A. B. v. Peerless Insurance (April 16, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

A. B.

v.

Peerless Insurance Co.

Opinion No. 16-08WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. Y-51457

OPINION AND ORDER

Hearing held in Montpelier on January 14, 2008.

APPEARANCES:

Frank Talbott, Esq. for Claimant
Bonnie Shappy, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant suffered a compensable work-related injury on October 18, 2005.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: John Carp letter, January 19, 2007
Claimant's Exhibit 2: Mike Derway statement, September 22, 2006
Claimant's Exhibit 3: Deposition of James Howe, M.D., January 24, 2008

Defendant's Exhibits:

Defendant's Exhibit A: *Curriculum Vitae*, H. James Forbes, M.D.
Defendant's Exhibit B: 5 photographs of Claimant's worksite

CLAIM:

1. Temporary total, temporary partial and/or permanent partial disability benefits under 21 V.S.A. §§642, 646 and 648

2. Medical benefits under 21 V.S.A. §640(a)

3. Attorney's fees and costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings Claimant has been an employee as defined under Vermont's Workers' Compensation Act.

2. At all times relevant to these proceedings Defendant has been the workers' compensation insurance carrier for The Offset House, Claimant's employer as defined under Vermont's Workers' Compensation Act.

3. Claimant has worked at The Offset House for thirty-eight years, the past sixteen as the bindery and finishing manager. He is responsible for overseeing the process by which books, brochures, pamphlets and other printed materials are bound and finished. Claimant's job includes both supervising employees and helping to set up machines based on the customer's finished product specifications. Claimant does a significant amount of walking throughout the plant, both to and from his office and on the production floor.

4. Claimant's office is located in a corner of the plant floor. To exit it he has to step out his doorway, make a quick left through an adjacent office door and then a quick right onto the production floor. Both Claimant's office and the adjacent office are carpeted; the production floor is concrete. The floor is level throughout.

5. On the morning of October 18, 2005 Claimant was assisting in setting up a production job. An employee was waiting for some information as to the set-up and Claimant went into his office to retrieve it from his computer. Claimant was walking somewhat hastily, as he knew the employee was waiting for him. Claimant exited his office and made the quick left through the adjacent office door. As he turned to make the quick right onto the production floor, his left knee twisted and gave out. Claimant immediately felt excruciating pain. He managed not to fall to the ground, but instead leaned against the wall and limped back into his office. Claimant called his supervisor and told her what had happened, then asked a co-employee to retrieve his car from the parking lot and bring it around to the shipping area so that he could drive himself home.

6. Claimant did not trip or slip on the floor. His left knee simply gave out as he twisted to make the quick right turn into the production area.

7. Claimant has a prior medical history of osteoarthritis in his left hip, but no prior medical history of any left knee pain or symptoms.

8. Claimant began treating for his injury the next day, October 19, 2005, first with his primary care physician and later with Dr. Kaplan, an orthopedic surgeon. His symptoms included swelling, bruising and pain, both aching and stabbing, primarily in the back of his knee. An MRI scan on November 6, 2005 revealed a variety of abnormalities, including both medial and lateral meniscus tears, some mild degenerative changes and a probable bone contusion in the medial tibial plateau.

9. Claimant's symptoms failed to respond to conservative care. At Dr. Kaplan's recommendation, he underwent arthroscopic surgery to repair the meniscal tears on February 9, 2006. Following the surgery Claimant's symptoms abated somewhat. He no longer experienced stabbing pain in the back of his knee, but the aching, throbbing pain continued, as did the swelling. The pain was bad enough that while on a pre-planned cruise with his wife in early March 2006, Claimant had to limit his activities and even purchased a cane to help ease the stress on his knee. Claimant testified that the pain was a dull, persistent ache, and that it kept him from sleeping at night, both before Dr. Kaplan's surgery and thereafter.

10. By July 2006 Claimant was complaining to Dr. Kaplan of pain "all over" his knee. A repeat MRI study revealed advanced degenerative changes within the medial tibiofemoral compartment, findings that were suspicious for osteonecrosis. Osteonecrosis, also known as avascular necrosis, is an inflammation in the bone marrow that occurs when the blood circulation to a bone is disrupted, as can happen with a bone contusion.

11. At his primary care physician's referral, Claimant obtained a second opinion with another orthopedic surgeon, Dr. Howe, in September 2006. Dr. Howe is board certified in orthopedic surgery, and specializes in treating patients with arthritis.

12. Dr. Howe diagnosed avascular necrosis of the left medial femoral condyle, causally related to the twisting injury Claimant suffered at work on October 18, 2005. As treatment, he recommended a total knee replacement, which Claimant underwent in October 2006.

13. In Dr. Howe's opinion, Claimant suffered from mild osteoarthritis in his left knee prior to the October 2005 injury, and probably had some degenerative changes in his meniscus as well. Both of these conditions were totally asymptomatic and neither was severe enough to be a likely cause of Claimant's injuries. According to Dr. Howe, when Claimant twisted his knee while turning right to exit his office in October 2005, he suffered an acute injury of significant magnitude, enough to cause not only meniscal tears but also a bone contusion. Dr. Howe believes that the bone contusion was the inciting insult that led to avascular necrosis, the treatment for which was Claimant's total knee replacement.

