STATE OF VERMONT
DEPARTMENT OF LABOR

PAMELA BOTHWELL	)	
	)	
v.	)	State File Nos. L-15688 and T-17209
	)	
NORTH COUNTRY HOSPITAL	)	

ARBITRATION DECISION AND ORDER

This matter came on for hearing in arbitration pursuant to 21 VSA §662(e).

Record Closed on March 3, 2006. The record was reopened on April 24, 2006 and reargument submitted and closed again on May 11, 2006 because questions arose with respect to the date of termination of the TIG coverage and the inception of the First Cardinal coverage.

APPEARANCES:

John W. Valente on behalf of First Cardinal, relevant workers compensation insurer after of January 1, 2002.

Eric N. Columber on behalf of TIG Specialty Insurance ("TIG"), relevant workers compensation insurer prior to January 1, 2002.

EXHIBITS:

Exhibits submitted jointly by the parties:

1. Joint medical record.
2. The parties stipulated with respect to the relevant workers compensation insurance coverage dates, the change from TIG to First Cardinal having occurred on January 1, 2002.

ISSUE:

Claimant, an employee of North Country Hospital ("NCH") at all times material, sustained a work-related injury to her right shoulder in 1997 for which TIG provided all workers compensation benefits except medical benefits for which

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NCH was self-insured. TIG contends that after First Cardinal became NCH's insurer on January 1, 2002, Claimant's work aggravated her right shoulder and resulted in surgery in May 2004 and lost time from work. TIG contends that it denied Claimant's claim for those benefits in May 2004, but agreed at an informal conference to pay voluntary weekly indemnity benefits. TIG claims it paid $16,305.59 in weekly indemnity in compliance with its agreement and promise, the "Reimbursement Claim." TIG seeks reimbursement of the Reimbursement Claim from First Cardinal and alleges that because of the aggravation, First Cardinal should be responsible for the compensable consequences of the aggravated right shoulder pursuant to 21 VSA Chapter 9. TIG also requests a ruling that it has no further liability with respect to Claimant's right shoulder. First Cardinal alleges that the Reimbursement Claim was paid by TIG as part of an accepted claim, that TIG made the Reimbursement Claim as a volunteer, that TIG's conduct with respect to the Reimbursement Claim constitutes a waiver of any right of reimbursement.

FINDINGS OF FACT:

1. Claimant is a long time employee of NCH. At all times material she worked as an ultrasonographer. A sonogram is an imaging technique using sound waves. The technique requires Claimant to hold a transducer or probe in her right hand and, working at shoulder level, to use her right arm to move the probe while pushing down on the patient's body compressing tissues so that the probe can get close to the internal organ or body part being examined. Claimant characterized this as both repetitive and strenuous use of her right shoulder because it required that she exert pressure while working the probe for relatively long periods of time. She did the work right-handed and this claim involves her right shoulder. Nelson Haas, M.D., TIG's original consultant who later became a treating physician, wrote on May 7, 2002 that Claimant's work involved "awkward right shoulder positioning and repetitive actions . . ." and that any shoulder impingement syndrome or rotator cuff tendinitis was likely caused by Claimant's work.

2. In 1997, when TIG insured NCH for workers compensation, Claimant began experiencing problems with her neck and in her right arm and hand associated with her ultrasonography work. Surgery on the neck in 1998 relieved the neck and upper back symptoms. A carpal tunnel release in 2003 relieved the right hand symptoms. It is notable that TIG's policy of workers compensation insurance with NCH was for indemnity only and NCH was responsible as the Employer for medical benefits.

3. On January 1, 2002 NCH's workers compensation insurance with TIG ended and its coverage with First Cardinal began. It is not known whether First

