

S. B. v. Homebound Mortgage

(November 6, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. B.

Opinion No. 29-07WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Homebound Mortgage

For: Patricia Moulton Powden
Commissioner

State File No. U-06915

OPINION AND ORDER

Hearing held in Montpelier on July 31, 2007

Record closed on August 21, 2007

APPEARANCES:

Chris McVeigh, Esq. for the Claimant

Keith Kasper, Esq. for the Defendant

ISSUES:

1. Did the Claimant's November 6, 2003 work-related injury at Homebound Mortgage necessitate total knee replacement surgery earlier than if she had not had the work related injury?
2. If so, to what benefits is she entitled?
3. If not, what is the percentage of the Claimant's right knee injury impairment?

EXHIBITS:

Joint Medical Records

FINDINGS OF FACT:

1. On November 6, 2003, Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (hereinafter referred to as "Act".) She began her employment with Homebound Mortgage in May, 2002. Claimant worked at Homebound Mortgage until April, 2004. Defendant was the employer of the Claimant within the meaning of the Act.

2. On November 6, 2003, Claimant suffered a personal injury to her right knee, arising out of and in the course of her employment. Claimant was working in the warehouse carrying documents to scan. In the course of lifting a box she turned slightly and felt a “pop” in her right knee which caused her pain and swelling. Homebound Mortgage’s workers’ compensation carrier, Guard Insurance Company, paid temporary disability benefits and medical benefits.
3. The Claimant has a high school education.
4. After injuring her knee in November, 2003, the Claimant underwent a number of different medical treatments. In December, 2003, Dr. Abate, an orthopedic surgeon, discussed a total knee replacement with the Claimant. This was the first time a total knee replacement was mentioned to her regarding treatment for her knee. However, due to her young age, she decided that she would wait to have this surgery. It was, however, determined at that time to be medically necessary.
5. Claimant has a history of right knee problems. The Claimant had undergone a tibial tubercle transplant on November 8, 1977 by Dr. Charles Rust when she was only 19 years old. After physical therapy, the Claimant recovered well and only experienced occasional weather related aches in her knee. She was able to continue her social, occupational and recreational activities.
6. She did not treat for her right knee again until April of 1984. In 1984, the Claimant treated with Carol Blattspieler, an orthopedic nurse practitioner, at the University Health Center. Claimant’s x-rays did show some degenerative changes in her right knee. Specifically noted was atrophy in the Claimant’s quadriceps. After physical therapy in 1984, she was again able to pursue all activities without interruption from problems with her right knee.
7. In 1991, the Claimant had arthroscopic surgery performed by Dr. Per Renstrum. She had experienced a right knee problem after getting off a couch in an awkward manner. Although degeneration was found, she had surgery followed by physical therapy and was able to do all normal activities. The only residual effect on her knee was the occasional weather related aches that she had experienced prior to surgery.
8. In 1991, Ms. Burns was a clerical worker. Subsequent to working in an office as a receptionist she also did housekeeping at hotels and retail sales work. Between 1991 and 2001, other than two visits to a doctor, the Claimant did not treat for her right knee condition.
9. In December 2001, the Claimant returned for additional treatment for her right knee with Dr. Sergeant and was referred for physical therapy and to orthopedic surgeon, Dr. Joseph Abate.

