

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

MICHAEL WOOD)
)
 v.)
)
MAPLE CENTER MOTORS)

STATE FILE NO. M-16270

MICHAEL WOOD)

STATE FILE NO. P-20565

v.)

By: John W. Valente, Arbitrator

GOSSCO)

Arbitration Opinion No. 3-02 WC

ARBITRATION OPINION AND ORDER

1. Pursuant to Rule 8.0 of the Vermont Workers' Compensation and Occupational Disease Rules and 21 V.S.A. § 662 (c, d) the above-referenced matter was submitted by the Commissioner of Labor and Industry to the undersigned for an arbitration decision.
2. The issue for consideration is which entity – Maple Center Motors (insured by One Beacon) represented by Attorney Eaton or Gossco (insured by Guard Insurance) represented by Attorney Aten – is responsible for the left upper extremity injury suffered by the claimant.
3. During the initial arbitration conference, counsel for both parties waived a formal arbitration hearing and jointly agreed that the record in this proceeding will consist of (1) medical records exhibit; (2) deposition of Michael Wood taken July 10, 2002; deposition of Sally J. Goss taken July 10, 2002. The parties have further agreed and stipulated that Attorney Aten's letter of February 16, 2001 and Attorney Eaton's letter of April 17, 2001 are to be considered as briefs and arguments of counsel. The record in this matter was deemed closed on September 13, 2002.
4. After reviewing the evidence and considering the arguments in the briefs, the undersigned makes the following findings pursuant to Rule 8.4 of the Vermont Workers' Compensation and Occupational Disease Rules.

FINDINGS OF FACT:

1. The claimant, Michael Wood, was employed through December of 1999 at Maple Center Motors. During this relevant period of time, he was an employee of Maple Center Motors and Maple Center Motors was his employer. Maple Center Motors was insured by One Beacon Insurance.
2. In February of 2000, the claimant began employment at Gossco. During the relevant period of time, the claimant was an employee of Gossco and Gossco was the claimant's employer for purposes of the statute. Gossco was insured by Guard Insurance.

3. Michael J. Wood was employed for roughly twelve years at Maple Center Motors until February of 2000. The claimant was a detailer for the twelve years he was employed at Maple Center Motors, taking used cars and cleaning them out for resale. This job entailed starting at the engine and working to the inside and the trunk and the outside, scrubbing carpets, scrubbing motors and buffing the vehicle. The claimant used an air hose, a water hose, spray bottles, cleaner, wax, etc. while performing this work. He worked at Gossco from February through May of 2000.
4. In April of 1999, Mr. Wood woke up one morning and had the feeling of pressure in his palm that he could not get rid of. When the claimant awoke, he felt very big pressure right in the palm area in his right hand that would not go away. He described this pressure as unbearable.
5. On March 30, 1999, the claimant was seen by Dr. Andrew Forrest who evaluated Mr. Wood noting him to be a 35-year-old right-handed male who works as an auto reconditioner. He has a several month history of hand parathesias right greater than left. Conservative treatment was ineffective. Dr. Forrest's physical exam at that time indicates negative tinel's at the wrist. Negative tinel's at the elbows. Positive Phalens at the right wrist. Negative Phalens at the left wrist. Thoracic outlet maneuver is negative. He diagnosed a probable median neuropathy in the right wrist.
6. Dr. Forrest conducted nerve conduction studies and concluded the findings are those of mild-moderate median neuropathy at the right wrist. There is no electromyographic evidence of an upper extremity plexopathy or radiculopathy, or a left upper extremity.
7. Following the nerve conduction study, Dr. Victor Gennaro assessed the claimant on April 7, 1999 with a medium nerve neuropathy at the right wrist with his EMG showing mild to moderate changes. There is no upper extremity flexopathy. The left median nerve was normal. Dr. Gennaro continued to diagnose the claimant with bilateral carpal tunnel syndrome, right greater than left and set him up for surgical intervention to include an open carpal tunnel decompression.
8. On April 22, 1999, the claimant underwent an operative procedure for (1) right carpal tunnel decompression and (2) flexor tendon synovectomy right wrist. Two days later on April 24, 1999, Dr. Lyons indicated there was a normally healing wound from carpal tunnel surgery.
9. Dr. Gennaro saw the claimant in follow up on May 3, 1999, ten days after his surgery. Dr. Gennaro removed the claimant's stitches and noted he does not have a lot of swelling and has no evidence of RSD. He referred Mr. Wood to occupational therapy.
10. Mr. Wood began occupational therapy at Northwestern Vermont Regional Hospital and on May 17, 1999, Dr. Gennaro had indicated Mr. Wood could engage in light duty work.

