STATE OF VERMONT
DEPARTMENT OF LABOR

Gregory Bower	Opinion No. 03-12WC
v.	By: Jane Woodruff, Esq. Hearing Officer
Mount Mansfield	For: Anne M. Noonan Commissioner
	State File No. BB-57124

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 9, 2011
Record closed on December 9, 2011

APPEARANCES:

Steven Robinson, Esq., for Claimant
Marion Ferguson, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant responsible for the surgical repair of Claimant's anterior cruciate ligament tear as a natural and direct consequence of Claimant's December 2009 work injury, or does the October 2010 apple-picking incident qualify as an independent intervening event sufficient to break the causal link back to that injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Dr. Huber's November 8, 2011 deposition (with attached exhibits)
Claimant's Exhibit 2:	Letter to Dr. Wieneke, October 12, 2011
Defendant's Exhibit A:	Dr. Wieneke *curriculum vitae*
Defendant's Exhibit B:	Dr. Wieneke report, October 25, 2011

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640
Costs and attorney fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant worked as a volunteer ski host at Defendant's various mountain slopes. His responsibilities included helping skiers define where they wanted to ski. Claimant was an expert skier and knew Defendant's slopes well. He was otherwise unemployed.

4. On December 30, 2009 Claimant caught a ski tip while skiing in the course of his host duties. He rotated around the ski and fell backwards down the mountain. After coming to a stop, he took five minutes to compose himself before attempting to get up. When he did so he was unable to bear any weight on his left leg. Claimant skied down to the bottom of the mountain using only his right leg.

5. Claimant experienced significant swelling in his left knee to the point where he could not bend it. Defendant accepted this injury as compensable and paid medical benefits accordingly.

Treatment for the Accepted Ski Injury

6. After waiting a few days to allow the swelling in his knee to subside, Claimant sought treatment at Stowe Urgent Care. He was examined for a possible anterior cruciate ligament (ACL) injury, but both anterior drawer and Lachman's tests were negative. These are the two most sensitive tests for detecting an ACL injury, but they are far less accurate in the early stages of a knee injury, when the patient is likely to be experiencing increased swelling, pain and guarding. Claimant was diagnosed with a knee sprain and released to return to work with restrictions.

7. Claimant followed up with Stowe Urgent Care on January 11, 2010. By then his knee felt better, but was still slightly unstable. As a protective measure, the physician advised him to wear a knee brace for stability. As before, he was released to return to work with restrictions.

8. Claimant next treated with Pierre Delfausse, a physician's assistant, on February 2, 2010. He complained of continuing discomfort in the left knee, reported that he did not completely trust it and that he was limiting his activities accordingly. Upon examination, Mr. Delfausse noted mild looseness in the left leg compared to the right and also that the left ACL was not attached solidly. Neither the anterior drawer nor Lachman's tests produced positive results, though Claimant was not relaxed during the exam and therefore these findings likely were affected by pain and guarding.

9. From March to the end of the ski season, Claimant performed some hosting duties for Defendant, but when he did so he wore both a knee brace and four ace bandages on his left knee. He could only ski five runs per day, whereas before he could ski twenty runs. Claimant's activity level after the ski season ended was similarly diminished. He played tennis only three times, and could not play golf at all. Both of these activities involve twisting and torque to the knee, a motion that he was unable to manage. Claimant was able to swim, perform landscaping work around his four-acre home, and chop and stack wood.

10. Claimant did not seek any treatment for his knee between February and September 2010. On September 16, 2010 he sought treatment at Stowe Urgent Care for a respiratory ailment. While he was there, he remarked to Mr. Delfausse that his left knee "was just not right." Upon reexamining the knee Mr. Delfausse noted both positive anterior drawer and positive Lachman's test findings. As treatment, he recommended physical therapy. From the evidence submitted it is unclear whether Claimant took any steps to pursue this recommendation.

The Apple-Picking Incident

11. On October 6, 2010 Claimant took his family to a private apple orchard across the street from his house. He reached up for an apple and could just barely touch the bottom of it. He then hopped approximately one to two inches straight up to pick the apple. When he landed, his left leg gave out beneath him, he felt excruciating pain and he crumpled to the ground.

