

Miller v. Engelberth Construction Co.

(November 5, 2004)

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

Daniel Miller

Opinion No. 45-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Engelberth Construction Co.

*For: Michael S. Bertrand
Commissioner*

State File No. T-20174

*Hearing held in Montpelier on June 15, 2004 and June 16, 2004
Record closed July 26, 2004*

APPEARANCES:

*Craig A. Jarvis, Esq., for the Claimant
David McLean, Esq., for defendant CNA
Tammy Denton, Esq., for defendant AIG*

EXHIBITS:

*Joint I: Medical Records
Plaintiffs 1: Medical Bills
Defendant's Exhibit A: Weekly Project Time Sheets*

ISSUES:

- 1. Did claimant Daniel Miller's left knee osteoarthritis arise out of and in the course of his employment for Engelberth Construction Co?*
- 2. If the condition is compensable, which of the successive carriers is liable for claimant's workers' compensation benefits?*

FINDINGS OF FACT:

- 1. Engelberth Construction Co. is an employer and Daniel Miller (claimant) was an employee as defined by the Workers' Compensation Act. Engelberth was insured for workers' compensation by AIG on the "Solstice Project" at Stratton Mountain and by CNA on the Rutland Hospital Orthopedic Clinic Project (Rutland Project).*

2. *Claimant is 54 years old and worked construction his entire life with the exception of working roughly one year as an apprentice electrician and approximately one year on a horse farm in the late 1970s.*
3. *Defendant Engelberth Construction employed claimant as a carpenter from June of 2001 until October of 2002. Claimant stopped working because of knee pain, which ultimately resulted in a total knee replacement.*
4. *During his employment with Engelberth, claimant worked on two projects, the Solstice Project and the Rutland Hospital Project.*
5. *The Solstice Project was the first, at which time AIG was the insurer. Claimant worked on that project from June 21, 2001 until May 2002, generally from 7:00 AM to 4:30 PM. At that time he drove an automatic vehicle to work on a commute of 10 to 15 minutes each way. He was allowed to park next to each unit at which he worked.*
6. *The Solstice Project punch list work was less physically demanding, light duty, and easier than the other construction work claimant has performed. Claimant joined the Solstice Project at about the half-completed stage when approximately half of the condominium units were weather-tight, the insides were finished, and the units were just about ready to turn over to customers. The punch list work claimant performed included adjusting doors, windows, and kitchen cabinets, replacing baseboard, vacuuming, washing windows, and occasional painting. On a typical day at the Solstice Project, claimant spent less than one hour per day on his hands and knees. Claimant spent less time working on his hands and knees and on ladders on the Solstice Project than he did on other construction jobs. Claimant did not experience knee symptoms while working at the Solstice Project and did not seek medical care for his knee during that time.*
7. *Claimant was transferred to the Rutland Project on July 15, 2002. Claimant worked from 5:00 AM or 6:00 AM to 4:30 PM. He drove a car with standard transmission during that time. His commute was an hour each way.*
8. *While working on the Rutland Project, claimant performed commercial work involving working with concrete, removing forms, supplying co-workers, building an addition with floor joists, walls, rafters, exterior trim, windows, and siding. Claimant's outside work was medium to heavy duty. It required his going downhill when removing the forms*

and occasionally squatting. At some point, claimant moved inside the clinic to work. That inside work involved remodeling, moving around offices, moving walls, preparing different offices, addition work, removing carpet, and preparing floors by filling voids in the concrete.

- 9. After starting on the Rutland Project, the claimant began experiencing pain and swelling in his left knee while working. He recalled one specific incident in which he felt pain while installing floorboards or carpet on his knees. The pain and swelling in the claimant left knee got worse as the workday progressed. The pain and swelling also worsened over the workweek. By the end of the weekend, he had recovered such that he would begin work on Mondays without much problem.*
- 10. The claimant had little trouble driving to work, but when he returned home from work, he would experience pain in the knee while driving. The claimant's car at the time had a manual transmission, requiring use of the left leg for shifting.*
- 11. Prior to working for Engelberth, claimant worked for Prouty Construction for approximately 13 years. Claimant's responsibilities at Prouty Construction involved getting down on his knees frequently climbing ladders, and squatting. His work at Prouty Construction was similar to the work he performed at Rutland Project.*
- 12. The claimant had had intermittent pain in his right hip and thigh for a number of years prior to the Rutland Project.*
- 13. Claimant broke his right tibia and fibula in or about August 1974 as the result of a work related accident while employed for Ted Quinton. Surgical plates and screws were placed in claimant's right leg. Claimant was out of work for 8-12 months while recovering. Since the fracture, claimant has favored his right leg, which has caused him to place more stress on his left leg.*
- 14. After the 1974 fracture, claimant received lifts in his shoes that made his posture better by helping him stand more erectly.*
- 15. Claimant had problems with obesity and weight gain, coronary disease and peripheral vascular disease prior to his employment for defendant. His weight steadily increased from 200 lbs when he graduated from high school in 1968 to his current weight of just less than 260 lbs. Doctors have advised Claimant to lose weight.*

