STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-23315
	)	
	)	By: Margaret A. Mangan
James Stannard	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
The Stannard Company	)	
	)	Opinion No. 33R-01WC

RULING ON CLAIMANT'S MOTION TO RECONSIDER ATTORNEY FEES

In the opinion in this case signed by the Commissioner on October 5, 2001, the claimant's attorney was awarded fees based on fifty percent of the time spent on the case. Since then, claimant through his attorney Mary C. Welford, submitted a memorandum in support of reconsideration of that award.

Claimant is correct in stating that the primary contested issues were whether his injury was compensable and, if so, which carrier was responsible for paying benefits. Those issues consumed the vast majority of the legal work. A secondary and less time-consuming issue was whether the claimant had reached medical end result. Claimant, who prevailed on the issue of compensability but not on the medical end result issue, argues that the fee awarded is not proportional to the actual success.

It was necessary for the claimant to retain counsel because the compensability of his claim was challenged. As a result counsel attended seven depositions which involved travel and expended considerable time on the hearing. Total hours were 122.65 Had compensability not been challenged, claimant's counsel's extensive involvement would not have been necessary.

I accept the claimant's representation that the work on the medical end result issue consumed no more than 15% of the time spent. She is therefore entitled to fees based on 85% of the total time spent. The order is amended accordingly.

Amended Order:

CNA is ORDERED to pay the claimant attorney fees based on 104.25 at $70.00 per hour.

All other aspects of the original order remain unchanged.

Dated at Montpelier, Vermont this 29th day of November 2001.

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R. Tasha Wallis
Commissioner

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The Stannard Company	)	
	)	Opinion No 33-01WC

Hearing held in Montpelier on April 2, 2001
Record Closed on May 29, 2001

APPEARANCES:

Mary Welford, Esq. for the claimant

Corina Schaffner, Esq. of Eaton and Hayes (at the time of hearing), for Peerless Insurance Co.

John Valente, Esq. of Ryan Smith & Carbine for Gallager Bassett, administrator for United Pacific

Christopher McVeigh, Esq. of Paul Frank and Collins for CNA Insurance, successor in interest to Continental Insurance Company.

ISSUES AS STIPULATED BY THE PARTIES:

1. Whether Mr. Stannard's right knee arthroscopic surgery of July 1985 arose out of his work as a plumber at the Stannard Company.

2. Whether Mr. Stannard's bilateral osteoarthritic knee condition is a compensable claim under the Workers' Compensation Act.

3. Whether Mr. Stannard's weight was the aggravating or accelerating factor for the progression of his osteoarthritic knee condition, such that he is not entitled to workers' compensation benefits for his bilateral osteoarthritic knee condition.

4. If Mr. Stannard's progressive bilateral osteoarthritic knee condition is a compensable injury:

    Which employer/carrier is responsible for any workers' compensation benefits related to Mr. Stannard's right knee?

    Which employer/carrier is responsible for any benefits related to Mr. Stannard's left knee?

STIPULATION OF FACTS:

1. James Stannard was employed as a plumber at the Stannard Company for many years until June 8, 1998.

2. CNA Insurance Company, or its predecessor in interest, the Continental Insurance Company, insured the Stannard Company for its workers' compensation obligations from March 30, 1985, through March 30, 1995.

3. Peerless Insurance Company insured the Stannard Company for its workers' compensation obligation from March 30, 1995, through March 30, 1997.

4. United Pacific, with adjusting by Gallagher Bassett, insured the Stannard Company's workers' compensation obligations from March 30, 1997, through at least June 5, 1998, when Mr. Stannard left his employment at the Stannard Company.

5. Mr. Stannard was an employee of the Stannard Company at all material times involved in this claim.

6. The Stannard Company and its various workers' compensation carriers were employers as defined by Vermont's Workers' Compensation Act during the material time periods relevant to this litigation.

7. The parties stipulate to the qualifications and expertise of the following medical care providers: Dr. Michael Polifka, Dr. Robert Block, Dr. Kuhrt Wieneke, Dr. Jonathan Thatcher, Dr. Victor Gennaro, Dr. Mark Bucksbaum, Dr. Stephen Incavo and any other medical care provider whose records appear in the joint medical records exhibit.

8. On June 5, 1998 the claimant's average weekly wage was $522.41.

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	First Report of Injury 9/18/89
Claimant's Exhibit 2:	First Report of Injury 9/2/92
Claimant's Exhibit 3:	First Report of Injury 7/28/93
Claimant's Exhibit 4:	First Report of Injury 3/1/94
Defendants' Exhibit A1:	Transcript of deposition of Robert S. Block, M.D.
Defendants' Exhibit A2:	Transcript of 2nd deposition of Robert S. Block, M.D.
Defendants' Exhibit B:	Transcript of deposition of Stephen J. Incavo, M.D.
Defendants' Exhibit C1:	Transcript of deposition of Michael Polifka, M.D.
Defendants' Exhibit C2:	Transcript of 2nd deposition of Michael Polifka, M.D.
Defendant CNA Ex. D1:	Transcript of deposition of Kuhrt Wieneke, M.D.
Defendant CNA Ex. D2:	Transcript of 2nd deposition of Kuhrt Wieneke, M.D.