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Cardinal, like TIG, was responsible only for weekly indemnity payments. Claimant was referred to orthopedic surgeon Donald Saroff, M.D. On January 14, 2002 Dr. Saroff interpreted x-rays as showing significant spurring and a "high riding humerus," and he interpreted his clinical exam as showing signs and symptoms consistent with impingement. He initially performed a subacromial injection that seemed to bring immediate relief. However, from a description in Dr. Haas' May 7, 2002 Records Review, on February 5, 2002 Dr. Saroff performed an arthroscopic subacromial decompression and partial debridement of less than 50% thickness rotator cuff partial debridement (the "Saroff surgery"). We do not have Dr. Saroff's surgical note. Claimant was out of work for 12 weeks after the Saroff surgery. Dr. Saroff noted on June 3, 2002 that Claimant "has no complaints," was doing well and that her strength and range of motion was the same on both sides. He stated she had light duty capabilities as of April 22, 2002 and she stated her symptoms were receding. When Dr. Saroff left the Newport area, Claimant began care with Nelson Haas, M.D. and from David Arango, MD who also left the Newport area. The individual office records of Dr. Arango are not in the medical records except as quoted by other physicians. William F. Boucher, M.D., Cardinal's medical expert witnesses, states that Claimant's symptoms were never completely resolved by the Saroff surgery. Claimant testified that after the Saroff surgery her shoulder was "never totally right."

4. Claimant returned to work 12 weeks following the Saroff surgery. The physical demands of the job remained the same, but there were increasingly more and more patients for ultrasound evaluation. The job did not change, there was just more of it. There is no evidence that job site modifications were made with respect to the positioning of Claimant's injured arm while she worked, although Dr. Haas' Records Review dated May 7, 2002 refers to a Job site/ergonomics assessment of March 18, 2002.

5. On May 29, 2002 Claimant was seen at NCH's Occupational Health Service by Nelson Haas, M.D. This evaluation was an IME requested by TIG's administrator and was preceded by a records review dated May 7, 2002. Claimant said she had returned to work two weeks earlier without limitation on her activity and that she was having no problem performing her work duties; however, the examination cover sheet listed reaching as a specific aggravating factor. On examination Dr. Haas noted tenderness to palpation over the acromioclavicular joint ("AC joint") and at the head of the humerus.

6. Claimant testified that after the Saroff surgery her shoulder was "never totally right." She also testified that within five or six months, "it started again."

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7. There now appears a gap of almost 10 months in medical attention from Dr. Haas' May 29, 2002 visit until a visit with Dr. Haas on March 23, 2003. While Dr. Haas' evaluation on May 29, 2002 did not mention that Claimant was taking any medications, at the March 26, 2003 visit Dr. Haas states that Claimant is taking Relafen, a non-steroidal anti-inflammatory prescription medication, and it is not clear who prescribed it or for what. The Insurers agreed that there was no evidence of any non-work related explanation for any change in Claimant's condition after the Saroff surgery. This March 26, 2003 record mentions worsening pain in the right shoulder, pain in the lateral right shoulder, discomfort on palpation of the anterior shoulder and upper arm. On examination there was discomfort on abduction and external rotation. Prescriptions were given as well as a note for a revisit in two weeks, but if the revisit occurred, there is no office record corresponding to it.

8. On July 21, 2003 Dr. Haas again saw Claimant and she complained of hand numbness, evidently the focus of the visit, and also of right shoulder pain "most of the time." The right shoulder examination showed tenderness of the superior border and head of the humerus and positive impingement signs and pain with abduction and external rotation. Dr. Haas referred Claimant to physical therapy and injected the subacromial space. On July 28, 2003 Claimant reported improvement with the injection but said she had been working long hours at her job and was getting occasional "little twinges" in the right shoulder. On August 28, 2003 Dr. Haas again injected the subacromial space. Claimant had a carpal tunnel release on September 2, 2003 and was out of work for some time. On September 4, 2003 Dr. Haas again injected the subacromial space. At the November 26, 2003 visit, Dr. Haas concluded there was a failure of conservative treatment because Claimant said the shoulder was back to where it was before she took five weeks off work for the carpal tunnel release. On examination the anterior right shoulder was tender and there was shoulder pain with external rotation and abduction of the right arm. A MRI on November 24, 2003 was interpreted as showing extensive osteophyte formation and degenerative overgrowth of the AC joint that was causing severe impingement on the supraspinatus with associated severe tendonitis of the rotator cuff. A physical therapy discharge summary of December 8, 2003 summarized that Claimant was having significant pain and difficulty with certain ultrasound procedures and was being referred to Dr. Arango. On December 11, 2003 Claimant went out of work because the Employer could not accommodate the job restrictions imposed by Dr. Haas.

