STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Charles Farris	)	State File Nos. J-03971; D-21376
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: R. Tasha Wallis
Bryant Grinder	)	Commissioner
	)	
	)	Opinion No. 30-00WC

Case submitted on the record; no hearing was held.
Record closed on April 11, 2000.

APPEARANCES:

John W. Valente, Esq. for AIG
Barbara A. Alsop. Esq. for Wausau

ISSUE:

Whether the claimant suffered an aggravation or a recurrence of his pre-existing knee osteoarthritis after AIG began to insure Bryant Grinder.

EXHIBITS:

I. Transcript of the deposition of Charles Farris, May 11, 1998

II: Transcript of the deposition of Jon C. Thatcher, M.D., November 9, 1998

III: Transcript of the deposition of Stephen J. Fox, M.D., April 9, 1999

FINDINGS OF FACT:

1. The claimant, Charles Farris, began working for Bryant Grinder in July 1973 and worked there until December 19, 1996. At all times relevant to this action, he was an employee and Bryant Grinder his employer within the meaning of the Workers' Compensation Act ("Act").

2. Wausau was the workers' compensation insurer for Bryant Grinder from May 26, 1989 to May 14, 1992. Cigna insured the employer between 1992 and 1994 and is not a party to this proceeding.

3. TIG insured the employer from May 15, 1994 until May 15, 1995. In a Ruling on TIG's Motion for Summary Judgment, which met no opposition, TIG was dismissed from this action in February 1999 because no medical evidence was produced to connect the work

under TIG's watch to the claimant's current condition, although he was seen by a physician once during that time.

4. AIG has been the workers' compensation insurer for Bryant Grinder from May 15, 1995 to the present.

5. On May 22, 1972, more than a year before he began working for Bryant Grinder, the claimant underwent a medial meniscectomy of his right knee for a torn meniscus.

6. On January 24, 1985, the claimant, 47 years old at the time, was admitted to the hospital for an arthroscopic partial meniscectomy of his left knee due to a tear in the posterior horn of his medial meniscus. The complaints that led to the surgery began about two months earlier when he noticed pain in that knee. The symptoms came on without a fall or major twisting incident. However, his knee was swollen and had limited mobility.

7. On May 24, 1991, the claimant saw Dr. Halsey with a complaint of knee pain after slipping on some oil on the floor at Bryant Grinder a few weeks earlier. The doctor noted that the claimant had had intermittent buckling and aching pain since the incident. A subsequent arthroscopic surgical investigation of the right knee revealed mild medial compartment degenerative arthritis and Grade 3 deterioration in all three compartments of his right knee. The doctor diagnosed underlying osteoarthritis of the right knee with exacerbation from the on-the-job injury with possible degenerative meniscal tear. After the surgery, the claimant remained out of work for approximately 15 months.

8. In July of 1991 Dr. Halsey first raised the issue that the claimant might need a total knee replacement sometime in the future. He did not think it appropriate at that time because of the claimant's young age.

9. In March of 1992 the claimant still had modest symptoms in his right knee and infrequent swelling. In June 1992 he again complained that his knee buckled. By October of that year, Dr. Halsey recommended a knee brace after learning that the claimant had fallen twice as a result of recurrent knee catching and buckling.

10. The claimant also saw Dr. Kilgus in October of 1992 with complaints of right knee buckling and some joint instability. On examination, the doctor noted crepitation and some atrophy of the quadriceps muscles. X-rays taken ten months later revealed evidence of increased degenerative joint disease.

11. On August 4, 1993 Dr. Kilgus performed an arthroscopy and chondroplasty of the claimant's right knee for degenerative joint disease with surgical findings of Grade 2 chondromalacia over the medial aspect of the patella. The operative report notes that "[e]xamination of the medial compartment disclosed some degeneration along the periphery of the meniscus." After nine months, the claimant returned to work.

12. On March 7, 1994 Dr. William Kilgus determined that the claimant had a 10% impairment in the lower extremity.

13. The claimant testified in his deposition that after an initial period of knee pain and buckling upon returning to work in each instance, his leg would get stronger and he

would have an extended period of time when his knee pain was tolerable. His work activities included kneeling, crawling, standing and climbing in, over, around and under machinery upon which he was working.

14. After some length of time, usually two or three years, the claimant said, he found that prolonged standing on cement floors would begin to irritate his knee until he would finally need to return to his surgeon for further medical intervention.

15. At a February 2, 1995 office visit, Dr. Kilgus noted that claimant's right knee had given out on him the previous week.

16. The claimant next underwent surgery on December 19, 1996, again on his right knee, for degenerative joint disease with findings of degenerative tears in the medial and lateral menisci.