FINDINGS OF FACT:

1. Claimant was an employee of the Stannard Company for approximately 32 years from 1966 until June 5, 1998. He began working there when he was 18. When he stopped working for the company in 1998 he was 50. He is now 53.

2. Claimant worked for the Stannard Company as a plumber, primarily doing service work in private residences.

3. Claimant's service work involved repairs of faucets, toilets, furnaces and other plumbing fixtures. In the course of an average day, he spent about 65% of his time working on his knees. During the time spent working on his knees, he repeatedly got up and down from a kneeling position.

4. Claimant's work involved: standing on hard surfaces, twisting movements, going up and down stairs, often carrying tools. His five-gallon tool pail weighed between 35 and 40 pounds.

5. Because he was one of the larger, stronger employees at Stannard Company he was often asked to help with boiler removals and replacements. Boilers weighed up to 800 pounds each.

6. When claimant lowered a new boiler down a basement stairs, he did so by holding a rope that was around the boiler and bracing the boiler with his legs.

7. Claimant also helped with other heavy lifting such as carrying old radiators and bathtubs

downstairs. He acted as the "low man," thereby bearing most of the weight.

8. Over the years, the claimant developed a variety of medical conditions, but they did not interfere with his work. For example, he has had asthma since he was six months old, a condition that requires daily medication. He also receives treatment for high blood pressure, diabetes and sleep apnea. None of these conditions ever interfered with his work.

9. On December 22, 1980 the claimant saw Dr. Roger Fox at the Mountain Valley Health Center complaining of a painful right knee. He reported having suffered no trauma to the knee. The x-ray showed no abnormality. At that time he had worked for Stannard Company for about fourteen years. In his note for the visit that day, Dr. Fox specifically noted that the claimant "does much squatting."

10. On December 27, 1983 the claimant saw Dr. Mark Novotny at the Northshire Medical Center with the complaint of pain and swelling in his right knee. Dr. Novotny suspected bursitis and recommended using ice and taking a day off from work.

11. On March 25, 1985 the claimant saw Dr. Michael Polifka at the Northshire Medical Center complaining of right knee pain despite no trauma. Dr. Polifka found some fluid in the right knee and prescribed Naprosyn and rest. He noted that the claimant had been hunting in the woods. Despite the treatment, the claimant's right knee pain and swelling persisted, prompting a visit to an orthopedist, Dr. Robert Block.

12. When Dr. Block first saw the claimant on June 26, 1985 he noted that the claimant's right knee pain was primarily related to his plumbing work and had been aggravated in April of 1985 when he knelt down on a nail head. Claimant reported persistent snapping and popping in his right knee and intermittent effusions. On examination Dr. Block found a mild effusion but full range of motion and no significant tenderness. Dr. Block suspected a stretch injury caused by repetitive kneeling and squatting at work or a degenerative meniscal tear.

13. An arthrogram performed on July 2, 1985 showed a meniscal tear and a popliteal cyst of the right knee.

14. On July 22, 1985 Dr. Block performed an arthroscopy and partial meniscectomy on the claimant's right knee. During that surgery, Dr. Block found moderate chondromalacia of the patellofemoral joint, marked synovitis of the medical compartment and a large posterior horn flap tear. He also found marked fragmentation of portions of the medial meniscus. The history Dr. Block reported included a one year history of intermittent right knee pain particularly related to the kneeling and squatting involved in his plumbing work.

15. Chondromalacia means softening of a cartilage. It is an early stage of osteoarthritis. Synovitis is inflammation of the synovial membrane of a joint.

16. A twisting movement with an overload most likely caused the cartilage tear in the claimant's knee. A tear in turn causes swelling.

17. An injury can trigger osteoarthritis, also called degenerative joint disease. Such an injury

may be a torn cartilage or ligament that one may or may not appreciate at the time.

18. Claimant returned to work full time and full duty.

19. By September 4, 1985 Dr. Block noted marked improvement in the claimant's knee pain, swelling and locking, although he still had mild knee soreness in both knees after bent knee activity.

20. The repetitive squatting and kneeling involved in the claimant's plumbing work put a lot of stress on his knees and contributed to the degeneration of his knee joints.

21. On August 5, 1986 claimant went to see Dr. Block and reported increased swelling, pain and redness in his right knee after working on a tile floor at his job. Dr. Block had him stay out of work for three days in order to avoid repetitive kneeling and squatting while the knee healed. The incident was reported to the workers' compensation carrier.

22. There is a three-year hiatus in the medical records for knee pain.

23. September 15, 1989 while at work the claimant tripped in a depression as he was coming out of a cellar hole and twisted his knee. Three days later, he returned to Dr. Block who suspected a meniscal tear and recommended conservative treatment.