11. By May 26, 1999, the claimant's physical therapist, Lisa Garey, noted the claimant was doing great. His grip strength had increased, he has good right wrist range of motion and functionally he was performing various tasks. He was cleared to return to full duty work on June 1, 1999.
12. On July 12, 1999, Dr. Gennaro saw Mr. Wood noting he returned rather suddenly, reporting difficulty in the palmer aspect of his right hand where he had surgery and in the wrist. He is getting some recurrence of the paresthetic sensation primarily into his finger and is also having increasing difficulty with his left hand now with increasing paresthesias. Dr. Gennaro's physical examination on that date indicates a mildly positive tinels in the right wrist. The left hand has a mildly positive phalen sign. Tinel is negative. Grip strength seems weak. The diagnosis is tendonitis right wrist, possible recurrent carpal tunnel and left carpal tunnel syndrome. Dr. Gennaro took Mr. Wood out of work at that point and wrote, "I suspect at some point we are going to need to do his left hand."
13. On August 17, 1999, Mr. Wood was again seen by Dr. Forrest, who again conducted an EMG study. Dr. Forrest's conclusion was of an essentially normal study with no electromyographic evidence of an upper extremity neuropathy, plexopathy or radiculopathy. The finding of isolated slowing of the left median sensory conduction velocity is of uncertain clinical significance.
14. Dr. Gennaro saw Mr. Wood on August 26, 1999 and indicated the EMG nerve conduction study was within normal limits, but there was a bit of slowing on the left. On that date, Dr. Gennaro indicated what is happening really at this point remains an enigma. He indicated a number of differential diagnoses.
15. On September 13, 1999, Mr. Wood was seen by Dr. James Mogan. Dr. Mogan's examination indicated a positive tinel over the carpal tunnel with radiating pain out into his long finger. There was some slight decrease to sensibility in the ulnar distribution with a positive elbow flexion test, even though his EMG showed no evidence of any ulnar nerve lesions. Dr. Mogan indicated that other than physical therapy and anti-inflammatory medication or perhaps a cortisone injection, he has nothing to offer Mr. Wood.
16. On October 1, 1999, Mr. Wood was seen by Dr. Nutting at Dartmouth Hitchcock Medical Center. Dr. Nutting diagnosed reflex sympathetic dystrophy following right carpal tunnel release.

17. Dr. Gennaro wrote a letter on November 10, 1999 indicating Mr. Wood had returned for follow up and was improving. About 90% better. The diagnosis was right carpal tunnel syndrome and mild RSD improving. Dr. Gennaro indicated he could return to work, but was very much against him going back to his previous job buffing cars. The constant high force gripping required would cause some trouble in the future and is likely to cause profound deterioration.
18. By December 13, 1999, Dr. Gennaro found the claimant to be at end medical result pursuant to the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition and found a 6% whole person impairment. Dr. Gennaro again indicated that the claimant needed to do something different as attempting to keep him buffing cars is simply banging his head against the wall and just isn't going to work.
19. Dr. Broderick saw the claimant on May 12, 2000 indicating that the claimant had had bilateral carpal tunnel syndrome symptoms for about two years. Then he indicates in the last three months, the claimant has taken a new job working as a driver and delivering tires and during that time, his left wrist has begun to bother him. He gets tingling when he drives, sometimes wakes him at night from sleep. It is sore when he is using his wrist. Dr. Broderick diagnosed left carpal tunnel syndrome.
20. Dr. Gennaro saw Mr. Wood in follow up on May 24, 2000. He diagnosed the claimant at that time with bilateral carpal tunnel syndrome, left worse than right. He indicates that at about the time of the occupational change in February, the claimant did have some symptoms consistent with carpal tunnel syndrome, but they were not too bad and certainly manageable. The time period that he worked driving the truck has aggravated his condition, causing it to worsen. From a causation standpoint, Dr. Gennaro believes the claimant had pre-existing bilateral carpal tunnel syndrome but his occupation in February until May aggravated his condition.
21. On June 20, 2000, Dr. Forrest performed nerve conduction studies. His conclusions indicate the findings suggest an extremely mild left median neuropathy at the wrist.
22. On June 23, 2000, Dr. Gennaro interprets that study as being positive for left carpal tunnel syndrome. Dr. Gennaro indicates at that time that Mr. Wood's working for the tire company caused his symptoms to worsen to his present condition.
23. On July 6, 2000, the claimant underwent left carpal tunnel decompression and began occupational therapy on July 11, 2000.