12. Claimant sought treatment with Mr. Delfausse on that same day. Of note, Mr. Delfausse reported that Claimant heard a "pop" in his knee when he jumped for the apple, an observation that Claimant strenuously and credibly denied at formal hearing. In any event, as he had in mid-September Mr. Delfausse noted positive findings in his clinical exam on both anterior drawer and Lachman's tests. He ordered an MRI of Claimant's left knee and referred him to Dr. Huber, an orthopedic surgeon.

13. Claimant next treated with Leah Hartenstein, Dr. Huber's physician's assistant, on November 2, 2010. Ms. Hartenstein reported increased laxity in Claimant's knee, as evidenced by positive findings with both the anterior drawer and Lachman's tests. Subsequent diagnostic testing, both MRI and x-ray, revealed a full thickness ACL tear, and a medial meniscus tear as well. In consultation with Dr. Huber, Claimant elected to undergo surgical repair. Surgery was scheduled, but then cancelled when Defendant advised that it would not voluntarily pay. Claimant has yet to undergo the procedure.

Expert Medical Opinions

14. Both parties presented expert medical testimony regarding the causal relationship between Claimant's ACL injury and either his December 2009 fall while skiing or the October 2010 apple-picking incident. Dr. Huber concluded that more likely than not the December 2009 fall while skiing caused Claimant's ACL injury. Dr. Wieneke concluded that more likely than not the October 2010 apple-picking incident was the cause.

(a) Dr. Huber

15. Dr. Huber is a board certified orthopedic surgeon. His practice focuses on the full spectrum of knee issues. He performs 20 to 25 knee surgeries per month. Given his clinic's proximity to a major ski resort, he sees knee injuries every day.

16. Dr. Huber testified credibly in his deposition, to a very high degree of medical certainty, that Claimant's December 2009 skiing mishap was the cause of his injured ACL. Dr. Huber based his opinion on the following facts:

- Although Claimant initially was not diagnosed with an ACL tear immediately after his skiing-related fall, this does not mean that one had not occurred. Due to significant patient guarding, pain and swelling, it can take several weeks to a couple of months to diagnose a torn ACL. The fact that in January 2010 the treating physician recommended that Claimant wear a brace to stabilize his knee is an indication that Claimant's knee was unstable even at that early stage.

- On two occasions prior to the apple-picking incident, Mr. Delfausse reported signs indicative of an ACL injury – looseness and laxity on February 2, 2010 and positive anterior drawer and Lachman's tests on September 16, 2010.

- Claimant never felt his knee was stable after his December 2009 fall, and as a result significantly curtailed his activities thereafter.

- Claimant's skiing mishap was such that it generated a significant amount of force, of a type that can cause an ACL to tear. In contrast, the apple-picking incident likely did not generate sufficient force, in either type or degree, to cause an ACL tear.

17. According to Dr. Huber, even if Claimant's ACL was not actually torn as a result of his fall while skiing, it clearly was injured to the point that it was unstable. It thus prohibited Claimant from engaging in many of the activities he enjoyed, including golf, tennis and aggressive skiing, because he was unable to manage the required cutting, twisting or torque movements. Surgical reconstruction is the treatment most likely to remedy the knee's deficient function in this respect. In Dr. Huber's view, therefore, whether the December 2009 fall actually caused an ACL tear or not, clearly it caused sufficient instability to require surgical repair in a patient with Claimant's active lifestyle. I find Dr. Huber's reasoning in this regard to be credible.

(b) *Dr. Wieneke*

18. Dr. Wieneke is a board certified orthopedic surgeon. His practice currently is limited to performing independent medical examinations. At Defendant's request, Dr. Wieneke performed a medical records review.

19. Dr. Wieneke concluded, to a reasonable degree of medical certainty, that Claimant's need for surgical repair of his ACL tear stems from the October 2010 apple-picking incident rather than from his December 2009 fall while skiing. Dr. Wieneke based his conclusion on the following facts:

- Claimant did not initially exhibit any signs indicative of an ACL injury when he first reported to Stowe Urgent Care. His station and gait were normal, he had only mild swelling with grossly stable ligaments and both his anterior drawer and Lachman's tests were negative.

