STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-5728 & G-20067
Stephanie Smith	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Chittenden Bank	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 17-01WC

Hearing held in Montpelier on September 22, 2000
Record Closed on January 2, 2001

APPEARANCES:

Keith J. Kasper, Esq. for Chubb Insurance Group
Christopher McVeigh, Esq. for CNA Insurance

ISSUES:

1. Which carrier is responsible for the workers' compensation benefits concerning claimant's carpal tunnel syndrome?

2. Is CNA entitled to a credit for any unpaid permanent partial impairment the claimant may have had as a result of her carpal tunnel condition diagnosed in December of 1993, if apportionment is medically feasible?

STIPULATIONS:

1. Claimant was an employee of Defendant, or its successor bank the Vermont National Bank within the meaning of the Vermont Workers' Compensation Act (Act) from January 1, 1990 until March 23, 2000.

2. Defendant was the employer of Claimant within the meaning of the Act from January 1, 1990 until March 23, 2000.

3. Claimant sought medical treatment for a bilateral carpal tunnel syndrome or repetitive trauma syndrome on December 8, 1993 from Dr. James Mogan, M.D.

4. On December 8, 1993, Chubb Insurance Group was the workers' compensation insurance carrier for Defendant.

5. Chubb Insurance Group paid Claimant's medical bills through July of 1996.

6. Chubb Insurance Group was on the risk for Vermont National Bank from June 29, 1993, through June 29, 1996.

7. Claimant did not lose any time from work due to her carpal tunnel syndrome while Chubb Insurance Group was on the risk.

8. Chubb Insurance did not seek to assess whether Ms. Smith had reached a medical end result or had a permanent partial impairment at any time it was on the risk for Ms. Smith's workers' compensation claim.

9. On May 28, 1999, CNA Insurance became the workers' compensation insurance carrier when the Chittenden Bank merged with Vermont National Bank.

10. On September 13, 1999, Claimant returned to Dr. Mogan for carpal tunnel release.

11. Both Chubb and CNA denied responsibility for the proposed surgery, each alleging that the other carrier was responsible for the proposed surgery.

12. Claimant had her bilateral carpal tunnel syndrome surgeries in 2000.

13. Pursuant to an interim order issued in this matter on March 3, 2000, CNA has paid all of Claimant's workers' compensation benefits since September 13, 1999.

14. The parties agree to the submission of a Joint medical records exhibit as Joint Exhibit No. 1, and the admission of the deposition transcripts of Dr. Mogan and Stephanie Smith.

15. There is no dispute as to the qualification of any of Claimant's examining or treating health care professionals.

16. The parties agree that as Claimant has been paid all workers' compensation benefits due to her to date, the matter may be determined on the papers filed with the department without the necessity of live testimony.

EXHIBIT LIST:

Joint Exhibit I:	Medical Records
Joint Exhibit II:	Deposition of James Mogan, M.D.
Joint Exhibit III:	Deposition of Stephanie Smith

FINDINGS OF FACT:

1. The stipulations are adopted as true and the exhibits are admitted into evidence.

In addition to the stipulated facts, the Department finds:

2. Defendant Chubb was on the risk for Vermont National Bank until May 28, 1999 when VNB merged with Chittenden Bank and CNA became the workers' compensation carrier.

3. Claimant has a long history of hand numbness dating back to occurrences of writer's cramp in high school. Since the claimant was 18, she has experienced prickling or coldness in her hands, especially her right hand while performing manual tasks as a cashier or bookkeeper.

4. Prior to working for the Vermont National Bank, claimant worked from 1984-1991 for Grand Union and from 1984-1990 for Ron's Corner Store. At Grand Union, claimant's duties as cashier and bookkeeper required her to push groceries along a belt, right hand keying for every item, counting money, using an adding machine, and writing.

5. Claimant performed similar cashier duties at Ron's Corner Store during the same period.

6. Together, claimant worked 55 hours a week between the two part-time jobs.

7. After working seven years at Grand Union and Ron's Corner Store, claimant began employment at Vermont National Bank as a teller and customer service representative.

8. Her duties at VNB involved counting money, computer use, telephone use, adding machine use, typing, customer contact, and lifting bags of coin.

9. For a period of one year, beginning sometime in 1992 and ending in 1993, claimant worked as an administrative assistant for VNB vice-president, Norm Peduzzi.

10. Unlike her previous and later positions, the administrative assistant position involved a great deal of typing for Mr. Peduzzi and at least four other bank officers.

11. During 1992-93, claimant's fingers began "sticking" in stiff, painful positions. While at work, claimant's hands fell asleep more frequently. For the first time claimant experienced pain and ache in her hands and joints.

12. Treating physician, Dr. James Mogan, M.D., concluded in his December 8, 1993 report that claimant suffered from moderate to severe carpal tunnel syndrome in left and right hands. At a follow up consultation Dr. Mogan recommended surgery to relieve the carpal tunnel as the only reasonable medical solution.

