STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-22739
Jonathan Laubacker	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Adecco Employment Services	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 37–00WC
	)	

Hearing held in Montpelier on April 10, 2000 and June 22, 2000.
Record Closed on August 1, 2000.

APPEARANCES:

Jonathan M. Cohen , Esq. for the claimant
Johan Davis Buckley, Esq. for the defendant

ISSUES:

Did claimant's injury arise out of and in the course of his employment with Adecco?

If claimant's injury arose out of and in the course of his employment with Adecco, for what periods of time, if any, has he been temporarily totally disabled?

OFFICIAL DEPARTMENT FORMS:

Form 1:	First Report of Injury, filed May 17, 1999.
Form 5:	Notice of Injury and Claim for Compensation, filed June 17, 1999.
Form 6:	Notice and Application for Hearing, filed June 17, 1999.

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibit I:	Medical Records.
Defendant's Exhibit C:	Adecco Employee Statement of Industrial Injury, 4/29/00.
Defendant's Exhibit D:	Form to Report Workers' Compensation Injuries.
Defendant's Exhibit E:	Adecco Employee Work History Report.

FINDINGS OF FACT:

1. Claimant is 29 years old. He graduated from Cambridge High School in 1989 and since that time has worked at several jobs, including landscaping, mill work and factory work.

2. From March of 1997 until the end of February 1999, the claimant worked full time, with some overtime, for Vermont Composites in Bennington, Vermont. Most of his work there involved manually cutting carbon fiber material on a table. The task required grasping a sheet rock knife with his right hand and cutting the material against a straight edge. The claimant agreed that he had to push pretty hard, explaining that "it all depended on how sharp the blade was."

3. The claimant stopped working for Vermont Composites because of family problems. However, within a month he contacted Adecco Employment Services, a temporary employment agency in Arlington, Vermont.

4. At the end of March, 1999 the claimant was assigned to work at W.J. Cohwee, a lumber mill in Berlin, New York where he worked through April 26, 1999. His job there was to grade stakes which are about four feet long and an inch to an inch and a half wide. He loaded individual wooden stakes into a machine that honed them to a point. Then he bundled approximately 50 stakes together and loaded the bundle onto a pallet that held 20 bundles. He estimated that each bundle weighed between 30 and 50 pounds.

5. The claimant testified that on April 20, 1999, after having substantially completed a full pallet of grade stakes, he hurt his arm. He described picking up a bundle and throwing it up on the pile when points got caught with the other points. When he tried to free them loose, he said that a bundle kicked back and snapped his arm. He testified that he heard a distinct "popping" sound and was in pain. Claimant continued to work, although he said that his arm "kept getting sore and more pain was coming, and my arm was like going numb and tingling and finally it was getting towards lunch and I said 'well I need to call my employer and let them know that I injured myself.'"

6. The claimant further testified that at about lunch time he telephoned the Adecco office, spoke with Jason Volpi, explained that he had been injured and asked to see a doctor. According to the claimant, Jason Volpi told him that he did not think seeing a doctor was a good idea and that he should wait until the weekend.

7. John Hodsdon, claimant's co-worker who had also been assigned to W.J. Cohwee through Adecco, testified that he was working with the claimant on April 20th. Hodsdon explained that the claimant did the grade stake work by himself for the most part, in an area that was about 15 feet from where Hodsdon and the other employees worked. Hodsdon did not see the claimant injure his arm, although he testified that the claimant told him when he hurt his arm. Hodsdon could not remember when that conversation took place, although he believes it was before lunch. He remembers the claimant making a phone call, something he needed permission to do, although he did not hear the conversation. Hodsdon imagined that the claimant was speaking to Jason Volpi about the injury.

8. Jason Volpi, branch manager at Adecco, testified that the claimant never called him with a complaint of a work injury on April 20th. Had such a telephone report of a work-related injury been made, Volpi explained, a specific form for that purpose would have been filled out. In the notes of the telephone conversations with the claimant, Defendant's Exhibit E, Volpi noted for April 23rd that the claimant called to say he was sick and was going home. According to Volpi, this was the only time before the 29th that the claimant complained to him about a health problem, which was what he characterized as a "stomach bug."

