 564 (1982).

¹ a) In case of the following injuries, the disability caused thereby shall be deemed total and permanent: (1) The total and permanent loss of sight in both eyes; (2) The loss of both feet at or above the ankle; (3) The loss of both hands at or above the wrist; (4) The loss of one hand and one foot; (5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and (6) An injury to the skull resulting in incurable imbecility or insanity.
(b) The enumeration in subsection (a) of this section is not exclusive.

7. The fundamental basis of a claim for permanent total disability has been described as follows:

Since claimant does not allege that he has one of the scheduled injuries listed in § 644, he must show that he has an unscheduled injury which has as severe an impact on earning capacity as one of the scheduled injuries. *Bishop v. Town of Barre*, 140 Vt. 565 (1982). Claimant must show through medical evidence that he is totally disabled for gainful employment. This assessment is to be based on physical impairment rather than individual employability factors like age or experience and without regard to work available in the community, *Fleury v. Kessel/Duff Construction Co.*, 148 Vt. 415, 419 (1987).

Gravel v. Cabot Creamery, Opinion No. 15-90WC (July 10, 1991) at 9.

8. If claimant's fibromyalgia and carpal tunnel syndromes were to be included in the equation, claimant would be considered permanently totally disabled. Despite the employer's efforts to show that this claimant could engage in light duty work with accommodations, the overwhelming evidence, including all the functional capacity evaluations, proves that in her current state she is not capable of working. Like the claimant in *Fleury*, "the claimant in this case is totally disabled under any definition. The medical evidence is that [s]he is totally disabled for gainful employment." *Id.* at 419.
9. The health care providers in this case are unanimous in the opinion that claimant's work-related physical impairment is 5% of the spine and 7% of the right shoulder. Dr. Talley opined that she was unable to differentiate between the degree of disability claimant suffers as a result of her fibromyalgia and the disability from her back and shoulder injuries. Yet, because the back and shoulder impairments have been rated, and given that neither her carpal tunnel syndrome nor fibromyalgia is work-related, the question remains whether her permanent total disability is compensable.
10. Claimant argues that this Department must consider the cumulative effect of the fibromyalgia, and back and shoulder injuries. It is her position that she is entitled to permanent total disability benefits even with the presence of pre-existing or collateral conditions that may contribute to her overall disability. In support, she cites *Notte v. Rutland Railroad*, 112 Vt. 498 (1942), in which the Vermont Supreme Court held that a claimant who was practically blind in his right eye at the time of his injury was rendered permanently totally disabled when the injury rendered him blind in the left eye. Crucial to that holding was the finding that at the time of the injury the claimant "In his then impaired condition had that degree of working ability which enabled him to do the work for which he was hired. Such working ability was transformed into total disability as a direct result of the accident." *Id.* at 501. Indeed, the Workers' Compensation Act does not require the Commissioner to make determination of the relative contributions of the accident at issue and a prior disease to the end result of permanent total disability. 21 V.S.A. § 648 (d); see also *Aker v. ALIIC*, Opinion No. 53-98WC (Sept. 8, 1998) and cases cited therein.

11. Unlike the claimant in *Notte*, however, the claimant in this case developed the conditions that combine with her work-related injuries to render her totally disabled after she incurred work-related injuries. Her working ability was transformed into permanent total disability not by factors related to work, as was the case in *Notte*, but to outside causes that remain unexplained.
12. Claimant's strong arguments to the contrary, I cannot accept her position that the spine and shoulder injuries totally disable her. Her testimony that distinguished between the shoulder pain and fibromyalgia and the testimony that she was not suffering from fibromyalgia at the time of the FCE's, if accepted, would bolster her claim that her disability is work-related. But the more credible evidence is that found in the medical records documenting that it is the fibromyalgia that has disabled this claimant.
13. The impairment to which this claimant is entitled is what has already been paid, 5% of the spine and 7% of the shoulder. Despite the thoughtful and articulate expert opinions offered, they have not convinced this trier of fact that work-related factors have rendered the claimant permanently totally disabled.
14. Because claimant's current medical condition and physical capacities, with the exception of her back and shoulder conditions, did not arise out of her work injury, she is not entitled to benefits pursuant to 21 V.S.A. § 644. And because she is at medical end result for her work-related injuries, she is not entitled to ongoing temporary total disability benefits.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, I find that:

1. Claimant is at a medical end result for her work-related injury with a 5% impairment of the spine and a 7% impairment of her shoulder, which has been paid. No further benefits are due.
2. Claimant's claim for permanent total disability benefits or a finding of no medical end result is DENIED.

Dated at Montpelier, Vermont, this 31st day of May 2000.

Steve Janson
Commissioner