10. Dr. Abate performed arthroscopic surgery on February 18, 2002. Dr. Abate noted that the Claimant had a degenerative knee condition which showed severe degenerative problems under the patella. He also noted that she had degenerative changes in the medial femoral condyle and the lateral femoral condyle. During surgery Dr. Abate cleaned up some of the degenerative changes and also repaired a meniscal tear. Following surgery, the Claimant had physical therapy. Again, following physical therapy, the Claimant was able to engage in all of her normal activities.
11. Claimant began work at Homebound Mortgage following her surgery in 2002. She worked as a document scanner. Her knee had been stable for approximately 18 months prior to the work related injury which occurred at Homebound Mortgage on November 6, 2003. Claimant credibly testified that she was turning and lifting a box when she heard a “pop” in her right knee.
12. Claimant finished her work that day without complaint. However, she called her employer the following day to report the severe pain she was experiencing and to report the injury.
13. On November 10, 2003, Dr. Smith Horn was the first doctor to examine Claimant after the Homebound injury. She saw Dr. Smith Horn prior to attending physical therapy.
14. The Claimant had significant pain and swelling in her right knee following her injury. A radiology report dated December 10, 2003, after the Homebound injury, noted a tear in the Claimant’s meniscus in the same part of the knee as evidenced by an MRI done in 2001 and noted by Dr. Abate in 2002.
15. Claimant was again referred to Dr. Abate. Dr. Abate said it was possible that the changes on the MRI report represented post-surgical changes as opposed to a tear from her injury. Dr. Abate noted on December 19, 2003, after the Homebound injury, that Claimant had “fairly significant” muscle atrophy in the thigh of the right leg compared to the left leg. Dr. Abate performed arthroscopic surgery on Claimant’s right knee on April 7, 2004. During surgery he discovered that there had been no new miniscal tear. Following the surgery, the Claimant continued to work at Homebound Mortgage after a week of recovery. As expected, although this surgery did help provide minimal relief, the Claimant continued to endure significantly increased right knee pain and limitations of her work activities and recreational activities. She never went back to the level of comfort experienced prior to the 2003 Homebound injury. Later in 2004, Homebound closed its doors and discontinued business.
16. However, as previously stated, total knee replacement was discussed for the first time after the Homebound Mortgage injury. It was only due to the Claimant’s young age that there was hesitancy to do the surgery immediately. After the injury in 2003, the Claimant’s knee continued to have swelling and pain.
17. Dr. Howe administered Suparz injections to prolong the use of Claimant’s knee after her Homebound work injury. The injections were not particularly helpful in reducing the Claimant’s knee pain.

18. The Claimant's knee did not respond to treatments including the arthroscopic surgery, the injections and the physical therapy, following the 2003 work related injury. The Claimant felt significant pain even though she had to return to work. This is the first time her knee was injured and treatment did not return her knee to her baseline condition where she could continue all of her normal activities.
19. Dr. Abate's progress notes show that Claimant was on full duty status by July 30, 2004. In January of 2005, Dr. Abate determined that Claimant was at medical end result.
20. The Claimant again reported pain in her right knee in January of 2005 to Dr. Howe. He believed her knee unchanged since 2001. This is inconsistent with medical records which show surgeries and treatments since that date.
21. Sometime in 2005 and 2006 the Claimant, due to financial hardship, worked for several months at Champlain College performing housekeeping duties. She worked with her daughter-in-law, which allowed her to adjust her work to avoid aggravating her right knee. Although her knee was not re-injured doing this work, she could not maintain the job after several months due to the pain it was causing to her knee. Although her knee bothered her while bending and doing the housework required for this job, her knee was not re-injured.
22. After the job at Champlain College, the Claimant tried to work at the Comfort Inn as a housekeeper for a short time but she again experienced knee pain while at work and had to leave the job. Again, this type of work was painful for the Claimant while engaging in it but her knee condition was not aggravated by this work according to her credible testimony.
23. The Claimant did not seek work again except for a few applications for office work. She was limited in the type of work she could do both by her knee condition and her lack of office skills. The Claimant did not have a physician's note taking her out of work or suggesting that she should not work. She did, however, continue to seek treatment for her right knee. She underwent total knee replacement surgery on March 30, 2007. Since that time she has been rehabilitating from her total knee replacement surgery through physical therapy, pain medication and home exercises. She still has swelling and pain. She cannot squat or bend her knee completely. It is unclear at this time whether or not she will ever be able to do so. She has not sought work or been hired for any type of employment since the surgery. It has not been determined that she is at medical end result after surgery.
24. Dr. Joseph Abate, an orthopedic surgeon, operated on the Claimant twice. It was not until after the injury at Homebound that he advised her to have total knee replacement surgery. Dr. Abate wrote that the claimant's November 6, 2003 work injury aggravated her right knee condition so that she had to have an eventual total knee replacement. This assessment was done prior to any work at Champlain College and the Comfort Inn. Dr. Abate stated in his report that Claimant was not going to get significant relief for her pain other than a complete knee replacement, and that the injury which occurred at Homebound Mortgage is directly responsible for her current condition. Dr. Abate also wrote on December 20, 2006 that the Claimant's work injury at Homebound led to her current medical condition.

