

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

Durwood Preston)	
Claimant)	
)	
v.)	
)	State File Nos. S-21380 & L-04178
)	
Maine Blasting and Drilling;)	
G.W. Tatro; and Wilfred King)	
Paving)	
Defendants)	

ARBITRATION DECISION AND ORDER

Parties stipulated to arbitrating this matter on the submitted records.

APPEARANCES:

Jason Ferreira, Esq., for Maine Blasting & Drilling/Liberty Mutual Insurance Group
Corina Schaffner, Esq., for Wilfred King Paving/Norguard Insurance Company
William Blake, Esq., for G.W. Tatro/Acadia Insurance Company

EXHIBITS:

- § Complete set of medical records which include the following categories of records: Dr. Benoit's; Dr. Johansson's; Dr. Backus'; Dr. Ciongoli's; Fletcher Allen Health Care's; Copley Hospital's; Dr. White's; Dr. Foerster's; the Spine Institute's; Dr. Zweber's; Dr. Roomet's; and Dr. Ferguson's.
- § Dr. Michel Benoit's September 24, 2003, deposition;
- § Durwood Preston's April 24, 2003, deposition;
- Exhibit 1: Department's May 19, 2004, Order for Arbitration.
- Exhibit 2: Maine Drilling & Blasting's Employer's First Report of Injury.
- Exhibit 3: Julie Heath's September 4, 2002 Interim Order to Guard Insurance pursuant to 21 V.S.A. § 662(c).
- Exhibit 4: Arbitration Decision in Michelle Boutwell v. Hubbarton Forge, dated July 1, 2003.
- Exhibit 5: Arbitration Decision in Audie Bellimer v. Dead River Company of Maine, dated July 27, 2004.

ISSUE

The issue presented for resolution is which carrier is responsible for the workers' compensation benefits for Mr. Preston's February 4, 2003, operation for right-sided ulnar nerve transposition with Dr. Benoit. This determination involves issues of recurrence/aggravation.

FINDINGS OF FACT

The parties submitted this matter to arbitration pursuant to 21 V.S.A § 662(e), as ordered by the Department of Labor & Industry on May 19, 2004. The record was closed and all the briefing concluded on September 10, 2004. Based on those submissions and the parties' respective arguments, I find as follows:

1. Durwood Preston is 52 years old. Since 1991, he has been employed primarily in the drilling and blasting industry. His pattern of employment included working seasonally from the start of the spring construction season until the mid to late-fall when his employer laid him off for the winter months, during which he received unemployment benefits. Mr. Preston would then start employment again the following spring.
2. In 1991, Mr. Preston started working with G.W. Tatro, a drilling and blasting company located in Jeffersonville, Vermont. He continued in his employment at G.W. Tatro until he started working with Maine Blasting and Drilling in June 1997. Mr. Preston changed employment from G.W. Tatro to Maine Blasting and Drilling seeking better retirement and insurance benefits.
3. At G.W. Tatro from 1991 through the end of the season in 1996, Mr. Preston operated a drilling machine which he likened to a backhoe. He operated and controlled the drill through a series of levers located in the drilling machine's cab. While working at G.W. Tatro between 1991 and 1996, Mr. Preston did not suffer any work-related injuries and filed no claims for workers' compensation benefits. Prior to August 1997, he had suffered no injury to his wrists or arms and had not experienced difficulties with his wrists or arms.

4. At Maine Drilling and Blasting, Mr. Preston worked drilling and blasting. As a driller he operated a hydraulic drill. Similar to his work at G.W. Tatro in which he operated at air track drill, Mr. Preston controlled the hydraulic drill by manipulating a series of levers. When necessary, Mr. Preston also filled freshly drilled holes with dynamite. Operating the hydraulic drill or the air track drill were not physically strenuous activities.

5. Mr. Preston filed a workers' compensation claim related to this injury which Liberty Mutual, Maine Drilling and Blasting's workers' compensation carrier, accepted. The parties signed, and the Department of Labor and Industry approved, a Form 21.

6. On September 22, 1998, Dr. George White evaluated Mr. Preston. He noted continuing symptoms in both upper extremities, specifically contrasting findings of ulnar involvement on the left side, but not the right side. On the right side, Dr. White noted pain in the right forearm which he associated with the radial aspect of the forearm. Dr. White performed a cubital tunnel provocative maneuver on the right which produced symptoms into the radial aspect of Mr. Preston's right hand while the same maneuver on the left produced ulnar symptoms in his left hand.

