

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-333

FEBRUARY TERM, 2002

Stephanie Smith	}	APPEALED FROM:
	}	
v.	}	Commissioner of Department of Labor &
	}	Industry
Chittenden Corporation	}	
	}	
	}	DOCKET NOS. P-05728 & G-20067
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Appellant Chittenden Bank/Chubb Insurance Group appeals a decision of the Commissioner of the Vermont Department of Labor and Industry ordering appellant to reimburse CNA Insurance Company for all benefits paid in connection with claimant Stephanie Smith's claim for workers' compensation benefits. Appellant contends the Commissioner erred in: (1) failing to apply the last injurious exposure rule; and (2) classifying the claim as resulting from the recurrence of an earlier injury rather than the aggravation of a pre-existing injury by subsequent events. We affirm.

The facts, as found by the Commissioner, may be summarized as follows. From 1984-1991, claimant worked as a cashier at two grocery stores. In 1990, claimant went to work as a teller and customer service representative for Vermont National Bank, which merged with Chittenden Bank in 1999. For a period of one year, beginning in 1992 and ending in 1993, claimant worked as an administrative assistant for a VNB vice-president, a position which required a great deal of typing. During this period, claimant began to experience pain in her hands and joints. In December 1993, claimant's physician, Dr. Mogan, diagnosed her condition as moderate to severe carpal tunnel syndrome, and recommended surgery to relieve the condition. For several reasons, and against her doctor's strong recommendation, claimant declined at that time to have the surgery; she feared the procedure, had no one to help her during the post-operative period, could not afford to have her wages reduced, and felt that she could get by with other treatment.

Thereafter, claimant received several cortisone shots and began using hand splints, renewing her prescription for the splints in 1996. She also returned to her duties as a teller and service representative. In 1999, claimant informed Dr. Mogan that she was prepared to undertake the recommended surgery. She stated that although she was still afraid of the procedure, her circumstances had changed because she now had someone to take care of her, would receive full pay for time missed, and found that the symptoms were no longer tolerable. Dr. Mogan testified that the surgery which he ultimately performed in 2000 was the same that he would have performed in 1993, and that the results would not have been any better had he operated earlier.

Following the surgery, and pursuant to an interim order, the bank's workers' compensation carrier as of 1999, CNA Insurance Co., paid claimant's workers' compensation benefits. CNA asserted, however, that the bank's carrier from 1993 to 1996, Chubb Insurance Group, was responsible for the claim. Following a hearing, the Commissioner agreed, and ordered Chubb to reimburse CNA for all benefits paid, and to assume responsibility for any permanency assessed. In so ruling, the Commissioner concluded that claimant's symptoms in 1999 were the recurrence of the injury she suffered in 1993, followed by a temporary remission, rather than the aggravation or exacerbation of a pre-existing

condition caused by intervening events. It thus followed that Chubb was liable for the full extent of the benefits paid. See Pacher v. Fairdale Farms, 166 Vt. 626, 627 (1997) (mem.) (first employer remains liable for full extent of benefits if second injury is solely "recurrence" of first injury).

In concluding that the nature of the injury was a recurrence rather than an aggravation, the Commissioner applied a multi-part test, finding that claimant's medical condition from 1993 had never stabilized or reached a medical end result; that claimant had suspended but not stopped medical treatment, because she did not wish to see the treatment through to completion; and that, while her symptoms had worsened, the testimony that the surgical results would have been no different in 1993 indicated that claimant's medical condition had not changed in the interim.

Finally, the Commissioner declined to apply the last injurious exposure rule (LIE Rule), an alternative to the recurrence/aggravation test which holds the most recent employer solely liable for workers' compensation benefits. In so ruling, the Commissioner relied on this Court's observation in Pacher that the doctrine was appropriate "only where separate injuries all causally contribute to the total disability so that it becomes difficult or impossible to allocate liability among several potentially liable employers." Id. at 628 n.2.

On appeal, appellant contends the Commissioner erred in failing to apply the LIE Rule. We will affirm the Commissioner's order if her conclusions are rationally derived from the findings and based on a correct interpretation of the law. See id. at 627. The Commissioner's decision not to apply the LIE Rule was based on her conclusion that the evidence showed the nature of the claim to be a recurrence of the 1993 injury rather than the result of an aggravation through subsequent events. This was not a case where "separate injuries all causally contribute to the total disability so that it becomes difficult or impossible to allocate liability among several potentially liable employers." Id. at 628 n.2. Although appellant cites policy reasons and numerous out-of-state decisions - some involving carpal tunnel syndrome - in support of the LIE Rule, the record evidence and findings demonstrate that the rule was simply not appropriate in this case under the test in Pacher. See, e.g., State Accident Ins. Fund Corp. v. Luhrs, 663 P.2d 418, 422 (Or. Ct. App. 1983) (although claimant's symptoms later worsened until surgical intervention became necessary, medical evidence established that carpal tunnel syndrome was caused by work conditions during prior employment, and LIE Rule did not apply); ITT-Hartford Ins. Group v. Workmen's Comp. Appeal Bd., 688 A.2d 247, 249 (Pa. Commw. Ct. 1997) (substantial evidence supported finding that claimant experienced recurrence of symptoms of carpal tunnel syndrome, not new or aggravated injury, so that carrier at time of original injury was responsible for benefits).

Appellant also contends the Commissioner erred in concluding that the nature of the injury was a recurrence rather than an aggravation. The Commissioner's findings are binding on this Court if supported by the evidence, and we test the sufficiency of the facts from a perspective favorable to the award. Wroten v. Lamphere, 147 Vt. 606, 611 (1987). Although appellant cites some conflicting testimony, the record contains ample credible evidence to support the Commissioner's finding that claimant's injury had not stabilized or reached a medical end result, and was not caused or exacerbated by subsequent events. Accordingly, we discern no basis to disturb the conclusion that the injury was in the nature of a recurrence, and that Chubb was therefore responsible for the payment of benefits.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice