STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY

Audie Bellimer	)	
	)	
v.	)	State File Nos.: K-12645, L-24551, M -08796,
	)	P-16797, R-51397, S-14163
Dead River Company of Maine,	)	
d/b/a Leonard's Gas & Electric Service	)	

ARBITRATION DECISION AND ORDER

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

Record Closed on April 19, 2004.

APPEARANCES:

Barbara Cory, Esq., Hanover Insurance Company
Jason Ferreira, Esq., St. Paul Insurance Company
Richard Windish, Esq., Liberty Mutual Insurance Group

EXHIBITS:

Exhibits submitted jointly by the parties:

1. Joint Medical Exhibit
2. Deposition transcript, Claimant Audie Bellimer, August 27, 2003
3. Deposition transcript, Dr. Howard Jonas, August 27, 2003 (part I)
4. Deposition transcript, Dr. Howard Jonas, October 14, 2003 (part II)
5. Deposition transcript, Dr. Jonathan Fenton, January 29, 2004
6. DLI Form 1, FROI, State File Number K-12645, DOI December 23, 1996
7. DLI Form 22, State File Number K-12645, approved November 16, 2001
8. DLI Form 1, FROI, State File Number L-24551, dated June 19, 1998
9. DLI Form 1, FROI, State File Number M-08796, DOI (??)
10. DLI Form 1, FROI, State File Number P-16797, DOI February 17, 2000
11. DLI Form 1, FROI, State File Number R-51397, DOI April 11, 2001
12. DLI Form 1, FROI, State File Number S-14163, DOI January 15, 2002
13. DLI Interim Order, State File Number S-14163, dated November 4, 2002

Exhibits submitted by Hanover, which counsel for St. Paul and Liberty Mutual agreed were admissible:

1. Correspondence

10/11/00	Paul Hoyt to Dennis Shillen, counsel for claimant
10/14/02	Jason Ferreira to Paul LaPadula
10/15/02	Wendy Polk to Department of Labor & Industry
11/04/02	Paul LaPadula to Dennis Shillen, Wendy Polk, Jason Ferreira and Carrie Reilly
12/10/02	Paul LaPadula to Richard Windish
12/19/02	Paul LaPadula to Dennis Shillen, Richard Windish, Jason Ferreira and Carrie Reilly

2. 6/23/97 Report of Benefits & Related Expenses Paid
3. 5/26/00 Intake Form - James McGlinn, D.C.
4. 11/16/01 Agreement for Permanent Partial Disability Compensation
5. 3/28/02 Notice and Application for Hearing
6. 11/4/02 Interim Order of Benefits
7. 12/13/02 Notice and Application for Hearing
8. VT. Department of Labor & Industry Decision - *Michelle Boutwell v Hubbardton Forge* (July 1, 2003)
9. First Reports of Injury

CLAIMS:

1. Hanover and St. Paul have resolved various of the claims between them such that Hanover has withdrawn its claim that St. Paul reimburse the amounts it paid Claimant pursuant to the Form 22, Permanent Partial Disability Agreement, and they have settled the dispute between them with respect to $3,491.82 in medical benefits paid by Hanover during 2000. Those two matters are settled and resolved by accord and satisfaction. However, Hanover continues in its request for a finding that Claimant's condition was aggravated during St. Paul's and/or Liberty's policy period.

2. St. Paul requests a finding that Claimant's condition was aggravated during Liberty Mutual's policy period.

3. Liberty Mutual seeks reimbursement from Hanover, St. Paul or both of all amounts it has paid pursuant to the November 4, 2002 Interim Order.

FINDINGS OF FACT:

1. Claimant has been an employee of Employer since 1985. Leonard's is a full service heating and electric service and appliance retailer located in Woodstock, Vermont. Claimant's date of birth is March 24, 1958, he is married and has two children in their teens. Claimant has worked for Leonard's in a variety of capacities since his hire, beginning as an installer of heating and electrical systems and appliances, then progressing to dispatcher and interim service manager, and finally to a management position. Claimant is presently the Service Manager at Leonard's, a position which he has held since September 1, 2001. Claimant worked in the installer position until 2001. As an installer, Claimant would deliver and set up propane tanks, install boilers, furnaces, appliances, refrigerators, dishwashers, or "anything" as he testified.