9. There are no records from Dr. Arango, but records of others state he performed a series of three injections during December 2003 and January 2004 that resulted in no improvement, and Dr. Arango supposedly said he had no further treatment options to offer. On January 27, 2004 Dr. Haas allowed

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Claimant to return to work with strict limitations. On March 10, 2004 Dr. Haas noted that Claimant's condition was the "same," that NCH would not allow her to return to work, that Claimant requested an evaluation by an orthopedic surgeon and that he would proceed to schedule an orthopedic examination.

10. John C. Macy, M.D., orthopedic surgeon, on referral from Dr. Haas, examined Claimant on April 6, 2004 and scheduled an arthroscopic evaluation, AC joint resection and rotator cuff surgery on the right shoulder on May 24, 2004 (the "Macy surgery"). Reviewing the MRI study, Dr. Macy felt there was severe tendinitis of the rotator cuff with considerable subacromial impingement, AC joint hypertrophy and mass effect. He felt the study showed no full thickness tearing of the rotator cuff and no significant muscle atrophy or tendon retraction. The surgical findings were a "high grade supraspinatus rotator cuff tear and a type I superior labral fraying and significant bone spurs off the acromicioclavicular joint and anteromedial acromion." The tear was a partial tear involving greater than 50% of the foot print of the supraspinatus tendon. On June 1, 2004 Dr. Macy wrote that the condition was a progression of the prior rotator cuff partial tear which was debrided in February 2002. Dr. Macy wrote to the Department of Labor on June 9, 2004 characterizing the medical situation as a chronic, ongoing problem since 1996 that involved a prior rotator cuff debridement. He added, "(B)ut the rotator cuff tear progressed to the point where it was a very high-grade essentially full thickness rotator cuff tear which required repair." In other words, Dr. Macy observed that while Dr. Saroff's original findings in the first surgery of "less than 50%" tearing that necessitated only partial debridement, the lesion had progressed to "greater than 50%" and that necessitated repair. Dr. Macy's surgical note describes the use of anchors, biocorkscrews and fiber wire sutures to complete the repair of the supraspinatus tendon.

11. Each insurer obtained an IME, TIG with Victor Gennaro, D.O. orthopedic surgeon, and Cardinal with William Boucher, M.D., occupational medicine specialist. Both physicians wrote letters and both were deposed. Both reviewed the records. Both met Claimant, took a history and performed a physical examination. Both stated that after the Saroff surgery, the shoulder improved but that the condition "never completely resolved" (Boucher), i.e. the surgery did not achieve "complete relief" (Gennaro). Dr. Boucher's examination occurred on May 29, 2003 and Dr. Gennaro's occurred on October 28, 2004. Neither physician was a treating physician. Both saw Claimant once.

12. Dr. Boucher is First Cardinal's proponent of a recurrence. On May 29, 2003 Dr. Boucher examined Claimant and reviewed medical records which he did not list. He concluded Claimant's work caused the original condition that necessitated the Saroff surgery that he described as acromioplasty and tendon repair. He said the hand and shoulder positions required of sonographers are

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known to cause chronic shoulder tendonitis. Claimant described to Dr. Boucher sharp and intense pain in the shoulder that was worsened by pressure and raising the arm. On examination Dr. Boucher felt that Claimant exhibited signs of supraspinatus tendonitis but not signs of a complete rotator cuff tear. He felt she was not at medical end result, but he did not say whether he was commenting on MER from the original injury, the Saroff surgery or from an aggravation. In his deposition Dr. Boucher summarized the case by saying Claimant's condition gradually worsened from 1997 to the 2002 Saroff surgery, and this surgery brought about somewhat of an improvement. When Claimant returned to sonography, the shoulder again gradually worsen which resulted in the Macy surgery and surgical improvement again. Dr. Boucher added that as of his May 29, 2003 IME, it was not clear which "direction" her condition was going to go. He felt the problems Claimant experienced in 2003 leading to the Macy surgery in 2004 were a continuation of the original condition that had never completely resolved. In a December 28, 2005 letter after his deposition, Dr. Boucher added that had Dr. Saroff initially performed a distal clavicle excision as Dr. Macy did, it is likely that the Macy surgery would have been unnecessary. On cross examination in his deposition, Dr. Boucher conceded that Claimant's work after the Saroff surgery contributed to the worsening of the condition of the shoulder just as it did prior to the Saroff surgery. With respect to the 2004 Macy surgery, Dr. Boucher testified that it involved a repair of a partial tear of the supraspinatus tendon, an acromioplasty to make more room for that tendon and excision of the end of the collarbone. He stated the tear encountered by Dr. Macy was a partial tear and in a "little bit of a different location."

