STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Mark Eglin	)	State File No. M-1735
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Stratton Corporation	)	
	)	For: R. Tasha Wallis
v.	)	Commissioner
	)	
Equinox Hotel	)	Opinion No. 27A-00WC

AMENDED ORDER

In an unopposed motion, the claimant asks the Commissioner to amend the attorney fee portion of the August 17, 2000 decision issued in his favor. Mary C. Welford, Esq., represents the claimant. Stratton Corporation is represented by Barbara A. Alsop, Esq., and the Equinox Hotel by Seth Bongartz, Esq.

Specifically, the claimant argues that he is entitled to attorney fees based on an hourly rate. Because the claimant prevailed, this Department has the discretion to award reasonable attorney fees under 21 V.S.A. § 678 (a). In a timely fashion, the claimant's attorney had submitted evidence of 66.9 hours worked on the claimant's behalf in this matter. The time involved litigating this case was reasonable given the defenses raised and justifies an award based on the hours worked. Accordingly, the order is amended as follows:

> Stratton Mountain is ORDERED to pay claimant attorney fees of $60 per hour for 66.9 hours of attorney work for total of $4014.

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

_____
R. Tasha Wallis
Commissioner

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Hearing held in Manchester, Vermont, on February 3, 2000
Record closed on April 5, 2000

APPEARANCES:

Mary C. Welford, Esq. for the claimant
Barbara H. Alsop, Esq. for the defendant Stratton Corporation
Seth B. Bongartz, Esq. for the defendant Equinox Hotel

ISSUES:

1. Did claimant's knee injury arise out of and in the course of his employment?

2. If the claimant's knee injury arose out of and in the course of his employment, which employer is liable?

EXHIBITS:

Joint Exhibit I:	Stipulation
Joint Exhibit II:	Medical Records
Joint Exhibit III:	Medical Expenses
Claimant Exhibit 1:	Venous compression ultrasound report of July 13, 1998
Equinox Exhibit A:	Transcript of deposition of Arthur Amuso
Equinox Exhibit B:	Transcript of deposition of Brain Aspell
Stratton Exhibit AA:	Transcript of deposition of Mary Gail Miller
Stratton Exhibit BB:	Transcript of deposition of Robert C. Shoemaker, M.D.

STIPULATION:

1. Mark Eglin was an employee of Stratton Corporation for the 1997-1998 ski season. His last day of work for that season was April 9, 1998.

2. Mark Eglin was an employee of the Equinox Hotel from May 24, 1998 to March 7, 1999.

3. Mark Eglin was out of work due to a knee injury and subsequent knee surgery from July 20, 1998 to August 24, 1998. He returned to work at the Equinox full time on August 24, 1998.

4. Mark Eglin ended his employment at the Equinox Hotel on March 7, 1999. His departure from the Equinox was not related to his knee injury.

5. Mark Eglin incurred medical expenses associated with his knee injury totaling $7,091.99.

6. Mark Eglin's average weekly wage at Stratton was $337.99.

7. Mark Eglin's average weekly wage at the Equinox was $542.61.

FINDINGS OF FACT:

1. Claimant Mark Eglin had been a ski instructor at Stratton for six consecutive seasons beginning in 1993. In addition to skiing, claimant played basketball, football and other sporting endeavors.

2. As a ski instructor at Stratton, claimant primarily taught children.

3. In late March of 1998 claimant began experiencing some discomfort in his right knee while he was teaching skiing.

4. The claimant had not previously had any discomfort in his right knee other than some tendonitis approximately 24 years earlier.

5. The claimant testified that the discomfort in his knee became progressively worse over the next two weeks. He noticed it most when he was skiing, particularly skiing backwards, but it also was noticeable when going upstairs.

6. On April 8, while teaching a group of young skiers and skiing backwards, the claimant noticed that the pain in his right knee was considerably worse.

7. On April 9, 1998 claimant was scheduled to continue teaching the same group of young children he had been teaching the day before. He was again skiing backwards a lot that day. After teaching all morning on April 9, 1998, the claimant found that his knee was getting worse.

8. The claimant happened to speak with the clinic doctor, Dr. Southern, reporting that his knee was quite painful. The doctor suggested that they meet in the clinic after lunch.

