

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

Gary Brault)	State File No. L-15419
)	
)	By Margaret A. Mangan
v.)	Hearing Officer
)	
Rock of Ages)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 19-00WC

APPEARANCES:

Steven P. Robinson, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Is the total amount of the claimant's permanent impairment to his left knee due to his work injury?
2. If not, is it appropriate for the Department to apportion claimant's permanent impairment between his work-related injury and his pre-existing non-work related injury?

EXHIBITS:

Joint Exhibit I: Medical Records of the claimant
Joint Exhibit II: Transcript of Dr. Davignon's deposition
Joint Exhibit III: Correspondence from Dr. Davignon

STIPULATION:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") at all relevant times.
2. Defendant was an employer within the meaning of the Act at all relevant times.
3. Liberty Mutual was the workers' compensation insurance carrier for defendant at all relevant times.

4. On or about January 3, 1998 claimant suffered a personal injury by accident arising out of and the course of his employment with defendant.
5. The parties stipulated to the issues stated above.
6. Claimant seeks an additional 7% whole person permanent impairment award for his left knee and, if successful, attorney fees and costs of the formal hearing process.
7. The parties agreed to the admission of the exhibits listed above.
8. The parties agree that the Department may take judicial notice of any and all forms or agreements between the parties in its files in this matter.
9. There is no dispute as to the qualifications of any of the claimant's treating or examining health care professionals.

FINDINGS OF FACT:

1. Approximately ten years before the work-related injury at issue here, claimant suffered an ACL (anterior cruciate ligament) injury to his left knee. Because that first injury was not work-related, claimant received no workers' compensation benefits. The ACL was not repaired at the time of its injury. However, according to claimant's treating surgeon, Dr. Russell Davignon, claimant did "quite well" up and until January 1998.
2. In January 1998 claimant suffered a second injury to his left knee which resulted in damage to his meniscus (cartilage in the knee). It is undisputed that the second injury was work-related and compensable. Following this work-related injury, claimant had an MRI that Dr. Davignon testified "confirmed the ACL tear which we knew existed, but he also has a torn meniscus."
3. On March 26, 1998 Dr. Davignon surgically removed the medial meniscus and reconstructed the ACL. On November 13, 1998, Dr. Davignon placed the claimant at maximum medical improvement and, at the carrier's request, provided two ratings. He assigned 1% to the post surgical meniscus condition and 7% to the post surgical ACL condition. Liberty Mutual paid the 1%, but refuses to pay the 7%. Dr. Davignon said the injuries were "distinctly different" and testified to his belief that the second injury did not worsen the ACL tear.
4. In response to the employer's request for clarification of his opinion, on March 19, 1998 Dr. Davignon wrote, "it is the current [meniscal] injury that has forced our hand in terms of his current deterioration such that we now need to pursue ACL reconstruction with meniscectomy or meniscal repair ..."
5. Liberty Mutual at first refused to pay for the ACL repair and any related impairment. In April 1998, Dr. Davignon provided another clarification, this time to the Department:

Mr. Brault's 1998 injury essentially brought to a culmination ongoing problems with his knee. The second injury brought to the fore the need in the patient's mind as well as my own the need to fix the cartilage and the ACL

6. At his deposition, Dr. Davignon testified that the ACL and cartilage injuries combined to worsen the instability of the knee as a whole. He explained that sacrificing the meniscus led to even greater instability. By repairing the ACL, he helped improve the knee that had been destabilized by both the injured ACL and the injured cartilage. He also testified that the 7% ACL rating included some impairment from the surgery itself.
7. After the claimant retained counsel, the defendant paid for the ACL/meniscal surgery and all associated benefits except for the permanency benefits associated with the ACL.
8. Claimant submitted evidence of his contingency fee agreement with his attorney and reasonable and necessary costs of \$50.15.