13. Dr. Gennaro is TIG's proponent of an aggravation. Victor Gennaro, D.O. completed his residence in orthopedic surgery in 1989. He does many arthroscopies of the shoulder every year. He examined Claimant on October 28, 2004, so he did not have the benefit of seeing Claimant either before the Saroff or the Macy surgeries. He reviewed the medical records and performed a physical examination. Claimant told Dr. Gennaro that following the Saroff surgery she modified her sonography work activity but that her return to work was accompanied by an increased work load that aggravated her shoulder and made her condition more painful and compelled her to seek additional medical care. Dr. Gennaro concluded that the ongoing work activity more probably than not aggravated the underlying condition and that if Claimant had not resumed the work activity that stressed the rotator cuff structures, ". . . she probably would have been just fine." Generally speaking, after surgery such as the Saroff surgery, patients do very well and very uncommonly have difficulty. The surgery is designed to reduce the impingement and the bursitis and then the follow up therapy improves the cuff strength. Dr. Gennaro testified that at the time of his examination of Claimant, she was not yet at medical end result from the Macy surgery. In deposition Dr. Gennaro stated Claimant could have been placed at

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medical end result four or five months after the Saroff surgery and he attributed the absence of a MER evaluation to a lack of continuity of care as both Drs. Saroff and Arango left the area. Dr. Gennaro stated that since the Macy surgery involved a resection arthroscopy, the permanency evaluation after that second surgery would include an additional 10% upper extremity or 6% whole person more than any permanency evaluation following the Saroff surgery. So, Dr. Gennaro concluded that when Claimant stabilized after the Saroff surgery she had 5% whole person impairment and when she stabilized after the Macy surgery she had a 11% whole person impairment.

14. None of these physicians who has seen Claimant since the Macy surgery has placed Claimant at medical end result *at the time they saw and examined her.* Dr. Gennaro's December 1, 2005 letter containing a MER statement and a permanency evaluation were completed without seeing her.

15. TIG seeks recovery of $16,305.59 in TTD and PPD benefits it voluntarily paid to Claimant. There is no Stipulation with respect to this number. TIG presented five pages of TIG's Payment History.

CONCLUSIONS OF LAW:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 VT. 161 (1962). Claimant must establish by sufficient credible evidence the character and extent of the injury, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 VT. 367 (1984). Because the medical issues involved are beyond the ken of a layperson, expert testimony is required. See *Lapan v. Berno's Inc.*, 137 VT. 393 (1979). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 VT. 17 (1941).

2. Pursuant to 21 VSA §662(c), First Cardinal has the burden of proof because it was the insurer at the time of the most recent alleged personal injury for which the employee claims benefits. *Farris v. Bryant Grinder Corporation, et al.*, 2005 VT 5, PP7, 16 Vt.L.W. 13, 14-15. But, First Cardinal became the workers compensation insurer on January 1, 2002 which is even before the first visit with Dr. Saroff.

3. This is an aggravation/recurrence dispute. The Supreme Court has described the differences between these and the Commissioner has provided further clarification including a Regulatory definition and administrative decisions in similar cases.

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4. The Vermont Supreme Court has explained, "In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a 'recurrence' of the first injury – i.e., if the second accident did not causally contribute to the claimant's disability (cite omitted). If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point." *Pacher v. Fairdale Farms & Eveready Battery Company,* 166 VT. 626 (1997) (mem.) "Mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement." *Stannard v. Stannard Company, Inc., et al.*, 2003 VT 52 ¶11. The Supreme Court has defined a third type of situation, the flare up, which is neither an aggravation nor a recurrence. A flare up is a temporary worsening of a pre-existing disability caused by a new trauma for which the new employer is responsible for paying compensation benefits until the worker's condition returns to the baseline and not thereafter. *Cehic v. Mack Molding, Inc.*, 17 VT.L.W. 38 (2006).

