

Pettee v. Rock River Renovations (April 20, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Arthur Pettee) File #: F-24260
) By: Barbara H. Alsop
v.) Hearing Officer
) For: Mary S. Hooper
Rock River Renovations) Commissioner
)
) Opinion #: 17-95WC

Hearing held at Montpelier, Vermont, on March 27, 1995.

APPEARANCES

*Thomas M. Rounds, Esq., for the claimant
Harold E. Eaton, Jr., Esq., for the defendant*

ISSUE

Whether the claimant suffered a compensable injury when he was unable to reduce his torn meniscus cartilage at home on June 18, 1993.

THE CLAIM

- 1. Temporary total disability compensation under 21 V.S.A. §642 from June 21, 1993, to September 13, 1993.*
- 2. Permanent partial disability compensation under 21 V.S.A. §644 to be determined.*
- 3. Medical and hospital benefits under 21 V.S.A. §640 in the amount of \$9021.13.*
- 4. Attorney's fees and costs under 21 V.S.A. §678(a).*

STIPULATIONS

- 1. The claimant is an employee of Rock River Renovations at all times pertinent to this claim.*

2. *Rock River Renovations was an employer within the meaning of the Workers' Compensation Act at all times pertinent to this claim.*
3. *The treatment received by the claimant was appropriate and he suffered a 5% permanent impairment of his lower left extremity because of the damage to his left knee.*

EXHIBITS

The parties have agreed to the admission of the following exhibits:

Exhibit 1 A joint exhibit containing the following records:

- 1.1 *BMH Emergency Department Record 6/18/93*
- 1.2 *BMH Report of Operation 6/22/93 (2 pages)*
- 1.3 *Orthopaedic Associates of Brattleboro Clinical Data for 12/7/93 and 6/24/94 (2 pages)*
- 1.4 *John T. Chard, M.D., Letter of 1/24/94*
- 1.5 *John T. Chard, M.D., Deposition of 10/5/94*
- 1.6 *Form 5, Notice of Injury and Claim, 7/8/93*
- 1.7 *Form 6, Notice and Application for Hearing, 1/11/94*
- 1.8 *Form 25, Report of Employee's Wages*
- 1.9 *Kuhrt Weineke, M.D., Letter of 10/29/94*
- 1.10 *Kuhrt Weineke, M.D., Letter of 8/26/94*
- 1.11 *Kuhrt Weineke, M.D., Letter of 2/1/95*
- 1.12 *Medical Bills and Cost Summary Sheet with Copies of Bills*

Exhibit 2 Deposition of John T. Chard, M.D., 10/5/94

WITNESSES

Arthur Pettee, the claimant
Dylan Devlin, a prior employee of Rock River Renovations
Paul Dedell, the owner of Rock River Renovations

FINDINGS

1. *The stipulations entered into are true, and the exhibits are admitted into evidence without objection.*
2. *The claimant Arthur Pettee was employed by the defendant Rock River Renovations from 1987 to the present.*

3. *The business of Rock River Renovations was to renovate old houses and to perform some rehabilitation work on newer premises, as well as to do new construction. The claimant worked as a carpenter, although he was something of a jack-of-all-trades, as were all of the employees of the company.*

4. *In the late summer of 1990, the claimant was working with the owner of the company, Paul Dedell, on the so-called Bombicino job, doing a roof working on a scaffold. The roof was steeply pitched, and the work entailed much crouching and working in difficult postures. On that job, both the claimant and Mr. Dedell testified that the claimant's left knee locked, although the claimant was able to shake it loose. This was the first time that the claimant ever experienced a locked knee.*

5. *When the claimant's knee locked, which only occurred when he was crouching down, he felt intense pain, and he could not put weight on the leg. He described the feeling as of being "out of joint". When the leg finally straightened, he could feel something pop. The duration of these episodes was only about fifteen seconds. After the initial incident, the knee locked many times, estimated as in excess of 70 times, over the ensuing years. Each time that it happened at work, Mr. Pettee was able to work it out, doing what was called his "knee dance".*

6. *In June of 1993 from the third to the sixth, the company began a job, known as the Cox job, involving a foundation coating for a studio and residence. The job required clumsy positioning because the buildings were on an incline and there was much crouching to get down to apply the material to the foundation. Initially, Mr. Pettee worked on the job with Mr. Dedell for a day and a half, but for the last day he worked with Mr. Devlin. According to all three men, this job was difficult for Mr. Pettee, and his knee locked an exceptional number of times. Prior to this job, he had never had more than two locking incidents in one day, but at the Cox job, there were as many as five incidents in one day.*

7. *Almost two weeks later, on June 18, 1993, while Mr. Pettee was spreading a load of gravel on his driveway, his knee locked again, and this time would not release on its own. He was not crouching when the knee locked, which was unusual, but otherwise it felt like a regular locking to start. He only*

realized it was different when it didn't slip back to normal within the usual time period of seconds. The initial pain was no more severe than normal, but as the episode continued the pain became overwhelming. He could not walk on the left leg without support from a rake, and later from Mr. Dedell.