14. In support of his opinion Dr. Howe found significant the fact that the surgical repair of the meniscal tears in Claimant's knee alleviated the stabbing pain he had been experiencing, but not the aching, throbbing pain. That pain Claimant continued to experience, not only with activity, but also at night. According to Dr. Howe, night pain is the *sine qua non* of avascular necrosis. Typically, patients with osteoarthritis or a meniscal tear experience pain during the day, when activity causes them to put force on their knee, but have fewer symptoms at night, when their knee is at rest. In contrast, avascular necrosis is painful all of the time, day and night, regardless of activity.

15. At Defendant's request, in February 2007 Claimant underwent an independent medical evaluation with Dr. James Forbes, a board-certified orthopedic surgeon. In Dr. Forbes' opinion, Claimant suffered an acute rotational injury to his left knee on October 18, 2005 that resulted in both medial and lateral meniscus tears. In that respect, his opinion is the same as Dr. Howe's.

16. Contrary to Dr. Howe's opinion, however, Dr. Forbes believes that Claimant's avascular necrosis was not caused by the October 2005 injury, but rather was totally coincidental. Dr. Forbes cited three factors in support of this opinion: first, that MRI evidence of avascular necrosis did not appear until some nine months following the October 2005 injury; second, that Claimant's knee symptoms improved for a period of time after his meniscal tears were surgically repaired; and third, that Claimant had a medical history of gout and diabetes, both risk factors for avascular necrosis.

17. As to the lack of evidence of avascular necrosis on the first MRI, Dr. Howe testified that at three weeks post-injury the condition very well might not have developed to the point of being recognizable on an MRI scan yet. The first MRI scan did show a contusion of the tissue in the area, which in itself suggested the magnitude of the injury to Claimant's knee, according to Dr. Howe. Furthermore, although it is true that Claimant suffers from diabetes and has a prior medical history of gout, Dr. Howe did not list either of these conditions as significant risk factors for avascular necrosis. Last, as was noted above, Claimant testified credibly that while the stabbing pain in his knee abated somewhat after arthroscopic surgery, his other symptoms persisted, including his night pain.

18. Claimant testified that since the total knee replacement his symptoms have largely resolved. He still experiences occasional pain when he twists or turns his knee, but no longer suffers the persistent throbbing ache he felt previously.

19. The medical records reflect that when asked in patient questionnaires whether his injury was work-related, Claimant initially responded that it was not. It was not until July 2006 that Claimant spoke with his employer's comptroller and asked that a workers' compensation claim be filed. Claimant testified credibly that as part of the management team at The Offset House he was aware of the impact that his injury might have on his employer's workers' compensation insurance costs, and he was reluctant to be the cause of any increase in this expense. For that reason, he delayed filing a claim until he realized that his knee required further treatment and that his out-of-pocket medical costs were becoming more expensive than he felt capable of absorbing.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Claimant's argument in the current claim is straightforward. He was at work, fulfilling his job responsibilities, when he turned a corner and twisted his left knee. In doing so, he suffered both meniscal tears and a bone contusion. Claimant contends that the latter injury was the "inciting insult" that later led to avascular necrosis and the need for a total knee replacement. Claimant argues that because he was at work when these injuries occurred, and because they would not have occurred "but for" the conditions and obligations of his employment, they are work-related and compensable.

3. In response, Defendant argues that Claimant's injury resulted from a weakness that was purely personal to him, a so-called idiopathic injury. For such a claim to be compensable, Defendant argues, Claimant must show that his employment contributed to the injury by placing him in a position of "increased danger." *J.C. v. Experian Information Solutions*, Opinion No. 30-07WC (October 30, 2007). Defendant argues that Claimant has failed to make such a showing and that therefore his injury is not compensable.

4. To establish a compensable claim under Vermont's workers' compensation law, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment" and that it "arose out of the employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. §618.

5. An injury occurs in the course of employment "when it occurs within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964). There is no dispute that in this claim Claimant was on duty, at work and fulfilling his employment responsibilities when the injury occurred. Therefore, the first prong of the compensability test is met.

6. As to the "arising out of" component, Vermont adheres to the "positional risk" doctrine, which uses a "but for" test for meeting the second prong of the compensability test. Thus, an injury arises out of the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), quoting 1 A. Larson, *Workmen's Compensation Law* §6.50 (1990) (emphasis in original).

7. Putting the two prongs of the compensability test together, "[o]rdinarily, if an injury occurs during the 'course of employment,' it also 'arises out of it,' unless the circumstances are so attenuated from the condition of employment that the cause of injury cannot reasonably be related to the employment." *Miller, supra* at 215, citing *Shaw, supra* at 598.