5. The Regulatory definitions provided by the Commissioner follow: "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1110, Vermont Workers' Compensation and Occupational Disease Rules (2001). This has been explained as "a destabilization of a condition which has become stable, although not necessarily fully symptom free." *Cote v. Vermont Transit*, Opinion No. 33-96 WC (June 19, 1996). ""Recurrence" means the return of symptoms following a temporary remission." Rule 2.1312.

6. The Commissioner has decided many cases by applying the regulatory definitions in addition to a five factor test described by the Supreme Court without specific approval in *Farris*. In *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998), the Commissioner explained that recurrence is the return of symptoms following a temporary remission, or a continuation of a problem, which had not previously resolved or become stable. An aggravation means an acceleration or exacerbation of a previous condition caused by some intervening event or events; it is a destabilization of a condition, which had become stable, although not necessarily fully symptom free.

7. In this case TIG remains the carrier responsible for benefits if Claimant simply has suffered a simple recurrence of her original injury, i.e. if Claimant was merely experiencing a return of symptoms following temporary remission and her continued work after January 1, 2002 did not causally contribute to her ultimate disability. *Pacher v. Fairdale Farms*, 166 VT. 626, 629

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(1997). On the other hand, First Cardinal is responsible for the entire disability if Claimant's work after the inception of its insurance contract on January 1, 2002 aggravated, accelerated, or combined with a preexisting impairment to produce a disability greater than what would have resulted from the original injury alone. *Id.*; Rule 2.110. The "entire disability" rule has been modified in cases such as this and allows an arbitrator to apportion liability, costs and expenses among the respective employers and insurers in a dispute. 21 VSA §662(e).

8. The five factors considered by the Commissioner to distinguish an aggravation from a recurrence are: (1) whether claimant had reached a medical end result, (2) whether claimant had a successful return to work, (3) whether claimant had stopped treating for the injury, (4) whether claimant's condition was destabilized by a work-related incident, and (5) whether the alleged aggravating incident contributed to the final disability. See *Trask v. Richburg Builders*, Op. No. 51-98WC (1998). Important to the distinction between an aggravation and a recurrence is that a mere increase in symptoms, standing alone, does not constitute an aggravation for workers' compensation purposes. *Badger v. Cabot Hosiery Mills*, Opinion No. 21B-97WC (July 9, 1998); *Pelkey v. Rock of Ages*, Opinion No. 74-96WC (January 3, 1997). There must be evidence of a change in the underlying condition. *Id. Stannard v. Stannard Company, Inc. et al.*, 2003 VT 52; Opinion No. 33-01WC.

9. In the workers' compensation context, the terms "aggravation" and "recurrence" are legal rather than purely medical terms. So, the testimony of the doctors or testimony by claimant are not the deciding factors. The finder of fact must consider the medical evidence, but ultimately the determination is a legal one. *Taro v. Town of Stamford*, Opinion No. 25-00 WC (Aug. 9, 2000)(quoting *Monaney v. Geka Brush Manufacturing*, Opinion No. 44-99 WC (Nov. 17, 1999).

10. It is necessary to define the nature of the Claimant's injury. This problem is the right shoulder. From years of working with the arm extended and applying downward pressure, the shoulder structures, the rotator cuff and acromion developed an impingement syndrome that caused tearing of the supraspinatus tendon and associated arthritis of the acromioclavicular joint. This is a degenerative condition. This condition clearly began and was symptomatic prior to January 1, 2002 and the Saroff surgery and was the accepted responsibility of TIG.

11. Applying the *Trask* factors to this case, I find the following.

(i) Whether Claimant had reached a medical end result after the Saroff surgery? No, but this is very close. After a brief period of recovery, Claimant returned to NCH doing the same work in the same manner which

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caused the rotator cuff impingement syndrome in the first place. Claimant testified that after returning to work, the symptoms returned within months and deteriorated despite periods of modified duty, physical therapy, oral medications, injections and a period of rest after the carpal tunnel surgery. After the Saroff surgery, Claimant's condition did not stabilize for a sufficient time and in a sufficient fashion that a doctor in a position to do so made the statement that Claimant was at a substantial plateau in the recovery process such that significant further improvement was not likely regardless of treatment. Dr. Gennaro's statement on this point is too speculative.