7. While Dr. White concluded that Mr. Preston was at a medical end result for the carpal tunnel surgeries he had undergone with Dr. James Mogan, he also concluded that Mr. Preston was not at a complete medical end result since the carpal tunnel diagnosis did not explain his entire symptom complex. Dr. White diagnosed Mr. Preston with possible cervical radiculopathy and possible thoracic outlet syndrome.

8. In August 1997, the hydraulic press Mr. Preston was operating for Maine Drilling and Blasting malfunctioned while he was working on a project. Maine Drilling and Blasting provided Mr. Preston with a hand drill to finish the project of creating a trench 150 feet long and six feet deep. Operating the hand drill, Mr. Preston used drill bits in two-foot lengths, four-foot lengths, and six-foot lengths, using one after the other to increase the depth of the drill hole to the required six feet. The hand drill had a worn-out "chuck" which apparently caused the drill to wobble back and forth during use. Mr. Preston operated the hand drill for approximately four days, working 12-hour shifts. At the end of his fourth day, Mr. Preston's left and right hands were swollen and painful.

9. Mr. Preston initially treated with a physician at Immediate Health Care located on Kennedy Drive in South Burlington, Vermont, who diagnosed him with carpal tunnel syndrome, provided him with wrist splints, and allowed him to return to work. When he returned to work, Mr. Preston operated the hydraulic drill. It was painful for Mr. Preston just to push the levers of the hydraulic drill, a machine he had previously operated without any difficulty. When Mr. Preston complained to his employer that his hands were still painful, Maine Blasting and Drilling laid him off.

10. After this layoff, Mr. Preston sought treatment with his primary care physician, Dr. John Ferguson, who referred him to Dr. James Mogan, a hand surgeon in South Burlington, Vermont. Dr. Mogan diagnosed Mr. Preston with a bilateral carpal tunnel problem, performed a carpal tunnel release on Mr. Preston's right wrist on January 23, 1998, and performed a carpal tunnel release on his left wrist on March 20, 1998. Following his usual seasonal pattern of work and layoff and Maine Blasting and Drilling's seasonal actions, Mr. Preston was not working at the time Dr. Mogan performed these surgeries.

11. While Dr. Mogan's surgical treatment provided some relief, it did not provide complete relief for Mr. Preston's symptoms. Dr. Mogan released him back to work, but also recommended referral to a different physician for additional evaluation. It appears that Mr. Preston's primary medical care physician, Dr. Ferguson, then referred Mr. Preston to Dr. Bruce Foerster in St. Albans, Vermont.

12. Dr. Bruce Foerster, a St. Albans, Vermont orthopedic surgeon saw Mr. Preston on July 16, 1998, August 25, 1998, and October 20, 1998. On October 20, 1998, he wrote to Dr. Ferguson about Mr. Preston's symptoms, noting that both his hands were going numb with the ulnar digits worse than the median enervated digits. He noted persistent symptoms and that Mr. Preston had been doing a fair amount of work in New Jersey during the past month. Mr. Preston complained that his hands were bothering him more and more, that he had difficulty operating equipment at work, and that he "feels like he is getting worse." Mr. Preston did not identify any new, intervening event or trauma and Dr. Foerster referred him to a spine specialist for additional evaluation.

13. On December 11, 1998, Dr. Rowland Hazard of the Spine Institute evaluated Mr. Preston. In his examination, Dr. Hazard detected symptoms of numbness and a sense of grip locking which he attributed to the right medial nerve distribution. On the left, Dr. Hazard detected numbness that he attributed more in the ulnar distribution and also noted that Mr. Preston complained of a sense of his hand locking up on the left as well. Dr. Hazard concluded that Mr. Preston could benefit from medical attention to the ulnar nerve on the left and referred him to Dr. Benoit for that attention.

14. On January 11, 1999, Dr. Michel Benoit evaluated Mr. Preston. Mr. Preston complained of persistent pain in several fingers with symptoms on his left side being worse than his right side. He complained of pain waking him during the night, particularly on the left side and that he was dropping things like coffee cups and heavy items he needed to grip.