13. In late December of 1993, claimant underwent an EMG exam to determine the extent of her carpal tunnel. Dr. Mogan found that claimant had moderate to severe carpal tunnel according to the tests.

14. Medical practice rates a 6 or higher on an EMG result as severe. Although severe carpal tunnel syndrome can yield much higher EMG results, the recommendation for surgery is the same. A higher result on the EMG, such as 18, only serves to prognosticate the results of surgery. Thus the higher the EMG result the lower the expectations for full hand recovery are.

15. Claimant declined surgery at the time for four reasons. First, she harbored a fear about the surgical process. Second, she had no one to help her during the post-operative recovery. Third, she could not afford her wages cut back to two-thirds for any period of time. And finally, with the cortisone treatment, the claimant did not feel enough pain to overcome her misgivings. Claimant made the decision not to seek surgery in January of 1994 against the strong recommendation of her treating physician.

16. On January 12, 1994, claimant received a cortisone injection in her right hand and another in her left on March 28, 1994.

17. Despite the claimant's refusal and claims that the cortisone injections had relieved her of symptoms, Dr. Mogan believed that claimant was not cured and only needed time to become comfortable with the idea of hand surgery.

18. The persuasive medical evidence supports a finding that any activity over the next five years could have worsened claimant's symptoms.

19. Claimant's symptoms slowly resurfaced and steadily worsened. About six months after the injections, she began using the hand splints a couple of nights a week. Within a year, she was wearing them almost every night. Originally prescribed by Dr. Mogan in December of 1993, the splints eventually wore out. In July of 1996, claimant called Dr. Mogan's office and received a prescription for a new pair.

20. After leaving her temporary administrative assistant position in 1993, claimant resumed her prior duties as a teller and customer service representative.

21. Dr. Mogan did not see the claimant as a patient again from March of 1994 until September of 1999. At that time claimant was prepared to undergo surgery. Claimant states that although she was still afraid of the procedure, she now had someone to take care of her, assumed she would receive full pay for time missed, and felt her symptoms were no longer tolerable.

22. According to Dr. Mogan's testimony, the carpal tunnel surgery performed on claimant was the same surgery he would have performed if claimant had agreed in 1993. As of July 31, 2000, Dr. Mogan's professional opinion was that the results could not have been better.

23. Carpal Tunnel Syndrome is a cumulative disease that has origins in a person's physical disposition, repetitive motions, lack of rest periods, unnatural hand positions, and a potential number of unknown sources. Furthermore, as a chronic disease, severe CTS can worsen overtime but rarely corrects itself automatically or with non-surgical treatment.

24. The claimant had a moderate to severe case of bilateral CTS as of 1993. Claimant's symptoms increased beginning six months after the cortisone injections in 1994 until her surgery in 2000, regardless of task or self-applied splint treatment. Furthermore, the surgery done in 2000 was only the logical fruition of the prior CTS diagnosis in 1993. Thus, as of May 27, 1999, no medical end result had been reached. The nature of CTS supports such a finding. In cases of severe CTS, surgery is the only known cure. With the lack of any intervening medical procedure, or documented re-injury, it can only follow that Chubb left the medical end result unresolved when they gave up the risk and let it pass on to CNA.

CONCLUSIONS OF LAW:

1. Defendant CNA submitted a reply to the findings of facts and law two months after the submission of briefs. Even with a liberal attitude to the submission of supplemental briefs, the late hour in which the brief was submitted along with defendant Chubb's argument are persuasive in excluding it. Without the proper motion for late admission, CNA's brief cannot and has not been considered in this decision.

2. Pursuant to 21 V.S.A. §662(c), defendant CNA was ordered by the department to pay all of claimant's workers' compensation benefits for carpal tunnel syndrome surgeries. CNA has cooperated.

3. 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 trying to relieve their burden of paying compensation. *See Jeannett Bressett-Robarge v. Personnel Connection and Ethan Allen*, Opinion No. 03-99WC (Jan. 26, 1999) (Citing *Trask* Opinion No. 51-98WC; *Frederick v. Metromail Corp*, Opinion No. 25-97WC (Sept. 23, 1997); *Bushor v. Mower's News Service*, Opinion No. 75-95WC (Oct. 16, 1995*); Smiel v. Okemo Realty Development Corp.*, Opinion No. 10-93WC (Aug. 24, 1993)). Thus, CNA bears the initial burden of proof concerning the issue at stake.

