STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Dale Farr	)	State File No. P-14013
	)	
v.	)	Arbitration No. 1-02WC
	)	
Peerless Clothing, USA	)	Keith J. Kasper, Esq. Arbitrator

ARBITRATION DECISION

APPEARANCES:

Chris McVeigh for CNA
Jeffrey Spencer for TIG

1. Pursuant to WC Rule 8 and 21 V.S.A. §(c), (e), this matter was presented for resolution on the following issue: Which carrier, TIG Insurance Company (hereinafter "TIG") or CNA Insurance Company (hereinafter "CNA"), is responsible for the workers' compensation benefits concerning claimant's Carpal Tunnel Syndrome?

2. The parties agreed to submit this matter on the briefs, the deposition transcripts of Claimant and Dr. Foerster, and the Joint Medical Exhibit. The parties filed their primary briefs on April 29, 2002, with a reply brief filed on May 3, 2002.

FINDINGS OF FACT:

1. Claimant suffered a personal injury by accident arising out of and in the course of her employment with Peerless Clothing. Claimant's work for Defendant was repetitive, which resulted in Claimant suffering a bilateral carpal tunnel injury. TIG was on the risk in this matter prior to October 9, 1999. CNA was on the risk in this matter from October 9, 1999 to October 9, 2000.

2. Claimant testified, and the medical records support, that she had noticed this problem for approximately one year prior to receiving medical care for this condition.

3. On October 3, 1999, Claimant lost time from work as a result of this work-related condition. On that date, Claimant contacted Dr. Foerster's office to seek medical attention for her condition, but due to the doctor's schedule she was unable to be seen by Dr. Foerster until November 4, 1999. Prior to that initial visit with Dr. Foerster, Claimant had not treated with any other health care provider for her condition, but she had self-medicated for her condition. Claimant testified that she had no change in her symptoms from October 3 until her initial visit with Dr. Foerster on November 4, 1999. Dr. Foerster opined that his treatment and diagnosis of Claimant would not have changed if he had seen her on October 3, 1999, instead of November 4, 1999.

4. At this initial office visit, Dr. Foerster first diagnosed Claimant with bilateral carpal tunnel syndrome. Dr. Foerster sent Claimant to Dr. Roomet for nerve conduction studies, which confirmed the bilateral carpal tunnel diagnosis. Claimant underwent bilateral endoscopic carpal tunnel release in her left and right wrists on March 1, 2000, and March 29, 2000, respectively.

5. Claimant did not lose any time from work for this carpal tunnel problem between October 3, 1999, and her first surgery on March 1, 2000.

6. Claimant returned to work on May 1, 2000, with the job modification of no overhead lifting. Unfortunately, Claimant continued to experience problems with both of her upper-extremities, despite the March 2000 surgeries. Subsequent nerve conduction studies showed no significant change in her underlying condition. Claimant underwent a second set of carpal tunnel surgeries on both upper extremities on January 17, 2001 (right), and June 27, 2001 (left). Claimant returned to work on March 19, 2001, again with the restriction of no overhead work. Claimant continues to work for Defendant.

7. In response to an inquiry from CNA's counsel, Dr. Foerster stated that Claimant had not reached a medical end result for her condition as of December 6, 2000.

8. Pursuant to an interim order of the Department, CNA paid Claimant's workers' compensation benefits. CNA now seeks recoupment of those benefits paid to Claimant from TIG.

CONCLUSIONS OF LAW:

1. CNA argues that no burden of proof should be assessed against it in this matter as the Department allegedly erred in issuing the interim order against CNA. The carrier further argues that Claimant's injury occurred prior to CNA coming on the risk in this case on October 9, 1999, and that Claimant's work subsequent to that date did not result in an aggravation of Claimant's work-related condition.

2. TIG argues that Claimant's "date of injury" did not arise until Dr. Foerster diagnosed Claimant's condition on November 4, 1999, after TIG was off the risk in this matter. TIG also argues that if the date of injury is accepted as being October 3, 1999, or earlier, then the claim would be time barred. 21 V.S.A. §656.

3. It is incongruent to have a litigated claim without a burden of proof. One party must bear that burden of convincing the trier of fact as to the correctness of its factual and legal arguments. If no burden of proof existed, then there would exist no incentive on either party to uncover the truth of the matter. Furthermore, there would exist the potential that the evidence would be evenly weighted and the finder of fact would be unable to determine which party had prevailed. Finally, there exists no support for CNA's suggestion in either the Vermont Workers' Compensation Act or the case law applying the Act (or in the law in general) that no burden of proof should be assigned in cases such as this. As CNA is seeking reimbursement from TIG for benefits paid to Claimant, it bears the burden of proof in this matter. See *Thorn v. Albany Ladder,* Opinion No. 17-02WC (Apr. 2, 2002); *Smith v. Chittenden Bank,* Opinion No. 17-01WC (June 27, 2001).

4. TIG's reliance on the "date of injury" argument is misplaced. The language relied upon by TIG focuses on establishing the "date of injury" for the commencement of the 6-month notice period. See 21 V.S.A. §656; Adjuster's Manual. It is simply not controlling for the purposes of the issue in this case, which requires an analysis of medical causation in order to apportion responsibility between the parties for Claimant's compensable work-related injury.

