

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Gilbert Worthen

Opinion No. 48-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Newton Gas

*For: Laura Kilmer Collins
Commissioner*

State File No. S-19564

Hearing held in Montpelier on July 7, 2004

Record closed on August 17, 2004

APPEARANCES:

Christopher McVeigh, Esq., for the Claimant

Jeffrey W. Spencer, Esq., for the Defendant

ISSUE:

Did the claimant suffer an injury that arose out of and in the course of employment with Newton's Gas, particularly as a result of bumping his knee on a truck bumper on or about January 25, 2003?

EXHIBITS:

Joint I: Medical Records (I a and I b)

Claimant's 1: Deposition of Andrew Kaplan, M.D.

Defendant's A: Report from Verne Backus, M.D.

STIPULATION:

Claimant was an employee of defendant Newton's Gas within the meaning of the Vermont Workers' Compensation Act at all relevant times, and continues to be so employed.

FINDINGS OF FACT:

- 1. Claimant has worked at Newton's Gas (defendant) as a service technician, a physically demanding job, since 1992.*

2. *Before he began his employment with defendant, claimant had left knee problems that required surgery in 1989. In that surgery, bone fragments and a portion of the meniscus were removed.*
3. *After the 1989 surgery, claimant continued working full-time in work as a landscaper and heavy equipment operator, then as a technician for defendant.*
4. *Claimant had occasional knee symptoms, such as locking or clicking, over the years, but nothing that required medical attention between 1989 and 2002. In fact, until the 2002 incident at issue here, claimant had lost no time from work at Newton's Gas for knee problems.*
5. *On or about January 25, 2002, claimant was working for defendant, roughing a new home, when he bumped his left knee into the solid steel bumper of his service truck and felt immediate severe pain, causing him to react verbally. Although he returned to work, he iced the knee to control the swelling and awoke at night with the pain. Claimant cannot independently remember the date of the incident. He chose January 25 after talking with coworkers and searching records for the date he visited the residence where he remembered having bumped the knee.*
6. *At a visit to his primary care physician on February 11, 2002, claimant made no mention of knee problems. However, at a visit on February 26, 2002, claimant told his doctor that he had bumped his knee into a truck that it had swollen afterwards, that he had treated the knee with ice and that he was awakened at night.*
7. *On March 27, 2002, claimant went to the office of Dr. Mahoney, the orthopedic surgeon who had performed the knee surgery in 1989. For the date of injury claimant identified March 3, 2002.*
8. *Claimant returned to see Dr. Mahoney on April 30, 2002 when he reported that his symptoms remained the same. On examination, range of motion in the right knee was excellent. Dr. Mahoney ordered an MRI and referred claimant to his partner, Dr. Andrew Kaplan.*
9. *Claimant reported the incident to George Newton, owner, and Lisa Boudreau, accountant at Newton's Gas in April 2002. The First Report of Injury was filed with this Department on May 6, 2002.*

10. *Dr. Kaplan saw claimant on June 10, 2002. The MRI confirmed significant degenerative damage in the knee. Three days later, on June 13, Dr. Kaplan operated on the knee arthroscopically, shaving the meniscus and removing a spur to reduce snapping. During surgery, Dr. Kaplan noted an old meniscal tear as well as a new one.*

Expert Medical Opinions

11. *Based on the claimant's history and surgical findings, Dr. Kaplan concluded the claimant's knee pain and symptoms were "significantly aggravated or possibly caused" by the injury. Although degenerative changes predated the injury, the reason for the arthroscopic surgery and related pre and postoperative care, was caused when claimant bumped his knee into the bumper and tore the meniscus. The onset of severe pain with a single incident is consistent with the fresh meniscal tear seen at the time of surgery, even though there was no twisting involved. Dr. Kaplan reviewed all records from his practice, including those from 1989.*
12. *Verne Backus, M.D., rehabilitation specialist, evaluated claimant at the request of the defendant's insurer. Dr. Backus attributes the need for claimant's knee surgery to a spontaneous worsening of a claimant's long standing degenerative knee problems, although he conceded that bumping the knee into a steel bumper could have caused the problem. Dr. Backus reviewed all medical records.*

Attorney Fees and Costs

13. *Claimant submitted a copy of his contingency fee agreement with his attorney as well as a statement for professional services reflecting 48.50 attorney hours and \$1,268.28 in costs.*

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, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984).*
2. *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).

3. *Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979).*
4. *Although claimant has been inconsistent with the date of the injury, it is clear that he bumped his knee on a truck bumper while making a delivery to a customer's home, resulting in considerable pain. Whether it was in late January or a few weeks later does not detract from his credibility, although it does show a poor memory for dates. The crucial determining factors here are the specificity of his complaints, the consistency of his report of what happened to the physicians (as opposed to when it happened) and whether such a mechanism accounts for the injury he had.*
5. *Claimant recalls vividly having hit his knee on a steel bumper and verbally expressing the discomfort, even though he returned to work afterwards. That is the only such specific event he recalls and that is documented in medical records. With every doctor, he consistently reported having bumped his knee into a truck, with resultant swelling in that knee and pain that awoke him.*
6. *Whether bumping the knee into a bumper caused the tear that necessitated the surgery is a question that depends on medical evidence and a choice between conflicting opinions.*

7. *The Department has historically examined certain criteria when considering the conflicting medical evaluations and opinions of physicians. These criteria include: (1) the length of time a physician has provided care to the claimant; (2) the physician's qualifications, including the degree of professional training and experience; (3) the objective support for the opinion that the physician is advancing; and (4) the comprehensiveness of the respective examinations, including whether the expert had available all the relevant records. Miller v. Cornwall Orchards, Op. No. 27-97 WC (1997); Gardner v. Grand Union, Op. No. 24-97 WC (1997).*
8. *Dr. Kaplan has a treating physician relationship with the claimant, qualifications in orthopedic surgery and first hand knowledge of what was seen at surgery, three key advantages over Dr. Backus. Perhaps the most important is Dr. Kaplan's observation of a meniscal tear consistent with a new injury. It is more likely than not that a specific event with resultant pain and swelling was the cause of the fresh meniscal tear than the spontaneous worsening of the underlying condition. The only specific event was the bump on the truck at work.*
9. *Based on the credible testimony of the claimant and the medical opinion of Dr. Kaplan, I conclude that claimant injured his knee in the course of his employment with Newton's Gas and that the injury necessitated the surgery Dr. Kaplan performed as well as the postoperative disability.*
10. *Since claimant prevailed, he is entitled to a discretionary award of attorney fees and mandatory award of necessary costs, subject to WC Rules 10.000 and 40.000. 21 V.S.A. § 678(a); § 640(d).*
11. *The 48.5 hours worked on this claim are reasonable given the nature of the dispute and necessary discovery involved. Therefore, claimant is awarded \$4,365.00 (48.5 x \$90) in fees and costs subject to the Rule 40 fee schedule. It is not clear from the itemization how much time was involved on June 11, 2004 for the \$500.00 expert fee incurred and whether Rule 40 would apply to that request. If the parties cannot resolve this issue within two weeks, claimant is to submit a more specific data to support the claim for costs.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to adjust this claim.

Dated at Montpelier, Vermont this 6th day of December 2004.

*Laura Kilmer Collins
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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.