Haskins v. Merrill Gas (May 14, 2003)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Philip Haskins	)	State File No. L-12374 and T-12535
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Merrill Gas	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 22-03WC

Hearing held in Montpelier on December 18, 2002
Record closed on February 3, 2003

APPEARANCES:

John C. Mabie, Esq. for the Claimant
Glen L. Yates, Esq. for Old Republic, the Defendant
Jeffrey W. Spencer, Esq. for TIG, the Defendant

ISSUES:

1. Is the claim compensable?
2. If so, is Claimant entitled to temporary total disability benefits and for what periods?
3. Which carrier is responsible for this claim?

EXHIBITS:

Claimant's Exhibit 1:	First Report of Injury 12/97
Claimant's Exhibit 2:	Fee Agreement with Attorney Gibson
Claimant's Exhibit 3:	Fee Agreement with Attorney Mabie
Claimant's Exhibit 4:	Attorney Invoice
Claimant's Exhibit 5:	Attorney calculations re: TTD adjustment due
Claimant's Exhibit 6:	Letter from Attorney Yates re: benefits paid
Claimant's Exhibit 7:	Wage statements (Form 5)
Claimant's Exhibit 8:	Calculation of TTD from 12/27/00
Claimant's Exhibit 9:	None
Claimant's Exhibit 10:	Deposition of Thomas Shirreffs, M.D.
Claimant's Exhibit 11:	Deposition of Sylvia O'Neil
Claimant's Exhibit 12:	Deposition of William Dunn

TIG Exhibit B: Attorney Yates letter to Dr. Jon Thatcher

ORIC Exhibit A: Time Records
ORIC Exhibit B: Weather report

PROCEDURAL HISTORY:

Prior to the hearing in this case, three of four insurers moved for summary judgment. In Opinion No. 46SJ-02WC dated, November 13, 2002, the Commissioner granted summary judgment to Frontier and Great American. Therefore, the case proceeded against the first and last insurers, Old Republic and TIG.

FINDINGS OF FACT:

1. Philip Haskins (Claimant) was an employee and Merrill Gas Company, Inc. (Merrill Gas) his employer within the meaning of the Vermont Workers' Compensation Act from 1996 to 2000. Claimant drove a delivery truck, delivered propane to customer's homes, installed tanks and performed furnace repairs.

2. Old Republic Insurance Company provided workers' compensation coverage to Merrill Gas from May 1, 1997 through April 30, 1998.

3. At an office visit on July 23, 1997, Dr. Richard Whiting performed a physical examination and documented several areas of concern. Claimant's knee was not one of the concerns identified.

4. On December 17, 1997 Claimant fell onto his left knee in the course of his employment while delivering propane to a residence. His knee was painful. He sat in his truck and rested before continuing on his route.

5. Claimant's description of the amount of snow on the ground at the time of the fall is not consistent with the weather reports from official sources for the day of the fall. Despite that inconsistency, I accept Claimant's report that he fell onto his knee while delivering propane.

6. Claimant reported his injury at work that day and again the next morning. The office manager, Sylvia O'Neil, prepared and filed a first report of injury. On December 26, 1997 the Employer's first Report of Injury was filed in this Department.

7. Claimant continued to work full time, full duty, although he had pain in his knee and swelling at night. He thought the pain would get better and that he should "tough it out." However, the pain failed to resolve.

8. Great American provided workers' compensation coverage to Merrill Gas from May 1, 1998 through April 30, 1999.

9. Claimant first saw a physician with the complaint of knee pain on June 11, 1998. At that visit, Dr. Whiting noted that Claimant had injured his knee at work in 1997, had painful swelling that waxed and waned and had intermittent catching.

10. Claimant noted that his everyday work, including getting in and out of the truck, periodically made the knee symptoms worse.

11. Claimant lost no time from work until after Great American was on the risk on May 1, 1998.

12. Frontier insured Merrill Gas from May 1, 1999 through April 30, 2000.

13. The first documentation in the medical records of any locking in Claimant's left knee appears in a March 1999 note. On November 15, 1999 Claimant had arthroscopic surgery on his left knee.

