STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-17555
Michael Shea	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Worcester Insurance Co.,	)	For: R. Tasha Wallis
Harleysville Insurance Co and	)	Commissioner
Aadco Medical Co.	)	
	)	Opinion No. 13-02WC

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Defendant, by and through its attorney, Andrew C. Boxer, Esq. of Kiel, Ellis & Boxer, moves for summary judgment on the issue whether claimant's fall at work on February 28, 2001 arose out of and in the course of his employment. Claimant, by and through his attorney, Charles L. Powell, Esq. of Shillen, Gray & Powell, opposes the motion.

ISSUE:

Did an employee whose knee gave out while ascending stairs that are not alleged to have caused his fall suffer a compensable injury?

Facts Found for Purposes of this Motion Only

At all relevant times, the claimant was an employee of Aadco Medical, Inc. within the meaning of the Workers' Compensation Act.

On February 28, 2001 claimant sustained an injury while walking up the stairs at work to punch out for lunch. His knee was fully extended, locked and popped, and then he fell forward.

The stairwell was carpeted, equipped with a handrail. No condition or defect was alleged to have caused the injury. Claimant was not carrying anything at the time.

Immediately following the incident, claimant was taken to the Emergency Department at Gifford Medical Center where Dr. George Terwilliger suspected a meniscal tear, advised the claimant to take Ibuprofen, and claimant was thereafter discharged.

Claimant told Dr. Terwilliger that he had had fluctuating knee pain and had initially injured his knee while walking in the sand four to five months prior to the incident at work. The sand incident occurred in a parking lot where the claimant had parked at his employer's direction.

Claimant returned to work on March 5, 2001, the Monday following the accident.

On March 22, 2001 Claimant visited Dr. William Minsinger, an orthopedic surgeon, who also suspected a meniscal tear. Claimant told Dr. Minsinger he had first twisted his knee when he placed his foot in some sandy soil while stepping out of his car.

Dr. Minsinger performed a knee arthroscopy on May 18, 2001, but found no tear in the meniscus. The postoperative diagnosis was a large right medial synovial plica.

In a September 5, 2001 letter, Dr. Minsinger wrote that he could not say that claimant's heavy work was an influence on the February 28th injury, but he also wrote, "certainly I have no history or suggestion that there was an injury outside of work that would have contributed to this injury."

Discussion

Defendant argues that the claimant's fall is from an explained, idiopathic origin personal to the claimant. Claimant argues that it was unexplained.

The party seeking summary judgment must satisfy a two-part test. First, the moving party must demonstrate that there is no genuine issue of material fact. Second, the defendant as the moving party must present a valid legal position, one that entitles him to judgment as a matter of law. See, V.R.C.P. 56(c); *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25 (1999). The record must be viewed and all reasonable inferences drawn in the light most favorable to the claimant as the nonmoving party.

To recover workers' compensation benefits, a claimant must prove that the accident 1) arose out of; and 2) occurred in the course of employment. 21 V.S.A.§ 619; *Miller v. IBM*, 161 Vt. 213, 214 (1993). An accident occurs "in the course of" employment "when it occurs within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be while fulfilling the duties of [the] employment contract." *Miller*, 161 Vt. at 215. Because this concept extends to incidental trips across the premises it would also include walking up stairs to punch out for lunch. See, Id. Thus, this claimant's fall occurred in the course of his employment.

The central dispute in this case addresses the second part of the analysis, whether the incident "arose out of" claimant's employment. Intrinsic to this requirement is the positional risk doctrine which asks if the injury "would not have occurred *but for* the fact that the conditions and obligations of employment placed claimant in the position where [he] was injured. Id. at 214.

