R. M. v. Bell Atlantic *(March 3, 2004)*

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

R. M. *Opinion No. 08-04WC*

By: Margaret A. Mangan
v. *Hearing Officer*

For: Michael S. Bertrand
Bell Atlantic *Commissioner*

State File No. P-25347

Hearing held on November 4, 2003
Record Closed on December 8, 2003

APPEARANCES:

Joseph P. McEntyre, Esq., for the Claimant
Jennifer K. Moore, Esq., for the Defendant

ISSUES:

1. *Did the claimant sustain a right knee injury as a result of his employment with Bell Atlantic?*

2. *If claimant sustained a work-related knee injury, what, if any, impairment does he have as result of that injury?*

EXHIBITS:

Joint I: *Medical Records*

Claimant's 1: *Curriculum Vitae of Richard H. Yee, M.D.*

FINDINGS OF FACT:

1. *At all times relevant to this action, claimant was an "employee" and "Bell Atlantic" his "employer" within the meaning of the Workers' Compensation Act.*

2. *Claimant was hired by Nynex in June of 1986. Nynex later became Bell Atlantic and later, Verizon.*

3. *After three months on the job, claimant was moved to the night shift, delivering packages and mail. During an eight-hour shift, claimant drove about 6 ½ hours and loaded or unloaded the van during the remainder of the shift. He maintained that job until 1995.*

4. *Overall, claimant's work involved getting in and out of a van, lifting, pushing, pulling and leveraging materials of considerable weight*

5. *While on the night shift, claimant played pick-up basketball a few days a week when his day was free. He met Dr. Richard Yee socially at those games.*

6. *In 1995, claimant's job changed to a "line haul" shift that required him to drive from Middlesex, Vermont to Concord, New Hampshire once each day.*

7. *Also, in 1995 claimant started to coach basketball and has done so every year since with the exception of the 1999-2000 season. Usually practice is two afternoons a week and games number 12 to 18 for the season that runs from early December to late February.*

8. *In 1997 claimant's job changed again, to a "terminal job" that he described as an office job, one he had until his March 15, 2000 right knee injury.*

9. *Claimant started to officiate football games in 1997, with a 2 ½ month season during which he officiated 13 games. He was a side or line judge, a position that required him to run and keep up with players in the 1997, 1998 and 1999 seasons.*

10. *Claimant first sought medical treatment for his right knee on July 29, 1999 when he saw Dr. Russell Davignon.*

11. *During the 1999-2000 season, claimant refereed 60 basketball games.*

12. *On December 14, 1999, claimant returned to Dr. Davignon with a complaint of right knee pain after pivoting when he was*

13. *Dr. Davignon released claimant to return to light duty work on April 14, 2000. However, the physical demands of claimant's job actually increased when compared to what he had been doing before the surgery.*

14. *On July 19, 2000 claimant presented to an emergency room with a report that he had twisted his right knee at work when pulling a floor jack that was loaded with a pallet.*

15. *At his physician's direction, claimant participated in physical therapy from mid- August to mid-September, 2000 where he reported continued and consistent improvement. In therapy notes, reports of improvement are measured by improvements in his ability to officiate at games, e.g. "he was able to referee at a football game with much less pain…" Physical Therapy note of Sept. 12, 2000.*

16. *Beginning in 2000 claimant officiated at football games in a position that required less running.*

17. *On October 24, 2000, claimant visited Dr. Marvin Kendall complaining of back and right knee pain while lifting at work.*

18. *During the 2000-2001 season, claimant refereed basketball and coached one team. On January 29, 2001, he saw Dr. Gagnon with a report of increased pain after doing "a lot of refereeing."*

Expert Medical Opinions

19. *On October 4, 2000, Dr. Sikhar Banerjee evaluated claimant at claimant's attorney's request for an assessment of his permanent partial impairment to his right knee following the March 15, 2000 surgery.*

20. *Based on the history from the claimant and a physical examination, Dr. Banerjee found that he had reached medical end result for the March 2000 surgery and, based on the 4th edition of the AMA Guides to the Evaluation of Permanent Impairment, had a 1% whole person (2% lower extremity)*

21. *On August 17, 2001, Dr. Davignon opined that claimant's basketball injury caused the need for the arthroscopy and that the claimant's work activities were no more a cause of the degenerative process in his knees than any other part of his life.*

22. *Later, Dr. Davignon assessed the claimant's permanent partial impairment at 2% whole person based on the 5th edition of the Guides, with one third attributable to his work.*

23. *Next, Dr. William Spina assessed claimant's whole person impairment at 3% for his meniscectomy based on the 5th edition of the Guides and an additional 8% for his degenerative condition, caused in part by his work.*

24. *Finally, Dr. Richard Yee, an emergency room physician and personal acquaintance of the claimant, concurred with Dr. Spina's 3% rating, but added that since that time claimant's condition worsened, primarily because of his job duties, rendering him unable to participate in recreational activities. Therefore, he increased Dr. Spina's 8% permanent rating by one to two percentage points.*

DISCUSSION:

1. *In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 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. *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 form the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941). Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc.,137 Vt. 393 (1979).*

3. *In this case, the medical evidence must be viewed in light of two distinct sets of facts. On one hand, claimant spent years playing pick-up basketball and refereeing at basketball and football games. He described his knee complaints, and even improvement in symptoms, in terms of his ability to officiate at those games. When he saw Dr. Davignon in December of 1999 with the complaint of right knee pain, it was after pivoting while refereeing a basketball game.*

4. *On the other hand, claimant's work at first involved getting in and out of a van and lifting heavy materials, changed in 1995 to that of driving from Middlesex to Concord and changed again in 1997 to work claimant himself described as an "office job."*

5. *Dr. Davignon, an orthopedist who performed the surgery on the claimant, opined that it was the basketball injury that caused the need for the arthroscopy, a decision that merits great weight because he was the treating physician and because the facts logically support that conclusion.*

6. *On balance, the evidence supports the defense position that it was claimant's recreational activities, not his work, that led to his knee problems.*

CONCLUSIONS OF LAW:

Accordingly, claimant has not met his burden of proof under Burton 112 Vt. 17 standard.

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 3rd day of March 2004.

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Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.