15. In his evaluation, Dr. Benoit noted that Tinel's sign at the cubital tunnel was positive bilaterally but was more aggravated in Mr. Preston's left arm than his right arm. Dr. Benoit opined that Mr. Preston's symptoms were consistent with cubital tunnel syndrome bilaterally, and provided splints to Mr. Preston to see if use of them would improve his condition.

16. On February 20, 1999, Dr. Benoit evaluated Mr. Preston again, who complained of numbness and pain in the small and ring fingers bilaterally, that he woke at night with pain, and that his symptoms had not changed from the previous visit. Dr. Benoit discussed the ulnar nerve transposition surgery on the left with Mr. Preston, because the left side was worse than the right. In his deposition, Dr. Benoit testified that Mr. Preston was a candidate for right ulnar transposition surgery in January 1999.

17. On March 2, 1999, Dr. Benoit performed a subcutaneous transposition of the ulnar nerve on the left side. In a March 15, 1999, office visit, Dr. Benoit noted that Mr. Preston was recovering well from his left sided surgery but that he was still experiencing dysphasia in his right fifth digit which occasionally woke him from sleep.

18. On April 12, 1999, in another office visit, Dr. Benoit again evaluated Mr. Preston regarding his right-sided symptoms and stated, "regarding his right cubital tunnel, he would like to have something done for that probably in the fall."

19. On May 27, 1999, Dr. Benoit examined Mr. Preston again, noting that Mr. Preston was having occasional symptoms on his right side but did not feel that the symptoms were bad enough to go through the surgery. Mr. Preston would contact Dr. Benoit if he wanted to have the ulnar transposition surgery performed on his right arm.

20. After the May 27, 1999 visit, it was almost two years before Mr. Preston returned to treat with Dr. Benoit on April 23, 2001. During this two-year period, Mr. Preston also maintained his seasonal work pattern, working during the spring, summer, and early fall, with layoff during the winter months.

21. On October 5, 1999, Dr. John Johansson, D.O., evaluated Mr. Preston for the purposes of an independent medical evaluation and permanent partial impairment determination. While Dr. Johansson recorded a history of continuing but intermittent symptoms for Mr. Preston, his physical exam found no apparent abnormality on the right side. Dr. Johansson found Mr. Preston to be at a medical end result and assessed a 9% impairment to the right upper extremity, 9% impairment to the left upper extremity, and 2% impairment to the upper extremity for sensory loss. Combined, these impairments resulted in an 11% whole person impairment resulted in an 11% whole person impairment for Mr. Preston's work related injury. Liberty Mutual and Mr. Preston signed, and the Department approved, a Form 22 Settlement Agreement based on Dr. Johansson's evaluation.

22. After Dr. Benoit released Mr. Preston to work following his left ulnar transposition surgery, Mr. Preston did not take any medication on an on-going basis, he did not treat medically with any medical care provider, he did not lose time from work because of his condition, and he performed his usual work activities.

23. In the spring of 1999, Durwood Preston returned to work at G. W. Tatro. He continued in his employment operating the drill. He did not treat medically with either medication or with a medical care provider, nor did he lose time from work because of his right wrist symptoms.

24. Mr. Preston intended to have his right wrist symptoms addressed during his layoff for the late fall of 1999 into the spring of 2000. His right wrist symptoms were bothersome, sometimes waking him from his sleep with a numb, tingling, and pressured

feeling. Since his injury of August 1997, his symptoms had worsened progressively and, according to Mr. Preston his activity, whether work-related activity or not, did not effect the progression of his degenerative symptom complex.

25. While stepping off the platform of a drill machine on or about October 8, 1999, Mr. Preston's leg slipped into a drill hole, at which time he pitched forward, causing ligament damage to his left knee. Because of this work-related knee injury, Mr. Preston underwent surgical treatment with Dr. Lapinsky on November 9, 1999, and focused his attention on treating his knee injury, rather than his right hand and wrist symptoms.

26. In the spring of 2000, Mr. Preston attempted to return to his work with G.W. Tatro but because of his knee injury he could not stand and perform the work required of a driller. As a result, Mr. Preston was eligible for vocational rehabilitation services which Acadia Insurance Company, G.W. Tatro's workers' compensation insurer, provided. Apparently, Mr. Preston trained so that his commercial drivers' license could be expanded from a Class B license to a Class A license. He completed his training and in June 2000 passed the licensing examination to become a commercial driver with a Class A license.

