Shohet v. Land Air Express and U.P.S. (Apr. 29, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Charles Shohet	*)*	*File #: J-211 and C-9090*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Land Air Express and	*)*	*Commissioner*
United Parcel Service	*)*	
	)	*Opinion #: 27-96WC*

Hearing held at Montpelier, Vermont, on February 15, 1996.
Record closed on February 23, 1996.

APPEARANCES

Barbara E. Cory, Esq., for Land Air Express
Keith J. Kasper, Esq., for United Parcel Service

ISSUE

Whether the claimant suffered an aggravation or a recurrence of a prior injury leading to the claimant's 1995 surgery.

STIPULATIONS

1. Claimant Charles Shohet worked as a truck driver for UPS from November 27, 1988, until February 28, 1992.

2. He injured his knee in September of 1989, while employed by UPS.

3. He underwent surgery by Dr. Andrew Walker at Springfield Hospital on October 15, 1989, on his left knee for osteochondritis dissecans involving a large weight bearing area of the left lateral femoral condyle.

4. The claimant was out of work, recuperating from surgery, and undergoing rehabilitation from October 1989, until April 1991, when he returned to work at UPS.

5. Claimant left work at UPS on February 28, 1992, and began work with Land

Air on March 12, 1992, working as a truck driver.

6. Claimant underwent further surgery by Dr. Walker in September 1992, to remove a loose fragment in his left knee.

7. Charles Shohet stopped working as a truck driver at Land Air in June of 1995, based on Dr. Andrew Walker's recommendation and later began doing light clerical work in the summer of 1995.

8. The claimant underwent further surgery on November 27, 1995, at Massachusetts General Hospital by Dr. Henry Mankin. That surgery was an allograft procedure which again involved the left lateral femoral condyle.

EXHIBITS

Joint Exhibit 1	*Medical records of claimant*
Joint Exhibit 2	*Deposition of Robert J. Johnson, M.D.*
Joint Exhibit 3	*Deposition of G. Andrew Walker, M.D.*

FINDINGS OF FACT

1. The above stipulations are accepted as true, and the above exhibits are admitted into evidence. Notice is taken of all forms filed with the Department in this matter.

2. Both defendants are insured by Liberty Mutual Insurance Company. Liberty Mutual, on behalf of Land Air Express, has advanced payment for the claimant's medical care and indemnity benefits since the filing of a First Report of Injury on July 5, 1995, by Land Air. Land Air is seeking "reimbursement" for its expenditures from UPS, in effect an accounting transfer within Liberty Mutual.

3. The claimant worked for UPS as a "casual" driver covering a four state area, New York, Vermont, Massachusetts and Connecticut. He drove tractor trailers, and was responsible for both the truck and its contents. He worked as needed by UPS, from six to nine months of the year, sometimes working as many as 50 or 60 hours in a week during the busy season.

4. The injury occurred on one of the claimant's most strenuous routes, from Brattleboro to Albany to Burlington to White River Junction and then back to Brattleboro. He was loading the trailer in Albany, and was attempting to

move a large, oversize package that weighed between 50 and 70 pounds. He squatted, grabbed the box and tried to press it above his chest. He lost his balance, his left leg got caught in a roller, he fell, and the package landed on his left knee.

5. The claimant sat down for a few moments to recover, then completed loading his truck and finished his route. By the end of the trip, the knee had swollen and was stiff. He reported in by telephone to his manager, after he returned to the terminal. He was referred to a local doctor in White River Junction, and later went to see Dr. Walker, after becoming dissatisfied with the treatment he was receiving.

6. On October 24, 1989, the claimant underwent an arthroscopy at Springfield Hospital, with the purpose of pinning a large fragment of bone to the left lateral condyle to treat a condition diagnosed as osteochondritis dissecans. At that time, Dr. Walker opined that the claimant would at some point in the future require a total knee replacement as a result of the damage to his knee. With physical therapy and other rehabilitation, the claimant was released to return to work without restrictions in April of 1990. He actually returned to work in the fall of 1990.

7. The claimant testified that his knee was still bothering him, although it was less painful than it had been prior to the surgery. The claimant changed jobs in April of 1992 and went to work for Land Air Express. The primary reason for the change was that the claimant could have full time work with benefits at Land Air.

8. The claimant was the most experienced driver at Land Air, and hence performed the more difficult tasks, such as driving double-trailers. These were more difficult to line up, requiring more shifting and hence more clutching. They were also more difficult to drive. After his first year at Land Air, the company stopped using doubles. The claimant testified at his deposition that he drove an average of 375 miles a night, each night shifting the transmission about 100 times.

9. There was less manual work in the sense that Land Air utilized forklifts, pallets and hand dollies, rather than the roller system used at UPS. On the other hand, the packages at Land Air tended to be heavier than those he had transferred at UPS. The loading and unloading involved walking on concrete floors for about an hour a night, and this would bother his knees.

10. The claimant had no incident while at Land Air that resulted in a

specific need to see a physician. However, the replaced bone broke free again at some point and his knee began to lock. He underwent a second surgery in September of 1992, which resulted in the removal of the bone fragment. At that time, Dr. Walker advised the claimant of the possibility of a bone graft that would replace the missing bone fragment and defer the necessity for a total knee replacement. Prior to the surgery, the claimant had not treated since 1990 for his injury. After the surgery and the recovery from it, the claimant did not seek treatment again until the late spring of 1995, when he reported to Dr. Walker that symptoms had increased since the fall of 1994. The claimant testified that he felt significantly better after the 1992 surgery, and it was only gradually that his knee reached the point of requiring further medical treatment.