16. *Medical records dating back to 1973 document a history of left knee injuries prior to claimant's ankle fracture. These records document injuries to the left knee, one on July 12, 1973 (internal derangement of left knee while playing softball); one on September 5, 1975 (meniscal tear, cause not specified); and one on February 15, 1976 (torn left medial meniscus, cause not specified). The February 15, 1976 record states "this is the 5th time for similar injury since 1974."*
17. *Claimant began limping occasionally in 1997 due to numbness beginning in the right hip spreading down to the right knee. Claimant began seeking treatment for the numbing and vascular problems.*
18. *Claimant believed that the limping that resulted from the right lower extremity numbness was caused by his vascular problems. It did not increase in frequency or cause him to miss work during his employment for defendant.*
19. *In September of 2002, the claimant reported the pain that he was having in his left knee to a supervisor, Phil Bissonette. The claimant told Mr. Bissonette that he was having trouble with his left knee from work and that he wanted it noted before he went on a hunting vacation so that his employer would not attribute the pain to the hunting trip.*

20. *The claimant went on a hunting trip to Canada in September. His knee bothered him some on his trip to Canada; however, it did not bother him significantly during the trip. His hunting guide who knew he was having problems with his knee gave him special treatment. The guide would drive him to a place for hunting, set up a crate on which to sit, and leave the claimant to wait for elk to come by. The claimant did shoot an elk, but the guide retrieved the elk. By the end of the hunting trip, the claimant did not feel significant pain and swelling in the knee.*
21. *When the claimant returned to work in late September, the same pattern of pain and swelling in his left knee returned. On October 14, 2002 the claimant sought out treatment from the Vermont Orthopedic Clinic. An x-ray taken then showed "bone-on-bone deterioration of the medial compartment and degenerative arthritis with spurring also of the patella femoral joint." The following day he saw Dr. Joseph Vargas at the clinic who informed the claimant he had osteoarthritis and recommended a total left knee replacement.*
22. *Claimant's knee pain had worsened, causing him to stop working on October 18, 2002.*
23. *Dr. Vargas is a board certified orthopedic surgeon and was the claimant's treating surgeon.*
24. *Dr. Vargas testified that a total left knee replacement was needed in the claimant's case because the claimant had developed symptoms of pain and swelling and had significant degeneration in two of the three compartments of the knee. Even with advanced bone-on-bone degenerative changes, Dr. Vargas would never operate on a knee that did not have significant symptoms of pain, unless there were special circumstances, which were not present in the claimant's case.*
25. *Dr. Vargas noted that claimant began having left knee pain in the summer of 2002 and pointed out that claimant had long-standing pre-existing degenerative arthritis of his knee, which was exacerbated by his work as a carpenter. He said that the claimant needed the knee replacement surgery sooner than he would have otherwise because of the work for Engelberth.*
26. *Dr. Vargas's October 15, 2002 note states "The patient was involved in a bad construction accident in the 70's which he sustained*

a compound fracture of his right ankle. Since then he has been using his left knee considerably and he has had progressive pain and discomfort, trouble walking any distance or standing on it for prolonged periods of time."

27. *Dr. Vargas diagnosed claimant's left knee problem as end-stage degenerative arthritis based upon three factors: claimant's report of significant pain and discomfort; x-ray findings consistent with tri-compartmental osteoarthritis including a bone on bone condition in the medial compartment, significant compromise of the anterior compartment, and early changes of arthritis in the lateral compartment; and physical examination findings including hypertrophic changes, limited range of motion and flexion, and marked patellafemoral crepitus. He opined that it is likely that a torn meniscus in the claimant's left knee caused the osteoarthritis.*
28. *In an obese person, once the knee tips into a varus alignment, the condition will inevitably progress to a point where a total knee replacement is necessary. Factors that accelerate the progression of osteoarthritis include obesity, smoking, stair climbing, ladders, scaffolding, standing from a sitting position, shifting a manual transmission vehicle, and getting in and out of a vehicle.*
29. *At the time of Dr. Vargas's initial examination, claimant had bone-on-bone in the medial and anterior compartments of his left knee. Claimant also had long-standing hypertrophic changes in his knee, including large osteophytes and sclerotic bone surfaces, and a varus alignment. In Dr. Vargas's opinion, the varus alignment of claimant's knee pre-existed claimant's employment with Engelberth.*
30. *In his testimony Dr. Vargas could not say to a reasonable degree of medical certainty when claimant's bone-on-bone condition was established, i.e., whether before or after claimant began work for Engelberth. However, he opined that the bone-on-bone condition definitely pre-existed claimant's work at the Rutland Project. Dr. Vargas also testified that in general it take 15-20 years for osteoarthritis to progress to a bone-on-bone condition.*
31. *Given the condition of claimant's knee in October of 2002, Dr. Vargas believed that claimant would eventually require a total knee replacement whether or not he worked at Engelberth.*
32. *At hearing, Dr. Vargas conceded that the onset of claimant's pain could be the natural progression of osteoarthritis.*
33. *Dr. Vargas opined that claimant's work aggravated his osteoarthritis. His opinion is based on claimant's self-reports. Dr. Vargas stated: "I can't pin the day or the event that caused it; it is a*