2. At issue is the responsibility for ongoing and future benefits due and owing to the Claimant, Audie Bellimer, arising out of a workplace injury, which originally occurred on December 23, 1996. Prior to that date, Claimant did not experience any problems with his spine. On December 23, 1996 and continuing until November 28, 1997, Hanover Insurance Company ("Hanover") was Leonard's workers compensation insurer. Hanover accepted responsibility for the original December 23, 1996 workplace injury. The next carrier on the risk, St. Paul Insurance Company ("St. Paul"), was the workers' compensation carrier for Leonard's from November 28, 1997 through November 28, 2000. Finally, Liberty Mutual Insurance Company ("Liberty") picked up coverage in November 28, 2000 and remains Leonard's workers' compensation carrier through the present. Unfortunately, Claimant testified that he has very poor recollection of changes in his condition over the ensuing years; however, he did recall that " . . .from 1996 to today, I haven't had a good day. . . I have been in pain every day since 1996 . . .. I've had good days and bad days. But I have been in pain every day since 1996." The depositions and arguments of counsel dealt with a debate the parties' Joint Statement describes as "upwards of eighteen separate incidents involving his back," each of which are mentioned in the records of the primary treating osteopathic physician, Dr. Howard Jonas.

3. The initial December 23, 1996 injury happened when Claimant attempted to move a propane tank weighing 500-600 pounds. As the Claimant was attempting to maneuver the tank off of a pickup truck using a crane and some chains, the chains slipped and Claimant snapped forward. The Claimant's primary treating physician since 1996 has been Dr. Howard Jonas, an osteopathic physician. Dr. Jonas recorded complaints of pain between the shoulder blades with some tingling in the right upper extremity and low back pain without leg pain. Dr. Jonas' diagnostic impression was: low back pain due to dysfunction of the lumbar spine, sacrum, pelvis and lower extremities and mid-back pain due to dysfunction of the thoracic spine. Claimant received osteopathic manipulation and prescriptions for Motrin and Tylenol and missed a couple of days of work. X-rays taken at the time were essentially normal. Dr. Jonas' records reflect that Claimant's symptoms waxed and waned depending on the amount of heavy work he did. Several times Dr. Jonas noted in his records that Claimant said he had been asymptomatic only to experience an increase in symptoms associated with moving heavy appliances, lifting things, working in confined spaces or, later on, simply moving around.

4. On May 27, 1997 Dr. Jonas wrote to Hanover adjuster Cheryl-Anne Joyal and made a prediction that has largely come true. If Claimant continued to do heavy lifting, the prognosis would be "guarded." If Claimant were to change to a sedentary job, his prognosis would be good. Unfortunately, Claimant intermittently did heavy labor for several more years, frequently resulting in increases of symptoms. The parties have stipulated, however, that Claimant has missed virtually no time from work as a result of his back pain over the course of the last seven years.

5. At the May 27, 1997 office visit with Dr. Jonas, Claimant reported that his back was well so long as not provoked. At the July 10, 1997 visit, Claimant reported a set back three days earlier and Dr. Jonas described the situation as "persistent and non-progressive pain." At the August 15, 1997 office visit Claimant mentioned another bout of increased low back symptoms 11 days earlier, but by the time of the office visit the chief complaint was the dorsal pain, which was described as non-progressive and intermittent.

6. On September 5, 1997 Dr. Jonas wrote to Ms. Joyal at Hanover Insurance and said Claimant had called him the day before and cancelled an appointment because " . . . he felt fine and was asymptomatic since his last treatment on 8/15/97 and saw no reason to come for another." Dr. Jonas wrote that Claimant was now at medical end result for the December 23, 1996 accident and injury. In his deposition, Dr. Jonas ratified this opinion and agreed that as of September 5, 1997 Claimant had substantial and significant improvement and a successful return to work. In fact, Dr. Jonas did not see Claimant again until June 19, 1998, a nine-month gap between Jonas visits, and at the June 1998 appointment Claimant said he had been asymptomatic since the previous August. Claimant disagreed with Dr. Jonas' recollection and testified repeatedly that he has been in pain every day since the 1996 accident.