9. Jason Volpi also testified that the claimant telephoned him almost daily with complaints about the job and his unhappiness with the placement at Adecco, but until the 29th never said anything about a work injury. Volpi believed that the claimant was unhappy with the placement at Cohwee and had conflicts with his supervisor. As a result, he said, the claimant actually "walked off the job at noon…" on the 26th. He did not return. On April 26th, Jason Volpi wrote in his notes that the claimant had called during his morning break, complaining about Bob Danish and that he was quitting. Also according to those notes, the claimant telephoned on the 28th to report that he was going to the doctor's the next day.

9. Jason Volpi testified that from experiences Adecco had with W.J. Cohwee, an employee from Cohwee would report a work related incident directly to Adecco, something that was not done here.

10. The claimant testified that he contacted Bennington Family Practice on the day of the injury and was told that the earliest he could be seen was April 29th. Furthermore, he said that he worked a portion of the next seven days in severe pain and although he asked for help, he never received any. The claimant's testimony on this subject is simply not credible. Had he been in as much pain as he would have us believe, it is unlikely that he would have had to wait nine days to receive medical care.

11. When the claimant was seen at the Bennington Family Practice office on April 29, 1999, he told the Physician's Assistant Paul Graether that he had right arm numbness with pain over the past week, since lifting a bundle of stakes at work. Mr. Graether's note indicates that "he states that he was throwing a bundle, felt pain in the right elbow…he has had no previous elbow injuries." After that appointment the claimant telephoned Adecco where a report outlining the claimant's complaint of a work-related injury was generated. (Defendant's Exhibit C).

12. The claimant paints a picture of non-cooperation all around him. Although he was in severe pain, the physician's office could not see him for nine days. He asked for help at work because of the pain, but no one helped him. He made a claim, but his employer did not file a form. These contentions are not convincing.

13. If the claimant had gone to a doctor's office or hospital within a day or two of the alleged injury or before he quit his job, his testimony would have been more credible. The history the claimant gave the physician more than a week after the alleged incident was suspect because it followed an angry departure from his job. The claimant argues that he

had reported the incident on the 20th, but it was his employer who had failed to follow up with it, testimony I cannot accept. If he had done so, the employer would have completed an Employee Statement of Industrial Injury which it did on the 29th in response to the claimant's telephone report. On this subject, Volpi's testimony was more credible than the claimant's and is bolstered by the facts that the claimant did not obtain medical care sooner and that Volpi's office produced a record of the work-related complaint when one was made on the 29th and followed it with a First Report of Injury.

14. The claimant returned to Bennington Family Practice on May 7, 1999, with a complaint that his arm discomfort continued. He was released from that visit with the restrictions that he have no repetitive movements and not lift more than five pounds. He was also told to begin physical therapy.

15. After his appointment at Bennington Family Practice, the claimant contacted Jason Volpi and told him of the medical restrictions, which included no lifting for a week. He argues that he could not have continued to work at Cohwee's with those restrictions. Therefore, Adecco offered him a job in the "Step Program" which is designed to allow employment while respecting the doctor's limits on lifting.

16. As a result the claimant was assigned work at Catamount Glass through Adecco during the first week of May. His job duties there included wrapping candles, putting stickers on them, tying bows on them, taking them out of a box and putting them back in a box. The claimant contends that the work exceeded the restrictions recommended by his doctor.

17. The claimant worked for Catamount Glass for less than a week and stopped working there as a result of a dispute between him and his supervisor. The claimant contends that the dispute centered around the claimant's contention the work exceeded medical restrictions. Adam Volpi, vice-president at Catamount and Jason Volpi's brother, testified that the claimant handled approximately 180 to 280 candles per hour and approximately 1600 candles per day.