- Claimant was released to return to work in early February 2010, finished the ski season without incident, and was able to play tennis during the summer.

- As he jumped for the apple in October 2010, Claimant reportedly felt a "pop," which was accompanied immediately by sharp pain and rapid swelling. The ensuing MRI documented a full thickness ACL tear.

20. It is unclear whether Dr. Wieneke actually reviewed all of Claimant's relevant medical records prior to rendering his opinion. Of particular note, he appears not to have reviewed the record of Mr. Delfausse's September 16, 2010 examination, in which Claimant was reported to have both positive anterior drawer and Lachman's findings. This omission is critical. Dr. Wieneke himself admitted that the anterior drawer and Lachman's tests are accurate indicators of an ACL injury. The positive results in September provide strong evidence, therefore, that Claimant's injury predated the October 2010 apple-picking incident. Dr. Wieneke's opinion suffers from its failure to address this important finding.

21. I note other deficiencies in Dr. Wieneke's opinion as well. He does not appear to have accounted for the likelihood that Claimant's negative findings on anterior drawer and Lachman's tests in January 2010 occurred in the context of increased swelling, pain and guarding, all of which may have masked the extent of an ACL injury. In addition, his statement that Claimant was able to ski and play tennis after the December 2009 fall does not accurately reflect Claimant's testimony, which I find credible, as to his limitations when engaging in those activities. Last, as Dr. Wieneke acknowledged, his opinion was based solely on a records review, whereas having the opportunity physically to examine the patient is typically a better approach.

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. The disputed issue here is whether Claimant's current ACL injury, which now requires surgical repair, is a consequence of his December 2009 work-related fall while skiing, for which Defendant is liable, or whether it arose instead as a result of the non-work-related apple-picking incident in October 2010. The parties have briefed their respective positions as if the claim thus presents an aggravation-versus-recurrence dispute. The more appropriate analysis is to ask whether the apple-picking incident constituted an independent intervening cause sufficient to break the causal link back to the primary work-related injury.

3. The parties presented conflicting expert testimony as to the cause of Claimant's current knee injury and need for surgical treatment. Dr. Huber concluded that it very likely relates back to his December 2009 fall while skiing, and definitely is not causally related to the October 2010 apple-picking incident. Dr. Wieneke reached the opposite conclusion.

4. When faced with conflicting expert medical evidence, the commissioner 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 (September 17, 2003).

5. I conclude here that Dr. Huber's opinion is the most credible. In addition to reviewing all of Claimant's pertinent medical records, Dr. Huber also conducted a comprehensive physical examination. He adequately addressed the reasons why Claimant's anterior drawer and Lachman's tests were negative immediately after the December 2009 fall, but positive thereafter. He clearly explained how the mechanism of that fall was far more likely to cause an ACL injury than the apple picking activity that Claimant described. His experience with skiing-related knee injuries is impressive. Taken together, these factors render Dr. Huber's causation opinion highly persuasive.

6. Dr. Wieneke's opinion is lacking in important respects. It is based on a records review only, with no physical examination. It does not account for a significant objective finding – positive anterior drawer and Lachman's tests in September 2010 – that established Claimant's ACL injury to have occurred *before* the apple-picking incident, not after. It mischaracterizes the extent to which Claimant limited his activities following his skiing-related fall. These omissions render it unpersuasive.

7. In accordance with Dr. Huber's view, therefore, I conclude that Claimant's current ACL injury is a natural and direct consequence of his December 2009 work-related fall while skiing. Either that event caused the ACL tear itself, or it caused sufficient laxity in the joint to require surgical repair in a patient with Claimant's active lifestyle.

8. In reaching this result, I do not conclude that Claimant suffered a "recurrence" as that term is defined in the workers' compensation rules. There was no "temporary remission" here following which Claimant's symptoms returned. *Workers' Compensation Rule 2.1312*. Rather, the facts establish that Claimant suffered a compensable work-related knee injury, resulting in symptoms that continued to plague him to the point where additional treatment became necessary.