27. After earning his Class A license, Mr. Preston started working for Wilfred King Paving Company driving a dump truck with a trailer for equipment. Mr. Preston started his employment with Wilfred King Paving in June 2000, and worked until October 2000, when he was laid off at the end of the paving season.

28. At Wilfred King Paving, Mr. Preston drove a single axle dump truck which had power steering. He explained that the steering wheel turned easily and that he could turn it using only his fingers. Mr. Preston testified that driving the dump truck did not worsen the symptoms in his right hand which continually worsened over time. His duties for Wilfred King Paving only involved driving the dump truck, driving the Bobcat up onto the trailer, and chaining it down, raising and lowering the ramps so the Bobcat could be driven up onto the trailer, hauling crushed stone and asphalt in the dump truck when necessary and unrolling and rolling a tarp to cover his load with a crank. Mr. Preston rolled/unrolled the tarp approximately four times a day. Mr. Preston's employment with Wilfred King Paving did not require him to lay asphalt or perform duties other than driving the dump truck and transporting and chaining down the Bobcat. Slate or asphalt

were loaded onto the truck through a chute at a plant while Mr. Preston sat in the cab of the truck.

29. On April 23, 2001, Mr. Preston returned to Dr. Benoit for additional evaluation because his right hand had been causing him significant pain, especially at night, over the past several months. Keeping with his practice of work-lay off-return to work, Mr. Preston had not been working prior to his April 2001 return to Dr. Benoit.

30. At that visit, Dr. Benoit notes that the symptoms were different from the ones for Mr. Preston's cubital tunnel syndrome on the left since they involved Mr. Preston's entire hand. Dr. Benoit found it difficult to assess with certainty whether Mr. Benoit had cubital tunnel syndrome and also had him reassessed for carpal tunnel problems.

31. On June 7, 2001, Dr. Thomas Zweber, a physiatrist, conducted EMG testing on Mr. Preston, finding abnormal EMG results indicating moderate positive carpal tunnel on the right, a mild delay of the ulnar motor across the wrist, and a moderate positive cubital tunnel syndrome on the right.

32. Based on these results and his clinical examination, Dr. Benoit suggested ulnar nerve subcutaneous transposition and an open re-do carpal tunnel release on the right. This surgery, apparently scheduled for November 27, 2001, was cancelled due to insurance coverage disputes.

33. Mr. Preston returned to work for Wilfred King Paving for the 2001 work season performing the same type of work he had performed previously. He worked with Wilfred King Paving until his seasonal layoff in October 2001.

34. While Mr. Preston returned to LaVictory Drilling and Blasting in 2002, Dr. Michel Benoit testified that he considered Mr. Preston a surgical candidate for ulnar nerve transposition surgery in 1999 and made specific recommendations for surgery in August 2001. Therefore, surgery had already been proposed by the time Mr. Preston started working for La Victory Drilling and Blasting.

35. On April 25, 2002, Dr. Kenneth Ciongoli performed a records review of Mr. Preston's treatment. In the report on that review, which took the form of a letter to Wendy

Pooh (sic) of Liberty Mutual, Dr. Ciongoli did not express any definitive opinion regarding whether Mr. Preston's work after 1997 aggravated his carpal tunnel or cubital tunnel conditions.

36. In that letter, Dr. Ciongoli wrote in part, "[t]he objective findings indicate that the patient has residual complaints from the medical end result in 1999. It is not clear from the records how and when he suffered an aggravation of this problem." In effect, Dr. Ciongoli did not render a definitive opinion on aggravation/recurrence.

37. In a July 1, 2002, letter to Attorney Ferreira, Dr. Ciongoli wrote

It appears that the patient complained of recurrent symptoms over the course of the year. There was no specific intervening event that was mentioned. Therefore, it would appear that from the record that this is a recurrence of symptoms following a remission after surgery.

38. In another letter dated July 23, 2002 and July 24, 2002, Dr. Ciongoli stated that repetitive work could cause a recurrence after remission and that Mr. Preston's work as a truck driver could have exacerbated his condition. Dr. Ciongoli specifically wrote

Patient's (sic) with Mr. Preston's history can reexacerbate their problems, neck, upper extremity, etc. with repetitive work, truck driving in this case. This kind of activity could cause a recurrence after a remission of symptoms.

