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

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| | ) | State File No. L-12374 |
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| Philip Haskins | ) | By: Margaret A. Mangan |
| | ) | Hearing Officer |
| v. | ) | |
| | ) | For: R. Tasha Wallis |
| Merrill Gas Company, Inc. | ) | Commissioner |
| | ) | |
| | ) | Opinion No. 46SJ-02WC |

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

Appearances:

John C. Mabie, Esq. for the Claimant
Glen L. Yates, Jr, Esq. for Old Republic Insurance Company
Joshua L. Simonds, Esq. for Great American Insurance Company
Keith T. Aten, Esq. for Frontier Insurance Company
Jeffrey W. Spencer, Esq., for defendant TIG Insurance Company

**EXHIBITS:**

1. Medical records
2. Transcript of deposition of Sylvia O'Neil 3/11//02
3. Transcript of deposition of Philip Perkins 3/11/02
4. Transcript of deposition of William Dunn 3/11/02
5. Transcript of deposition of Truman Yeaw 3/11/02
6. Transcript of deposition of Thomas G. Shirreffs, M.D. 12/15/00
7. Transcript of deposition of Philip Haskins 2/5/01

**UNDISPUTED FACTS:**

1. Claimant Philip Haskins (Claimant) was an employee and Merrill Gas Company, Inc. (Merrill Gas) his employer within the meaning of the Vermont Workers' Compensation Act from 1996 to 2000. Claimant drove a delivery truck, delivered propane to customer's homes, installed tanks and performed furnace repairs.

2. At an office visit on July 23, 1997, Dr. Richard Whiting performed a physical examination and documented several areas of concern. Claimant's knee was not one of the concerns identified.

3. Claimant alleges that on December 17, 1997 he fell onto his left knee in the course of his employment while delivering propane to a residence. He reported the injury to his employer although he did not seek medical care. On December 26, 1997 the Employer's first Report of Injury was filed in this Department. Claimant continued to work full duty full time.

4. Old Republic Insurance Company provided workers' compensation coverage to Merrill Gas in December 1997. Its coverage ran from May 1, 1997 through April 30, 1998.

5. Claimant first saw a physician with the complaint of knee pain on June 11, 1998. At that visit, Dr. Whiting noted that Claimant had injured his knee at work in 1997 and that he had painful swelling that waxed and waned.

6. Claimant noted that his everyday work, including getting in and out of the truck, periodically made the knee worse.

7. Great American provided workers' compensation coverage to Merrill Gas from May 1, 1998 through April 30, 1999.

8. Claimant first sought medical treatment for his left knee in June 1998. He lost no time from work until after Great American was on the risk on May 1 of that year.

9. The first documentation in the medical records of any locking in Claimant's left knee appears in a March 1999 note.

10. Frontier insured Merrill Gas from May 1, 1999 through April 30, 2000.

11. On November 15, 1999 Claimant had arthroscopic surgery on his left knee.

12. TIG insured Merrill from May 1, 2000 through April 30, 2001.

13. On May 18, 2000 Dr. Shirreffs treated Claimant's left knee with steroid injections for knee symptoms that had returned to a pre- arthroscopic surgery level. Claimant continued to work full time, full duty.

14. On May 25, 2000, after walking over a railroad track that ran across the employer's lot, Claimant felt a "sharp, deadly pain" in his left knee and almost blacked out.

15. On May 26, 2000 Dr. Shirreffs documented Claimant's complaint of significant pain and prescribed a knee brace. On June 22, he ordered the Claimant to remain out or work. In November of that year, Claimant learned that a total knee replacement would be necessary in the future.

16. Claimant has not worked since May of 2000.

17. Old Republic paid the Claimant temporary total disability benefits during the following periods:

    - July 16, 1999 to September 9, 1999
    - November 15, 1999 to December 27, 1999
    - May 25, 2000 to December 26, 2000

Medical Opinions

18. Claimant's treating orthopedic surgeon, Dr. Shirreffs, opined that Claimant's knee problem is more likely the product of age and wear rather than trauma. Yet he also opined that the traumatic event in 1997 could have aggravated the condition and that any symptoms claimant had later when he got in and out of the truck were temporary increases in symptoms, not contributions to underlying pathology.

19. On November 30, 2000 Dr. Shirreffs noted that Claimant could return to work if he could find a job that would allow him to sit down most of the time with no work that would require standing, walking, climbing or placing excessive stress on the left knee.

20. In his deposition Dr. Shirreffs described the 2000 event as "an aggravating event that took a situation and made it worse." He also said the more the knee is used, the more it can wear and that heavy labor is tough on the knees.

21. Dr. Jon Thatcher, also an orthopedist, opined that the December 1997 fall "most likely initiated the patellofemoral arthritis." Furthermore, he said that Claimant suffered a meniscal tear, either at the time of the initial fall or later "when he was getting in and [out] of a truck at work." He explained that it is common for patients to endure symptoms for a period of time before they seek medical attention.