4. The department has long recognized Carpal Tunnel Syndrome as a gradual onset injury suffered by workers who perform repetitive motions with their arms. *Lewis v. Ethan Allen and Green Mountain Wood Products*, Opinion No. 41-00WC (Dec. 20, 2001) (Citing *Jeannett Bressett-Robarge*, Opinion No. 03-99WC (Jan. 26, 1999)). In turn, the state has long acknowledged the compensibility of gradual on-set injuries. *Campbell v. Savelburg* 139 Vt. 131 (1980). Thus, the central dispute in the present case is which employer should be liable for the claimant's injuries and any permanence associated. In the past, the department has applied only two analytical tests in determining carrier liability: 1) The aggravation-recurrence analysis, and 2) the Last Injurious Exposure Rule (or the LIE Rule). See *Lewis* at paragraph 5 and *Bressett-Robarge* at paragraph 7.

5. While the LIE Rule has the distinct tactical advantage of easy application, the department has consistently applied it only after a clear failure of aggravation-recurrence to solve a dispute. *See Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626, 628 n.2 (1997) (only appropriate where separate injuries all causally contribute to the total disability and it is difficult or impossible to allocate liability amongst employers).

6. The department defines aggravation as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Workers' Compensation and Occupational Disease Rules, Rule 2.1110. Recurrence means the return of symptoms following a temporary remission. Workers' Compensation Rules and Occupational Disease, Rule 14(p)(2)(D)(2). See *Rodger Parker v. Albert Decel*, Opinion No. 58-94 (March 1, 1995), and *Paul Cote v. Vermont Transit and St. Johnsbury Academy* Opinion No. 33-96 (June 19, 1996).

7. Under an aggravation-recurrence analysis the goal is to determine that nature of the injury or disease as either a recurrence of an older injury or the aggravation of an existing but stable condition. *Pelky v. Rock of Ages Corp.*, Opinion No. 74-96WC (Jan. 3, 1997). To assist the determination of carrier responsibility, the department asks several questions. *Bressett-Roberge*, Opinion No. 03-99WC (Jan. 26, 1999), and *Pelky*, Opinion No. 74-96WC (Jan. 3, 1997). While each question may shed light on the quality of the injury no one question, or combination thereof, is an established litmus test. *See Lewis,* Opinion No. 41-00WC (Dec. 20, 2000) (four negative answers fail to answer the final question of contribution to injury). Moreover the answers to each question are only helpful in that they serve to establish either aggravation or recurrence.

8. The questions are: 1) Did a subsequent incident or work conditions destabilize a previously stable condition? 2) Did the claimant reach a medical end result before moving to work under another carrier? 3) Did she stop treating medically before the carriers changed? 4) Did the claimant successfully return to work? 5) Did her subsequent work, in this case work done while CNA was on the risk, contribute to the final disability? *Lewis*, Opinion No. 41-00WC (Dec. 20, 2000).

9. Whether a subsequent incident or work condition caused a destabilization cannot be answered because claimant was never at a stable condition. However, the lack of stability in claimant's condition is important. The fact that claimant's condition never stabilized and never found a medical end result proves that the claimant's injury is a continuation of her older condition. Further, there is no objective point after 1994 to prove Chubb's claim that post May 1999 work exposure created micro-traumas, aggravating claimant's diagnosed condition.

10. From the testimony of Dr. Mogan and the claimant, the second and third questions must be answered no. Claimant never stopped treating with Dr. Mogan but rather suspended treatment until she overcame her misgivings to have surgery. Both Dr. Mogan and the claimant understood that this self-imposed remission was not a cessation of the problem but a voluntary refusal to finish treatment. The fourth question like the stabilization question is unanswerable because the claimant never missed work.

11. Finally, the fifth, and in many way the most important question, whether or not subsequent work contributed to final disability must be answered negative. From the objective medical record, the claimant had severe carpal tunnel in both hands as early as December of 1993. By personal choice alone, claimant chose not to follow her doctor's recommendations. Claimant did choose to have surgery in 1999. Dr. Mogan performed the exact same surgery as he would have in 1994, and the results were the same as could have been expected in 1994. Given the medical testimony, it follows that if claimant's condition had worsened, her

surgery would have yielded different results. The objective results of claimant's surgery show only that her condition had not medically changed. In contrast, claimant's symptoms had progressively worsened since 1994 and were an integral reason for her return to Dr. Mogan in 1999. However, symptoms and medical conditions are not the same. Without further evidence, there is no objective proof that claimant's condition worsened. In fact, the evidence of the type of surgery and results prove the opposite.

12. Defendant CNA carries its burden persuasively. As a continuation of a previous, unstable condition, claimant's injury is classified under recurrence/aggravation analysis as a recurrence. Such a classification does not necessarily require any type of remission or discontinuation. Rather it is the continuity from the 1993 diagnosis to the results of the 2000 surgeries that make defendant CNA's argument convincing. Therefore, the department concludes based on the very unique situation and limited, objective evidence that the claimant's condition was a recurrence of the prior 1993 injury.

ORDER:

In accordance with the above findings and conclusions, Chubb Insurance Company is ORDERED to reimburse CNA Insurance Company all benefits paid in connection with this claim and to assume responsibility for any permanency assessed.

DATED at Montpelier, Vermont this 27th day of June, 2001

_____
R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.