STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jeannett Bressett-Roberge	)	File No. K-17830
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Personnel Connection	)	
and	)	For: Steve Janson
Ethan Allen Furniture	)	Commissioner
	)	
	)	Opinion No. 03-99WC

Case submitted on stipulated facts and legal briefs.
Record closed on September 28, 1998.

APPEARANCES:

John W. Valente, Esq. for Personnel Connection/Sedgwick James
Keith J. Kasper, Esq. for Personnel Connection/Liberty Mutual
Andrew C. Boxer, Esq. for Ethan Allen/Travelers

STIPULATION:

1. Claimant was an employee of defendant, Personnel Connection, within the meaning of the Vermont Workers' Compensation Act (Act) from December 1, 1996 to February 23, 1997.

2. Claimant became an employee of defendant, Ethan Allen, within the meaning of the Act on February 24, 1997.

3. Both defendants were "employers" of claimant within the meaning of the Act within the relevant time periods.

4. Sedgwick Insurance Company was the workers' compensation insurance carrier for defendant, Personnel Connection, from December 1, 1996 until January 14, 1997.

5. Liberty Mutual was the workers' compensation insurance carrier for defendant, Personnel Connection, after January 14, 1997.

6. Travelers was the workers' compensation insurance carrier for defendant, Ethan Allen, on and after February 24, 1997.

7. Pursuant to an interim order dated June 11, 1997, Travelers has paid claimant all workers' compensation benefits to which she is currently entitled.

8. Claimant's average weekly wage for the 12 weeks prior to March 7, 1997 was $305.53, resulting in an initial compensation rate of $226.

9. The parties agree to the submission of medical records as Joint Exhibit I.

ISSUE:

The parties agree that the sole issue for decision is which carrier is responsible for workers' compensation benefits associated with claimant's bilateral carpal tunnel syndrome.

EXHIBITS:

I: Claimant's Medical Records
II: Transcript of deposition of Jeannett Bressett-Roberge taken July 14, 1997
III: Transcript of deposition of William A. Birge, D.O., taken February 12, 1998
IV: Transcript of continued telephonic deposition of Dr. Robert L. Van Uitert taken July 15
V. Transcript of deposition of Victor Gennaro, D.O., taken June 26, 1998.

FINDINGS OF FACT:

1. Personnel Connection hired claimant as a "white sander" for work in the manufacturing plant of Ethan Allen Furniture for a job that began on December 2, 1996. The job was a repetitive one that involved sanding marks on the wood, puttying any holes, and doing what needed to be done to fill and clean furniture so that it could be stained. Claimant worked 40 hours per week on bureaus, hutches, vanities, and armoires.

2. Claimant estimated that in the first three weeks of the job she began to notice swelling in her hands which she treated by soaking her hands and taking over-the-counter medications. Her hands felt better when she took some time off in late December to coincide with school vacation.

3. A day or two after returning to work in January, claimant's hands swelled again and she noticed numbness in her fingertips which made it difficult for her to hold on to things. As a result, claimant sometimes dropped her sander, sandpaper, and blocks.

4. Claimant testified that at the end of January or the beginning of February, she felt electric shock type shooting pains that started in her wrist and radiated down to the hand and up to the arm. She felt numbness, swelling and shooting pains in her arms on a daily basis. The pain, which continued 24 hours a day, sometimes awakened her at night.

5. After claimant had been doing the sanding work for a few weeks, Ethan Allen offered her a job and arranged for a post-offer pre-employment physical by the company doctor, Dr. Birge, who performed that physical on February 14, 1997.

6. Claimant reported a two-month history of arm pain to Dr. Birge which he documented as problems with her hands and wrists "since she started work at Ethan Allen." Dr. Birge determined that claimant needed a medical evaluation of her hands before he could certify

her ability to do the job at Ethan Allen. He marked that she was "not acceptable" for employment.