7. Hanover's coverage expired on November 28, 1997 and St. Paul's commenced the same day and continued for three years. With November 28, 1997 as a guidepost, Claimant hadn't seen his physician for three months and he didn't see his doctor for another six months. Claimant repeatedly testified that regardless of what Dr. Jonas noted in his office records with respect to remissions and absence of symptoms, "I can tell you, from 1996 to today, I haven't had a good day."

8. Almost seven months into St. Paul's coverage, i.e. on June 17, 1998, Claimant experienced another bout of increased symptoms working for Leonard's. Although Dr. Jonas characterized this incident as an aggravation, the records reflect that treatment returned the symptoms to their baseline. This was not an aggravation. This June 1998 incident was the subject of a First Report, Exhibit 8, and St. Paul Insurance received notice of the incident. The seesaw pattern of waxing and waning symptoms reestablished itself, the worsening being triggered by lifting incidents on October 26, 1998 and November 23, 1998. Of these two, only the October 26, 1998 incident resulted in a First Report of Injury, Exhibit 9. When Dr. Jonas saw Claimant on November 9, 1998 for the October 26, 1998 incident, he wrote that Claimant had been asymptomatic prior to the October 26, 1998 incident. However, Claimant repeatedly testified that he had never been symptom free since December 1996. A December 11, 1998 increase in symptoms may have been significant because it was the first episode where the precipitating event did not involve heavy work, i.e. Claimant reported that merely rotating in his chair provoked the usual "pop" and resultant pain. However, there appears to be no First Report for this episode, just a visit with Dr. Jonas.

9. St. Paul Insurance hired CorVel's Mimi Tessier, RN, to act as its medical case manager. Nurse Tessier wrote to Dr. Jonas on February 26, 1999 and posed a number of questions about Claimant's medical status and care. She told Dr. Jonas that Claimant " . . . now has a more sedentary 'inside' job . . ." So, it is clear that St. Paul Insurance and the Employer were well aware of Claimant's on-going difficulties and of his continued susceptibility to reinjury by heavy labor. On March 9, 1999 Dr. Jonas responded to the questionnaire and stated that Claimant was at a medical end result as of March 9, 1999. Dr. Jonas predicted that Claimant "will have an average of two bouts of upper and lower back pain per year that will be reversed with osteopathic manipulative treatment."

10. On September 2, 1999, after not having seen his physician for the three summer months and having told Dr. Jonas that he'd been "asymptomatic" during the interval, Claimant described what the doctor called an exacerbation related to lifting small boxes. Claimant repeatedly testified that he had no recollection of this episode. The only treatment mentioned by Dr. Jonas was some osteopathic manipulation and continuation of the Motrin medication regime. While the doctor's notes contain the comment about Claimant having been asymptomatic, when asked about this Claimant testified that he was always in pain. Claimant's testimony with respect to his daily pain since 1996 is difficult to square with Dr. Jonas' numerous notations (11/9/98; 12/9/99; 12/17/99; 2/18/00; 4/12/01) about Claimant having been asymptomatic for significant periods of time. The discrepancy is important because a clear and complete remission in symptoms would be very important to the dispute between the insurers.

11. On December 9, 1999, after not having seen his physician for three months during which Dr. Jonas said Claimant had been "asymptomatic," Claimant described left sided low back pain with radiation to his left buttock and left leg resulting from throwing chains into a boom truck while delivering tanks at work. But once again the doctor's treatment record merely reflects osteopathic manipulation, continuation of the existing medications and no scheduled follow up visit.

12. On February 18, 2000 Claimant told Dr. Jonas of an incident at work when he was lifting a box of fittings and felt a "pop" in his back. Claimant testified that the box of fittings weighed about 50 lbs. As he lifted, he also twisted. He felt pain in his back that he rated as 10 on a scale of one to ten. Claimant testified that after this incident his condition worsened. In fact, it is after this incident that Claimant apparently elected to seek other answers and solutions to his back problems. Each of the doctors testified that this incident constituted an aggravation of the condition caused by the 1996 accident.