24. At an October 10, 1989 office visit when claimant complained that his left knee continued to bother him, Dr. Block recommended arthroscopic surgery. He performed that surgery on October 18, 1989 when he found and repaired a complex horizontal tear of the posterior horn of the medial meniscus. In mid-November Dr. Block released the claimant back to work.

25. At a December 6, 1989 visit Dr. Block noted that the claimant's left knee was slowly improving. He advised the claimant to take ibuprofen and avoid kneeling and squatting.

26. Claimant returned to work as a residential plumber performing all of the work he had done prior to his left knee arthroscopic surgery, working the same hours, carrying the same weights and encountering the same conditions.

27. On January 10, 1990 the claimant reported to Dr. Block that he was having recurring episodes of swelling. Dr. Block injected the knee with Xylocaine and advised the claimant to continue to use ice and wrap his knee. He also advised the claimant to avoid bent knee activity.

28. On April 17, 1990 Dr. Polifka noted that the claimant's left knee moved well. Claimant is noted as saying he was absolutely pain free over the previous month. At the same visit, the claimant continued to complain of right knee pain with new swelling behind the knee.

29. On May 15, 1990 Dr. Block found a small popliteal cyst behind the right knee, which was painful and swollen. Claimant reported that his left knee was pain free.

30. The claimant next sought treatment for his knees in July 1992 when he saw Dr. Polifka for right leg swelling.

31. On August 31, 1992 the claimant stepped in a hole while digging up a septic tank at work and wrenched his right knee. He did not return to work that day.

32. When the claimant saw Dr. Block on September 1, 1992, he reported that the swelling in his right calf, foot and ankle had slowly increased over time. His routine work at Stannard Plumbing with squatting and kneeling had continued. His popliteal cyst was increasing in size.

33. On July 26, 1993 the claimant felt a pop in the back of his right knee while loading an air compressor into a truck. He reported the incident but did not lose any time from work.

34. The claimant returned to see Dr. Block on August 5, 1993 complaining of increased swelling in his right knee. Dr. Block found mild crepitation of the knee on motion and recommended that the claimant consider re-arthroscopy and excision of the popliteal cyst. The doctor suggested that a high tibial osteotomy be considered if the arthroscopy revealed major damage in the medial compartment. But because the claimant felt he could not take time from work, Dr. Block re-injected the knee with Xylocaine (a local anesthetic) and Celestone (an anti-inflammatory corticosteroid).

35. On February 25, 1994 the claimant fell on the ice at work, landing on both knees. He noted a “spongy, swollen feeling” in the right knee and marked discoloration of the left knee.

36. When Dr. Block saw the claimant on March 2, 1994, he noted that that Mr. Stannard continued to work full time despite an “ache and some medial joint pain.” At that visit, the doctor also noted progression of the varus deformity in both knees and “nearly complete loss of articular cartilage height and adjacent spurring.” Dr. Block advised that the claimant stay off his feet except for two to three hours per day for the following week. A varus deformity is a narrowing of the medial half of the knee joint.

37. On March 31, 1994 Dr. Block injected the claimant’s right knee with Xylocaine and Celestone and recommended frequent ice packs. If he did not make good progress, Dr. Block projected that he would need another arthroscopy and probably a high tibial osteotomy.

38. Claimant then went to Dr. Polifka who on June 10, 1994 noted that the claimant had twisted his ankle and had swelling in both ankles.

39. Over the next two years, the claimant followed up with Dr. Polifka about persisting swelling in both legs. Dr. Polifka injected the right knee and recommended elevating the legs and using ice.

40. CNA last insured the Stannard Company for workers' compensation on March 30, 1995. At that time, Peerless came on the risk.

41. On March 26, 1996 the claimant returned to see Dr. Block complaining of increasing right knee pain, difficulty with bent knee activity and stair climbing, even though he had lost 150 pounds in the previous year. Dr. Block described the progression of the varus deformity. And he concluded that the claimant's degenerative joint disease had progressed to the point where high tibial osteotomy was not likely to be helpful and that repeat injection and a brace were the most likely course to allow pain control prior to total knee replacement.

42. Claimant began using the brace after the March 26 appointment and found it improved his walking. When he returned to see Dr. Block on May 26, 1996 he reported that he had been able to get out for some turkey hunting. Dr. Block diagnosed a painful Baker's cyst, "likely worsened by walking on uneven surface."

43. On May 17, 1996 Dr. Polifka noted that claimant had been out walking and climbing for turkey season, although he had been less aerobically active than the previous year. His right knee had a modest degree of pain.

44. By September 1996 the brace the claimant had been wearing started to irritate his skin. A rash developed in the area.

45. By January 1997 claimant had marked dermatitis and cellulitis in the area of the popliteal cyst.

46. At a February 4, 1997 visit, Dr. Block found excoriation in areas where the brace was touching the skin. He concluded that the claimant had neoprene sensitivity and would not be able to continue with the brace unless he could wear it over some sort of skin protection. Dr. Block thought it was time to consider total knee replacement. He injected the knee with Xylocaine and Celeston and instructed the claimant to use ice three times per day. Dr. Block told the claimant at that visit that he would need a total knee replacement of his right knee because of its deterioration and that he did not believe that an osteotomy would provide the needed relief.