7. Claimant was then referred to Dr. Bourgeois, her family doctor, for an arthritis screening. He examined her on February 17, determined that she did not have arthritis, and diagnosed overuse syndrome of both hands. Also on February 17, after speaking with Dr. Bourgeois, Dr. Birge agreed to give claimant a tentative 90 day approval for working with the stipulation that she return in 90 days for a re-evaluation. In his note for that date, Dr. Birge wrote that he "could not with certainty say that claimant could tolerate the working conditions based on what [he] suspect[ed] to be her response to either an allergen or the overwork of the conditions of Ethan Allen."

8. On February 24, 1997 claimant became a permanent employee of Ethan Allen. For the next two weeks, she continued the same white sanding work that she had been doing there when Personnel Connection was her employer.

9. On Friday, March 7, claimant complained of an injury to her back while working on some furniture. She continued to work until March 10 when she told the company nurse about her back injury and, for the first time, mentioned that she also had swelling and discomfort in her hands because of the sanding work. Claimant left work at 12:30 that day and did not return.

10. The white sanding job claimant did from the time she began work for Personnel Connection on December 2, 1996 until she left her job at Ethan Allen on March 10, 1997 remained unchanged.

11. On March 11 claimant saw Dr. Bourgeois who noted that she had slight swelling in her hands and a negative Tinel's sign bilaterally. On March 12 she saw Dr. Birge for an evaluation of her back and treatment for her hands. He noted that she had negative Tinel's and Phalen's signs.

12. Claimant testified that after a few weeks out of work, she felt that her back had improved enough to allow her to return to work, but her hands continued to have problems.

13. In April 1997 claimant was referred to a neurologist, Dr. Cherie O'Brien, who did nerve conduction studies that confirmed a diagnosis of bilateral carpal tunnel syndrome which was worse on the right.

14. On May 14 Dr. Larry Sisson operated on claimant's right hand to release the carpal tunnel. In his surgical note of that date he wrote, "Apparently she worked on some temporary probational basis, eventually being hired later in the spring. Her right hand has progressed during that time interval."

15. Three physicians testified by deposition in this case: Dr. Birge who first examined claimant for Ethan Allen and with whom she later treated, Dr. Gennaro who performed a records review for defendant Travelers, and Dr. Van Uitert who performed a records review for defendant Liberty Mutual.

16. At his deposition, Dr. Birge testified that claimant's hands were in better condition on March 12 than when he had seen her in February. He opined that she developed carpal tunnel syndrome at the time she complained of shooting pains which was in late January 1997. Dr. Birge explained that when he saw claimant in February, it had been after a full day of work. At the time of the March visit, she had not worked for a couple of days and had been taking anti-inflammatory medication.

17. Dr. Gennaro is an osteopathic physician who practices in New Hampshire. He performs 35 to 50 carpal tunnel surgeries every year and treats medically more than that number of patients with carpal tunnel syndrome. Defendant Travelers retained him as its expert in this case. Dr. Gennaro explained that classic carpal tunnel symptoms include shooting type pains, hand numbness, dropping things, and pains which awaken one from sleep. He testified that the repetitive motion, gripping and extension of the wrist with pressure of white sanding could worsen carpal tunnel syndrome and could cause more damage to the hands and wrists. Dr. Gennaro also testified that CTS symptoms are exacerbated by activity.

18. After reviewing claimant's medical records, her deposition and recorded statement, as well as the deposition transcripts of Dr. Birge and Dr. Van Uitert, Dr. Gennaro opined that claimant began developing carpal tunnel syndrome in December of 1996 as indicated by claimant's complaints of numbness. He further opined that the syndrome, caused by the cumulative nature of the white sanding job, was more likely than not fully established by the end of January 1997. Noting that claimant stopped working because of her back, not her hands, Dr. Gennaro concluded that there was no evidence that work at Ethan Allen between February 24 and March 7 accelerated or exacerbated claimant's carpal tunnel syndrome. Nevertheless, he agreed that claimant should not have been doing the job after her February 14 evaluation. He conceded that no one could know with certainty when claimant's condition worsened because there was nothing objective one could use from the time before the surgery to compare with the condition of the nerve at the time of the surgery. And he agreed with the statement that it was the exposure to the white sanding "that's causing the swelling, causing the tendonitis, causing the carpal tunnel."