13. Between February 18, 2000 and March 30, 2001 Claimant did not seek or request any medical advice or treatment from Dr. Jonas. However, during that period Claimant pursued two other lines of medical inquiry. One was that Claimant sought treatment from a Chiropractor, James McGlinn, beginning on May 18, 2000 and apparently ending on July 31, 2000. When asked to state the causes of his low back and right scapular pain, Claimant mentioned the original December 1996 accident and the February 2000 episode when he picked up the box of fittings. Chiropractor McGlinn's records reflect that Claimant continued to subjectively complain of pain and discomfort through the period of treatment. McGlinn referred Claimant to Leonard Rudolf, M.D., orthopedic surgeon, for a MRI and evaluation. Dr. Rudolf's July 21, 2000 office note says the MRI of the lumbar spine showed normal vertebral body disc space and no evidence of nerve impingement. However, there was some evidence of bone edema in the sacroiliac joint. X-rays of the spine and pelvis were interpreted as normal. Because treatment of the spine was not his specialty, Dr. Rudolf referred Claimant to DHMC's Spine Center.

14. While this McGlinn line of evaluation and treatment was proceeding, a parallel line of inquiry began when Claimant saw his general practitioner, Steven Smith, MD (July 12, 2000). Dr. Smith also referred Claimant to the DHMC Spine Center where the evaluator thought the "most striking finding" was overt pain behavior and nonorganic signs. The diagnosis of sacroiliitis was given and Celebrex prescribed. Claimant saw Dr. Banerjee at DHMC on October 26, 2000 on referral for an FCE and permanency rating, however he didn't do the permanency evaluation or arrange for the FCE but re-ordered a Sed Rate that Dr. Smith had obtained just three months earlier, a trial of TNS and physical therapy. On May 16, 2001, after six months of TNS and physical therapy, Dr. Banerjee recorded that Claimant's active range of motion in his lumbar spine was significantly reduced over similar testing done prior to the physical therapy. Dr. Banerjee determined Claimant was at medical end result and proceeded to do a permanency rating. He assessed an 11% whole person permanent partial impairment based on the lumbar spine and pain. The parties have stipulated that a Form 22 was executed, approved by the Commissioner and paid, so the permanency award is not in issue. The insurers also concede that at this point, there is no dispute over Claimant's entitlement to receive such future workers compensation benefits as to which he may be entitled. It is noteworthy that range of motion testing by Dr. White in February 1999 was deemed "normal" and by Mr. Walsh on August 20, 2000 as "reasonably good."

15. On November 28, 2000 St. Paul's workers compensation insurance coverage for Leonard's ended and that of Liberty Mutual began. Liberty Mutual has remained the insurer since November 28, 2000. On the very next day, Claimant was seen by therapist Walsh at DHMC and Walsh observed that Claimant's condition was unchanged and only minimally helped by Celebrex. Walsh referred Claimant to Dr. Banerjee for the FCE and permanency rating as discussed above.

16. After a 10-month hiatus (May 2001 to March 2002) of DHMC involvement, Claimant returned to Dr. Smith on March 20, 2002 explaining that he was a little worse and that it seemed to be taking less activity to excite his condition. Dr. Smith referred Claimant to the DHMC anesthesia department for SI lesioning. During that same ten month period, Claimant had a series of what Dr. Jonas called "remission and exacerbation" that were nothing more than short-lived set-backs. The episodes discussed immediately below in subparagraphs A.- D. are all simple recurrences. None destabilized the condition of Claimant's back. Each happened on the job and each "sounds" dramatic, but all were brief set-backs that happened in the midst of Claimant's ongoing back problems. In each case, Claimant reestablished his symptomatic baseline.

A. On April 12, 2001 Dr. Jonas recorded that Claimant had an increase in low back symptoms related to crawling in a crawl space. Despite Dr. Wieneke's and Dr. Jonas' opinions that this was an aggravation, I agree with Dr. Fenton that it was a recurrence. For one, Claimant's overall, long-term condition was not worsened by this episode - no doctor has attributed any specific increased disability to this incident. Similarly, Claimant returned to his same job after this episode, so objectively it doesn't appear to have had any long-term effect. Claimant received a minimum of medical attention consisting of one visit to Jonas for this episode. This episode isn't even mentioned in Dr. Banerjee's office note a month later when Banerjee found Claimant to be at medical end result. Dr. Wieneke's opinion with respect to this incident was contained in his supplemental report, but it came without any explanation of the basis of his opinion.