14. In a November 26, 1999 office visit Dr. Thomas Shirreffs, an orthopedic surgeon, noted that Claimant was to gradually increase his activity level. He signed a form for a December 6, 1999 return to work.

15. Claimant's employer offered him work in the "yard" in a job that would be less strenuous on his knees. Claimant perceived the job as demeaning and rejected it in favor of his usual trucking work.

16. TIG insured Merrill from May 1, 2000 through April 30, 2001.

17. On May 18, 2000 Dr. Shirreffs treated Claimant's left knee with steroid injections for knee symptoms that had returned to a pre-arthroscopic surgery level. Claimant continued to work full time, full duty.

18. On May 25, 2000, Claimant and a co-worker, Philip Perkins, were assigned to an appliance repair call. Before the two left the company parking lot, Claimant got out of the service truck to retrieve his hat and coat from his own truck, which was across the lot. After walking across the parking lot where there was an imbedded railroad track, he felt a "sharp, deadly pain" in his left knee and almost blacked out.

19. Despite the pain, Claimant traveled to the work site with his coworker, but later left with Mr.Yeau, who was also at the site. Claimant declined the offer to take him directly home, was dropped off at the company lot and drove himself home.

20. Claimant visited Dr.Shirreffs the next day, May 26, but said nothing about the parking lot incident the day before. He simply reported a continuation of pain when standing and walking. Dr. Shirreffs documented Claimant's complaint of significant pain and prescribed a knee brace.

21. Within two or three days, Claimant's symptoms were back to where they were before the parking lot incident.

22. On June 22, Dr. Shirreffs ordered the Claimant to remain out of work. In November of that year, Claimant learned that a total knee replacement would be necessary in the future.

23. Claimant has not worked since May of 2000.

24. On November 1, 2000 Dr. Shirreffs concluded that Claimant could no longer work as a propane delivery person. He took him out of work through December 6, 2000.

25. Claimant visited the Merrill office from time to time. On two occasions, he told Bruce Yeau that he wanted to return and left in anger when Yeau told him he did not believe they could accommodate him.

26. Claimant was offered, but declined, vocational rehabilitation services. He decided to await the outcome of the hearing or receive a total knee replacement before engaging in any vocational effort.

27. Old Republic paid the Claimant temporary total disability benefits during the following periods:

    - July 16, 1999 to September 9, 1999
    - November 15, 1999 to December 27, 1999
    - May 25, 2000 to December 26, 2000

Medical Opinions

28. Dr. Shirreffs performed the 1999 surgery when he observed extensive degeneration of the knee joint indicating a long-term process, aggravated by the 1997 fall. The Claimant's progressively worsening symptoms were natural and expected. The parking lot incident indicated stress from pain and probably came on because the relief from the injection given a week earlier wore off.

29. Further, in Dr. Shirreffs opinion, temporary periods of respite from pain were a natural and expected part of the disease process.

30. On November 30, 2000 Dr. Shirreffs noted that Claimant could return to work if he could find a job that would allow him to sit down most of the time with no work that would require standing, walking, climbing or placing excessive stress on the left knee.

31. In his deposition Dr. Shirreffs described the 2000 event as "an aggravating event that took a situation and made it worse." He also said the more the knee is used, the more it can wear and that heavy labor is tough on the knees.

32. Dr. Jon Thatcher, also an orthopedist, opined that the December 1997 fall "most likely initiated the patellofemoral arthritis." Furthermore, he said that Claimant suffered a meniscal tear, either at the time of the initial fall or later "when he was getting in and [out] of a truck at work." He explained that it is common for patients to endure symptoms for a period of time before they seek medical attention. Symptoms wax and wane early on and ultimately become more constant as the deterioration of the joint progresses.

33. At the hearing, Dr. Thatcher theorized that a small piece of cartilage might have entered the joint causing pain when Claimant was walking across the parking lot.

34. Claimant submitted copies of his fee agreement with his attorneys and claims for attorney fees and costs for work by Gale Corum & Mabie and Gibson Law Office. An itemized statement reflecting 39.05 hours worked and costs incurred totaling $100.85 supports the claim for attorney fees and costs for Gale Corum & Mabie. The claim for the Gibson Law office is supported by an itemized statement of 81.2 hours worked and costs totaling $1,380.48.