47. The claimant tried to continue normal activity and went turkey hunting in the spring of 1997.

48. After February 4, 1997 the claimant did not go back to see Dr. Block but continued to treat with Dr. Polifka. On May 14, 1998 claimant reported to Dr. Polikfa that his right knee pain had become severe, that kneeling at work was impossible and that simple walking had become more difficult. Claimant was referred to Dr. Incavo, a Burlington orthopedist, for a surgical consultation.

49. United Pacific came on the risk on March 30,1997.

50. A May 14, 1998 note from Dr. Polifka's office reports a complaint of increased pain in the knees with the right greater than the left, worsened at plumbing work with kneeling, bending, lifting more than 25 pounds. Dr. Polifka referred the claimant to Dr. Incavo for a second opinion about the claimant's "persistent knee discomfort." In a May 19, 1998 letter to Dr. Incavo, Dr. Polifka specifically noted that the claimant's symptoms were making his "getting through his daily work as a plumber difficult."

51. After evaluating the claimant on May 26, 1998, Dr. Incavo determined that the claimant's only viable options for treatment of his right knee were tibial osteotomy and knee replacement. However, a knee replacement would not have allowed the claimant to continue working as a plumber. Therefore, the claimant chose to undergo a high tibial osteotomy on his right knee. At this point the claimant had determined that living with pain was not an option as it was affecting activities as basic as walking.

52. The claimant continued to work through Friday, June 5, 1998. He had a right tibial osteotomy on Monday, June 8, 1998. An external fixator device stabilized the surgical site. The osteotomy procedure re-positions the tibia into alignment to correct the varus deformity.

53. Until June 5, 1998 the claimant had worked full-time for Stannard Plumbing, despite knee pain and his other medical problems. It was not until his knee pain and dysfunction reached an intolerable level that he stopped working.

54. At the time of claimant's last day of work in June 1998 United Pacific (Gallagher Bassett) was on the risk.

55. The June 8, 1998 surgery was reasonably successful but he developed postoperative cellulitis that required readmission and forty-eight hours of intravenous antibiotics.

56. At follow up visits on September 1, 1998 and October 6, 1998 it was noted that the healing from the surgery was incomplete. At the end of October, Dr. Incavo aspirated fluid from the knee and injected a steroid.

57. When the claimant saw Dr. Incavo on December 22, 1998 he reported some, but not complete pain relief in his right knee. He also reported that his left knee was bothering him significantly. Dr. Incavo agreed with the claimant that he would not be able to return to work as a plumber.

58. At a February 16, 1999 visit to Dr. Incavo, claimant reported pain and swelling in his right knee and increasing symptoms in his left knee. Dr. Incavo recommended proximal tibial osteotomy on the left and a course of injections on the right. Three injections, with some improvement, followed over the next two months.

59. At a check-up with Dr. Incavo on May 14, 1999 the claimant reported some improvement with his right knee but severe pain in his left knee. Dr. Incavo injected the right knee with local anesthetics and a steroid.

60. Claimant returned to see Dr. Incavo on July 16, 1999 when they discussed options for his left knee. A total knee replacement would mean that the claimant would probably not be able to return to plumbing work. Yet an osteotomy on his left knee was not likely to be more effective than the one on the right, which still left the claimant with pain. Therefore, the claimant opted for a left total knee replacement, which was performed on August 30, 1999.

61. After the surgery the claimant went to physical therapy five times per week for two weeks, then three times per week for an additional eight weeks. After that course of physical therapy, the claimant returned to see Dr. Incavo on November 30, 1999. Dr. Incavo determined that the claimant had made good progress, but he doubted if he would ever return to a significant level of labor.

62. Claimant reached a medical end result for his left knee on or about March 28, 2000.

63. On or about May 26, 2000 Gallagher Bassett filed a Form 27 terminating the claimant's temporary total disability benefits based on medical end result as documented in Dr. Bucksbaum's March 28, 2000 report.

64. On August 22, 2000 the claimant returned to see Dr. Incavo who noted that his left knee was healing well, but that the right knee was painful. X-rays of the right knee showed significant joint space narrowing.

65. On November 6, 2000 Dr. Polifka remarked that the claimant was still recovering from left knee surgery and that he had ongoing symptomatology from osteoarthritis on the right.

66. Claimant intends to have a right total knee replacement but is waiting until he can no longer tolerate the pain.

67. Claimant now leads a primarily sedentary life. There are many days he does not leave the house at all. He is reluctant to undergo another operation until it is absolutely necessary because of the complications with slow healing and infections that followed his other operations.

68. The need for a total knee replacement is determined by the claimant's pain. He was able to continue his work as a plumber after the osteotomy, but would not be able to do so after a total knee replacement.