8. Mr. Dedell transported Mr. Pettee to the hospital, where the claimant was seen by Dr. John T. Chard. He was advised that he probably had a torn meniscus and that there were two options, either an MRI or arthroscopic surgery. With the latter, there was the possibility of doing any necessary repair in the same procedure. Arthroscopic surgery was performed on June 22, where the diagnosis of a left medial meniscus tear was confirmed. Dr. Chard also found extensive wear of the articular surface of the medial femoral condyle. The tear of the meniscus was approximately two inches long, with the last half inch being of more recent generation, while the remainder was older.

9. Mr. Pettee had a normal recovery, and returned to work on September 13, 1993, with a 5% permanent loss of function in his left knee.

10. Mr. Pettee had never lost any work nor sought any medical treatment for his locking knee prior to the incident on June 18, 1993. He was considered a great employee, a "mainstay of the business" and very honest by his employer. I find all of the witnesses to be credible.

11. The medical evidence in this case is presented by deposition and letters from the treating physician, and letters from the insurance company's doctor. In a case where so much depends on the medical evidence, it is unfortunate that neither party chose to bring in a witness to testify on these issues. When credibility must be determined by written records, there is no opportunity to ask any additional questions to conform to and qualify the evidence that is developed at trial.

12. Dr. Kuhrt Weineke has expressed his opinion based on review of the operative notes and various letters written by Dr. Chard, as well as a reading of Dr. Chard's deposition. Dr. Weineke has not examined the claimant, and has therefore no personal knowledge of the case. Under these circumstances, his reports are not given much weight.

13. *Dr. John T. Chard is the man who operated on the claimant. He had the opportunity to inspect the damaged knee and to make his determinations based on actual observations and hands-on experience. He was also deposed, giving both sides an opportunity to question his judgment and conclusions. Having been tested in that crucible, his evidence can be given greater credence.*

14. *Dr. Chard indicates that the injury to the knee, that resulted in the final locking, most likely occurred on June 18, 1993, but was a continuance of the pre-existing injury. He cannot say to a reasonable medical certainty that the newer portion of the tear occurred on that date, although he believes that it must have occurred within three or four weeks of the surgery, given the physical evidence of fresh bleeding in the area of the newer tear. Because of the nature of the meniscus, pain would be felt when the original or any other tear occurred.*

15. *The two menisci primarily serve two functions. First, they are shock absorbers between the tibia, which is the weight bearing bone in the lower leg, and the femur. The femur's end is round, while the tibia's end is flat. The menisci together convert the flat end of the tibia into a shallow socket. The mechanism involved in the locking of the knee is that a fragment of the torn meniscus can slip into a new position when the knee is flexed that it could not fit into when the knee is straight. The knee cannot then straighten because the fragment interferes with the straightening. If the fragment is small enough, or the invasion into the knee is minimal, it can be made to go back to its original position, or be reduced, more easily. This is apparently what Mr. Pettee was able to accomplish with his "knee dance."*

16. *The causes of a torn meniscus are numerous, including squatting and any number of athletic endeavors. Torn menisci are common in plumbers and carpenters because of the amount of squatting that they do. In most cases, the act of the tearing of the meniscus will be felt by the victim, not necessarily as pain but at least as something that draws one's attention to the knee. The claimant denies any incident of knee pain prior to the locking incident in 1990 on the Bombicino job.*

17. *The claimant has been active in a number of sports throughout his life, including formal sports in high school and college, and informal activities since. The only occasion other than work on which he felt the knee lock occurred when he was teaching skiing. He attempted to lift up a young skier who had fallen and could not get up. When he squatted down to help the child, the knee locked in a manner identical to the way it had locked at work on so many other occasions.*