B. Dr. Jonas noted on June 7, 2001 Claimant said he had a sharp pain while standing at the work counter; however, Dr. Jonas treated Claimant and didn't see him again for another six months. This Claimant is not shy in obtaining care, so the absence of followup with Dr. Jonas is significant. This incident is simply the normal waxing and waning of symptoms.

C. On December 6, 2001 and again on December 19, 2001 Claimant told Dr. Jonas that riding with a co-worker in a small car bothered his back; however, on January 17, 2002 Claimant told Jonas that he'd improved to a great extent after the December 19 treatment. This was a simple and brief recurrence.

D. At this January 17, 2002 visit, Claimant said his symptoms increased while "twisting at his desk" at work and heard a "thunk." This incident was the subject of the Department's interim order of benefits, Exhibit 13. This episode wasn't even mentioned to Dr. Smith on March 20, 2002 and Dr. Smith noted on March 20, 2002 that Claimant had "no new pains." Dr. Jonas did mention observing Claimant dragging his left foot (Claimant testified he didn't remember this), but that symptom was gone by early February according to Dr. Jonas. Difficulty breathing was another symptom discussed as being significant; however, by the February 19, 2002 visit with Dr. Jonas, that symptom was no longer mentioned. Finally, this January 17, 2002 visit is argued to be different because the symptoms appeared to settle in the mid-back; however, as discussed above, at the March 26, 2002 visit with Dr. Jonas and with Dr. Smith on March 20, 2002, Claimant didn't even mention mid-back symptoms. Dr. Wieneke described this incident as an aggravation in his amended report; however, he provided no explanation of the basis for this impression, he didn't couch his opinion in terms of reasonable medical certainty and he didn't even mention this incident in his primary report. Dr. Fenton felt this January 17, 2002 incident was not an aggravation because the clinical findings recorded by Dr. Jonas were essentially the same before and after the incident, and there was no evidence of any additional neurological or soft tissue damage. Dr. Fenton also observed that in his opinion, this incident involved insufficient force or energy to cause damage. Dr. Jonas characterized this incident, and many others, as an aggravation, but he conceded on cross examination that it was hard to say that it caused any additional damage, and he also observed that the symptoms related to it subsided and the incident involved very little energy or force. So, I conclude the incident around January 17, 2002 was a recurrence, albeit a recurrence involving great discomfort. The incident did not worsen Claimant's condition or his level of disability. This incident reflects the reality that many injured people with a permanent injury and functional impairment will experience a waxing and waning of symptoms with activities from time to time. This incident didn't go beyond Claimant's usual pattern of symptoms that waxed and waned depending on his activity level.

17. There are no claims of aggravations having occurred since the January 2002 incident. However, Claimant continued to see Dr. Jonas complaining of ongoing, intermittent back and lower extremity pain.

18. Claimant was examined by DHMC's Dr. Fanciullo on April 30, 2002. Claimant mentioned only the original injury, i.e. none of the other alleged aggravations are mentioned in the doctor's note. Various x-rays were ordered because the doctor suspected the problem was more a facet joint problem than a SI joint problem. Bilateral medial branch blocks were given on May 6, 2002 and left-sided radiofrequency facet denervation ("RF") was done on June 21, 2002. RF on the right side was done on June 27, 2002. When seen again at DHMC on October 30, 2002, Claimant was described as a "very unhappy, angry man." Claimant said he obtained no long-term benefit for the Anesthesia Department's therapies. At this visit Claimant complained of pain from the base of his neck to his coccyx. At a visit with Dr. Fanciullo on December 5, 2002 Claimant asked for a referral to Dr. Robert Banco in Boston, but the next day bilateral SI joint anesthetic injections were administered. In January 2003 Dr. Fanciullo administered bilateral SI joint radiofrequency denervation. On February 13, 2003 Claimant reported complete relief of his low back pain, so Dr. Fanciullo administered mid-back trigger point injections and afterwards Claimant said he had almost complete relief of his mid-back pain. Unfortunately, five months later, i.e. on August 7, 2003 Claimant reported that all his symptoms had returned.