5. It is undisputed that Claimant suffered a compensable work-related injury while employed by Peerless Clothing. The issue is which carrier is responsible for those benefits. Claimant clearly had carpal tunnel syndrome prior to her being evaluated by Dr. Foerster. Her first reimbursable monetary "loss" relating to that condition was her out-of-work day on October 3, 1999. Claimant testified that her condition had not changed between October 3, 1999, and November 4, 1999. Dr. Foerster opined that his diagnosis and treatment of Claimant would not have altered between October 3, 1999, and the date of his evaluation of her on November 4, 1999. Therefore, it is clear that Claimant suffered a personal injury arising out of and in the course of her employment prior to October 9, 1999, when CNA came on the risk in this matter.[1] Therefore, TIG is responsible for this initial problem.

6. TIG's argument that Claimant did not suffer a personal injury until Dr. Foerster diagnosed the problem would require denigrating the issue of medical causation to the happenstance of doctors' schedules and the affixing of a proper label for the condition. The label placed upon the injury is not necessarily a controlling issue for workers' compensation purposes. See *Latouche v. North Country Union High School,* Opinion No. 58-98WC (Oct. 9, 1998). It is clear from the record that Claimant had carpal tunnel syndrome when she first lost time from work due to her work-related condition on October 3, 1999. There is no suggestion in the record that Claimant's diagnosis or underlying condition changed between October 9, 1999, and when she happened to get a convenient appointment with Dr. Foerster on November 4, 1999. See *Pelkey v. Rock of Ages,* Opinion No. 74-96WC (Jan. 3, 1997). Furthermore, Dr. Foerster opined that any problems Claimant had when she first came to see him on November 4, 1999, would have existed prior to this office visit. Therefore, Claimant suffered a work-related injury while TIG was on the risk in this matter.

7. While TIG's suggestion of a "bright line" test for determining aggravation v recurrence claims at the date of diagnosis is appealing for its administrative utility, it is rejected in this matter in favor of the medical and factual evidence of the time of causation of the work-related condition. Administrative efficiency cannot overcome legal and medical causation in these matters, unless it is "difficult or impossible" to assess such time frame of causation, in which case, the last injurious exposure rule would be applicable. See *Pacher v. Fairdale Farms,* 166 Vt. 626 (1997); *Smith,* Opinion No. 17-01WC. In the instant case, the factual and medical causation issues are relatively clear: Claimant suffered from Carpal Tunnel Syndrome arising out of her employment prior to CNA coming on the risk on October 9, 1999.

[1] Other than establishing that Claimant suffered a personal work-related injury prior to CNA coming on the risk in this matter, the exact date of that injury is not relevant for the purposes of this arbitration proceeding.

8. TIG's alternative argument that if the date of injury is taken to be prior to November 4, 1999, then Claimant's claim is barred by 21 V.S.A. §656, cannot be resolved in this forum. The only issue available in the arbitration process is determining which carrier is responsible to pay for the Claimant's benefits. See 21 V.S.A. §662, WC Rule 8.110 ("Arbitration shall address insurance or employer disputes but shall not resolve other disputes that may arise in a claim.").

9. After establishing TIG's initial responsibility for this carpal tunnel syndrome claim, the issue more clearly becomes an aggravation versus recurrence dispute.[2] Applying the oft-cited *Trask* standard, Claimant's subsequent treatment and time lost from work as a result of this compensable injury are the result of a recurrence. See *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).

10. The record indicates that Claimant's condition was relatively stable after October 9, 1999. Claimant had clearly not reached a medical end result until after that time period. Claimant continued to treat medically for her work-related condition during that time frame. Although Claimant successfully returned to work during that period of time, her work was altered in an attempt to address her work-related condition. Most importantly, no medical evidence exists which suggests that Claimant's work after October 9, 1999, adversely affected her underlying condition. The medical and factual evidence is clear that Claimant's condition subsequent to October 9, 1999, was the result of a recurrence and not an aggravation of her pre-existing condition. See *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997); *Trask*, Opinion No. 51-98WC.[3]

[2]CNA retains the burden of proof throughout this matter as it seeks reimbursement of funds it has paid to Claimant, despite the previous determination that TIG had initial responsibility for this claim. Cf. *Smitb v. Chittenden Bank*, Opinion No. 17-01WC (June 27, 2001).

[3]Similarly, there lacks any medical or legal basis to apply the last injurious exposure rule to the facts of this case. See *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997); *Trask*, Opinion No. 51-98WC.

11. Therefore, TIG must reimburse CNA for all workers' compensation benefits actually paid to Claimant or her health care providers in treating this work-related injury. The arbitration fee in this matter of $500 shall be shared equally between the parties with each party paying the arbitrator $250.[4]

Dated at Burlington, Vermont this 30th day of May 2002.

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Keith J. Kasper, Esq.
Arbitrator

[4] CNA requested an award of interest in this matter. However, the Act and the applicable rules do not specifically provide for an award of interest in these arbitration matters. See 21 V.S.A.§ 662(e)("costs and attorney fees"), WC Rule 8.3119 ("costs and attorney fees"). Moreover, as no delineation of costs and/or attorney fees was presented with the parties' briefs or thereafter, none shall be awarded herein. To the extent the arbitration process allows for discretion in the awarding of costs and attorney fees, it would be inappropriate to make such award in this case in light of the respective positions and arguments of the parties undertaken in this matter.