9. After lunch the claimant went to the clinic where he was first seen and examined by Mary Gail Miller, a registered nurse. At that time the claimant was able to walk on level ground without limping and noticed only minor swelling around his knee. The claimant claimed that at the time of that first aid visit, his knee was swollen in the front and painful in the back. This was the first time in the five seasons the claimant had worked at Stratton that he sought help at the first aid clinic.

10. Ms. Miller examined the claimant's knees for ligament injuries, finding no ligament laxity and no swelling. She testified that if there had been any swelling, the claimant would have been sent downstairs to the clinic.

11. Dr. Southern also examined the claimant's knee. Dr. Southern instructed the claimant to ace his knee, apply ice, take Motrin and not ski for the rest of the day. The doctor's note suggests that he suspected wear and tear on the meniscus for which rest was needed. The claimant testified that Dr. Southern commented that he had a small amount of swelling in the right knee. Ms. Miller testified that she examined and compared both of claimant's knees, noting no swelling at all.

12. The following day was the final day the ski area was open, and there was free skiing but no lessons scheduled for the day. The claimant did not ski in the open skiing period.

13. The claimant testified that for the next two weeks, he stayed off his leg almost completely. Following Dr. Southern's instructions, he stayed home with his leg elevated, applied ice and took Motrin. At the time he thought his knee was fine, as the pain and swelling had gone away completely.

14. He estimated that he would have attempted to return to work at Stratton after three weeks, that is at the beginning of May, had the ski season been ongoing. However, the only medical evidence on this subject was from the first aid physician who instructed the claimant not to ski the day he was seen in the clinic. After three weeks, the claimant resumed his normal activities, including grocery shopping and the like. He testified that during that time he did not engage in athletic activities, such as basketball or bike riding.

15. A little more than six weeks after the incident at Stratton, the claimant started working at the Equinox Hotel as a banquet chef. When he began that job on May 24, 1998 he had neither pain nor swelling in his knee.

16. Brian Aspell, the Executive Chef at the Equinox and the person who hired the claimant, testified by deposition in this case. Mr. Aspell explained that the work of a chef is a combination of stationary work and moving around the kitchen. For example, the chef would stand in one place cutting vegetables or butchering meat, turning to obtain items necessary for food preparation. The claimant typically worked at one station. His work could have him walking to the refrigerator, returning to the workstation, then placing food in an oven.

17. The claimant's right knee remained pain free for the first three or four weeks at the job at the Equinox, after which he noticed swelling. He was not engaged in any athletic activities at that time. According to the claimant, he did not seek medical assistance immediately because he did not have medical insurance. Instead, he waited until his knee was so swollen that he could not put on his pants.

18. Mr. Aspell testified that knew nothing about any problem claimant had with his knee until he heard that claimant would need time off from work to have knee surgery, although he might have noticed a limp for a day or two before the claimant spoke to him

about surgery.

19. At the Equinox, Mr. Aspell explained, employees follow a protocol when they have a work-related injury. If there is an accident, he or another supervisor immediately fills out an accident report which is sent to the personnel office. If necessary, the injured worker is transported to the Northshire Clinic as quickly as possible. Otherwise, the supervisor sits down with the worker to obtain the pertinent facts for the form. At no point was that process followed in this case. No one at the Equinox ever believed that claimant had been injured there. The claimant himself does not allege that he ever suffered a work-related injury at the Equinox.

20. Mr. Aspell heard the claimant talk about skiing quite a bit, particularly his instructing, but not about any "daredevil" skiing.

21. Arthur Amuso, the morning sous chef at the Equinox, also testified by deposition in this case. He explained that as the banquet chef, the claimant was the chef responsible for putting out foods and supervising people. Claimant also worked on some facet of the function, such as making soups, making salads and roasting meats. Chefs often worked at the same time at long tables in the kitchen, chopping and talking. After claimant began having symptoms, he explained to his coworkers that he had injured his knee while skiing backwards in a class for children. Although Mr. Amuso remembered the claimant talking about being engaged in an occasional pickup basketball game, he could not say if that happened before or after claimant's knee surgery.