9. Notwithstanding Dr. Huber's opinion that given both Claimant's lifestyle and the laxity in his knee he would have been an appropriate candidate for surgical treatment even before the October 2010 apple-picking incident, the fact remains that no such surgery was proposed until after that event occurred. It is necessary to inquire, therefore, whether the October 2010 apple-picking incident qualifies as an independent intervening event sufficient to break the causal link back to the December 2009 work injury.

10. Once an injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from it likewise is deemed to have arisen out of the employment. 1 Lex K. Larson, *Larson's Workers' Compensation* §10 (Matthew Bender, Rev. Ed.) at p. 10-1. Had there been no apple-picking incident, it is at least possible, if not likely, that in accordance with this general principle Defendant would have been obligated to pay for the treatment Mr. Delfausse recommended in September 2010, upon learning that Claimant's knee still was "not right" since his December 2009 fall.

11. An exception to the general rule exists as to consequences that result from an independent intervening non-industrial cause attributable to the claimant's own intentional conduct. *Lushima v. Cathedral Square Corp.*, Opinion No. 38-09WC (September 29, 2009), citing *Larson's Workers' Compensation, supra.* Such an event may be sufficient to break the chain of causation back to the primary injury and thereby may relieve the employer of further workers' compensation liability.

12. Not all intervening events are sufficient to fall within the exception and thus sever the link between the work injury and any ongoing disability or need for treatment. It is only in instances where the claimant, knowing of certain weaknesses arising from the primary injury, "rashly undertakes activities likely to produce harmful results" that the causal connection disintegrates. *Lushima, supra,* quoting *Johnnie's Produce Co. v. Benedict & Jordan,* 120 So.2d 12 (Fla. 1960); *Larson's Workers' Compensation, supra* at §10.06[3], p. 10-17. In other words, for an intervening, non-work-related event to sever the connection back to a compensable injury the facts must establish that the claimant acted negligently under the circumstances.

13. I cannot conclude here that Claimant's apple-picking endeavor was so rashly undertaken as to amount to negligent conduct. He stretched to pick an apple, and finding it just beyond his grasp hopped up an inch or two to reach it. Perhaps with the benefit of hindsight he would have chosen another apple instead. For him to choose *this* apple may have been momentarily thoughtless, but it still was not so unreasonable a decision as to be negligent. *See, Larson's Workers' Compensation, supra* at §10.06, p. 10-13 (characterizing certain spontaneous, impulsive or momentarily thoughtless human acts as instinctive rather than negligent); *compare McMillan v. Bertek, Inc.*, Opinion No. 95-95WC (January 29, 1996) (reaching for branch while falling from tree was spontaneous act not rising to level of negligence), *with Lushima, supra* (engaging in extended physical altercation with border patrol agents deemed deliberately rather than momentarily thoughtless).

14. I conclude that Claimant has sustained his burden of proving that his current ACL condition is a direct and natural consequence of his compensable December 2009 injury. I further conclude that the October 2010 apple-picking incident does not qualify as an intervening non-work-related event sufficient to sever the causal link back to that primary injury. Consequently, I conclude that Defendant remains responsible for all reasonable and necessary medical treatment causally related to Claimant's ACL injury, including surgical reconstruction as indicated by Dr. Huber.

15. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $1,825.71 and attorney fees totaling $5,916.00. An award of costs to a prevailing party is mandatory under the statute. As Claimant has prevailed, these are awarded.

16. As for attorney fees, these lie within the commissioner's discretion. I conclude that 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 hereby **ORDERED** to pay:

1. Medical benefits covering all reasonable and necessary medical services and supplies causally related to treatment of Claimant's ACL injury, including surgical repair as indicated by Dr. Huber, in accordance with 21 V.S.A. §640; and

2. Costs totaling $1,825.71 and attorney fees totaling $5,916.00, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 18th day of January 2012.

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Anne M. Noonan
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.