STATE OF VERMONT
DEPARTMENT OF LABOR

Mary Ellen Cross

v.

State of Vermont
Department of Corrections

Opinion No. 16-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-60304

OPINION AND ORDER

Hearing held in Montpelier on February 21, 2012
Record closed on March 27, 2012

APPEARANCES:

William Skiff, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's current right knee condition causally related either to her April 5, 2011 incident at work and/or to her September 11, 2000 work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Deposition of Robert Beattie, M.D., November 11, 2011
Claimant's Exhibit 2:	Various workers' compensation forms
Claimant's Exhibit 3:	*Curriculum vitae*, Robert Beattie, M.D.
Defendant's Exhibit A:	Letter from Kathie Kretzer with attached Denial of Workers' Compensation Benefits, September 8, 2003
Defendant's Exhibit B:	*Curriculum vitae*, Verne Backus, M.D., M.P.H.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640(a)
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her 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 files relating to this claim, including both State File No. R-5641 and CC-60304.

3. Claimant has worked for Defendant as a corrections officer since June 2000. Her current position includes both supervisory and training responsibilities. She typically works a 40-hour work week plus overtime. She enjoys her job.

4. Claimant's average weekly wage as of April 5, 2011 was $1,050.51, which yields an initial compensation rate of $700.34 weekly.

Claimant's September 2000 Injury

5. On September 11, 2000 Claimant was instructing another officer at a computer. She knelt down to demonstrate something, and when she arose her right knee locked and would not straighten. Claimant immediately felt excruciating pain. She reported the injury to her supervisor and went directly to the hospital emergency room.

6. Claimant treated with Dr. Beattie, an orthopedic surgeon. On October 3, 2000 she underwent arthroscopic surgery. Dr. Beattie's post-operative diagnosis was grade IV chondromalacia patella with large chondral flap tears. In laymen's terms, this means that some time prior to her injury, a portion of the articular surface cartilage under Claimant's kneecap had softened, leaving a significant area of exposed bone. With the cartilage in her knee thus predisposed to injury, the act of rising from a squatting position likely caused a loose flap to flip and become caught in the joint.

7. Consistent with this analysis, Dr. Beattie determined that Claimant's cartilage tear was directly related to her work for Defendant, and was not due to her pre-existing chondromalacia. Presumably with that in mind, Defendant accepted the injury, referred to in the parties' Agreement for Temporary Total Disability Compensation (Form 21) as a "locked knee," as compensable.

8. The purpose of Dr. Beattie's arthroscopic surgery was to remove the loose flap of cartilage and any other unstable fronds that might catch in the joint. Doing so eliminates the acute symptoms, but does not normalize the joint. Removing a portion of the articular surface cartilage in a weight-bearing joint decreases the surface area over which the force created by moving the joint can be distributed. As a result, the remaining cartilage is subjected to increased stress. This leads to ongoing, progressive deterioration.

Claimant's July 2001 Re-Injury

9. Claimant did well for approximately 10 months after her October 2000 surgery. In August 2001 she returned to Dr. Beattie, reporting that her knee had locked up momentarily in July when she arose from her desk at work. Although the knee had released on its own, since that time she had had multiple locking episodes, accompanied by pain, swelling and stiffness.

10. This time Dr. Beattie treated Claimant's symptoms with viscosupplementation, a series of injections designed to lubricate the joint. Claimant responded well, to the point where after a time Dr. Beattie relaxed the modified duty work restrictions he previously had imposed, and allowed Claimant to resume negotiating at least short flights of stairs.

11. Defendant accepted responsibility for the medical treatment and time out of work necessitated by Claimant's July 2001 re-injury. In August 2001 it submitted a Form 21 in which it referenced the injury (described this time as "soreness – knee") as having occurring on September 11, 2000 and having resulted in a second period of temporary total disability beginning on July 20, 2001. The Department approved this agreement on October 15, 2001.

Claimant's June 2003 Re-Injury

12. Although Claimant continued to experience some niggling symptoms after her 2001 re-injury, her knee functioned reasonably until June 26, 2003 when it again locked up. The incident occurred at home, when she arose from a squatting position after retrieving from a file cabinet some papers relating to her union steward responsibilities. As had been the case in 2001, Dr. Beattie successfully treated her symptoms with viscosupplementation.

13. This time, however, Defendant denied responsibility for Claimant's re-injury claim. It did so on two grounds: first, that the incident had occurred at home, while Claimant was performing activities unrelated to her employment; and second, that her need for treatment was related not to her September 2000 work injury but rather to her underlying, pre-existing knee pathology.

14. As support for its second argument, Defendant cited to an independent medical examination performed by Dr. Backus, a board certified specialist in occupational medicine, in August 2003. Dr. Backus concluded, to a reasonable degree of medical certainty, that all of Claimant's knee symptoms, including both the original locking episode in September 2000 and the more recent incident in June 2003, were the result of pre-existing chondromalacia and patellofemoral arthritis and thus were not work-related at all.

15. In reaching this conclusion, Dr. Backus found significant the fact that Claimant's work activities did not involve any unusual stress to her knee. Rather, each of the locking episodes Claimant suffered occurred in the context of normal everyday movements, such as arising from a squatting position or getting up from a chair. In his view, therefore, that any of these incidents occurred at work was purely a matter of coincidence. Their root cause was the natural progression of her underlying degenerative joint disease.