22. The swelling claimant noted was not, at first, accompanied by pain. It began around his knee, then moved into his thigh and calf. At first the claimant made no association between his work at Stratton and the knee symptoms.

23. Over the next two weeks, claimant's leg became more swollen and painful, prompting him to visit the emergency room at Grace Cottage Hospital to have his leg examined. He presented to the emergency room with swelling and pain in his right leg. Dr. Sargent, the emergency room physician, reported that the leg was swollen "from the knee down, hot but not red … calf compression and passive foot dorsiflexion both produce pain." Claimant said nothing about a ski injury at that emergency room visit.

24. Dr. Sargent at first suspected deep vein thrombosis, a diagnosis an ultrasound later ruled out. However, the ultrasound revealed a Baker's cyst just behind the knee. A Baker's cyst is usually associated with some kind of injury, usually a tear in the cartilage. After speaking with Dr. Sargent about the results of he ultrasound, the claimant remembered the skiing incident at Stratton that spring.

25. Dr. Sargent referred the claimant to Dr. Lilly who first saw claimant on July 20, 1998. Dr. Lilly, an orthopedist with a special interest in sports medicine, has practiced his specialty for more than thirty years. He has treated many lateral meniscus injuries and finds that skiing has caused many of them. At that first appointment with Dr. Lilly, the claimant gave the history that the back of his knee started bothering him while teaching skiing. He reported that the knee got better after he rested it but started bothering him about a month prior to the appointment. Because of the exceptional swelling in the

claimant's leg, Dr. Lilly could not perform a full orthopedic evaluation. However, he noted significant tenderness on the outside and in the back of claimant's knee, although he noted no evidence of ligamentous instability.

26. After a repeat ultrasound that again ruled out thrombosis, Dr. Lilly ordered a MRI to determine whether claimant had suffered a lateral meniscal or ACL injury.

27. The MRI performed on July 21, 1998 showed a "small tear of posterior horn of lateral meniscus. Cruciate and collateral ligaments are intact." Dr. Lilly explained that the tear was exactly as outlined in the MRI, which was to the cartilage on the outside of the knee and to the back. He opined that a torn lateral meniscus was consistent with the history the claimant had given regarding knee pain that started while skiing. He also noted that the swelling had gone down noticeably when claimant was out of work.

28. On August 12, 1998, Dr. Lilly performed an arthroscopy on claimant's right knee. It confirmed the posterior horn tear to the lateral meniscus and revealed a partial tear of the anterior cruciate ligament. Dr. Lilly testified that he cleaned up the torn lateral meniscus, but did not reconstruct the ACL. In his opinion, it was the tear in the meniscus, not the ACL, that was causing the pain.

29. Dr. Lilly testified that if the claimant had not had a problem with his knee prior to skiing and the pain developed while he was skiing, he probably injured it while skiing. When asked if he could say within a reasonable degree of medical certainty what caused the tears he found, Dr. Lilly stated the claimant's story was consistent with the physical findings.

30. Dr. Lilly testified further that the pain in the back of the knee with swelling in front of the knee that the claimant reports he had on April 9, 1998 are symptoms consistent with a lateral meniscal tear. In Dr. Lilly's opinion, the fact that claimant did not have significant swelling when he went to the first aid room at Stratton does not mean that he did not tear his lateral meniscus that day. He explained that it would be consistent with a lateral meniscal tear to have more pain and limping while skiing and using stairs and less while walking on flat surfaces.

31. Dr. Lilly concluded that after reviewing the MRI, claimant's history and his symptoms, he found "the whole process of what I went through with him to be … consistent with an injury that occurred on the side of the mountain." He explained that symptoms from an injured cartilage can settle down and not bother a person for two or three months, particularly in a young active person who "can certainly tear these and don't have to go ouch." Dr. Lilly testified that skiing backwards involves twisting and bending, and that this claimant had a twisting flexion injury to his knee.

32. When asked about the possible mechanisms of injury, Dr. Lilly explained that the combination of a torn meniscus and torn ACL suggested a significant injury, probably severe enough to cause the claimant to fall down. The claimant denied having fallen. Dr. Lilly also testified that typically swelling occurs at the time the meniscus is injured, likely resulting in a limp. Yet, he also testified that the two injuries could have happened

at different times, with only the meniscal tear happening in April. The ACL could have been torn months or years earlier. If the two injuries had occurred separately, claimant's symptoms would not have been as dramatic as with a combined ACL-meniscal injury.