The parties agree that the analysis to be applied to this case centers on the concept of an idiopathic injury. There is general agreement that when an injury results from a condition personal to the claimant and has no connection to work, it does not arise out of employment and, therefore, is not compensable. If an instrumentality or condition of work contributed to the injury, it arises out of employment and is compensable. Between the two extremes is a third category, the unexplained fall, which most courts hold is compensable under the neutral force theory. See 1 Larson's Workers' Compensation Law, Chapter 4 "Scope"; *Dupee v. Service Merchandise*, Opinion No. 31-99WC (July 28, 1999). In some situations, the employment and personal risks concur, in which case "the injury arises out of the employment, since the employment need not be the primary cause, but need only contribute to the injury." Larson's, supra.

Defendant in this case argues that the claimant's fall was caused by personal risks as shown by the claimant's description of his knee locking. Claimant argues that this is an unexplained fall, as evidenced by the failed attempts to explain it.

In support of its position, defendant points to the opinion of Dr. Minsinger stating that claimant's work did not contribute to the injury. But that statement can also be interpreted as referring to the claimant's manual labor, not the specific incident on the stairs. Defendant also emphasizes claimant's description of having twisted his knee when he stepped into sand four to five months earlier. However, Dr. Minsinger's notes reflect his awareness of that incident, which he obviously did not attribute to work. He concluded that he had no suggestion or history that an injury outside of work attributed to the incident on the stairs.

Claimant contends that there is no medical support for the defendant's contention that the sand incident was the causative mechanism, and that even if it had been, that incident was work-related.

Defendant asserts that the cause of the fall is known and as such is an explained, noncompensable, fall. The cause he argues is the locking of the claimant's knee. In support of its position, it cites to *Stapleton v. The Industrial Commission*, 668 N.E. 2d 15 (Ill. App.1996) in which the Illinois Appellate Court affirmed a denial of compensation of an injury caused by a fall determined to have been idiopathic. The claimant in that case described the fall as "knee gave way and [I] fell." Id. At that time, the claimant had been back to work only two weeks following prior injuries to his knee. The court reasoned:

> A claimant may not recover if the risk to which he was exposed was a risk personal to him. An idiopathic fall is a type of accident, which results from an internal, personal weakness of the claimant. If the fall is unexplained, resultant injuries are compensable. If the fall is idiopathic, resultant injuries are not compensable unless the employment significantly contributed to the injury by placing claimant in a position of greater risk of injury from falling.

Id. at 834.

Defendant also relies on the reasoning in *Crosby v. Wal-Mart Store, Inc*. 499 S.E.2d 253 (S.C. App., 1998 where the South Carolina Court of Appeals affirmed a denial of benefits to a claimant who had fallen while working at Wal-Mart. The claimant in that case explained that her leg "just gave out." No condition of the floor contributed to the fall. The court explained that in idiopathic cases, "while the occurrences were unexplained, there [is] an apparent lack of work connection and the implication of some pre-existing physical condition." Id. at 494.

And in *County of Chesterfield v. Johanson*, 376 S.E.2d 73 (Va. 1989), the Supreme Court of Virginia reversed a judgment in favor of the claimant, concluding that an employee, whose knee gave out on a stairway without the conditions of the stairway or surroundings being a factor, did not sustain an injury arising out of employment. Id. at 1. In Johnson, the court clearly acknowledged that Virginia applies the "actual risk" test, not positional risk, which is the law in Vermont. See, *Miller* 161 Vt. at 214.

All three of the cases cited by the defense stand for the proposition that an injury does not arise out of employment if it is personal to the claimant and if there was nothing in the workplace to have caused or contributed to the injury. But none resolves the issue presented with the instant motion. To conclude, as the defense urges, that the knee give way is "personal" and "explained" is to ignore the medical evidence that activities outside of work did not contribute to the claimant's knee condition. What caused the knee to give way remains an unexplained material fact that precludes summary judgment on the issues framed by the defense. As a matter of law, it is not possible at this juncture to conclude that an employee whose knee gave out while ascending stairs that are not alleged to have caused his fall suffered a compensable injury.

THEREFORE, the defense Motion for Summary Judgment is DENIED.

Dated at Montpelier, Vermont this 13th day of March 2002.

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R. Tasha Wallis
Commissioner