25. Dr. Joseph Abate was a treating physician of the Claimant who saw her more than either expert, Dr. Backus or Dr. Fenton. He had the most contact and knowledge about the Claimant's right knee and the problems related to it. He has testified many times as an expert at workers' compensation hearings.
26. Defendant hired Dr. Jonathan Fenton to perform a record review, which he conducted on or about February 18, 2004. In that record review, Dr. Fenton concluded that the Claimant had aggravated her knee in November of 2003 at Homebound Mortgage but couched the aggravation as "temporary." Dr. Fenton is board certified by the American Board of Physical Medicine and Rehabilitation and by the Osteopathic Board of Musculoskeletal Medicine. He has testified many times as an expert at workers' compensation hearings.
27. Dr. Fenton performed a physical examination of the Claimant on May 18, 2006. His conclusions following the examination and a review of her medical history were that the total knee replacement would have been needed eventually. It was also his opinion to a reasonable degree of medical certainty that the Homebound injury did not hasten the need for the total knee replacement.
28. Dr. Fenton's report, following the May examination, stated that although the Claimant did suffer a different pain after her Homebound injury, she did not experience it daily. He did acknowledge that she suffered from swelling of her knee that she had not experienced prior to the injury. He also noted that prior to the 2003 injury she had fulltime work capacity but had to be careful with squatting. His suggestion was for the Claimant to use a cane to shift weight off of her right knee in an effort to reduce pain.
29. Dr. Fenton testified that when an orthopedic surgeon considers total knee replacement, he or she generally evaluate three factors; pain, functionality, and the anatomic condition of the knee joint. He disagreed that the 2003 Homebound injury was the major factor in the need for the total knee replacement but acknowledged that prior to the work injury, the Claimant was able to function normally without significant pain. Thus, he did acknowledge her functionality and pain prior to the 2003 injury but did not find the 2003 injury was anatomically significant.
30. Also, Dr. Fenton did find that the pain experienced at jobs cleaning for Champlain College and the Comfort Inn was a major factor in the determination for a total knee replacement. However, it is clear that Dr. Abate found a total knee replacement necessary prior to her work cleaning at the college and the Comfort Inn.