19. Dr. Van Uitert, a neurologist in Massachusetts, who does not perform surgery, evaluated this case for defendant Liberty Mutual by reviewing claimant's medical records and her deposition, as well as Dr. Birge's deposition. He testified that claimant had a repetitive movement disorder which included arthralgia, tendonitis, and carpal tunnel syndrome. He also testified that claimant's white sanding work caused her carpal tunnel syndrome which began in January 1997 and probably required surgery by mid-February of that year. Although he agreed that no one knew for certain the nature of claimant's condition when her employer officially changed from Personnel Connection to Ethan Allen, he opined that claimant's white sanding work from February 24 to March 7 worsened her carpal tunnel syndrome. That opinion was based on his knowledge of the natural progression of carpal tunnel in general and claimant's reported symptomatology, particularly what she reported on March 12 to Dr. Birge. The note for that visit included a comment that the pain and numbness in her hands had progressed to a point of bothering her while driving "very badly over the last month."

20. Dr. Van Uitert specifically testified that the continuing repetitive activity claimant was doing continued to cause further injury to her median nerve as long as she was doing it, regardless of who her employer was. He explained that carpal tunnel syndrome is a cumulative process, "it's a buildup . . . a gradual worsening over the course of time. The continued working at the same job doing the same repetitive activity would cause a further deterioration in the carpal tunnel syndrome, further demyelinization of the nerve as long as the irritant, which was the sanding job, continued."

CONCLUSIONS OF LAW:

1. This case asks us again to grapple with the difficult question of which, among three carriers, is liable for this claimant's hand injuries. Claimant's white sanding job lasted only 12 weeks. Sedgwick was on the risk for the first six weeks, Liberty Mutual for the next four weeks, and Travelers for the last two weeks.

2. Sedgwick James urges the Department to find that it cannot be the responsible carrier because this claimant had not seen a doctor and had not missed any time from work under its watch. It argues that it would, therefore, be impermissible speculation to find that claimant's CTS (carpal tunnel syndrome) manifested itself at any time while it was on the risk. Finally, Sedgwick maintains that this is an appropriate case for application of the last injurious exposure rule, as defined in *Pacher v. Rock of Ages*, 166 Vt. 626 (1997), which would place liability on Travelers.

3. Liberty Mutual agrees that if ever there were a case for which the last injurious exposure should be applied, this is it. It argues that the history of the rule in this Department, the Supreme Court's recent footnote on the subject, and the policy reasons underlying the last injurious exposure rule support its application to this case.

4. Travelers argues that a traditional aggravation vs. recurrence analysis supports its position that the Department should relieve it of liability. Claimant did not suffer an aggravation of her condition during the two weeks under its watch, Travelers maintains, because there is no objective medical evidence to suggest that claimant's condition worsened between February 24 and March 10. Consequently, Travelers urges the Department to find a recurrence and shift liability to Liberty Mutual.

5. The initial step in our analysis requires the proper assignment of the burden of proof. In what has become a case by case determination, more often than not we place the burden of proof on the insurance carrier which is attempting to relieve itself of the burden of paying compensation pursuant to a departmental order or preliminary determination. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 26, 1998); *Frederick v. Metromail Corp*, Opinion No. 25-97WC (Sept. 23, 1997); *Bushor v. Mower's News Service*, Opinion No. 75-95WC (Oct. 16, 1995); *Smiel v. Okemo Realty Development Corp*., Opinion No.10-93WC (Aug. 24, 1993). Travelers, who would bear the burden under our precedent, now argues that liability properly falls to Liberty Mutual or Sedgwick James, but does not justify shifting the burden to either of those carriers. As a threshold matter,

therefore, Travelers has the burden of proving that one or both of the two earlier carriers must be liable.