MEDICAL EXPERTS' OPINIONS:

19. Claimant was seen for an IME and examined on July 17, 2003 by Jonathan Fenton, D.O. at the request of Liberty Mutual Insurance Company. Dr. Fenton has been in practice since 1992 and is a member of various professional organizations. He does about 200 such examinations annually. He is board certified by the American Academy of Physical Medicine and Rehabilitation. Dr. Fenton has reviewed the medical records, the deposition of Claimant and the two depositions of Dr. Jonas. The insurer specifically asked Dr. Fenton whether the incident of January 15, 2002 (during Liberty Mutual's policy period) was an aggravation or recurrence. The distinction between aggravation and recurrence, Dr. Fenton testified, involves a five-part evaluation, but the main factor is whether there is a specific event, a new event or injury that clearly aggravated the prior condition. Dr. Fenton concluded that the January 15, 2002 incident was merely a recurrence of Claimant's chronic pain syndrome involving the ligament and muscle structures about lumbosacral junction and the sacroiliac joint and a small area of the thoracic spine. The incident caused no neurological or soft tissue injury. The event itself did not involve sufficient force to say that it extended or accelerated the underlying condition. However, Dr. Fenton concluded that the incident of February 2000 clearly was an aggravating event that worsened Claimant's symptoms and the underlying condition. He testified that prior to this incident Claimant's back wasn't particularly stable, although there had been two periods of relative stability in 1997 and 1999; however, after the February 2000 incident, Claimant's condition became unstable and thereafter developed progressive ligament laxity and progressive pain. Dr. Fenton agreed with Dr. Jonas' medical end result determinations of September 5, 1997 and March 9, 1999. Dr. Fenton did not believe the events of June 2001 (the incident at the counter) and

December 2001 (getting in and out of the car) rose to the level of an aggravation because these episodes were simple recurrences involving activities of daily living and insufficient force to cause an injury. "Just a tiny little activity," he called them.

20. Kuhrt Wieneke, Jr., M.D., orthopedic surgeon, evaluated Claimant, the medical records and the various x-rays and the MRI on October 21, 2003 at the request of Hanover's counsel. Dr. Wieneke, as did Dr. Fenton, felt the diagnosis was of chronic low back pain and sacroiliac joint pain. Dr. Wieneke, as did Dr. Fenton, felt that the February 17, 2000 box-lifting incident aggravated the diagnosed condition. Dr. Wieneke amended his original report on January 8, 2004 and stated that he considered the April 3, 2001 crawling incident and the January 15, 2002 twisting incident to be aggravations.

21. Howard Jonas, D.O. was Claimant's primary treating physician for his low back from the time of the initial injury in December 1996 until March 2002 when the focus of more interventional care switched to Dartmouth-Hitchcock. Dr. Jonas did continue to see Claimant up until January 2004. Dr. Jonas' specialty is the spine, the sacrum and the extremities. He was in private practice in Boston from 1963 to 1993 when he opened a full time practice of osteopathic manipulative medicine in Bridgewater. Dr. Jonas clearly felt that the original 1996 injury was the cause of Claimant's subsequent problems. The depositions demonstrated that Dr. Jonas struggled with what he called the contrast between the "real world" and "legalese" definitions of aggravation and recurrence, and he demonstrated an imperfect understanding of the standards applied to by the Commissioner, so Dr. Jonas' information is more helpful than the labels he applied to a particular incident. Dr. Jonas felt that a period of four months separates a temporary remission from a "more permanent one." Dr. Jonas felt that Claimant reached medical end result for the original injury by September 5, 1997. He felt that thereafter, Claimant aggravated his condition with work-related accidents on June 17, 1998; October 26, 1998; February 17, 2000; December 6, 2001 and January 15, 2002. Dr. Jonas testified that these episodes accelerated or combined with the 1996 injury to cause a disability that was greater than that produced by the original injury itself. One feature of Dr. Jonas' office notes is that so many of them make specific reference to a specific thing that happened at work, some of which Claimant didn't recall, yet there is hardly any reference at all to activities of daily living bothering Claimant's rather volatile low back.

