WINDSOR COUNTY SUPERIOR COURT
STATE OF VERMONT

ENTRY REGARDING MOTION

Rodger Parker v. Albert Decell
[Kasper/Valente] **S198-95 WrC**

Title: **Motion in Limine**
Filed on: November 27, 1996, by Keith J. Kasper, Attorney for CIGNA Property & Casualty
Response: December 20, 1996, by John W. Valente, Attorney for Granite State Insurance Co.
Supplement: January 17, 1997, by John W. Valente, Attorney for Granite State Insurance Co.

In this workers' compensation case, the certified questions from the Department of Labor and Industry are as follows:

> 1. Is the current disability suffered by the claimant, which commenced in October 1993, a recurrence of a work-related injury suffered in March of 1989, or an aggravation or new injury arising out of and in the course of employment?
>
> 2. Which of the two insurers for the defendant, Albert Decell, is responsible for payment of the claimant's temporary total disability and medical benefits incurred beginning in October 1993 and continuing to date?

On November 26, 1996, CIGNA filed a Motion in Limine, requesting the preclusion of any assertion or argument relying upon the "last injurious exposure" rule. CIGNA argues that the rule has no application in this case; Granite State argues that CIGNA has misinterpreted the rule. It appears to the court that the parties' arguments address two separate parts of the "last injurious exposure" rule: There is a rule of proof and a rule concerning assignment of liability. *See* 82 AmJur2d, Workers' Compensation § 233 at 227.

The rule of proof requires proof of causation. In the instant case the second insurer may be held liable only if the evidence shows an aggravation or new injury (as opposed to a recurrence) arising out of and in the course of the second phase of the employment. The Department of Labor has suggested in the past that the "last injurious exposure" rule might be utilized as proof of aggravation, in cases involving "gradual onset injuries." McKearney v. Miguel's Stowaway Lodge, No. 6-94 WC (3/27/94). However, the use of the rule in this way is questionable because it permits a first insurer to shift liability without proof of causation. It is noteworthy that the Department has abandoned its own interpretation of the "last injurious exposure" rule as discussed in McKearney. Pelkey v. Rock of Ages Corp., No. 74-96 WC (1/3/97). For these reasons, the court agrees with CIGNA that it would be inappropriate to permit the use of the "last injurious exposure" rule as a shortcut to circumvent the need for proof of aggravation or new injury.

On the other hand, the "last injurious exposure" rule can refer to a principle of law for the assignment of liability. In an appropriate case, including proof that injuries or aggravations occurred during both phases of employment, there may be issues concerning the allocation of liability. In the majority of states, the entire burden of liability falls upon the insurer providing coverage at the time of the "last injurious exposure" which has a causal relationship to the injury. Causation still must be proved. *See* Larson's Workers' Compensation, Desk Edition, § 95.20.

The court will grant CIGNA's motion in limine to preclude the parties from arguing the applicability of the "last injurious exposure" rule as any sort of shortcut to proving causation. This narrow ruling does not preclude the parties from addressing the fundamental issue of whether claimant's disability resulted from a "recurrence," an "aggravation," or a "new injury," nor will it preclude the application of a "last injurious exposure" rule as a rule of law for assignment of liability, as long as a causal relationship is proved.

CIGNA's Motion in Limine is **GRANTED** in part and **DENIED** in part, as discussed above.

Mary Miles Teachout
Hon. Mary Miles Teachout, Presiding Judge

April 16, 1997
Date

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Date copies sent to: _____ Clerk's Initials _____

Copies sent to:

Keith J. Kasper, Esq., of McCormick Fitzpatrick Kasper & Burchard, Attorneys for CIGNA.

John W. Valente, Esq., of Ryan Smith & Carbine, Ltd., Attorneys for Granite State Insurance Company.