STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Risa Singer

v.

S.B. Collins/Jolly Associates and their insurer AIG

Opinion No. 32-04WC

By: Margaret A. Mangan
Hearing Officer

For: Michael S. Bertrand
Commissioner

State File No. T-21147

Submitted on written record
Record Closed April 21, 2004

APPEARANCES:

James A. Dumont, Esq., for the Claimant
Tammy B. Denton, Esq., for Defendant/AIG

ISSUE:

Did Ms. Singer's knee injury arise out of and in the course of her employment for S.B. Collins?

FINDINGS OF FACT:

1. *Risa Singer (claimant) was an employee of S.B. Collins' (employer) at its retail business, Jolly Associates, on June 23, 2003.*

2. *On June 23, 2003 claimant left a Jolly Associates store to go to the bank with the purpose to drop off the store's deposits and pick up rolled coin.*

3. *After exiting the bank the claimant held a bag of rolled coins that weighed approximately 20 pounds in the crook of her right elbow. She stepped of the curb, first by her right foot followed by her left; she heard a pop and her left knee gave way causing her to fall to the ground. Claimant felt immediate pain. When she tried to get up she was unable to put any weight on her knee.*

4. *At the time of injury she was doing what she was supposed to while on company time.*

5. *The claimant immediately returned to work and reported the incident. Employer instructed claimant to see Dr. Verne Backus. Dr. Backus saw her and referred her to Dr. Long, and Dr. Long referred her to Dr. Beattie.*

6. *In the late 1970's to early 1980's during high school claimant suffered a left knee sprain while playing softball. She was treated with pain medication and told to stay off her knee. She has also felt occasional stiffness in her left knee prior to her June 23, 2003 injury.*

7. *Claimant was an active athlete until she was diagnosed with a heart condition in 1996. Since then her physical activity has been limited to walking.*

8. *In 1997 the claimant fell when her left foot slipped on snow. This caused no injury to either of her legs.*

9. *Dr. Backus was the first physician to examine the claimant after her June 23, 2003 injury. On June 24, 2004 he opined that there was no causal relationship between claimant's injury and her workplace. On July 15, 2004 he noted that the cause of the claimant's injury was undetermined. His conclusions were not subject to examination by either party by way of deposition. Based on his last note and the lack of a deposition provided by him I am unable to rely heavily on his conclusions.*

10. *Dr. Beattie is a knee specialist. After completing his residency in orthopedic surgery he completed a fellowship in sports medicine where he performed over a thousand knee surgeries. In private practice since 1988 he now performs a couple of hundred surgeries each year. He is the claimant's consulting physician.*

11. *Dr. Beattie opined, and I find, that the injury was a buckling episode as she stepped off a curb carrying a weight. The knee shifted as she was stepping off the curb with a weight in her hands. Stepping off a curb is a force; extra weight adds to that force. The combination of forces and vectors as she stepped down overcame the knee's stabilizers, allowing the injury to occur. Dr. Beattie opined that claimant's knee gave out because of a patella femoral subluxation due to some subtle mechanical predisposition in claimant's knee. Dr. Beattie also said the claimant had no "significant pre-existing instability of the knee as a cause for this event."*

12. *Dr. Beattie also opined that this injury could have equally happened while the claimant was stepping off a curb with a bag of groceries in her arms.*

13. *Claimant requests that her reasonable costs and attorneys fee be paid. Her attorney has submitted a certification of the hours spent. He has worked 22.6 hours on this case. Claimant has incurred costs of $361. Although he submitted a copy of the fee agreement, the claimant has not signed it.*

CONCLUSIONS OF LAW:

1. *In a worker's compensation case, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 123 Vt. 161 (1963).*

2. *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. The Book Press, 144 Vt. 367 (1984).*

3. *When the causal connection between work and the injury is obscure and a layperson would have difficulty forming a well-founded opinion as to causation, testimony from a medical expert is necessary. Lapan v. Berno's Inc.,137 Vt. 393 (1979).*

4. *An injury arises out of the course of employment under 21 V.S.A. § 618 if two tests are met. First, the injury must have occurred in the course of employment. "An accident occurs in the course of employment when it was within the period of time the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of the employment contract." Clodgo v. Industry Rentavision, Inc., 166 Vt. 548, 552 (1997). Second, the injury must "arise out" of the employment. "Ordinarily, if an injury occurs during the 'course of employment,' it also 'arises out of it.'" Shaw v. Dutton Berry Farm, 160 Vt. 594, 598 (1993).*

5. *An injury arises out of a claimant's employment "if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where [she] was injured." Id. An injury arises out of the employment when the employment contributes to the risk or aggravates the injury. Miller v. IBM, 161 Vt. 213, 214 (1993)*

6. *"If an instrumentality or condition of work contributed to the injury, it arises out of employment and is compensable." Shea v. Worcester Insurance Co., Op. No. 13-02WC (March 13, 2002)*

7. *The central dispute in this case rests squarely on the issue of whether this injury "arises out" of the employment. "Intrinsic to this requirement is the positional risk doctrine which asks if the injury would not have occurred but for the fact that the conditions and obligations of employment placed claimant in the position where [she] was injured." Shea v. Worcester Insurance Co., Op. No. 13-02WC (March 13, 2002) (citing Miller v. IBM, 161 Vt. 213, 214 (1993)).*

8. *The employer argues that the claimant's injury does not arise out of her employment because her fall was caused by a pre-existing mechanical pre-disposition. This disposition, it is argued, is purely personal to the claimant and had no connection to her work for the employer. The employer asserts that the claimant has not proven that the employment contributed to the risk or aggravated the injury beyond mere possibility, suspicion, or surmise and that claimant's fall and injury were the result of an idiopathic condition.*

9. *The claimant argues the claimant's injury was caused by the strain placed upon her knee when stepping down off a curb with a bag of coins in her arms. This she was doing while performing her duties as an employee. If she was not performing the duties of her job, she would not have been stepping down off the curb at that time in those circumstances and therefore her injury arose out of and in the course of her employment.*

10. *The claimant's knee, although pre-disposed for this type of injury, was stable. The fact that the claimant could have injured her knee while carrying groceries to her car is irrelevant. In that situation the claimant would be on her own time and assume responsibility for the self-imposed increased risk of stepping down from an elevated height with weight in her arms.*

11. The injury would not have occurred but for the fact that the conditions and obligations of claimant's employment placed her in the position where she was injured. In this case the claimant has met the requirement in Shea that an instrumentality of the employment contributed to the risk or aggravates the injury. The claimant was injured at work. She was performing work duties when carrying the coins and stepping down off the curb elevated her risk of injury. The credible medical evidence shows that weight and stepping down create a force that led to this injury. Because the weight (or coins) was an instrumentality of work, carrying it while stepping from a curb contributed to the incident that led to the injury.

12. Claimant would not have prevailed had it not been for the services of her attorney. The costs and fees submitted by the Claimant are reasonable and supported by a fee agreement. However, the Department does not have a copy of this agreement signed by the Claimant.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that defendant:

1. *Adjust this claim;*

2. *Pay claimant's costs of $361.00;*

3. *Pay claimant's attorney's fees at the rate of $90 per hour for 22.6 hours for a total of $2,034, contingent on this Department's receipt of a signed fee agreement within 30 days of this order.*

Dated at Montpelier, Vermont this 19th day of August 2004.

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Michael S. Bertrand
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.