(ii) Whether Claimant had a successful return to work? Yes, but this also is close. The Commissioner defines a successful return to work as occurring when the injured worker ". . . demonstrates the physical capacity and actual ability to perform the duties of the job without disabling pain and/or imminent risk of re-injury." Rule 18.1400. A finding of successful return to work does not necessitate a complete return to full symptom-free duties, but successful return to work, like a finding of medical end result, does contemplate a period of stability. Here, Claimant returned to work and was faced with an increased work load. She testified that she began to experience the same symptoms and her condition deteriorated. It is only with the benefit of hindsight that it is clear the situation was going downhill, but here Claimant appears to have worked without imminent risk of re-injury and/or disabling pain. Her ability to do the job and to tolerate the increasing discomfort that went with it were a marginally successful return to work.

(iii) Whether Claimant had stopped treating for the injury? Yes. The evidence is clear that Claimant Bothwell did not treat between May 29, 2002 and March 26, 2003; however, she testified that her discomfort during the period was tolerable and didn't have the time to seek treatment.

(iv) Whether Claimant's condition was destabilized by a work-related activity? The primary focus of this dispute is whether Claimant's downhill course from May 2002 to March 2004 was caused by her work or merely a gradual return of symptoms related to a natural progression of the arthritis in the shoulder. First Cardinal alleges that Claimant was never stable, and logically therefore she could not have been destabilized. First Cardinal's expert, Dr. Boucher felt that the problems Claimant experienced in 2003 leading to the Macy surgery in 2004 were a continuation of the original condition that had never completely resolved. Dr. Boucher felt that the Saroff surgery was incomplete and should have included an excision of the distal clavicle. Had that occurred, Dr. Boucher argues, the circumstances necessitating the Macy surgery would have never arisen. Apparently Dr. Saroff, the surgeon, did not feel that the clavicle excision was necessary, at least in 2002. Dr. Boucher believes that Dr. Saroff's

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surgery was essentially incomplete so the impingement was not corrected and what followed was merely continued impingement. TIG's expert Dr. Gennaro feels that the Saroff surgery was appropriate but that work-site modifications should have been made so that Claimant could have done her job without impinging the shoulder each time. Dr. Gennaro felt the impingement was improved, the inflammation was addressed and the symptoms quieted down as a result of the Saroff surgery. After the surgery a program was started to strengthen the rotator cuff. I find TIG's evidence on the issue of destabilization more persuasive. The two surgeon's descriptions of what they found indicates that Dr. Macy encountered a greater problem ("very high-grade, essentially full thickness rotator cuff tear") than did Dr. Saroff ("less than 50% rotator cuff tear"). Dr. Boucher conceded that Claimant's work after she returned to work following the Saroff surgery contributed to and worsened the condition of the shoulder. He agreed that her continued work could "speed up" the worsening of the shoulder. Dr. Gennaro described that patients generally do well following this type of surgery because the impingement is improved, the inflammation addressed and the rotator cuff strengthened; however, here Claimant returned to the same repetitive work with her injured right shoulder that caused the problem in the first place, except that now she ended up with a nearly full thickness rotator cuff tear. Finally, Dr. Macy's description of what he found did convince me that the condition of Claimant's shoulder had worsened after the Saroff surgery due to her work. Dr. Macy described the supraspinatus tear as greater than described by Dr. Saroff. Dr. Macy characterized this change in the tear as a progression of the condition. Dr. Macy's description of the complex repair he performed in 2004 was clearly more involved than Dr. Saroff evidently felt was necessary back in 2002.

(v) Whether the alleged aggravating incident contributed to the final disability. The problem with this issue is that no disability evaluation was done after the Saroff surgery. In addition, the actual patient treatment records provided end in November 2004 after Claimant had experienced two flare ups related to a fall-down accident and to closing a window, so the lack of evidence makes the comparison difficult. Claimant herself testified that the shoulder is "a lot better now than it was in 2002" but, of course, that is after Dr. Macy's successful surgical treatment. In aid of this point, however, Dr. Gennaro testified that Claimant probably had a permanent impairment after the Macy surgery of 11% whole person. Dr. Gennaro testified that Claimant probably had a 5% whole person impairment when her condition stabilized after the Saroff surgery. So, I conclude that Claimant had a permanent impairment relating to the injury that TIG accepted and an additional permanent impairment related to the aggravation by Claimant's work after the Saroff surgery. There is no evidence that Claimant has accepted Dr. Gennaro's permanency rating, so TIG is responsible for 5/11 or 45% of the permanency and First Cardinal is responsible for 6/11 or 55%.