6. There is general agreement that under Vermont Workers' Compensation law, gradual onset injuries sustained on the job are compensable. *Campbell v. Savelberg*, 139 Vt. 31 (1990). Carpal tunnel syndrome is one such gradual onset injury this Department has long recognized is suffered by workers who perform repetitive motions with their arms. See e.g., *McCrillis v. Vermont Castings,* Opinion No. 62-98WC (Nov. 7, 1998), *Frederick v. Metromail Corp*. supra; *Suskawicz v. The Book Press*, Opinion No. 18-94WC (May 6, 1994).

7. As the arguments of the parties amply illustrate, this Department has applied two analytical tests in determining which carrier is liable in a gradual onset injury case: (1) traditional aggravation-recurrence analysis, and (2) the last injurious exposure rule.

8. When presented by a gradual onset case in the aggravation-recurrence context, we usually ask a series of questions to determine which carrier is responsible. Did a subsequent incident or work condition destabilize a previously stable condition? Had the claimant reached a medical end result in her recovery while one carrier was on the risk before moving to work under another carrier? Had she stopped treating medically before her work moved from one carrier to another? Had the claimant successfully returned to work? Did her subsequent work, in this case the work under Travelers, contribute to the final disability? See *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 26, 1998) and cases cited therein. An affirmative answer to each of the questions as worded here would lead to a conclusion that claimant suffered an aggravation.

9. However, attempting to answer those questions on the facts in this case would be futile. At no point during the 12 weeks that she worked as a white sander was claimant's condition stable. A finding of destabilization would, therefore, be meaningless. Her need to treat medically continued. Travelers argues that she meets the successful return to work standard because it was her back, not her hand, that took her out of work. Yet her time on the job could hardly be called a successful return to work, especially in light of a mid-February medical opinion that gave claimant only a tentative 90 day approval to work after finding her "unacceptable" for the sanding work. Most importantly, however, Travelers urges us to find a recurrence because under the last and most important factor, we cannot find that the subsequent work contributed to the final disability. See, *Pacher* 166 Vt. at 627-28 (a second incident constitutes an "aggravation" if it "aggravated, accelerated, or combined with a pre-existing impairment to produce a disability greater than would have resulted from the second injury alone"). But claimant's condition was one, which by its very nature, worsened as her exposure to the offending agent continued. The unique challenge in this case is that the worsening cannot be quantified.

10. In Pacher, the Court recognized that there are cases "where separate injuries all causally contribute to the total disability so that it becomes difficult or impossible to allocate liability among several potentially liable employers." *Id*. at 628, n.2., citing *Port of Portland v. Director*, *Office of Workers' Compensation Programs*, 932 F.2d 836, 840-41 & n.3 (9th Cir. 1991). In such cases, the last injurious exposure rule would be appropriate, making the last carrier liable for the full extent of the benefits.

11. The last injurious exposure rule has at least two aspects: "(1) proof of a compensable claim and (2) assignment of liability between insurers." (cite omitted) *Reynolds Metals v. Rogers*, 967 P.2d 1251 (Or. App., Nov. 4, 1998). "Once it is established that a condition is work related, the rule assigns initial responsibility to the last period of employment whose condition might have caused the disability." *Id*.

12. In deciding whether the last injurious exposure rule, rather than a traditional aggravation-recurrence analysis, should apply to this case, the *Pacher* Court directs us to determine first, whether this claimant suffered "separate injuries." If she suffered separate injuries, we then must determine whether each casually contributed to her disability and whether it is difficult or impossible to allocate liability among the potentially liable carriers.

13. Because it is a rule that is applicable to gradual onset conditions that develop under more than one employer, we interpret the *Pacher* use of the term "separate injuries" to include separate exposures.