CONCLUSIONS OF LAW:

1. Because the medical evidence shows that claimant's work-related injury did not worsen claimant's ACL tear, the defendant argues that it is responsible only for the 1% permanency attributable to the meniscal tear and nothing toward the ACL repair. The claimant maintains that he is entitled to the 8% permanency because his current knee condition resulted from a combination of the ACL repair (7%) and meniscal removal (1%).
2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 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). There must be created in the mind of the trier of fact something more than a mere possibility, suspicion or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses. *Burton v. Holden Lumber Co.*, 112 Vt. 17, 20 (1941).
3. It is also well settled that an employer takes each employee as is and is thus responsible under our workers' compensation law for an accident or trauma which disables one person but which might not disable another. *Morrill v. Bianchi*, 107 Vt. 393 (1979)
4. While the defendant acknowledges that claimant suffered a work-related injury, it remains claimant's burden to prove that all of his claimed benefits, including permanency benefits, arose out of and in the course of his employment. See, *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug., 1997) at 10. ("The burden is on the employer to demonstrate that the claimant has reached a medical end result. ... The claimant then has

the burden of determining, by sufficient medical evidence, the degree of permanent impairment.")

5. It is beyond dispute that claimant's ACL was not injured in his work-related injury, but was a pre-existing problem.
6. The AMA Guides instruct that "an impairment evaluation should be based on the examiner's actual findings. A prior injury or illness should receive consideration only if valid evidence, such as roentgenogram or laboratory test result, exists that it was present before the impairment being evaluated." *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition. at 19.
7. The Workers' Compensation Act provides that impairment ratings are to be made pursuant to the *AMA Guides*. 21 V.S.A. § 648 (b). That would incorporate the language quoted above. However, §648 (d) also says impairment ratings "shall be reduced by any previously determined impairment for which compensation has been paid." The issue here, as in *Miller*, is whether permanency should be reduced when, pursuant to the *AMA Guides*, "valid evidence" exists of a pre-existing injury even if, as here, no compensation has been paid for a previously determined impairment. *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997).
8. As this Department concluded in *Miller*, the *AMA Guides'* procedure and § 648 (d) can be reconciled as follows: impairment ratings must be reduced for pre-existing impairments where compensation has been paid, and may be reduced by the physician if "valid evidence" of a defined pre-existing injury exists.
9. After *Miller*, this Department held that it was appropriate to apportion impairments where the first was from a non-work-related injury to the knee and the second was from a work-related injury to the lower leg. *Aker v. ALIIC*, Opinion No. 53-98WC (Nov. 5, 1998). Important to that holding was that the pre-existing condition was defined and unrelated to the work-related injury.
10. The situation presented in the instant case is different from the others cited, even though the treating physician was able to assign separate ratings to the ACL and meniscal injuries.
11. The 1% impairment accounts for the lost function from the meniscus, but it does not include the effect of the lost meniscus to the stability of a knee with an ACL injury. In other words, the knee's instability from the work-related injury increased the need to repair the ACL condition that had not previously been a functional issue for the claimant.
12. Claimant lived for ten years with a torn ACL, having chosen not to have surgery. According to his own physician he was doing fine. Whatever instability was attributable to his ACL was not problematic until he suffered the work-related injury to his meniscus. Once the surgeon removed the meniscus, claimant's knee instability was aggravated. That instability was corrected when the surgeon repaired the ACL. Although the surgeon

was able to assign distinct values to the ACL and meniscal impairments, the effect on the claimant in practical terms was a single impairment to his knee--instability created by a combination of the two injuries. Because the meniscal tear contributed to that instability and because no compensation had been paid for the first injury, it is an appropriate exercise of this Department's discretion to consider the impairment as a whole without apportionment.

13. Accordingly, the employer is responsible for payment based on an 8% whole person permanency rating.
14. Because the claimant has prevailed in this case, he is entitled to necessary costs as a matter of law and reasonable attorney's fees a matter of discretion. 21 V.S.A. § 678. Accordingly, he is awarded 20% of the 7% whole person permanency award subject to the limits of Rule 10 and \$50.15 in costs.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, claimant is awarded permanency based on a 7% whole person impairment and attorney fees and costs.

Dated at Montpelier, Vermont, this 29th day of June 2000.

Steve Janson
Commissioner