39. On January 16, 2004, Dr. Verne Backus examined and evaluated Mr. Preston, noting that Mr. Preston's history was not always consistent with the medical records. Dr. Backus noted a history of steadily worsening symptoms after the August 1997 work injury and that no activity in particular made the condition worse. A slight conflict exists in which Dr. Backus wrote that Mr. Preston used a dump truck with an automatic transmission while working for Wilfred King Paving whereas Mr. Preston testified that he drove a standard transmission truck.

40. Dr. Backus also found that Mr. Preston had more significant calluses on his left hand than on his dominant right hand, an observation supporting the conclusion that Mr. Preston used his left hand more than he did his right because of pain problems. Dr. Backus concluded that Mr. Preston did not exhibit signs of symptoms magnification.

41. Dr. Backus ultimately concluded that Mr. Preston's original injury of August 1997 was the cause of his medical condition, including ulnar neuritis leading to cubital tunnel syndrome, as the record did not support a finding of aggravation of Mr. Preston's condition.

CONCLUSIONS OF LAW

The issue presented here is whether the surgery Durwood Preston February 4, 2003, for transposition of his ulnar nerve on the right side, was medical treatment for a continuation or recurrence of his August 1997 injury or whether subsequent employments aggravated his condition, accelerating the need for the surgery or causing the need for the surgery all together.

Under these circumstances, the employer/insurance carrier, wanting to rid itself of responsibility for the injured worker's benefits, has the burden of proof. See Trask v. Richburg Builders, Opinion No. 51-98WC, dated August 25, 1998 at Conclusion 1; Bresset-Roberge v. Personnel Connection/Ethan Allen, *infra.* at Conclusion 5. Since the Department issued an interim order to Wilfred King Paving/Guard Insurance Company on September 4, 2002, Guard Insurance Company has provided benefits to Durwood Preston, and as a result, it has the burden of proving that another employer/carrier is now responsible for Mr. Preston's workers' compensation benefits.

When the issue under consideration is one on which a layperson would not have a well-grounded opinion as to causation, then expert evidence is necessary. See Lapan v. Berno's, Inc., 134 Vt. 393 (1979); Galbicssek v. Experian Information Solutions, Opinion No. 30-04WC, dated September 1, 2004.

In the oft-told tale of aggravation and recurrence, the Department of Labor and Industry has established a legal framework for factors to be considered when determining whether a condition is an aggravation or a recurrence. These factors include the following:

- Whether the injured worker's symptoms have stabilized;

- Whether the injured worker has continued treating medically;
- Whether the injured worker has reached a medical end result;
- Whether the injured worker has successfully returned to work; and, most importantly,
- Whether the injured worker has experienced a new event or work environment which has materially contributed to the injured worker's disability.

See Trask v. Richburg Builders, *supra*, at Conclusion 3; Smith v. Chittenden Bank, Opinion No. 17-01 WC, dated June 27, 2001, at Conclusions 7 and 8; Bresett-Roberge v. Ethan Allen/Personnel Connection, Opinion No. 03-99WC, dated January 29, 1999, at Conclusion 8, reversed on appeal to the Orleans Superior Court, Docket Number 50-3-99 cu, affirmed by the Vermont Supreme Court Docket No. 2001-254, 2002.

More recently, the Vermont Supreme Court articulated the aggravation/recurrence standard as follows:

As Pacher established, in workers' compensation cases involving successive injuries, the employer/carrier at the time of the first injury remains liable unless the medical evidence establishes that the second injury 'causally contribute[d] to the claimant's disability.' *Id.* at 627, 699 A.2nd at 46. When considering a progressively degenerative disease such as osteoarthritis, where "the disease, if left to itself, and apart from any injury, would, in time, have inevitably caused a complete disability," *Jackson*, 151 Vt. at 596, 563 A.2d at 623 (quoting *Gillespie v. Vt. Hosiery & Mach. Co.*, 109 Vt. 409, 415, 199 A. 564, 566 (1938)), the causation test becomes whether, due to a work injury or the work environment, "the disability came upon the claimant earlier than otherwise would have occurred." *Id.* Mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement. See *Ethan Allen, Inc.*, _____ Vt. at _____, 811 A.2d at 172 (original employer/carrier held liable where the employee's bilateral carpal tunnel syndrome was fully engaged and corrective surgery was already required before the change of employment, and the employee's continued work under a different employer/carrier impacted the symptoms but did not further contribute to the underlying disability)

Stannard v. The Stannard Company, 2003 Vt. 52, paragraph 11 (2003).