31. Dr. Fenton testified that the records showed that the Claimant had extremely advanced osteoarthritis in her right knee, that every compartment of her knee had grade three or grade four changes (grade 3 and grade 4 changes suggest that the cartilage in Claimant's knee was so severely worn that bone was rubbing on bone.), her meniscus was fraying apart and that nearly 30 years of severe right knee alignment problems had left her with a progressive degenerative disability in her right knee. Dr. Fenton noted that persons with the Claimant's degree of grade four changes prior to her 2003 injury at Homebound do not usually make it five years without total knee replacement. Her surgery was approximately three and a half years after her work injury. However, prior to her knee injury at Homebound, only some of her knee components were grade four or bone rubbing on bone. The meniscal tear and some of the degenerative problems were addressed by Dr. Abate's surgery. It was only after the Homebound injury that her knee never returned to a level where she could function normally. This case can be distinguished from *Miller v. Engleberth*, Opinion No. 45-04 (November 5, 2004) and other cases of degenerative osteoarthritis because the claimant suffered an injury at Homebound Mortgage which aggravated her right knee to the point that she needed total knee replacement earlier than otherwise would have occurred. Prior to the Homebound injury, the Claimant had not progressed so far that she was already a candidate for knee replacement surgery. See, *Stannard v. Stannard*, 175 Vt. 549 (2003). According to Dr. Abate, the expert with the most knowledge of Claimant's knee, the injury at Homebound was such that it created the need for total knee replacement. This is not a case where Claimant's work at Homebound merely increased symptoms already present.
32. Dr. Verne Backus is board certified in occupational and environmental medicine. He has testified many times at workers' compensation hearings as an expert. He examined the Claimant and wrote his opinion dated September 11, 2006. In this written opinion and his testimony at hearing, Dr. Backus stated that the Homebound injury did accelerate the Claimant's need for total knee replacement surgery. However, he also stated that due to the Claimant's degenerative condition of her knee that she would have had to have had a total knee replacement at some point. He also gave a permanency evaluation based on atrophy of her right thigh when compared to the left. Dr. Backus did acknowledge when cross-examined that Dr. Abate had found atrophy prior to the work related injury but he stated that the extent of the atrophy was not determined at that time. There was also a question regarding whether range of motion was used or should have been used in the permanency rating by Dr. Backus.
33. Dr. Backus testified that it was the pain and swelling following the work injury that finally tipped the scales in favor of a total knee replacement. He testified to a degree of medical certainty that the total knee replacement surgery occurred earlier than it might have due to the Homebound work injury. He stated this even though he believed that the work at Champlain College and the Comfort Inn may have contributed to her ultimate need for the total knee replacement.
34. Dr. Fenton did not report any atrophy in his evaluation of the Claimant in 2006 but stated that after examining her knee flexion, he found no permanent impairment related to her work injury.

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 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). In this case, the parties agreed the injury at Homebound Mortgage was compensable. The disagreement is whether the total knee replacement surgery was a result of the injury or was aggravated by the Claimant's subsequent cleaning jobs or a recurrence or natural result of her degenerative condition.
3. The trier of fact may not speculate as to an obscure injury which is beyond the ken of laymen. *Laird v. State Highway Dept.*, 110 Vt. 981 (1938). If the Claimant's injury is obscure, expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).
4. Expert medical testimony is required to make the causal connection between employment, an injury, and the resulting benefits sought. *Martin v. Woodridge*, Op. No. 11-97WC (June 13, 1997).
5. An employer takes each employee as is and is responsible under the Vermont Workers' Compensation Act for an injury which disables one person and not another. See *Paton v. State of Vermont, Department of Corrections*, Opinion No. 4-04WC (2004). The Claimant had a degenerative condition in her knee for many years prior to her employment with Homebound Mortgage. However, 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.
6. Thus, under Vermont Workers' Compensation statutes, the aggravation or acceleration of a pre-existing condition by an employment accident is compensable. See *Jackson v. True Temper Corporation*, 151 Vt. 592, 595 (1989). In other words, if a work injury accelerates the progression of a pre-existing condition, or disrupts its stability such that an individual's ability to work and function is disabled, then the injury is a compensable one. Furthermore, it is well established under the Vermont's Worker's Compensation Act that any aggravation or acceleration of a preexisting condition which produces a final disability sooner than it would have otherwise occurred is compensable. See *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95, 104 (1964).