33. Finally, Dr. Lilly testified that the claimant had injured his meniscus before he went to work at the Equinox and that the injury remained the same while he was working there. As long as the claimant was "taking it easy" he had no leg swelling. However, as soon as he started using the leg, the swelling began, eventually prompting him to seek medical attention. The swelling would have occurred with any normal activity, including walking. It just happened to occur while he was in the employ of Stratton.

34. Dr. Robert Shoemaker, an orthopedist, examined the claimant at defendant Stratton's request. That examination occurred five days after the claimant's arthroscopy. Dr. Shoemaker testified that although it is theoretically possible for a combination lateral meniscal tear and partial ACL tear to be caused by repetitive trauma, it is less likely than from a sudden acute trauma. He explained that those who lead active lives stand a risk of having symptomatic small tears of knee cartilage. Dr. Shoemaker testified that although it is not typical, it is possible that one could have an injury the claimant described and not have swelling for a month or two. However, it is unlikely that a tear would have occurred without the claimant noticing it. Dr. Shoemaker said that if there is only one incident of trauma in a history and it would be more likely that the tear happened then and was not an asymptomatic tear. He also said that this claimant's injury could have happened at any time during the previous five to ten years.

35. Finally, Dr. Shoemaker indicated that both the reported injury at Stratton and the swelling that occurred at the Equinox would be consistent with the awakening of an asymptomatic tear. Further he testified that the work at the Equinox extended or increased the tear of the lateral meniscus, causing an aggravation of a previously asymptomatic tear.

36. The claimant was out of work due to a knee injury and subsequent knee surgery from July 20, 1998 to August 24, 1998. He returned to work full time on August 24, 1998. His surgical recovery was considered normal. Due to the torn meniscus, he was found to have a 1% whole person permanent partial impairment.

37. On March 7, 1999 the claimant ended his employment with the Equinox for reasons unrelated to his knee injury.

38. The claimant submitted evidence of his contingency fee agreement with his attorney, evidence of 66.9 hours of attorney work in this case, and necessary expenses totaling $830.50.

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, Morse Co.*, 123 Vt. 161 (1962). He must establish by sufficient credible evidence the character and extent of the injury,

as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. The claimant asserts that his work caused his knee injury. For him to prevail in this action, "[t]here must be created in the mind of the trier something more than a 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 & Martin Lumber Co*., 112 Vt. 17, 20 (1941). "Proof of a mere possibility of causation is insufficient unless the evidence excludes all other causes or shows a direct connection between the accident and the injury." *Egbert*, 144 Vt. 367, 369.

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).

4. The medical dispute in this case does not involve any question involving diagnosis or treatment. In fact, the issue is whether claimant's injury occurred in the course of his employment. Testimony from the treating physician, Dr. Lilly, establishes one of two propositions: either the claimant had two separate and distinct injuries, one tearing the meniscus and one tearing the ACL, or he had a major injury, tearing both at the same time and in all likelihood falling down. The claimant was adamant in his assertion that he had not fallen.

5. Defendant Stratton criticizes the opinion of Dr. Lilly, claimant's treating physician, as lacking necessary objectivity and ignoring the findings of the nurse and physician at the Stratton Mountain first aid clinic who found that claimant had no swelling of his knee when they examined him. To counter Dr. Lilly's testimony, Stratton offers the opinion of Dr. Shoemaker who testified that there is no way of knowing when claimant suffered the torn meniscus and torn ACL. Yet, Dr. Shoemaker also said that if there were only one incident of trauma in a history, it would be more likely that the tear happened then and was not an asymptomatic tear.

6. It is undisputed that in teaching children to ski, the claimant needed to ski backwards some of the time. Dr. Lilly's conclusion that skiing backwards involves twisting and flexing the knees is a reasonable one. Twisting and flexing in turn are the mechanisms involved in a lateral meniscal tear. There is no evidence in the record to suggest that claimant injured his knee in any other way than when he was teaching skiing. That is what he told the nurse and physician at the Stratton clinic, although they did not notice limping or swelling in the knee. Dr. Lilly explained that the first clinician to examine a patient does not always see what he sees months later. And although uncommon, at times an injured person does not have noticeable swelling after a meniscal tear.