When analyzing the aggravation/recurrence factors, the issue of medical causation is still a prominent one. See, e.g., Aker v. AILC, Opinion No. 53A-98WC, September 8, 1998, at Conclusion 8.

Based on the factual and medical evidence in this record, and applying the pertinent legal principles, I find that Maine Drilling and Blasting and its workers' compensation carrier, Liberty Mutual Insurance Company, continued to be responsible for Durwood Preston's right-side ulnar transposition surgery and should reimburse Wilfred King Paving/Acadia for any and all benefits paid pursuant to the Department's September 4, 2002, Interim Order.

Since August 1997, when Mr. Preston operated a hand-held drill twelve hours a day for four days in an effort to drill holes for a 6-foot deep and 150-foot long trench, he has experienced left-sided and right-sided upper extremity problems. Since his left sided problem was more severe, Dr. Benoit who ultimately performed both ulnar transpositional surgeries for Mr. Preston, operated on the left side first in March 1999. Dr. Benoit had at the time recommended that Mr. Preston undergo the right-sided ulnar nerve transposition after he performed the left-sided surgery, but Mr. Preston declined the surgery at that time. Ever since the August 1997 work injury at Maine Drilling and Blasting, Mr. Preston had experienced right-sided symptoms, which Dr. Benoit ultimately addressed in February 2003.

While Mr. Preston did not treat with any medical care providers after Dr. Benoit performed the left-sided ulnar transposition surgery in March 1999, for his right-sided symptoms, he did not take any pain medication and he returned to work, and he eventually stopped using a splint, the fact remains that his right-sided symptoms continued. Dr. Benoit testified that his condition is one that would continue to deteriorate, and was one that Dr. Benoit stated needed surgical treatment.

Dr. Benoit could not specifically state why Mr. Preston's symptoms worsened after the left side surgery in March 1999, whether from a subsequent employment or simply the natural progression of the disease. The fact remains, however, that the symptoms on the right side did worsen progressively over time.

There is no evidence in this record that the right-sided tranpositional surgery Dr. Benoit performed on February 4, 2003, was any different from the surgery he stated Mr. Preston was a candidate for in 1999 or that he recommend be scheduled in 2001. In this respect, the facts of this case are similar to those presented in Smith v. Chittenden Bank, supra.

Admittedly, Dr. John Johansson concluded in his evaluation of October 5, 1998, that Mr. Preston had reached medical end result from his August 1997 work injury. Dr. Johansson's conclusion are inconsistent with Dr. Mogan's finding that Mr. Preston had continuing problems, a finding which prompted Dr. Mogan to suggest a referral to another specialist; Dr. Foerster's conclusion that Mr. Preston was still having ongoing problems, and Dr. Hazard's conclusions that Mr. Preston was still having ongoing problems. These referrals led Mr. Preston to Dr. Benoit's door in January 1999, when, after examination, Dr. Benoit suggested that Mr. Preston consider cubital tunnel transposition surgery on the right side after it had been completed on his more effected left side.

Between his return to work after his August 1997 injury at Maine Blasting and Drilling and his visit with Dr. Benoit in January 1999, Mr. Preston's work with G.W. Tatro did not cause by fact or medical opinion, any aggravation of his condition as it existed after his original work injury. His work at G.W. Tatro in this interim period involved drilling, which Mr. Preston described as not strenuous work. Mr. Preston also testified, and the records reflect this consistent history, that his symptoms had progressively worsened over time. While the factual record and Mr. Preston's reports to his medical care providers, e.g., his report to Dr. Foerster that he had been away working in New Jersey and that his symptoms had worsened, hint at a potential aggravation, the medical evidence and the medical opinions do not support the legal finding that Mr. Preston's work at G.W. Tatro in 1998 aggravated his work injury of August 1997.

As the Vermont Supreme Court and the Department of Labor and Industry have emphasized in aggravation/recurrence cases, it is the worsening of the underlying condition, not merely increased symptoms, that support a finding of aggravation under Vermont's Workers' Compensation Act. See Stannard v. The Stannard Company, supra.