18. The employer contends that the claimant was angry because he had been reprimanded for poor job performance. Adam Volpi testified that the claimant could not get along with his supervisor, Connie Simpson. She testified that she noticed that he was not able to talk and work at the same time and asked him to talk less. She also testified that the claimant's job included lifting boxes of candles that weighed 20 to 25 pounds. On the last occasion when Simpson admonished him, the claimant got up and left.

19. While he was working at Catamount Glass, on May 26, 1999 a physical therapist determined that the claimant was tolerating "light duty work of 8 hour duration with only mild complaints of soreness at times." This contradicts the claimant's testimony that he was not tolerating his work there.

20. The claimant testified that after he left Catamount Glass and between June 1, 1999 and October 29, 1999 he looked for other work but because of his restrictions as well as his

work history, he could not find suitable work. He testified that he kept his eye on the paper, but that people would not hire him because of his medical condition.

21. On October 29, 1999 the claimant started working for Garelick Farms in Bennington. He worked there until February 17, 2000, the day before his surgery. The claimant worked in the production room as a bottle washer. He said that although there were certain aspects of his job, such as moving milk crates, that were not within his restrictions, he took the job because he needed the money.

22. Eventually the claimant was referred to an orthopedist, had an EMG study and was diagnosed with median nerve entrapment at the elbow. On February 18, 2000, Dr. Jeffrey Matheny surgically decompressed the median nerve in the claimant's right elbow.

23. Dr. Matheny testified that typically two types of events cause the median nerve impingement the claimant had: Overuse marked by repetitive, forceful pronation of the hand, or traumatic injury to the muscle resulting in the formation of scar tissue that impinges upon the median nerve.

24. Based on the history provided by the claimant, Dr. Matheny opined to a reasonable degree of medical certainty that the claimant injured his pronator muscle while attempting to move the pile of grade stakes, which subsequently led to some changes in the muscle, which led to hypertrophy and subsequent compression of the nerve.

25. Dr. Matheny was able to visualize the superficial and inferior heads of the pronator teres muscle during the surgery. He found no scar tissue or evidence of traumatic injury which could correspond to the claimant's testimony that he heard or experienced a "pop" immediately before the onset of symptoms. Rather, he saw healthy muscle tissue and a nerve compression of long-standing duration, one that may have been there for months or even years.

26. The work the claimant did before working for Adecco involved cutting carbon against a straight edge, a mechanism that required pronation of the hand. When asked to consider the cause for the claimant's median nerve impingement in the absence of the described work-related injury at W.J. Cohwee, Dr. Matheny testified that he would relate it the to sheet rock work with the required pronation of the hand.

27. The claimant was temporarily totally disabled after his surgical median nerve decompression.

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 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. Where the causal connection between an accident and an injury is obscure and the layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*. 137 Vt. 393 (1979).

3. The primary issue to be decided is whether the claimant's median nerve compression is casually related to claimant's work while employed at Adecco. Dr. Matheny based his conclusion that the injury is related to the work with the grade stakes on the claimant's history. Therefore his conclusion rests completely on the claimant's credibility. The testimony of the claimant and Jason Volpi are squarely contradictory. Volpi's contemporaneous telephone records corroborate the testimony he gave at the hearing. By contrast, John Hodsdon's testimony is insufficiently detailed, and lacks grounding in personal knowledge to corroborate the claimant's contention of a work related injury. When asked to describe the telephone conversation he allegedly overheard, Hodsdon offered nothing more than speculation about the parties to the conversation, substance of the conversation, or purpose for which the conversation was initiated.

4. The credible evidence is that the claimant quit his job at W.J. Cohwee on April 26, 1999 and asserted a work-related injury some days later. The medical evidence does not support any conclusion about the timing of events, as Dr. Matheny testified that the nerve compression could have been present for months or years. The fact that Dr. Matheny found no evidence or traumatic injury corresponding with the alleged symptoms described by the claimant is persuasive evidence that the injury did not occur as asserted. Without the necessary causal connection, the claimant cannot prevail. Therefore, it is not necessary to address the issues involving the duration of temporary total disability and attorney fees and costs.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 9th day of November, 2000.

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