14. In support of its contention that it should not be liable, Travelers relies on the opinion of Dr. Gennaro who concluded that claimant's carpal tunnel syndrome was "fully established" by the end of January 1997, that is before Travelers was on the risk. Dr. Gennaro's conclusion, however, must be considered along with contrary convincing medical testimony, much of which came from him. For example, he testified that the repetitive motion, gripping and extension of the wrist with pressure of white sanding could worsen carpal tunnel syndrome and could cause more damage to the hands and wrists. Dr. Gennaro also testified that CTS symptoms are exacerbated by activity. Dr. Van Uitert opined that carpal tunnel syndrome involves a buildup, a gradual worsening over time. As such, doing the same repetitive activity would cause further deterioration as long as the irritant continued. The irritant here was the white sanding work which continued unabated for the duration of claimant's work at Personnel Connection and Ethan Allen. No objective medical evidence is available to compare the condition of her hand at the time claimant left her job, when Travelers was on the risk, with the condition of her hand at an earlier point in time. However, the natural history of the disease, nature of this claimant's work, her symptoms, and the convincing medical testimony combine to form in the mind of this trier of fact the conclusion that it is more probable than not that claimant's work at Ethan Allen causally contributed to her carpal tunnel syndrome.

15. Once an initial determination of causation is established, the burden then falls to Travelers to prove that claimant's work under its watch did not contribute to her carpal tunnel syndrome. With the convincing medical evidence supporting the theory that all of claimant's white sanding work causally contributed to her carpal tunnel syndrome and the lack of convincing evidence to show a comparison in her condition between the time she worked under Travelers watch and any earlier point in time, we are left with the conclusion that it is impossible to allocate liability "among the separate insurers." *Pacher*, 628 Vt. at 628, n2.

16. Policy also dictates application of the rule to this case. When Ethan Allen became claimant's employer, claimant had seen a physician who recommended that she not continue with the sanding work given her hand and arm problems, then gave tentative approval for a 90 trial. Ethan Allen had sent claimant to that physician and had to have

known of his advice. Yet it hired claimant to continue with the sanding work, which all experts agree could have exacerbated her carpal tunnel condition. These facts invoke the rationale articulated in *McKearney v. Miguel's Stowaway Lodge*, Opinion No. 6-94WC (Mar. 27, 1994), when this Department adopted the last injurious exposure rule. "Subsequent employers may exercise care in placing workers in appropriate positions so as to not exacerbate existing conditions; that same concern might not be exercised were all liability placed on the earlier employer for the consequences." *Id*. at 9. Although the last injurious exposure rule has not been applied in recent years, largely because traditional aggravation-recurrence analysis applied in those cases in which the rule was proposed, this case presents strong factual and policy bases for its application.

17. Factually this case falls squarely within the *Pacher* definition of last injurious exposure because cumulative trauma of white sanding caused this claimant's carpal tunnel syndrome, her cumulative trauma was unabated, and it is not possible to determine at what point in time her carpal tunnel syndrome began or was stabilized. It is, therefore, "difficult or impossible to allocate liability" among these three carriers. See *Pacher* 166 Vt. 628, n. 2. Furthermore, Ethan Allen had a medical assessment performed which specifically determined that she was unacceptable for the job it kept her in.

18. By its very definition, the last injurious exposure rule requires that the claimant be "exposed" to the offending stimulus for the doctrine to be applicable. In this case, the exposure to the deleterious sanding work continued until claimant stopped working for Ethan Allen. That she stopped working because of her back does not change this conclusion. Any perceived harshness from the conclusion that a carrier on the risk for such a short period of time is liable under the last injurious exposure rule will have to be remedied by our legislature. Nothing in *Pacher* suggests that a short exposure under one carrier would nullify application of the rule.

ORDER:

Under the last injurious exposure rule, Travelers is responsible for benefits due claimant for her work related carpal tunnel syndrome.

Dated at Montpelier, Vermont, on this 26th day of January 1999.

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Steve Janson
Commissioner