69. By March 2, 1994 it was inevitable that the claimant would need a total knee replacement. At that point in time his varus deformity had been fully established and the cartilage cushion at the knee joint had been lost, meaning that bone was rubbing against bone.

MEDICAL OPINIONS:

1. Dr. Polifka has been the claimant's treating physician since the early 1980's. He is an internist and is still treating the claimant. He had access to most of the claimant's medical records and is the only physician who has followed the claimant's knee condition from the very start to the present.

2. Doctors Block, Incavo, Thatcher, Wieneke and Gennaro are all orthopedic surgeons.

3. Dr. Block was the claimant's treating physician from the mid 1980's through 1997. He did not review any information after the claimant's last visit to him in February 1997.

4. Dr. Incavo has been the claimant's treating physician from 1997 through the present and performed both the right high tibial osteotomy in June 1998 and the left total knee replacement in 1999.

5. Dr. Jon Thatcher performed a records review for CNA and issued a report on May 19, 2000.

6. Dr. Wieneke performed a records review for United Pacific and reviewed the claimant's deposition.

7. Dr. Gennaro performed a medical records review on January 29, 1999 and later reviewed additional medical records. He also reviewed the depositions of the claimant, Dr. Wieneke, Dr. Incavo and Dr. Thatcher.

8. Neither Dr. Block nor Dr. Wieneke could state with any reasonable degree of medical certainty that the claimant's February 1994 fall onto both knees aggravated his osteoarthritic knee condition.

9. In an August 18, 1998 letter addressed to Whom It May Concern, Polifika wrote that the claimant had long-standing problems with his knees evolving over many years to severe osteoarthritis that resulted in surgery for severe pain and disability. He concluded: "Mr. Stannard's new problems clearly have been precipitated and exacerbated by his work as a plumber because of the strain anatomically placed on his knees in the variety of positions required to do his work."

10. Dr. Block testified to a reasonable degree of medical certainty that the claimant's knee arthritis began with cartilage damage, then progressed due to his activities of a plumber. He acknowledged that the claimant's weight alone could be a factor, but that "usually it has to be coupled with some injury or some inciting factor."

11. In Dr. Block's opinion, the squatting, kneeling, twisting and turning that a plumber does "would substantially alter the progression of arthritis."

12. Dr. Polifika testified that Mr. Stannard required the osteotomy and knee replacement surgeries (the left has been done; right is anticipated for the future) due to the claimant's symptoms that were precipitated and exacerbated by his work as a plumber.

13. Based on his years of treating the claimant Dr. Polifka observed that if anything, the claimant understates his symptoms. He opined that the claimant's osteoarthritis was related to trauma in the 1980's and the early 1990's.

14. Dr. Polifka further opined that the additional stress on the internal components of the claimant's knee would have continued as long as he worked as a plumber. However, he testified that it was the claimant's pain, not his underlying condition, which worsened. In fact, claimant's condition never stabilized.

15. Dr. Wieneke testified that the claimant's weight was a factor in his osteoarthritis but that it was the weight combined with the work activities that created increased stress across the knees hastening progression of the arthritis. In his opinion, after 1995 there were no major contributors to the osteoarthritic condition other than the varus deformity, which was established in 1994, and the claimant's weight.

16. Dr. Polifka was unable to state with a reasonable degree of medical certainty that the claimant's work contributed to his underlying osteoarthritic condition after his injuries in the early 1980's.

17. Dr. Incavo testified to a reasonable degree of medical certainty that the claimant's work as a plumber worsened his arthritis given the level of activity he described, including heavy lifting, pushing and pulling.

18. Dr. Incavo also testified that although the claimant will need a total knee replacement for his right knee in the future, he had reached "maximum medical improvement" for the June 8, 1998 high tibial osteotomy surgery by June 8, 1999, approximately one year after surgery. However, he did not believe the claimant was at "medical end result" because something more could be done. If the total knee replacement is never done, then in Dr. Incavo's opinion, he is at a medical end for his right knee. The terms "medical end" and "maximum medical improvement" aside, it is clear that the claimant's right knee condition has reached a plateau.

19. On February 1, 2000 at Gallagher Bassett's request, the claimant saw Dr. Mark Bucksbaum who recommended a series of Hyalgan injections in the claimant's right knee. He also recommended custom orthotics and appropriate footwear. Claimant underwent the injection series and obtained the orthotics and footwear.

20. On March 28, 2000 Dr. Bucksbaum performed a permanency assessment of the claimant. He determined that the claimant had reached medical end result and that he had a permanent whole person impairment of 36%. Based on Dr. Bucksbaum's opinion, Gallagher Bassett discontinued the claimant temporary total benefits as of June 7, 2000.

21. In Dr. Incavo's opinion, the claimant will not have reached a medical end result until he recovers from further surgery on his right knee. However, he opined that claimant had reached medical end result on the left knee on or about August 2000, one year after the left total knee replacement.