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. As the party attempting to relieve itself of liability, Liberty Mutual has the burden of proof. See, *Smith v. Chittenden Bank*, Op.No.17-01WC (2001), *aff'd* Supreme Court Docket No. 2001-333, Feb. 2002 (three justice panel entry order).

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.

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.

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).

6. The Commissioner has decided many cases by applying the standards established in the Regulations and by the Vermont Supreme Court. 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. In this case, Hanover Insurance Company remains the carrier responsible for benefits if Claimant simply has suffered recurrences of his original injury, i.e. if the work merely caused a return of symptoms following temporary remission and did not causally contribute to his disability. *Pacher v. Fairdale Farms* 166 VT. 626, 629 (1997). On the other hand, St. Paul or Liberty Mutual is responsible for the entire disability if Claimant's work during their respective policy periods aggravated, accelerated, or combined with a preexisting impairment to produce a disability greater than what would have resulted from 1996 injury alone. *Id.*; Rule 2.110. Five factors are generally considered by the Commissioner in distinguishing whether a specific case constitutes an aggravation versus recurrence: (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.*

7. 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 is 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).

8. Claimant reached medical end result on or about September 5, 1997 as described by Dr. Jonas. There is substantial debate between the parties over whether Claimant was symptomatic (as he says) or asymptomatic (according to Dr. Jonas) at that point, or whether he had simply reached a temporary remission; however, I find that Claimant's condition was at medical end result because it was stable and in fact continued to remain that way for many months. *Coburn v. Dodge & Sons, et al.* (1996). Dr. Jonas' testimony and written records as a whole are persuasive on this point, and I conclude that as of September 5, 1997 Claimant was at a substantial plateau in the medical recovery process and that viewed from the perspective at that time, Claimant was expected to remain as he was without significant further improvement. This is especially confirmed by the nine-month gap in medical attention and Claimant's statement to his physician that he had been asymptomatic since the previous August. However, I find that when Claimant reached medical end result on September 5, 1997 his injury was permanent and he had a permanent partial impairment. This is confirmed by each of the doctors, i.e. Jonas, White, Wieneke, Banerjee and Fenton. While an insurer in Hanover's position was not obligated to obtain a permanency rating - and in view of Dr. Jonas' September 5, 1997 note it probably seemed unnecessary at the time - Hanover could have protected itself in later proceedings by contacting Claimant and the Employer to verify Claimant's situation.

9. I find that the various episodes in 1998 and 1999 were merely recurrences of the underlying condition as explained above. Once established with permanency, such musculoskeletal conditions can wax and wane depending on what the injured person does and that is what has happened in this case. There is no specific or objective evidence that any of these incidents causally contributed to Claimant's disability. The effects of each was short-lived and responded to a minimum of attention from Dr. Jonas.

10. I find that the episode reported to Dr. Jonas on February 18, 2000 as having occurred on February 17, 2000 was an aggravation of the 1996 injury. Prior to this date, Claimant's condition had become stable, although somewhat brittle, with a pattern of intermittent, brief, minor recurrences. He had been determined to be at medical end result by Dr. Jonas on September 5, 1997. However, lifting the 50-pound box of pipefittings aggravated Claimant's condition, made that condition worse, increased Claimant's disability and increased his susceptibility to further recurrences. Prior to this incident, Claimant had been seeing Dr. Jonas infrequently for minor recurrences, had reached a medical end result and he had had a successful return to his work, albeit at a lighter duty level because of the lingering permanent impairment related to the 1996 injury. The test of successful return to work does not require the worker to return to his original duties. If that were the case, any worker with a permanent impairment requiring changed duties would never meet the test of successful return to work. During St. Paul's policy period in 1998 there are at least four lifting and twisting episodes and during 1999 another three episodes leading up to the February 2000 aggravation. It was after this February 2000 episode that Claimant intensified his efforts to find an answer and solution to his back problems by initiating care with Dr. Smith and Chiropractor McGlinn. Each of the doctors, Fenton, Jonas and Wieneke, subscribe to the view that the February 17, 2000 incident was an aggravation. Claimant testified that in his mind, his condition worsened after this incident. Although Claimant didn't see another doctor after this lifting incident until he went to Chiropractor McGlinn in May 2000; nevertheless the cascade of intensive professional diagnostics and treatment really begins with this February 17, 2000 destabilization of his condition. As Dr. Fenton concluded, this was the last clear aggravating event. Claimant reached medical end result for the effects of this February 17, 2000 aggravation on May 16, 2001 when Dr. Banerjee determined a medical end result.