17. The claimant has not returned to work since his December 1996 surgery. At the claimant's deposition almost a year and a half after that surgery, he testified that his right knee has not worsened as it did when he was employed, and that most of his symptoms now are in is his left knee. That his treating physician, Dr. Fox, is treating his left, not the right knee, corroborates that aspect of the claimant's testimony.

18. On October 7, 1998 the claimant had a diagnostic arthroscopy of his left knee with partial medial and lateral meniscectomies.

19. Several physicians evaluated this claimant and rendered opinions relevant to the aggravation versus recurrence issue in this case. Dr. Jon Thatcher reviewed the claimant's medical records at Wausau's request; Dr. Kuhrt Wieneke reviewed the records for AIG. The parties deposed and offered into evidence the depositions of Dr. Thatcher of the claimant's treating physician, Dr. Stephen Fox.

20. Dr. Fox testified that the claimant's continued work after all of his surgeries up to the time of the December 1996 surgery contributed to his degenerative arthritis in both knees. He based his opinion on the claimant's report to him of his work activities and his extensive experience with injuries of this kind. Although he never treated the claimant for his right knee problems, he opined to a reasonable degree of medical certainty that the same forces that accelerated his left knee arthritis also accelerated his right knee arthritis.

21. After he reviewed the claimant's medical records, Dr. Thatcher expressed the opinion that the claimant was suffering from osteoarthritis, a degenerative joint disease in his right knee, which he defined as a degeneration of the articular surfaces of the bones in the right knee. Dr. Thatcher testified that the total knee replacement surgery in most cases is an elective procedure. He explained that the determining factor in deciding whether to do the surgery is the patient's perception of the need. He indicated that while some individuals have the operation when experiencing Grade 3 articular damage, there are some patients with Grade 4 articular damage who do not have sufficient symptoms to warrant the operation.

22. Dr. Fox defined the four stages of articular damage as follows: 1) Grade 1 is the roughening of the cartilage; 2) Grade 2 is the loss of some of the cartilage covering the

articular surface; 3) Grade 3 is the loss of most of the covering of the articular surface; and 4) Grade 4 is the total loss of the articular surface, or as he put it, "bone on bone."

23. Dr. Fox testified that the acceleration or exacerbation caused by the claimant's work activities continued up until the day he stopped working.

24. Dr. Thatcher testified that, while the claimant had sufficiently advanced osteoarthritis at the time of the 1991 operation to justify the possibility of a total knee replacement in the future, his continued work at Bryant Grinder after the 1991 surgery most likely brought forward in time the point at which the claimant needed the total knee replacement.

25. Dr. Thatcher testified that it was generally accepted in the orthopedic community that the surface upon which one walks or stands can have some effect on osteoarthritis, and that a concrete floor is one of those surfaces. He indicated that the effect of the floors could be mitigated to some degree by well-cushioned shoes or mats, although there was no evidence in this case that he claimant wore well-cushioned shoes or that such mats were available to him. In conclusion, Dr. Thatcher opined to a reasonable degree of medical certainty that the work as described by the claimant accelerated or exacerbated his osteoarthritis.

26. Dr. Wieneke reviewed the claimant's medical records, as well as the depositions of Dr. Fox, Dr, Thatcher, and the claimant. He opined in two letters to AIG's counsel, one dated September 21, 1998 and the other December 1, 1998, that absent a specific further trauma to his right knee, the claimant's complaints of right knee pain after the March 19, 1991 injury characterize a recurrence. He explained that the pain is due to an underlying osteoarthritic condition which occurred as a result of his 1972 surgery and the work related aggravation in 1991.

27. Dr. Wieneke acknowledged that the claimant has significant arthritis in both knees, a fact that he attributes to hereditary predisposition. He opined that the pain, accompanied by effusion and consistent with three compartment degenerative osteoarthritis, preexisted any work activities performed between July 1, 1995 and July 1, 1997. Furthermore, Dr. Wieneke disagreed with the other two physicians who implicated the cement floors in the acceleration of the claimant's knee problems. He stated that there is "really no evidence in the literature that working on cement floors accelerates arthritis per se."

28. Wausau agreed at the informal level to pay for the claimant's 1996 surgery without prejudice. The payments made pursuant to that agreement and the claimant's entitlement to further benefits are the issues now in dispute.

CONCLUSIONS OF LAW:

1. The sole issue for resolution in this case is whether the claimant suffered an aggravation or a recurrence of his preexisting osteoarthritis after AIG began to insure Bryant Grinder.

2. 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). 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. A recurrence is the return of symptoms following a temporary remission or a continuation of a problem which had not previously resolved or become stable, whereas, an aggravation is an acceleration or exacerbation of a previous condition caused by some intervening event or events. Rule 2(i) and (j) of the Vermont Workers' Compensation and Occupational Disease Rules (April 1, 1995); *Lavigne v. General Electric*, Opinion No. 12-97WC (June 17, 1997).