22. At the November 2000 visit, Dr. Polifka considered the claimant "significantly dysfunctional" and unable to walk intermediate distances, such as in a supermarket, without significant discomfort. He further reported that the claimant was quite sedentary despite his desire to be fully active and that neither anti-inflammatory medication nor the Hyalgan injections had produced sustained improvement. Dr. Polifka stated that the claimant would not be at medical end result until he recovered from further surgery on the right knee.

23. Dr. Block testified that claimant's continued work as a plumber after March 30, 1995 aggravated or accelerated his osteoarthritic knee condition.

24. Dr. Wieneke opined that the claimant's knee condition existed since the early 1980's and that afterwards he had a recurrence of that condition. He defined "recurrence" as a "new or recurrent pain condition in which there is no significant change in the injury pattern…or… change in the underlying arthritic pattern…."

25. Dr. Wieneke provided the following explanation of how one's weight contributes to the acceleration or aggravation of an osteoarthritic knee condition: The pressure squeezed across the knee joints when one gets up or down is four to five times the individual's weight. It is not the simple act of kneeling, but rather that of getting up and down from one's knees that causes the problem. Dr. Wieneke opined that the claimant's weight was a major contributing factor aggravating or accelerating his osteoarthritic knee condition.

26. Dr. Jon Thatcher conducted a review of the claimant's medical records. He concluded that the claimant's weight was the primary contributing factor to the progression of his osteoarthritic condition in both knees.

27. Dr. Victor Gennaro testified that the primary cause of the claimant osteoarthritic knee condition and its progression was his excessive weight and the meniscectomies he had undergone. In his opinion, the work claimant did as a plumber had no impact on the aggravation or acceleration of the claimant's right knee condition.

28. Dr. Gennaro testified that, but for the claimant's age, he was a candidate for total knee replacement in March 1994. He also testified that a high tibial osteotomy was indicated in 1993 and 1994, based on radiographic findings.

29. Dr. Block's notation at the time of the July 22, 1985 right knee arthroscopic surgery that the claimant already had degenerative changes in the knee stands in contrast to Dr.Gennaro's opinion that the menisectomy was the cause. And Dr. Wieneke testified that the arthroscopic surgery would not aggravate or accelerate the progress of the osteoarthritic condition, but might actually slow it down.

30. Claimant submitted evidence of his fee agreement with his attorney; evidence of 122.65

hours worked on this case and expenses totaling $582.45.

DISCUSSION:

Compensability

1. 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). 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). 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).

2. There is sufficient credible evidence to conclude that the claimant's July 1985 surgery was necessary because of a work injury. The medical opinions are consistent that the types of activities require in plumbing work such as kneeling, squatting, stair climbing, heavy lifting and twisting are activities that put undue stress on a person's knees and can lead to meniscal tears and ultimately to arthritis.

3. This claimant first sought medical attention for his knees in 1980. During that evaluation and at virtually every medical appointment for his knees thereafter, the doctors opined that the claimant's plumbing activities were aggravation his knee condition.

4. During the five years preceding the July 1985 surgery claimant reported recurrent pain and swelling in his right knee. The medical opinions are consistent that pain and swelling are symptoms of a meniscal tear and that small meniscal tears can happen without major trauma.

5. Dr. Block testified to his opinion that the claimant's repetitive kneeling and squatting at work likely caused the meniscal tear he repaired in 1985. He based that opinion on the claimant's experience of recurring popping in his knee while kneeling and squatting at work.

6. The law does not require a showing that a specific incident led to his injury. *Campbell v. Savelberg,* 139 Vt. 31 (1980). "[I]njury, to be accidental, need not be instantaneous." 3 Larson's Workers' Compensation Law. § 50.02.

7. The defense theorizes that the claimant injured his knees while walking in the woods while hunting. However, Dr. Polifka's note of March 25, 1985 indicates that the claimant had returned from a walk in the woods without incident. Even if the claimant felt knee pain while walking would not be an indication that the walking caused the underlying problem, especially when the act of walking is compared to 20 years of kneeling and squatting involved in his work as a plumber. Furthermore, the claimant testified credibly that he had no incident outside of work in which he injured his knee.

8. Claimant is correct in arguing that even if the 1985 tear had not been work-related, the ultimate disability form severe osteoarthritis would be compensable. That is because of the well-established principal that a pre-existing condition does not bar recovery where an accident at work aggravates, accelerates or combines with it to produce a greater disability than otherwise would have resulted. *Jackson v. True Temper,* 151 Vt. 592 (1989). Regardless of the origin of the 1985 tear, there is ample evidence that the claimant's bilateral osteoarthritic knee condition was caused or at least exacerbated by his ongoing work activities and is a compensable claim.

9. The physicians are in unanimous agreement that osteoarthritis commonly begins with an injury and that once it begins, it is progressive and degenerative. There is no persuasive evidence in support of CNA's position that the claimant's 1985 injury is unrelated to work. Furthermore, there is no dispute that his injuries in 1989, 1992, 1993 and 1994 were sustained at work. Those injuries exacerbated the claimant's bilateral osteoarthritis. It was not only those specific injuries, but the continuous plumbing work with the wear and tear on the claimant's knees, that hastened the progression of his osteoarthritis.