wear and tear process, and he was in a position or job that does cause wear and tear."

34. *Dr. Vargas testified that flaking caused by the bone on bone condition in the claimant's knee caused pain.*
35. *Dr. Vargas did not have a treating relationship with the claimant prior to October of 2002.*
36. *Claimant never took any medication, prescription or over-the-counter drug for his left knee pain prior to his total knee replacement surgery.*
37. *John Johansson, M.D., CNA Insurance Companies' expert physician, opined that claimant has several conditions including obesity and significant weight gain, smoking history, and severe coronary and peripheral vascular disease that all contributed to the acceleration of the pre-existing osteoarthritic condition. He could not opine to any degree at what point in time that the claimant ended up with arthroplasty. However he opined that "the work he had been doing for Engelberth probably from day one began the process of accelerating his knee symptoms, but I cannot say to a reasonable degree of medical certainty at what point in time the osteoarthritis became so severe that he ultimately ended up with arthroscopy."*
38. *Dr. Johansson examined the claimant for CNA. Dr. Johansson reviewed all relevant medical records and x-rays of claimant's left knee.*
39. *Dr. Johansson testified that osteoarthritic pain could begin spontaneously. No triggering event or activity is necessary.*
40. *Dr. Johansson opined that claimant's employment at Engelberth may have affected the symptoms of his osteoarthritis, however, this does not equate to an acceleration of the underlying condition. Claimant's underlying condition was established prior to his employment with Engelberth and was going to result in pain at some point in time, regardless of his activity. In his opinion, claimant's work did not change his physiologic condition.*
41. *It is impossible to determine the rate of change in an individual's knee, and determine whether that rate increased, without a traumatic event or observations of the individual's knee over time.*

42. *Dr. Kuhrt Wieneke examined the claimant and also testified at the hearing. He is a board certified orthopedic surgeon who examined the claimant in relationship to this claim. Dr. Wieneke opined that the claimant's work on the Rutland Project resulted in at least a mild aggravation of claimant's left knee osteoarthritis.*
43. *Dr. Wieneke conducted an examination solely for the purpose of this litigation. He has only examined claimant once, and this was after the total knee replacement had been performed.*
44. *Dr. Wieneke did not review any x-rays of claimant's knee in developing his opinion, or at any time prior to the hearing in this matter. Dr. Wieneke's opinion is based upon claimant's self-reported history, medical records and his expertise in orthopedics. Dr. Wieneke opined that claimant's employment at the Rutland Project exacerbated a long-standing case of osteoarthritis, however mildly.*
45. *In Dr. Wieneke's opinion, any activity that overstresses the knee joint accelerates the progression of osteoarthritis.*
46. *Dr. Wieneke characterized the issue at hand as one of aggravation versus recurrence. In his opinion, claimant's employment at the Rutland Project contributed to the osteoarthritis because claimant began complaining about an increase in pain at that time.*
47. *Claimant had an arthritic knee for years, even though he claims he never complained of pain.*
48. *Dr. Wieneke agreed that claimant's left knee injuries in the 1970's were the likely cause of his osteoarthritis.*
49. *Dr. Wieneke conceded that there is no way to tell how fast the osteoarthritis would have progressed in claimant's knee with or without the complicating factors of obesity, smoking and stair climbing.*
50. *The bone-on-bone condition in claimant's left knee existed for more than two years.*
51. *Dr. Wieneke conceded that he could not state to a reasonable degree of medical certainty that a total knee replacement would not have been necessary had claimant not worked at Engelberth. Dr. Wieneke also conceded that the patient decides at what point the*

pain becomes intolerable and therefore the timing of a total knee replacement is his own choice.