4. In further clarifying the terms "recurrence" and "aggravation," the Vermont Supreme Court explained that in workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a "recurrence" of the first injury, that is, if the second accident did not causally contribute to the claimant's disability. If, however, the second incident aggravated, accelerated or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an "aggravation" and the second employer becomes solely responsible for the entire disability." *Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626 (1997) (mem.) The principles enunciated in *Pacher* are as applicable to successive insurers as they are to successive employers and as relevant to working conditions leading to a gradual onset injury as they are to a discrete injury from a brief event. *Campbell v. Savelberg*, 139 Vt. 31 (1980); *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).

5. To aid in the aggravation-recurrence analysis, the Department has examined five factors: 1) whether the subsequent incident or work 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. See, *Trask*, Opinion No. 51-98WC and cases cited therein.

6. In this case, all criteria devolve in favor of a finding of an aggravation, although the finding is a close one. Although there was no specific work incident under AIG's watch, the working condition destabilized a condition that had become stable. With the exception of one visit to Dr. Kilgus in 1995, the claimant ceased treating medically in 1994 after the 1993 surgery until his return in the fall of 1996 for further treatment. He successfully returned to work for two years. And he had reached a medical end result.

7. With regard to the final factor, whether the subsequent work contributed to the final disability, the expert opinions must be evaluated. When evaluating and choosing conflicting medical opinions, the Department has traditionally considered several factors: 1) the nature of the treatment and the length of time there has been a patient-provider relationship; 2) whether accident, medical and treatment records were made available and considered by the examining physician; 3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts, including professional training and experience. *Miller v. Cornwall Orchards*, Opinion No. 20-

97WC (Aug. 4., 1997). *Morrow v. Vermont Financial Services Corporation*, Opinion No. 50-98WC. (Aug. 25, 1998).

8. All physicians who rendered opinions in this case are equally qualified based on exemplary professional training and experience. Dr. Fox, as the only treating physician to offer an opinion in this case has had a direct relationship with the claimant and is the only one with whom the claimant has discussed his work history. Although Dr. Fox has only been treating the claimant for his left knee problems, not the right knee which is the subject of this controversy, he discussed intelligently and appropriately the forces that were brought to bear on the right knee, since those forces were equally present on both knees. Dr. Fox was fully deposed by the attorneys in this case and his opinions well tested by cross-examination. His opinion that the claimant's work continued to contribute to his osteoarthritis until the time of the 1996 surgery is persuasive and well grounded.

9. Like Dr. Fox, Dr. Thatcher was deposed with his opinions subject to cross-examination. Additionally, Dr. Thatcher had reviewed the claimant's deposition. Dr. Thatcher's testimony was forthright and logical. His opinion that claimant's work accelerated or exacerbated his osteoarthritis is convincing in light of claimant's working conditions and lack of mitigating measures. Although he acknowledged the possibility that AIG's position might have some merit, his opinion as a whole favored Wausau's position.

10. The opinion of Dr. Wieneke, expressed in two letters and not subject to cross examination, lacks the strength to overcome the cumulative and persuasive effect of the opinions of Dr. Thatcher and Fox. Dr. Wieneke stated that the other doctors' opinions on the effect of a floor surface must fail because their theory lacks support in the literature. However, I find their opinions more persuasive because of their experience and knowledge on this subject and the realization that the overall working conditions affecting the claimant's knee extended beyond the surface of floor on which he stood.

11. AIG relies on. *St. Arnault v. Canusa Corp*. Opinion No. 23-99WC (May 19, 1999) in its argument that the Department should find a recurrence in this case. In *St. Arnault*, as in this case, the work under the subsequent carrier was on a concrete surface that arguably aggravated the claimant's condition. Although in *St. Arnault* this Department held that the claimant had a recurrence, a different result is indicated here. The claimant in *St. Arnault* had an initial traumatic injury that led to weight gain and unrelenting cellulitis in the claimant's injured leg. The credible medical evidence in that case causally connected the claimant's problems to the original injury and convinced the Commissioner that claimant's prolonged standing neither worsened his condition nor produced any permanent damage. Contrarily, the medical evidence in this case demonstrates that the work claimant progressively accelerated and exacerbated the claimant's arthritis.

12. It is not possible to say that the claimant would not have needed total knee replacement had he stopped working for Bryant Grinder. However, based on a careful review of the evidence submitted by the physicians, it is clear from the opinions of Dr. Fox and Dr. Thatcher that the claimant's continued work at Bryant Grinder contributed to the osteoarthritis and accelerated the need for a total knee replacement.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, AIG is ORDERED to reimburse Wausau for all sums paid on the claim for Charles Farris's knee problems since December 19, 1996 and to assume adjustment of this claim.

Dated at Montpelier, Vermont, this 11th day of September 2000.

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R. Tasha Wallis
Commissioner