10. Dr. Gennaro, an expert hired by Peerless to perform a records review, testified that he completely disagreed with the other four doctors that squatting, kneeling, heavy lifting and twisting activities would exacerbate osteoarthritis in the knees. This opinion is so out of step with the strong opinions of the other physicians, even those hired by other insurance companies, that it must be rejected.

11. The fact that the claimant is overweight in no way compromises his workers' compensation claim. The medical testimony is consistent that his weight may have been a factor in the development and progression of his osteoarthritis but that his level of activity at work and his injuries at work were also substantial factors. The employer must take the claimant as is and cannot escape responsibility for his work related injuries based on his weight.

12. It would also be ironic and unfair to allow the employer to use the claimant's weight as an excuse to deny him compensation when the employer benefited from the claimant's large size for many years. As he credibly testified, he was often called upon to help with the heavy lifting due to his size. And the convincing medical evidence is that the claimant's weight exacerbated his osteoarthritis in connection with his work. The causal chain, therefore, remains unbroken.

<u>Medical End Result</u>

13. Dr. Polifka and Dr. Incavo stated the claimant will not have reached medical end result until his has had further the right total knee treatment, a procedure the claimant has decided to put off until his pain becomes unbearable. Dr. Buckbaum, retained by Gallager Bassett, determined that the claimant reached a medical end result for his right knee a year after he had the right knee osteotomy, notwithstanding that he might have total knee replacement in the future. All are in agreement that the claimant has reached medical end result for the left knee after he recovered from the left total knee replacement.

14. Claimant is entitled to receive temporary total disability benefits until he has returned to work or has reached medical end result. "When maximum earning power has been restored or the recovery process has ended, the temporary aspect of the workman's disability is concluded." *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962). Obviously this claimant's earning power has not been restored, therefore the question to be decided is whether his recovery process has ended. The Vermont Workers' Compensation and Occupational Disease Rules define this crucial time as "End Medical Result" or "Medical End Result" which "means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Rule 2.1200. Based on the contention that "significant further improvement" can be expected if and when he has a right total knee replacement, the claimant maintains that he has not yet reached a medical end. Consequently he argues he is entitled to temporary total disability benefits until after the right total knee replacement.

15. There can be no doubt that the claimant is putting off the total knee replacement because he had postoperative complications in the past. At the same time, it is clear that the decision about when to have the surgery is the claimant's alone. Surgeons have medical reason to perform the procedure and will do so as soon as the claimant decides to have it.

16. Dr. Incavo testified to a distinction that has not been recognized by this department—one between maximum medical improvement and medical end result. He opined that the claimant reached the point of maximum medical improvement from the high tibial osteotomy on or about June 8, 1999, one year after the surgery, at which time his condition had substantially plateaued. Other than pain medication and knee injection, no other treatment is available to improve the claimant's right knee condition other than a total knee replacement. Dr. Incavo believes that the claimant will not reach medical end result until that knee replacement is performed, which could be in one to five years. And it is possible that the claimant could decline the procedure.

17. The philosophy behind paying temporary total disability benefits to an injured worker is to support an injured worker during the healing period after an injury. Once the recovery or healing process is complete, temporary benefits are terminable, provided that the carrier observes the proper procedure. The Act specifically allows for intermittent periods of temporary total disability recognizing that healing processes may not be continuous. The periods of temporary disability may be intermittent. See 21 V.S.A. § 650.

18. In this case, the claimant has completed the healing process for the high tibial osteotomy. That another procedure is projected for some uncertain future time is not a basis for continuing temporary total benefits. If he opts to have a right total knee replacement, he will

be entitled to temporary total disability benefits once he undergoes that procedure. But he is not entitled to temporary total benefits as awaits the decision to have that surgery.

19. Dr. Incavo testified and I find that the claimant reached medical end result one year after his left knee surgery, on August 30, 2000. At that point he had already reached medical end for his right knee osteotomy. Therefore, August 30, 2000 is the operative medical end result date for both knees.

Aggravation-Recurrence

20. Three insurers disagree about which is responsible of this claim: CNA which insured the employer for the first decade of the events relevant to this case; Peerless who assumed the risk in 1995 and United Pacific who became the responsible insurer in 1997.

21. "Aggravation means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Recurrence means the return of symptoms following a temporary remission." Rule 14 (P) (2)(D)(1) (2), Vermont Workers Compensation and Occupational Disease Rules.

22. The Vermont Supreme Court determined that the first employer remains liable for the full extent of benefits if the second injury is solely a recurrence of the first injury, i.e. if the second incident did not causally contribute to the claimant's disability, whereas a claimant suffers an aggravation when "the second incident aggravated, accelerated or combined with a pre-existing impairment or injury to create a disability greater than would have resulted from the second injury alone." *Pacher v. Fairdale Farms and Eveready Battery Company*, 166 Vt. 626, 627 (1997) (mem).