While the change in Mr. Preston's EMG studies between Dr. Roomet's and Dr. Zweber's could arguably support a finding that Mr. Preston's underlying condition gradually worsened, the change does not support a finding of aggravation. Dr. Ciongoli's statements do not pass from the realm of possibility into the realm of probability on the issue of aggravation subsequent to 1997.

Applying the traditional aggravation/recurrence analysis also supports the conclusion that Maine Blasting and Drilling/Liberty Mutual are responsible for Mr. Preston's February 4, 2003, surgery. First, it does not appear that Mr. Preston's condition stabilized. It is true that Dr. Mogan's bilateral carpal tunnel surgeries improved, at least for a time, Mr. Preston's carpal tunnel condition, but he still had ongoing problems for which Dr. Mogan referred him to various medical care providers, including Dr. Benoit, who subsequently became Mr. Preston's treating hand/elbow surgeon. Given the progressive nature of this condition, I do not find that Mr. Preston's condition stabilized. Therefore, this factor favors a conclusion of recurrence.

The next question is whether Mr. Preston continued to treat medically. The record reflects that Mr. Preston treated with many different medical care providers. He initial treatment for his August 10, 1997, injury was with Dr. Mogan, who released him after performing bilateral carpal tunnel surgeries which did not completely address the symptoms. Mr. Preston subsequently treated with Dr. Foerster, Dr. Hazard, Dr. White, and finally, Dr. Benoit who considered Mr. Preston a surgical candidate for right-sided nerve transposition surgery in January 1999. While there were certain gaps in medical treatment after Mr. Preston's left-sided elbow surgery, the formative medical opinions were developed by 1999. Then Dr. Benoit initially attempted to carry out in 2001 but was unable to because of an insurance coverage dispute. While there have been gaps in medical treatment, Mr. Preston's symptoms have persisted, and there is no significant gap in medical treatment between the date of his injury in August 1997 and Dr. Benoit's determination that Mr. Preston was a surgical candidate in January 1999. Therefore, this factor weighs in favor of recurrence.

While Mr. Preston reached a medical end result for his carpal tunnel condition in October 5, 1999, when Dr. Johansson provided him with a permanent partial impairment evaluation, I do not accept Dr. Johansson's opinion that Mr. Preston was at a medical end

result for all of his upper extremity conditions. Dr. Foerster, Dr. Hazard, Dr. White, and Dr. Benoit all concluded that Mr. Preston needed additional medical treatment for his condition related to his work injury of August 1997, and he eventually had that treatment in February 2003.

Given that Mr. Preston returned to work and performed work for various employers on a regular basis, I do find that he successfully returned to work, even though he experienced ongoing symptoms. He subsequently modified the type of work he performed because of a work-related knee injury but that fact does not support finding that Mr. Preston had successfully returned to work, keeping in step with his work pattern of spring/summer/fall employment, with a winter layoff. This factor weighs in favor of aggravation.

Finally, the factual and medical evidence does not support a finding that Mr. Preston experienced another specific event or work environment which aggravated his underlying condition and contributed to his disability.

For these reasons, I find that Maine Blasting and Drilling/Liberty Mutual continued to be responsible for Mr. Preston's work related symptoms and that it should reimburse Wilfred King Paving/Guard for any benefits it has paid.

Although Maine Blasting and Drilling/Liberty Mutual argues that this claim should be apportioned, the facts and the medical evidence presented here simply do not support apportioning responsibility for Mr. Preston's claims.

As for the costs of arbitration, those costs will be equally split between Wilfred King Paving, who has met the burden of relieving itself of responsibility for Mr. Preston's claim and Maine Blasting and Drilling/Liberty Mutual. G. W. Tatro/Acadia apparently and belatedly pulled into this litigation, will not share in the costs of the arbitration.

ORDER

Therefore, Maine Blasting and Drilling/Liberty Mutual shall reimburse, without interest, Wilfred King Paving/Guard for benefits paid pursuant to the Department's

Interim Order and assume ongoing responsibility for Mr. Preston's claim pursuant to the Workers' Compensation Act.

DATED this 3rd day of June 2005 in Burlington, Vermont.

BY: _____
Christopher McVeigh, Esq.
Arbitrator