22. Activity advances the degenerative process of arthritis.

**DISCUSSION AND CONCLUSIONS OF LAW:**

1. Summary judgment is appropriate when the party against whom judgment is sought is given the benefit of all reasonable inferences, but no genuine issue of material fact exists and the moving party is entitled to judgment a matter of law. V.R.C.P. 56(b); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990).

2. Whether any party is entitled to judgment as a matter of law depends in part on whether the necessary burdens of proof are met. On the issue of compensability, the Claimant bears the burden of proving 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). On the aggravation-recurrence issue, Old Republic, as the carrier attempting to shift liability, has the burden of proving that another carrier or carriers are liable. *Bushor v. Mower's News Service*, Opinion No. 75-95WC (1995).

Claimant's motion

3. Old Republic challenges the Claimant's credibility and does not admit that the 1997 accident happened or if it did happen, that it caused the Claimant's knee problems. It points to the testimony of Dr. Shirreffs who said that Claimant's knee condition was from a long-standing degenerative process. But Dr. Shirreffs also said that it is possible the 1997 incident aggravated the condition. Dr. Thatcher considers the 1997 incident the most likely incident causing the knee injury.

4. The medical evidence on the initial issue of causation can be summed up as follows: the 1997 incident probably was the causative mechanism (Dr. Thatcher) or might have been an aggravating event (Dr. Shirreffs). Therefore, even if I were to accept Dr. Shirreffs testimony that Claimant had a long-standing knee condition, I would also have to accept his opinion that the December 17, 1997 incident aggravated it. And, if that is so, under the sound principle that an injury is compensable if it aggravates or accelerates a pre-existing condition, See, e.g. *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95 (1964); *Morrill v. Charles Bianchi & Sons, Inc.*, 107 Vt. 80 (1935), this claim for an injury in December 1997 would be compensable.

5. However, the credibility issues surrounding the initial incident cannot be resolved in this motion, making summary judgment for the Claimant inappropriate.

Great American's motion (Coverage May 1, 1998 through April 30, 1999)

6. It was during Great American's coverage, in June of 1998, that Claimant first sought medical care for his knee. Although he had lost no time from work after the December 1997 incident, he clearly related his symptoms back to it. In the intervening months, claimant worked full time and got in and out of the delivery truck often.

7. To avoid the obligation to pay benefits, Old Republic bears the burden of proving that the Claimant aggravated his knee after its coverage ended. Because this is an area beyond the ken of a layperson, expert testimony is necessary. See, Lapan *v. Berno's Inc*., 137 Vt. 393 (1979).

8. Great American insured Merrill Gas for one year, from May 1998 to May 1999. Although the Claimant sought medical care during that time, there is no specific incident at work that caused a knee injury or medical evidence to prove that work he did during that time caused a new injury or gradual onset aggravation of the preexisting injury.

9. Without evidence that work during Great American's risk caused an injury to the Claimant's knee, gradual or sudden, an action against it cannot be sustained.

10. Therefore, Great American's Motion for Summary Judgment must be granted.

Frontier's Motion (Coverage May 1999 to May 2000).

11. The only material events, which occurred during Frontier's policy period, are the referral to Dr. Shirreffs on May 9, 1999 and the arthroscopic surgery in November 1999. For the same reasons summary judgment is granted to Great American, it also must be granted to Frontier.

TIG's Motion (Coverage from May 1, 2000 to May 2001)

12. TIG argues that the Claimant, who left the employ of Merrill Gas in 2000 worked only fifteen days during its coverage and during that time only one event occurred—the painful knee-locking incident that occurred when Claimant was walking across the lot and over the train tracks at work. TIG cites to the oft-quoted *Pacher* definition of aggravation, that is, whether the incident on TIG's watch aggravated, accelerated or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, *Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626 (mem), in support of its argument that no aggravation can be found despite the specific incident of pain.

13. Claimant was able to work before the knee-locking incident under TIG's watch. That incident created excruciating pain that almost made the claimant pass out. A knee brace was prescribed afterwards. Claimant was unable to work. The disabling nature of that occurrence, like the disabling pain in *Merrill*, is within the "testimonial competence of the claimant." See, *Merrill v. U.V.M.* 133 Vt. 101 (1974). Taking this evidence in the light most favorable to the opposing party, there is basis to find on aggravation, making dismissal of TIG inappropriate.

Accordingly, TIG's motion for Summary Judgment is denied.

**ORDER:**

Therefore, based on Foregoing Facts and Conclusions of Law,

1. Great American's motion for summary judgment is GRANTED.

2. Frontier's motion for summary judgment is GRANTED.

3. Claimant's motion for summary judgment is DENIED.

4. TIG's motion for summary judgment is DENIED.

The hearing on December 18, 2002 shall consider compensability, benefits owed and liability of Old Republic and TIG.

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

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R. Tasha Wallis
Commissioner