52. *The osteoarthritis progressed throughout claimant's construction work, including all of his employments prior to Engelberth.*
53. *Dr. Wieneke had his testimony challenged during the hearing with the deposition he gave in Stannard v. Stannard. Dr. Wieneke sees this case significantly different from Stannard and his conclusions are different because of the differing circumstances.*
54. *Dr. Wieneke testified that knee replacement surgery is advised in a setting of intractable pain, with good, conservative care in other respects.*
55. *Dr. Wieneke testified that the flaking caused by the bone-on-bone rubbing in the knee can cause swelling.*
56. *Both Dr. Vargas and Dr. Wieneke are board certified orthopedic surgeons. Dr. Johansson is an osteopathic doctor and not a surgeon. He has never performed a knee replacement surgery and would not make a recommendation that surgery be performed without first referring a patient to an orthopedic surgeon. His experience in treating osteoarthritis is thus more limited than both Dr. Vargas's and Dr. Wieneke's.*

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). He 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. *If a worker receives a personal injury by accident arising out of and in the course of employment by an employer subject to this chapter, the employer or the insurance carrier shall pay compensation. 21 V.S.A. sec 618(a)(1).*
4. *An injury occurs in the course of a claimant's employment when it happens within the period of time the claimant was on duty at a place where she was reasonably expected to be while fulfilling the duties of the employment contract. Miller v. IBM, 161 Vt. 213 (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 he was injured." Id. 213.*
6. *An injury that occurs within the course of a claimant's employment does not arise out of the employment unless the employment contributes to the risk or aggravates the injury. When an injury results from a condition personal to the claimant and has no connection to work, it does not arise out of employment and, therefore, is not compensable. Shea v. Worcester Insurance Co., Op. No. 13-02WC (2002).*
7. *Where the causal connection between an accident and an injury is obscure, expert medical testimony is required. Lapan v. Berno's Inc., 157 Vt. 393 (1979).*
8. *In Vermont a medical condition is compensable if the employment aggravated, accelerated or combined with an existing weakness or*

disease to produce the final disability. Marsigli's Estate v. Granite City Auto Sales, 124 Vt 95 (1964). This is true even if the disease left to itself would in time produce the same result independent of the injury received on the job. Id. at 104.

9. *When considering a progressively degenerative disease such as osteoarthritis, where the disease, if left to itself, and apart from any injury, would in time have inevitably caused a complete disability, the causation test becomes whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred. Stannard v. Stannard, 2003 VT 52, ¶11.*
10. *The heart of this case revolves around the test laid out in Stannard. Here we are considering a progressively degenerative disease (osteoarthritis) that if left to itself would, in time, have caused a complete disability to the claimant. Therefore, if the claimant's work environment (construction) brought the disability on sooner than would have otherwise occurred then the employer is liable.*
11. *Defendant CNA argues that this case is parallel to Stannard and that benefits should be denied. The defendant focuses on the bone on bone condition found in both Stannard and the claimant as this case. CNA cites to this department's decision in Stannard v. Stannard, Op. No. 33-01WC (Oct. 5, 2001) at ¶29, for justification for denial of this claim. CNA claims it is unfair to place the burden on the last insurer when a claimant has a degenerative condition that over years progressed to the point of bone on bone and varus alignment.*
12. *The Department found, "It would be manifestly unfair to assign liability to the last insurer on these facts." Id. The Vermont Supreme Court added that Mr. Stannard's underlying condition had "already progressed so far that Stannard was already a candidate for a total knee replacement in both knees." Stannard v. Stannard, 2003 VT 52, ¶ 12.*
13. *Although the claimant in Stannard and Mr. Miller in this case had different medical history, they share the same diagnosis of osteoarthritis and need of a total knee replacement.*
14. *Even Dr. Vargas, claimant's expert, agrees that the condition came on before claimant began working at Engelberth. In fact, Dr. Vargas opined that claimant's knee had reached the point of bone on bone before he began working at Engelberth. The pain that caused*

claimant to seek medical attention did no more than reveal an existing, but until that time undiagnosed, condition. See e.g Foco v. Bariatrix International, Inc. Opinion No. 34-99WC (1999) (diabetes condition unmasked at time of treatment for work related injury not compensable).

15. *Although work at Engelberth may have caused symptoms, it did not cause or accelerate the underlying condition. Claimant's knee had reached the bone on bone condition, the point at which a total knee replacement is recommended, before he started working at Engelberth, despite the absence of an earlier diagnosis. Although work at the Engelberth caused knee pain, it did not aggravate or accelerate the underlying condition. Consequently, this is not a compensable claim.*
16. *Given this conclusion, it is not necessary to rule on the aggravation-recurrence aspect of this claim.*

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 5th day of November 2004.

*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.