24. On June 21, 2000, Mr. Wood was seen for a neurological evaluation for National Health Care Resources, Inc. by Dr. John Milhorat. Dr. Milhorat's impressions were a history of bilateral carpal tunnel syndromes for the past one and one-half years with the right side being significantly more abnormal than the left side at least initially. The right wrist underwent surgery with relatively good results and a stable condition to this date. With regard to his left upper extremity, his left sided carpal tunnel syndrome was documented a year and a half ago and presumably started when he was working as an auto detailer. Dr. Milhorat found that Mr. Wood developed a marked exacerbation of his ongoing left sided carpal tunnel syndrome while working at the tire company.
25. Mr. Wood testified that his right wrist has calmed down when he started working at Gossco and while it was not 100%, the right wrist was bearable. Mr. Wood also indicated that from December through January or February of that year the left hand was feeling very numb in the morning. Between December and February there were two or three times when the claimant woke up in the morning and his left hand was exhibiting symptoms, but other than that it was feeling all right.
26. While working at Gossco, Mr. Wood drove for an average of six hours a day visiting customers, delivering tires and bringing casings back to the company. During the course of his work at Gossco, his left wrist and arm got progressively worse in duration and frequency. Mr. Wood indicated that during December of 1999 and February of 2000, he had a few occasions where he woke up in the morning and his left hand was numb and tingly.
27. Prior to May of 2000, Mr. Wood had not seen a physician for a left hand problem specifically. He had not planned to see Dr. Gennaro again.
28. Mr. Wood's left-handed symptoms got much worse after he started working at Gossco than before. The job that Mr. Wood performed at Gossco was more physically vigorous than he had anticipated it would be. He lifted tires that weighed over 50 lbs.
29. The pressure feeling in Mr. Wood's left hand occurred for the first time in May of 2000 and had never occurred while the claimant worked at Maple Center Motors. Sally Goss testified on behalf of Gossco. She testified that the range of tires a salesman might have to load and unload in a day is from two tires to as many as one hundred if the worker was taking a load of passenger tires in the fall. She testified on an average day the driver would deliver ten to fifteen tires, but it can vary.
30. Ms. Goss indicated the claimant was hired February 7, 2000 and he worked until May 12, 2000.

31. Ms. Goss indicated Mr. Wood never told her he was having problems with either of his hands while he was working at Gossco. She agreed his duties would involve driving the truck and loading and unloading tires. She said he had no physical or medical complaints while he worked for Gossco. Ms. Goss testified that when Mr. Wood left on May 12, 2000, he had not reported to her any left wrist problems. When he came in on the 21st, he indicated that he was going to file a workers' compensation claim against Gossco.

CONCLUSIONS OF LAW:

1. The dispute in this gradual onset injury case is which employer should be liable for Mr. Wood's injuries to his left wrist¹.
2. In a case where a carrier is attempting to relieve itself of the burden of paying compensation pursuant to a departmental order or preliminary determination, the burden of proof generally lies with the insurance carrier who is trying to relieve itself of the burden of paying compensation. See, *Ethan Allen v. Bressett-Roberge*, Docket No. 50-3-99 Oscv (Orleans Superior Court, Pearson, J., April 24, 2001). Gossco was ordered to pay compensation in this matter and the burden of proof lies with it.
3. The Vermont Supreme Court has made clear that in successive employer matters, the original carrier remains liable for workers' compensation benefits if the second manifestation is solely a "recurrence" of the initial injury. *Pacher v. Fairdale Farms*, 166 Vt. 626, 627-628 (1997) (Mem.) The Court indicates if the second period of exposure did not causally contribute to the claimant's disability, the first carrier remains liable. If the second exposure aggravated, accelerated or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second exposure alone, the second incident is an "aggravation" and the subsequent carrier becomes solely responsible for the entire disability at that point. *Id.* at 627-628 (cits. omitted). If there is a new injury distinct from prior injuries, then liability must be apportioned between the successive employers. *Id.*
4. The Vermont Supreme Court recently affirmed the traditional aggravation vs. recurrence analysis supplied by the Superior Court in *Ethan Allen v. Roberge*. The factors to be considered are (1) whether there has been a specific new incident as opposed to a gradual worsening of a condition; (2) whether the claimant continued to treat medically; (3) whether the claimant has successfully returned to work; and (3) whether the claimant had been declared at end medical result. See, *Ethan Allen, Inc. v. Bressett-Roberge*, Supreme Court Docket No. 2001-254 (Entry Order, Aug. 20, 2002).

¹ In this matter, Maple Center Motors, has paid for the claimant's workers' compensation benefits associated with his right wrist injury. There is no real question regarding those benefits and the claimant's right-sided symptoms were caused by his work at Maple Center Motors and they are not entitled to reimbursement. The more perplexing question is that of the claimant's left wrist injury.