11. I find that the episode of January 15, 2002 was not an aggravation as a matter of law. The increase in symptoms reflects the usual waxing and waning of Claimant's condition and was a recurrence of the original injury as earlier aggravated on February 17, 2000. The reasons are explained in detail in Paragraph 16 herein above. Liberty Mutual has satisfied its burden of proof in this regard. This incident did not increase, change or alter Claimant's level of permanent impairment or disability. This incident did not destabilize Claimant's condition, it was part of the normal waxing and waning of symptoms he experiences and probably will continue to experience. It did not worsen his impairment or disability.

12. The Vermont Workers Compensation Act, Section 662(e)(1) and Compensation Rule 8.3119 give the arbitrator authority to apportion liability for an aggravation/recurrence claim among the responsible employers or insurers. The legislative change embodied in Section 662(e)(1) reflects a substantial change in the Vermont workers compensation system. Historically, an employment that aggravated a pre-existing work-related injury transferred liability to the insurer on the risk at the time of the aggravation. It makes sense and it is reasonable to utilize Section 662(e)(1) in a claim such as the current one, i.e. where there is an initial injury that causes permanent impairment and disability, which is later, aggravated and increased by subsequent work-related misuse when another insurer is on the risk. In the case of this Claimant, Claimant says that compared to September 1997, he now takes more and stronger medications, his back is more susceptible to flare-ups with increasingly less strenuous activity, his back pain is worse and bothers him all the time rather than just some of the time, and his ability to obtain restful sleep cycle has been diminished. I find that Claimant reached a medical end result from the effects of this aggravation on May 16, 2001. I find that each incident that contributed to the permanent impairment, i.e. the original December 23, 1996 injury and the February 17, 2000 incident, each caused one-half of the 11% whole person impairment to which the parties stipulated.

ORDER

The claim of Hanover for reimbursement from St. Paul of amounts paid as permanent partial disability benefits to Claimant pursuant to Exhibit 7, Agreement for Permanent Partial Impairment, has been withdrawn and it is dismissed with prejudice. The claim of Hanover for reimbursement from St. Paul of amounts paid for Section 640 medical benefits rendered during 2000 has been settled and it is dismissed with prejudice.

Hanover is responsible and is ordered to pay the following:

1. All appropriate benefits under the Vermont Workers Compensation Act arising out of the December 23, 1996 accident for temporary total disability benefits and reasonable and necessary Section 640 medical benefits for services rendered prior to February 17, 2000; and

2. One-half of all non-permanency benefits to which Claimant is entitled under the Vermont Workers Compensation Act for reasonable and necessary Section 640 medical benefits incurred, mileage and compensable lost time from work since May 16, 2001.

St. Paul is responsible for and is ordered to pay the following:

1. All appropriate benefits under the Vermont Workers Compensation Act for reasonable and necessary Section 640 medical benefits rendered or time lost from work from January 1, 2001 to May 16, 2001; and

2. One-half of all non-permanency benefits to which Claimant is entitled under the Vermont Workers Compensation Act for reasonable and necessary Section 640 medical benefits incurred, mileage and compensable lost time from work since May 16, 2001.

In addition, St. Paul and Hanover shall reimburse Liberty Mutual the benefits Liberty Mutual has paid pursuant to the Interim Order of Benefits dated November 4, 2002. To accomplish this, Liberty Mutual shall present St. Paul and Hanover with a statement itemizing each medical payment it has made with information about date of service, provider, nature of service and amount paid, and also providing all reasonable and necessary information and copies of invoices to permit Hanover and St. Paul to comply with the terms of this Decision.

Dated at Burlington, Vermont this 27th day of July 2004.

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Glen L. Yates Jr., Esq.,
Arbitrator