7. Stratton insinuates that claimant injured his knee in non-ski related recreational activities. It characterizes the claimant's testimony that he had never injured his right knee before, in all the skiing, basketball, football and other sporting endeavors in which he was involved, as disingenuous at best. Coupled with what Stratton describes as a "coincidence" that the injury was reported on the last day of skiing, Stratton concludes

that claimant's story is an insufficient basis for a doctor to find the requisite correlation between his work at Stratton and his need for surgery.

8. Stratton points to the July emergency room note as providing evidence that would undercut the claimant's case because it makes no mention of the skiing incident in April. In fact, no recent knee injury was identified in that note. The claimant recalled only an injury dating back more than 20 years and not relevant to this action. He did not identify an injury from another recreational activity, such as basketball or biking, to the emergency department staff. Had the claimant injured his meniscus after he left Stratton, such a history undoubtedly would have been provided to the emergency department staff. When he was forced to look at possible causes of the problem in a follow-up visit with the doctor shortly afterwards, the only activity he could recall was the skiing incident in April, which had been reported to Stratton. Given the clear report to the staff at Stratton, the claimant's failure to mention it to the emergency department staff does not detract from his credibility.

9. Because skiing backwards was the only identifiable incident leading to knee pain, the more probable hypothesis, with reference to the possibility of an asymptomatic meniscal tear, is that the claimant tore the lateral meniscus while teaching children to ski at Stratton. As such, the injury, resultant surgery, period of temporary total disability after the surgery, and permanency are compensable as work-related. However, the claimant has not met his burden of proving that he was temporarily totally disabled before he began his work at the Equinox.

10. Stratton argues that if this claim is compensable, then the Equinox, not Stratton, is the responsible employer because it was while claimant was working at the Equinox that the first medically documented swelling in his right knee occurred. In support of that assertion, Dr. Shoemaker testified that an asymptomatic or minimally symptomatic meniscal tear would be extended or enlarged by the kind of work the claimant did at the Equinox.

11. Contrarily, the Equinox argues that under this Department's traditional aggravation recurrence analysis, the inescapable conclusion is that the Stratton is the responsible employer.

12. As enunciated often, the issues to be evaluated in aggravation recurrence cases are: 1) whether a subsequent incident or condition 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 to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).

13. First, it is not possible to determine if this claimant's condition had stabilized before he began working at the Equinox because the claimant was essentially inactive after he left his work at Stratton and because so little time had passed. Second, he had stopped treating medically, not seeing a doctor between the Stratton first aid visit in April and the emergency room visit in July, although the short time frame involved weakens the importance of this criterion. Third, working at the Equinox for three to four weeks before

he had symptoms cannot be considered a successful return to work. Fourth, Stratton's assertions notwithstanding, the claimant could not have reached a medical end result for a condition that had not been diagnosed and certainly not treated before he began working at the Equinox.

14. Finally, although standing on his feet all day in all probability led to the swelling in the claimant's leg, the claimant's work at the Equinox did not aggravate the underlying condition, that is the meniscus the claimant tore while working at Stratton Mountain. The most convincing medical evidence, the testimony of Dr. Lilly, substantiates the Equinox's assertion that claimant's work there did not contribute to his final disability, that is a surgically repaired torn meniscus with a permanent partial impairment of 1%.

15. Having prevailed in this case, the claimant is entitled to attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678 (a). He is awarded fees based on 20% of the amount awarded and his costs of $830.50.

ORDER:

Stratton is hereby ORDERED to pay claimant:

1. Medical expenses incurred for the repair of his torn meniscus;

2. Temporary total disability benefits for the period after his surgery, from July 20, 1998 to August 24, 1998;

3. Permanent partial disability benefits based on a 1% whole person impairment; and

4. Attorney's fees of 20% of the amount awarded and costs of $830.50.

Dated at Montpelier, Vermont, this 17th day of August 2000.

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R. Tasha Wallis
Commissioner