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12. In a nutshell, while there are indicators of instability in Claimant's recovery from the Saroff surgery in that Claimant was not declared to be at medical end result and had only a marginally successful return to work, nevertheless, that fact that she stopped treating for several months, Dr. Macy's observations of a more extensive injury, the more extensive surgery performed by Dr. Macy and the findings of increased permanent impairment and disability are strong indicators that Claimant's work after the Saroff surgery aggravated the underlying condition of her shoulder. Claimant's work between the Saroff and Macy surgeries aggravated the condition of her shoulder and necessitated the Macy surgery. This aggravation of the shoulder fixed itself, it became established, as an aggravation requiring treatment on March 10, 2004. At that point the employer would not allow Claimant to work, her worsened condition was stable and Dr. Haas took steps to schedule a surgical consultation. This is not a flare-up situation because Claimant did not return to her baseline following the Macy surgery.

13. First Cardinal raises an issue of waiver. Insurers are expected to handle and adjust claims using reasonable diligence. *Valley v. Orleans Central Supervisory Union*, Decision 55-98WC. In its May 15, 2006 Revised Memorandum, First Cardinal alleges that TIG did not use reasonable diligence and TIG failed to deny the claim when it knew or should have known of grounds for denying the aggravation claim. First Cardinal contends TIG's conduct constitutes a waiver of any right to reimbursement. The only evidence presented on this subject is a letter dated November 17, 2004 from Melissa Trimmer of TIG that states that at an informal conference in May 2004 TIG agreed to pay Claimant weekly indemnity without prejudice. First Cardinal seems to suggest it had no knowledge of the claim until May 2004, but this seems to fly in the face of that fact that it had an IME by Dr. Boucher on May 29, 2003. First Cardinal contends that TIG waited three years to deny the claim, but since I find the alleged aggravation was not established until March 10, 2004 and TIG denied the claim in May 2004, this appears overstated. At the time TIG denied the claim in May 2004, it did not have evidence to support a denial because Drs. Haas, Boucher and Macy all characterized Claimant's shoulder problem as chronic. It appears that TIG agreed to pay the weekly indemnity without prejudice in exchange for the opportunity to have an expert review the case following Claimant's recovery from the Macy surgery. With the benefit of hindsight we can see that TIG's strategy of paying without prejudice to buy investigative time was a good bargain. But it was not a waiver. When the deal was made, neither TIG nor First Cardinal knew what the findings and outcome of the Macy surgery would be, and First Cardinal cannot be blamed for electing not to engage in the fight in May 2004. First Cardinal has not met its burden of proof with respect to the claim of waiver. As a matter of fact and law, TIG did not voluntarily relinquish its rights by agreeing to pay the weekly indemnity benefits without prejudice.

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ORDER

1. First Cardinal shall reimburse TIG for the sums paid as weekly indemnity on the claim for Pamela Bothwell's right shoulder beginning March10, 2004. TIG claims this amount is $16,305.59, but the documentary evidence presented by TIG is not self-explanatory and there is no stipulation to this amount.

2. Because I conclude that Claimant's work as of March 10, 2004 aggravated the pre-existing condition, First Cardinal has become solely responsible for all workers compensation benefits that it is obligated to pay by contract with NCH and to which Claimant becomes entitled on and after March 10, 2004 and continuing until relieved as a matter of law.

3. Because I conclude that the injury during TIG's policy period caused a permanent impairment, TIG shall pay Claimant 45% of the permanent impairment awarded to her and First Cardinal shall pay 55% of that permanent impairment.

4. Each party shall bear its own costs and expenses associated with this litigation.

5. Each party shall pay one-half of the cost of arbitration.

Dated at Burlington, Vermont, this 2 day of June 2006.

Glen L. Yates Jr., Esq., Arbitrator

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