11. The claimant continued to work for Land Air through the summer of 1995. During that period, he indicated that his symptoms varied, with some days being better than others. By the spring of 1995, the knee had begun to hurt more, with throbbing and aching, and some night time awakenings because of the pain. He indicated that it was difficult to get comfortable in bed.

12. In June of 1995, as a result of the claimant's increased symptoms, he was placed in a light duty position at Land Air, and ceased driving trucks. He indicated at the hearing that he would not drive trucks again. He testified that his light duty job was in the office, and involved filing and walking up and down stairs a number of times a day. Walking up and down stairs caused increased pain and discomfort in his injured knee.

13. In August of 1995, the claimant consulted with Dr. Robert J. Johnson, a board certified orthopedist, for a second opinion after Dr. Walker recommended an allograft procedure. Dr. Johnson indicated that the claimant should be referred to Dr. Henry Mankin at Massachusetts General Hospital for an evaluation as to the propriety of the grafting procedure.

14. Dr. Mankin confirmed that an allograft was appropriate for the claimant and would in all likelihood delay the need for a total knee or knee arthroplasty. On November 27, 1995, the claimant underwent the graft procedure, from which he is now recuperating.

15. Dr. Johnson and Dr. Walker testified by deposition in this case. Both opined that the injury suffered by the claimant in 1989 was severe, and that the likely consequence of that injury was the need for the surgery he has had, as well as the possibility of a knee replacement in the future. Both

agreed that the damage corrected by the graft was the same damage as had been caused by the original injury.

16. The question posed to each physician was whether the claimant's continued driving of large trucks while in the employ of Land Air accelerated the need for the surgery he has undergone here. Dr. Johnson indicated that the more the claimant used his knee in any activity, the more damage would be done. In effect, the use of the knee was cumulative, and any activity that utilized the knee would contribute to the damage.

17. Dr. Walker specifically indicated that the use of the left knee for clutching would "speed the development of what I felt would be the eventual outcome." He further confirmed that the amount of clutching required of the claimant, 100 times a trip, five trips a week, would be a contributing factor in the need for the claimant's surgery. However, he also confirmed that the surgical outcome was inevitable, and the only concern was the hastening of that outcome.

CONCLUSIONS

1. Where the causal connection between an accident and an 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). In this case, it is clear to the layman, and the medical testimony confirms, that the claimant suffered a massive injury to his left knee while in the employ of UPS.

2. 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).

3. If the claimant has suffered an aggravation of the original injury, then Land Air is responsible for his benefits. Conversely, if the 1995 surgery was as a consequence of a recurrence, then UPS is responsible. We have defined an aggravation as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events," while we have defined a recurrence as "the return of symptoms following a temporary remission."

See Workers' Compensation and Occupational Disease Rules, Rule 2(i) and (j).

4. The area of aggravation/recurrence has been frequently addressed in decisions of this Department, and the factors to be considered have been discussed as frequently. Among those factors are whether there has been a successful return to work, whether there has been active treatment of the injury prior to the second injury, whether the two injuries are in proximity in time, whether the claimant has reached an end medical result for the first injury prior to the second injury, and whether there was a specific new injury as opposed to a gradual worsening of the claimant's condition. See, e.g., Jaquish v. Bechtel Construction Company, Opinion No. 30-92WC, and the myriad cases referring to it.

5. The only factor of those cited above which does not devolve to the benefit of UPS is the last factor. Here the claimant has successfully returned to work after reaching an end medical result from his first injury, with no treatment over a lengthy period of time exceeding two years after his second surgery. Therefore, the question is whether the lack of a specific new injury is sufficient to shift the burden of this claim from Land Air to UPS. The simple answer is that if that were the case, there would be no need for the other four factors. More importantly, cumulative trauma has long been held to create the possibility of a new injury, and the carrier on the risk at the time of the "last injurious exposure" is generally responsible for the claim. See, e.g., McKearney v. Miguel's Stowaway, Opinion No. 6-94WC. Since the claimant's continued driving of trucks was seen by his original physician Dr. Walker as a factor in the claimant's need for the 1995 surgery, it is clear that the last injurious exposure occurred as late as June of 1995, when the claimant stopped driving trucks.

6. The claim that the surgery was inevitable does not alter the outcome of the case. As early as 1938, the rule in this state was that the hastened onset of an inevitable conclusion by accident or injury was compensable. See, e.g., Gillespie v. Vermont Hosiery and Machinery Co., 109 Vt. 409 (1938), in which the acceleration of a claimant's arteriosclerosis by an injury on the job was found to be compensable, the Court stating: "True, the disease, if left to itself, and apart from any injury, would, in time, have inevitably caused a complete disability, but this is not the test; as it was, the disability came upon the claimant earlier than otherwise would have occurred." 109 Vt. at 415.

7. The acceleration of the claimant's condition is established by Dr. Walker's testimony. It is unfortunate that, as treating physician in 1990

and 1992, Dr. Walker did not see fit to recommend that the claimant change his job, given the stressful nature of long haul truck driving with a bad knee. However, Dr. Walker's failure to advise a change in careers at an earlier date can not be charged to UPS, and Land Air must take its employee as it finds him. Because the work at Land Air constituted an acceleration or aggravation of the claimant's knee injury, Land Air is the responsible employer for the purposes of the claimant's current condition.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it
is hereby ordered that:

1. Land Air's claim for reimbursement is denied, and

2. Land Air is to continue to provide to the claimant all benefits to which he is otherwise entitled under the Workers' Compensation Act for the injury to his left knee.

DATED at Montpelier, Vermont, this 29th day of April 1996.

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Mary S. Hooper
Commissioner