7. Prior to the Claimant's November 6, 2003 injury at Homebound Mortgage, she had a degenerative arthritic condition in her right knee. She was, however, able to work and function normally. Her knee was stable for over a year prior to her injury. Prior to her injury no medical doctor had suggested a total knee replacement. However, immediately following treatment for the Homebound injury, Dr. Abate did recommend a total knee replacement. But for the Claimant's young age which caused hesitation, she could have had the total knee replacement at that time. She chose to wait even though she was still in pain. The first time that the Claimant's knee did not return to baseline was after her injury at Homebound Mortgage. It was the first time that she could no longer do all of her normal activities even though she did return to work.
8. When expert testimony conflicts, the Department looks at several factors: (1) whether the expert has had a treating physician relationship with the Claimant; (2) the professional's qualifications, including their education and experience; (3) the evaluation performed, including whether the expert had all the relevant evidence when making the assessment; and (4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Op. No. 38-00WC (November 9, 2000).
9. In this case, Claimant's treating physician is a well documented expert in the area in question. He did two surgeries on Claimant's knee and knew her condition. Although, due to circumstances beyond the control of the Claimant, Dr. Abate could not be cross-examined, this will not be held against her. His findings were clear. Dr. Fenton based his opinion on medical records and one examination of the Claimant in 2006. Dr. Fenton does have extensive experience and good credentials in this area. However he did not disagree that the Claimant's injury in question aggravated her right knee condition but found it only a "temporary" aggravation. This is in contradiction to Dr. Abate's opinion, Dr. Backus's opinion and the Claimant's credible testimony regarding her level of pain and function. Dr. Backus is considered an expert in occupational health. Dr. Backus also saw the Claimant as part of an Independent Medical Examination. He agreed with Dr. Abate that the 2003 Homebound Injury was the one that finally made a total knee replacement necessary even though he did believe that the Claimant's cleaning work, after her Homebound Mortgage employment, did affect her knee negatively. Claimant's credible testimony contradicts Dr. Backus's and Dr. Fenton's belief that the cleaning work further aggravated Claimant's knee.
10. Claimant should not be penalized for her financial necessity to work at cleaning jobs after Homebound closed its doors. She needed money and had to take work which may have made her knee more painful while engaged in the work. However, the Department does not consider this an intervening cause that would break the chain of causation. The Department considers, as did Dr. Abate, that the Homebound injury was the major factor in making the total knee replacement necessary. The Claimant never completely returned to her previous abilities with her right knee after this injury occurred. She needed a total knee replacement after the injury at Homebound.
11. Claimant is still recovering from her total knee replacement and is not yet at medical end result. Therefore, no permanent impairment rating can be obtained.

12. As for temporary total disability, defendant argues that no temporary total disability is due since the Claimant was not employed for the twelve weeks prior to her surgery. He is correct. Her compensation rate is \$0 as she was not employed for the twelve weeks preceding the date of her surgery on March 30, 2007. *Knoff v. Joe Knoff Illuminating*, Op.No 39-05WC (July 12, 2005). There were no wages to replace. Claimant had not done a good faith job search nor did she have a physician's report which stated that she could not work. There was not enough evidence presented to prove that the Claimant could not have engaged in any work after the incident at Homebound or following her cleaning jobs.
13. Claimant's attorney reported costs in the amount of \$2,475.92. A detailed printout showed a \$600.00 fee for Dr. Abate. There was an objection to Dr. Abate's rate for services on December 15, 2005. It appeared to exceed the hourly rate of \$300.00 allowed by the Department of Labor for medical experts. However, the Claimant's attorney asserts that the \$600.00 fee was for a medical report and therefore, not subject to the Workers' Compensation Rules. The rules state that the hourly rates for a physician not exceed \$300.00 per hour. Claimant's attorney needs to clarify the amount of hours his expert spent on his report.
14. Although requested, no interest is awarded. This is due to the fact that there was a legitimate dispute between medical experts regarding the claim for benefits.
15. Claimant's counsel reported that he spent 73.70 hours on Claimant's case for a total of \$6, 633.00 in attorney's fees. The Commissioner may allow the claimant to recover reasonable attorney fees when the claimant prevails. 21 V.S.A. § 678(a). It is not necessary to prevail on all claims in order to be a prevailing claimant entitled to award of attorney's fees; the question is whether the claimant has substantially prevailed. *Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). The Claimant has substantially prevailed in the instant case. Therefore, payment for in the full amount will be paid.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. Medical Benefits for Claimant's total knee replacement and all related medical expenses until she is at medical end result.
2. Claimant's costs are awarded except for the \$600.00 fee to Dr. Abate. Claimant's attorney needs to submit further documentation regarding this amount.
3. Attorney fees in the amount of 73.70 hours at \$90.00 per hour or \$6,633.00.

DATED at Montpelier, Vermont this 6th day of November 2007.

Patricia Moulton Powden
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.