18. *There is no evidence of any other non-work-related incident in which the claimant suffered any pain indicative of damage to the meniscus. Moreover, the claimant's employer testified that he engaged in casual sports with the claimant and never witnessed any problem with the claimant's knee, except at work, where he witnessed in excess of 30 occasions the locking of the claimant's knee. Because of the opinion of Dr. Chard that a tear of the meniscus would be felt by the claimant and the claimant's credible testimony that he had never felt anything in his knee prior to January of 1990, I find that the original injury to the claimant's knee occurred in 1990 on the Bombicino job.*

19. *Chondromalacia was found on the lateral half of the medial femoral condyle, which was the part of the condyle in direct contact with the torn meniscus. There was also some chronic scarring. That damage indicates a period of increased wear and tear that must have occurred over time, that is, a chronic condition. Dr. Chard correlates that wear to the damaged meniscus and indicates that the damage alone would have warranted surgical intervention for the injury, prior to the incident on June 18, 1993. This is credible evidence.*

20. *It is Dr. Chard's opinion that this is a work-related injury. He bases his opinion on the type of work the claimant did, the description of the times when the knee was symptomatic and his surgical findings. He testified in the deposition that an incident like the Cox job such as testified to by all three witnesses would bolster his opinion that the claimant's condition is work-related. He describes the June 18 incident as the straw that breaks the camel's back. This is credible.*

21. *Dr. Weineke's bald assertion that "the [original] tear ... in fact did not at any point require surgery" is precisely the kind of opinion that cannot be accepted without further inquiry, given that he did not see the claimant nor did he give the basis for reaching this conclusion. Simply because the surgery was not mandatory does not show that acceptable medical practice would not recommend it.*

22. *The claimant indicates that he is entitled to compensation based on his average yearly wage, given that his occupation is seasonal. There is no support for this assertion in either the statute or the rules.*

CONCLUSIONS

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 (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. *A compensable injury need not be instantaneous but may arise over time from repeated trauma. Campbell v. Savelberg, 139 Vt. 31 (1980). Where the causal connection between an accident and injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's, Inc., 137 Vt. 393 (1979).*
3. *There must be created in the mind of the trier of fact something more than a 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).*
4. *Dr. Chard was unaware of any specific prior injury to justify a finding of work-relationship, but indicated that work certainly was a factor in the on-going symptoms experienced by the claimant, and that the initial injury, if at work, would confirm the diagnosis that the original tear of the meniscus was a work related injury.*
5. *While the date of injury in this case is not susceptible of exact determination, it can be isolated to the incident at the Bombicino job in 1990. Any problem since that date would be a continuation of the original injury, since the injury was not resolved or stable. The appropriate analogy is to the rule of recurrence. The behavior that led to the locking of the knee on June 18, 1993, was not as stressful as that which usually led to the appearance of symptoms, in that the claimant was standing with knees slightly bent or flexed, rather than in a squatting position. Therefore, the incident is more consistent with a finding of everyday living rather than an aggravation or new injury.*
6. *It is irrelevant for the purposes of this decision whether the fresh tear occurred on June 18 or at some earlier date, since it was nothing more*

than the continuance of the original injury. It is important to note that Dr. Chard could not say to a reasonable degree of medical certainty that the fresh tear occurred on June 18. Although he suspected that the tear increased with the episode of that date, he also opined that it could have occurred within three weeks of the 18th. Under these circumstances, the more probable hypothesis is that the claimant suffered a compensable injury while working for Rock River Renovations, and as a result of that injury, he was unable to work from June 21, 1993, to September 13, 1993.

7. The claimant has suffered a 5% impairment of his leg, and is entitled to compensation therefor.

8. The claimant has presented evidence that he has had costs of \$559.61 with regard to the preparation of his claim, which he is entitled to recover as he is successful in his claim. Rule 10(c), Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts.

Although the claimant on his Form 6 requested attorneys' fees, he is not awarded any because the claimant has failed to proffer evidence establishing the amount and reasonableness of such fees no later than the date upon which proposed findings of fact and conclusions of law were to be filed in this matter.

9. The claimant alleges that he is entitled to compensation based on a yearly average weekly wage. He presents no authority for this proposition, and it is not accepted.

ORDER

THEREFORE, I find that the claimant suffered a personal injury arising out of and in the course of his employment with Rock River Renovations.

The defendant is ORDERED to:

1. pay the claimant temporary total disability compensation for the period 6/21/93 - 9/13/93;
2. pay the claimant permanent partial disability compensation for a 5% impairment of his lower extremity;
3. pay medical expenses of \$9,036.13; and,
4. reimburse \$559.61 in costs.

DATED in Montpelier, Vermont, this ____ day of April, 1995.

Mary S. Hooper
Commissioner