23. This department traditionally considers this five-factor aggravation- recurrence test when analyzing an aggravation vs. recurrence case: 1) whether there is a subsequent incident or work condition which destabilized a previously stable condition, 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached a medical end result; and 5) whether the subsequent work contributed independently to the final disability. *Beauregard v. Montpelier Public School System*, Opinion No. 26-00Wc (August 17, 2001). These factors are meant to guide us in our aggravation-recurrence analysis. When they are considered together, they complement the *Pacher* direction that asks whether "the second incident aggravated, accelerated or combined with a pre-existing impairment or injury to create a disability greater than would have resulted from the second injury alone."

24. Because in this case, we are faced with three insurers, we must whether the claimant's condition was aggravated between 1995 and 1997 when Peerless was on the risk. If that is the case, Peerless can be held liable only if the claimant's condition was not aggravated after 1997, when United Pacific assumed the risk. United Pacific will be held liable for this claim if we find that the claimant's condition worsened until he stopped working. CNA will be liable if we find that the claimant's condition is a recurrence that dates back to 1995 or earlier.

25. Under the first factor it was clear and all the physicians concurred that the claimant 's bilateral knee condition did not stabilize but rather continued to deteriorate and they would not expect it to stabilize. Similarly, his varus deformity, once started, as documented in 1993 and 1994, continued and would not be expected to stabilize. Between March 30, 1995 and March 30, 1997 when Peerless was on the risk, there was not specific incident or work condition that destabilized a previously stable condition. Therefore, the first factor favors a recurrence.

26. The answer to the second factor, whether the claimant stopped treating medically, also supports a recurrence. Although there was an occasional hiatus in treatment, it is clear that the claimant's knee symptoms persisted, varying only in degree. As Dr. Polifka stated, the claimant treated every year or two for his right knee and started to treat again for his left knee after he fell on the ice.

27. To the third question, whether the claimant successfully returned to work, the answer must be in the affirmative. In fact, the claimant never stopped working until his last day in 1998. But such a finding is indeed mixed since he worked in discomfort for much of that time.

28. The fourth factor favors recurrence. Dr. Block admitted that he never found the claimant to be at medical end result for either knee. There is no evidence in the extensive medical records that anyone found him at medical end result or that permanency was assessed until after both the left and right knee surgeries had been completed in 1998 and 1999 respectively.

29. Finally, the fifth factor also supports a finding of recurrence. It would be no more than speculation to conclude that the claimant's work after 1995 contributed to his final disability. The claimant has suffered from a progressive degenerative disease in both of his knees. Once the disease had progressed to the point where the knees were in varus, once the disease progressed to the point where high tibial osteotomies were being considered and once the knees showed almost complete articular cartilage loss, the claimant was going to need a total knee replacement. When the claimant opted for an osteotomy in lieu of a knee replacement, it was because he wanted to continue working. He could have stopped working years before he did, but for an obvious work ethic and commitment to the business. It would be manifestly unfair to assign liability to the last insurer on these facts.

30. Similarly, liability does not fall to Peerless who was on the risk March of 1995 and March of 1997 because during that time the claimant had an increased in symptomatology but not in his underlying condition. As such, I cannot find that his work during that period contributed to his final disability, a finding requisite under *Pacher* to a determination of an aggravation.

CONCLUSONS OF LAW:

1. With persuasive medical evidence and credible factual testimony, the claimant has met his burden of proving that his right knee arthroscopic surgery of July 1985 arose out of his work as a plumber at the Stannard Company. *See Egbert* 144 Vt. 367. Furthermore he has proven that his bilateral osteoarthritic knee condition is a compensable claim under the Workers' Compensation Act. His weight does not negate the compensability of this claim. However because I find that the claimant reached a medical end result on August 30, 2000, he has not met his burden of proving that temporary benefits should continue until he has the right total knee replacement.

2. The aggravation–recurrence analysis leads to the conclusion that the claimant's condition is a recurrence of a condition that had reached its essential current condition before 1995. Any aggravation that has occurred since has related to the claimant's pain, not to his underlying condition. Because his work after 1995 "did not causally contribute to the claimant's disability" *See, Pacher* 166 at 627, CNA is liable.

3. Claimant is entitled to attorney fees as a matter of discretion and reasonable and necessary costs as a matter of law. 21 V.S.A. § 678(a). He has succeeded in proving the compensability of his claim, but not in his argument that temporary total disability payments should continue until he has the right total knee replacement. This has been a long, highly contested claim. The claimant's success is due to the efforts of his attorney. However, since his success is only partial, an award of fees should be as well. An award of attorney fees based on 62 hours at $70.00 an hour is warranted as well as $582.45 in costs necessary to the success of this claim.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law

CNA is ORDERED to:

1. Assume adjustment of this claim, including reimbursement to Gallagher Bassett for benefits voluntarily advanced;
2. Pay the claimant attorney fees based on 62 hours at $70.00 per hour and costs in the amount of $582.45.

Dated at Montpelier, Vermont this 5th day of October 2001.

____
R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.