5. The credible evidence is that his left-sided symptoms had become stable. While there is no "incident", there is evidence of pressure in left hand upon waking during the period the claimant worked at Gossco was unlike anything he had experienced before. After that time, Mr. Wood was taken out of work for his left-sided complaints. Aggravation is the destabilization of a condition, which had become stable, although not necessarily symptom-free. *Ethan Allen v. Bressett*, Docket No. 50-2-99 Oscv, supra. The first factor favors aggravation. Second, Mr. Wood had not treated medically for his left wrist in 8 months and any treatment he had received prior to May 2001 was secondary treatment. The primary concern in the records before that date was the right wrist with little mention of the left side. This favors an aggravation. Third, Mr. Wood had taken a new job at Gossco. It was while working there that his pain progressively increased until he could no longer work there. The evidence is split on whether the claimant had to exceed his work restrictions while working at Gossco, but this was not a successful return to work. That finding favors recurrence. Finally, the claimant had never been declared at end medical result for his left carpal tunnel. While this favors a recurrence, he was not actively treating and Dr. Gennaro opined in August of 1999, a number of differential diagnosis and indicated what is happening is an enigma.
6. This is a difficult case and the real question is does the medical record support that whatever occurred after the claimant went to work at Gossco, combined with the pre-existing injury to produce a total disability greater than what would have happened from the post-Gossco events alone? See *Pacher*, supra. Dr. Gennaro says the time period that Mr. Wood worked driving the truck caused his condition to worsen. Dr. Milhorat indicated with regard to his left upper extremity, Mr. Wood's left-sided carpal tunnel syndrome was documented in 1999 and presumably started when he was working as an auto detailer. However, even Dr. Milhorat admits it was when he was working at the tire company for a period of three months or so, that he developed a marked aggravation or exacerbation of his ongoing (previously modest) left-sided carpal tunnel syndrome.
7. The Department has historically examined several factors in determining the credibility of physicians. The factors are: (a) the time over which the physician has treated the patient; (b) the degree of professional training and experience in that given area; (c) the evaluation performed, including the degree of access to all the medical records; and (d) the objective tests and findings the physician advances in support of his or her opinions.
8. Here, Dr. Gennaro is a treating physician. Dr. Milhorat saw Mr. Wood on June 21, 2000, one time after he had undergone surgery. This factor weighs in favor of Dr. Gennaro. The professional training and expertise of both physicians were not submitted to the arbitrator and therefore this factor is determined to be neutral. What records the doctors specifically reviewed are not outlined by either physician and therefore given the documented histories in the separate medical reports, the arbitrator finds that both doctors had access to the medical records and this factor is determined to be neutral.

9. There have been three electrodiagnostic studies performed in this matter. All three were performed by the same physician, Dr. Andrew Forrest at Cottage Hospital in Woodsville, New Hampshire. The first study was dated March 30, 1999. The conclusion was a finding of a mild-moderate median neuropathy at the right wrist. There is no electromyographic evidence of an upper extremity plexopathy or radiculopathy, or a left upper extremity neuropathy. His next evaluation was August 17, 1999. Dr. Forrest's conclusions indicate essentially a normal study. There is no electromyographic evidence of an upper extremity neuropathy, plexopathy or radiculopathy. The finding of isolated slowing of the left median sensory conduction velocity is of uncertain clinical significance. The final test is dated June 20, 2000. This test indicates a nerve conduction study that is technically normal but demonstrates a relative prolongation of the left median sensory distal latency at the wrist. The findings suggest an extremely mild left median neuropathy at the wrist without any electromyographic evidence of upper extremity plexopathy, radiculopathy or other focal compression neuropathy. That finding was not present prior. When combined with the claimant's report of a new pain in the left palm and the start of treatment for the left hand symptoms is that report is persuasive. Those facts advance Dr. Gennaro's opinion that the time period Mr. Wood worked driving the truck caused his carpal tunnel syndrome to worsen.
10. Accordingly, the benefits for the left wrist injury are found to be the responsibility of Gossco.

ORDER

1. Based on the foregoing, the arbitrator orders that Gossco is responsible for benefits to the claimant for his left wrist injury and is not entitled to reimbursement from Maple Center Motors.
2. As the dispute was reasonable, the arbitrator's fee shall be split equally between the parties. The arbitrator spent twelve hours reviewing the record and preparing this award for a total of \$1,800 of which \$900 is due from each party.

Dated at Rutland, Vermont this 7th day of October 2002.

John W. Valente,
Arbitrator