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 (1963). 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 form 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).

Compensability

4. Old Republic challenges the compensability of this claim, arguing that there could not have been as much snow as Claimant now alleges at the time he fell at a customer's house, thereby rendering his total account of the accident unreliable and incredible. However, I accept Claimant's report that he fell onto his knee at the customer's home on December 17, 1997 even though the fall was not witnessed and his description of the amount of snow is probably inaccurate. That is because he reported the incident the day it occurred, as validated by the employer's first Report of Injury, because the medical evidence demonstrates that the normal pattern is for symptoms to wax and wane, and because he is one to "tough it out," and wait until he has severe pain before he seeks medical attention.

5. I accept not only that he fell on his knee while at work, but also that the fall set in motion a process that ultimately led to degeneration and necessitated a total knee replacement, as both experts convincingly explained.

Aggravation or recurrence

6. Which carrier is responsible for this compensable claim invokes the familiar aggravation-recurrence analysis. Old Republic is the carrier responsible for benefits associated with Claimant's injuries if he suffered a recurrence, that is if the work Claimant continued to do merely caused a return of symptoms following temporary remission, *Workers' Compensation Rule* 14.9242, but did not causally contribute to his disability. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem.) (1997). On the other hand, TIG is responsible for the entire disability if Claimant's work while it was on the risk aggravated, accelerated, or combined with a preexisting impairment to produce a disability greater than what would have resulted from 1993 injury alone. Id.; Rule 2.110. Of course, a prerequisite to a finding of liability in either instance is causation, as the *Pacher* decision clearly indicates.

7. There is no evidence to demonstrate that the parking lot created any obstacles or challenges to Claimant's gait. Although there is a train track running across the lot, there is nothing to suggest that it played any role in the development of the Claimant's pain. For example, nothing was produced at hearing to show that Claimant lifted his knee in an unusual way to navigate across the tracks and then had the onset of pain. That walk across the lot was no different from any normal walk. No instrumentality of work played a role. Even if I accept Dr. Thatcher's theory that a piece of cartilage broke off and entered the joint while Claimant was walking across the lot, there is nothing about the workplace that caused it. As such no liability can fall to TIG, the insurer on the risk at that time.

8. "[T]he progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause." 1 Larson's Workers' Compensation Law. § 10. Such is the case here. Because Claimant has proven that a fall while working in 1997 set in motion a disease process that continues, Old Republic remains responsible.

Temporary total disability

9. A claimant is entitled to temporary disability compensation upon reaching medical end result or successfully returning to work. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996); *Orvis v. Hutchins*, 123 Vt. 18, 24, 179 A.2d 470, 474 (1962). Once released to work, a Claimant is obligated to conduct a good faith job search within prescribed limitations. If those efforts prove unsuccessful, the right to TTD continues. However, if a properly notified claimant fails to conduct that good faith search, the carrier is not obligated to continue paying temporary benefits. WC Rule 18.1300.

10. This Claimant was released to work, with restrictions, on December 6, 2000. He rejected efforts to modify his duties at Merrill. He emphatically testified that he was a truck driver and did not want to work in a less prestigious job. Although he is within his rights to assert such a preference, he cannot simultaneously maintain a claim that he is temporarily totally disabled, when his own employer offered to employ him within restrictions.

11. Claimant has not presented convincing testimony that he made good faith efforts to look elsewhere for jobs within his restrictions. And he rejected efforts at vocational rehabilitation.

12. Therefore, Claimant is not entitled to temporary total disability benefits after December 6, 2000 except for periods related to the total knee replacement, necessitated by the work related injury.

Attorney Fees and Costs

13. Pursuant to 21 V.S.A. § 678 (a), a prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. In this case, where the Claimant partially prevails, he is entitled to a partial award of fees. If the parties cannot resolve this informally, Claimant may submit an amended request for fees proportionate to the degree of success.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law:

1. The claims against TIG are DENIED;
2. Old Republic is ORDERED to adjust this claim;
3. Claimant's claim for temporary total disability benefits after December 6, 2000 is DENIED, except as specified in paragraph 12 above.
4. The issue of attorney fees and costs is deferred.

Dated at Montpelier, Vermont this 14th day of May 2003.

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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.