8. As the Supreme Court explained in *Miller*, the more liberal positional risk doctrine adopted in this state reflects the broad, remedial purposes of Vermont's workers' compensation law. *Miller, supra* at 214. The positional risk analysis adopted here differs from the "neutral risk" reasoning applied in many other states. In order to satisfy the "arising out of" component under a "neutral risk" analysis, the conditions of employment must expose the employee to a risk of injury "greater than that to which the general public is exposed" before compensability can be established. *See, Illinois Consolidated Telephone Co. v. Industrial Commission,* 732 N.E.2d 49, 56-57 (2000)(Rakowski, J., concurring). No such "greater-than-the-general-public" type exposure is required in a positional risk state. *See* 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §7.04(1) at 7-15 (1999), cited in *Illinois Consolidated Telephone Co., supra*.

9. Applying the positional risk doctrine to the current claim, it was the conditions and obligations of Claimant's employment – having to turn quickly to his right as he exited his office – which placed him in the position where he was injured. That Claimant might have injured his knee while making a similarly quick right turn in a non-work-related setting is irrelevant. *Singer v. S.B. Collins/Jolly Associates,* Opinion No. 32-04WC (August 19, 2004). He did it at work, because his work responsibilities required him to traverse that path and make that turn. Positional risk analysis needs no more than that.

10. Defendant makes much of the fact that there was no exceptional work activity or abnormal work condition to explain why Claimant's knee twisted when it did – no defect in the floor, no uneven surface and nothing upon which to slip or trip. Defendant contends that without such unusual circumstances for Claimant's knee to give out when it did must necessarily have been due to an idiopathic weakness instead, one purely personal to Claimant. This argument is unconvincing, both medically and legally.

11. Medically, the evidence established that while Claimant did have some pre-existing osteoarthritis and degenerative changes in his knee, these conditions were entirely asymptomatic and not severe enough in themselves to cause his knee to twist and give out when it did. The legal conclusion that must follow from this medical evidence is that Claimant's injury cannot be deemed idiopathic because it did not result from a purely personal weakness. Rather, it represented a confluence of both personal and employment risks. The personal risk was a pre-existing condition that might have predisposed Claimant to what Dr. Forbes described as an acute rotational injury. The employment risk was the requirement that in order to traverse the route from his office to the production floor Claimant had to make a quick right turn, thus necessitating the rotation that in fact occurred.

12. An injury caused by the concurrence of both personal and employment risks is not idiopathic and does not merit special consideration under that doctrine. *See Dubuque v. Grand Union Co.*, Opinion No. 34-02WC (August 20, 2002)(stress personal to claimant combined with fall down stairs, a necessary condition of employment, to produce compensable claim under positional risk analysis). There is no requirement that the risk contributed by the employment be one of increased danger, therefore, or of any greater magnitude than what is required by the more lenient positional risk analysis. So long as the conditions and obligations of Claimant's employment placed him in the position to be injured – and I conclude that they did – the arising out of component necessary to establish compensability is satisfied. *Singer, supra*; *Shea v. Worcester Insurance Co.*, Opinion No. 13-02WC (March 13, 2002).

13. The remaining issue to be decided is whether there is sufficient medical evidence to connect causally Claimant's avascular necrosis – the condition that ultimately led to his total knee replacement – to the October 18, 2005 injury. This requires consideration of Dr. Howe's and Dr. Forbes' contrary medical opinions. In such situations, the Department traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

14. Dr. Howe was Claimant's treating physician. In formulating his opinion, he considered the fact that Claimant's symptoms did not improve appreciably after his meniscal tears were surgically repaired, particularly his night pain. He also noted the significance of the bone contusion evident on the first MRI. He credibly explained why it was likely that an injury of significant magnitude to cause such tissue damage probably was the "inciting insult" leading ultimately to avascular necrosis. By thus taking into account all of the relevant medical facts Dr. Howe's opinion was clear, thorough and objectively supported.

15. In contrast, Dr. Forbes' opinion was based in part on his inaccurate assumption that Claimant's symptoms abated significantly following the surgery to repair his meniscal tears. In the end, Dr. Forbes concluded that it was simply coincidental for Claimant to have developed avascular necrosis when he did. Rarely is a medical opinion that relies on coincidence as its strongest linchpin persuasive, and it does not convince me here.

16. I conclude, therefore, that Dr. Howe's opinion as to the causal relationship between Claimant's October 18, 2005 injury and the subsequent development of avascular necrosis in his left knee is the most credible.

17. I find that Claimant's October 18, 2005 injury did not result from an idiopathic condition but rather arose out of and in the course of Claimant's employment. All of the natural consequences that flow from that injury are compensable, including both the treatment necessitated by his meniscal tears and that required to address the avascular necrosis that subsequently developed.

18. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $945.30 and attorney's fees totaling $7,029.50. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. All workers' compensation benefits associated with Claimant's October 18, 2005 injury, including both indemnity and medical benefits, in amounts to be proven; and

2. Costs of $945.30 and attorney's fees of $7,029.50.

DATED at Montpelier, Vermont this 16th day of April 2008.

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Patricia Moulton Powden
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.