16. Even if the September 2000 incident were characterized as a work-related aggravation of Claimant's underlying condition, Dr. Backus continued, in his analysis the June 2003 incident would be an aggravation of the same condition, and thus still unrelated to the first locking episode. In this respect, his opinion conflicts with Dr. Beattie's analysis, as it disregards the increased stress on the surrounding cartilage that likely resulted once the cartilage flap created by the first incident was removed.

17. Having missed only three or four days from work following the June 2003 re-injury, Claimant decided that it was not worth the effort to appeal Defendant's denial. As a result, the Department never ruled on either of the grounds Defendant asserted in support of its position.

Claimant's April 2011 Re-Injury

18. Although her knee continued to ache occasionally, after June 2003 Claimant did not experience any additional locking episodes for almost eight years, until April 5, 2011. On that date, she was sitting in a swivel chair at her work station and when she turned to get up so that she could attend to another work task, her knee locked.

19. As with the prior two episodes, Dr. Beattie treated this most recent incident with another series of viscosupplementation injections. Claimant also underwent a course of physical therapy. Although her acute symptoms have since abated, her knee continues to ache, and she still has difficulty negotiating stairs. For the time being, at least, she has concluded treatment.

20. Following this most recent locking episode Claimant was totally disabled from working from April 5, 2011 through August 2, 2011.

21. Defendant has denied responsibility for Claimant's April 2011 re-injury on the grounds that it is not work-related. As support for this position, it cites again to Dr. Backus' opinion. Dr. Backus conducted a second independent medical examination of Claimant in July 2011.

22. As he had in the context of her 2003 re-injury, Dr. Backus concluded that Claimant's re-injury was causally related to her pre-existing degenerative joint disease rather than to any work event. In reaching this conclusion, his analysis was essentially the same as that propounded in 2003 – that moving one's knee to get up from a chair is a normal activity not specific to work and therefore does not constitute a new injury. Again, Dr. Backus did not address from a medical perspective whether Claimant's knee had been rendered more susceptible to subsequent locking episodes once the cartilage flap created by the original episode in September 2000 had been removed.

23. In contrast, Dr. Beattie has continued to maintain that Claimant's most recent re-injury is a direct consequence of her original September 2000 injury. His deposition testimony illustrates how strongly he holds that opinion:

> I don't usually word things quite so emphatically, directly, and definitively because there's often gray zones, but in this case she had such a significant and clear-cut traumatic [cartilage] injury that sets her up for ongoing and . . . progressive post-traumatic degenerative change that I thought there was no doubt in my mind, so I actually used more definitive wording than I often use and said that this is a direct consequence of her original injury. That was a function of the clarity of causation that would allow me to make that statement.

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 April 2011 re-injury is compensable. With Dr. Beattie's expert medical opinion as support, Claimant asserts that this most recent locking episode is a direct consequence of her compensable September 2000 knee injury. Defendant raises three arguments in defense: first, that the mechanism of injury was insufficiently connected to work to be deemed to have arisen out of it; second, that Claimant's 2003 re-injury broke any causal link that might otherwise have related back to the original compensable event; and third, that the more credible medical evidence fails to establish a causal connection between the April 2011 re-injury and any prior work-related injury or event.

Positional Risk Analysis

3. Defendant's first argument requires consideration of the "arising out of" component for determining compensability under Vermont law. Satisfying this factor requires a causal connection between an employee's injury and his or her work – not necessarily in the sense of proximate or direct cause, but rather as an expression of origin, source or contribution. *Lehneman v. Town of Colchester,* Opinion No. 10-12WC (March 13, 2012), and cases cited therein.

4. Vermont has long adhered to the "positional risk" doctrine in interpreting and applying the "arising out of" prong of the compensability test. *Miller v. IBM*, 161 Vt. 213 (1993), citing *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993). According to this doctrine, 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." *Id.*, quoting 1 A. Larson, *Workmen's Compensation Law* §6.50 (1990) (emphasis in original).

5. Positional risk analysis thus differs in important respects from the "neutral risk" rule applied in many other states. In order to satisfy the "arising out of" component of compensability 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." *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. *Id.*, citing 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §7.04(1) at 7-15 (1999).

6. Viewed in this context, I cannot accept the essence of Defendant's first argument – that even if it occurs at work, the mere act of arising from a chair is insufficient to establish the employment connection necessary to support a finding of compensability. To the contrary, it was the conditions and obligations of Claimant's employment that placed her in the position where she was injured. That she might – or might not – have injured her knee while arising from a chair at home is irrelevant. *Boucher v. Peerless Insurance Co.*, Opinion No. 16-08WC (April 16, 2008); *Singer v. S.B. Collins/Jolly Associates*, Opinion No. 32-04WC (August 19, 2004).

7. The facts in *Boucher* are strikingly similar to those presented here. The claimant there injured his knee when he twisted it while turning to walk around a desk. As here, the mechanism of injury was such that it easily could have occurred outside of work. Also as here, the claimant was found to have pre-existing, but asymptomatic, degenerative joint disease. The employer argued that because there was no exceptional work activity or abnormal work condition to explain why the claimant's knee twisted and gave out when it did, the cause must have been purely personal rather than employment-related, and therefore the "arising out of" component was not satisfied.

8. The commissioner disagreed, concluding that the claimant's injury resulted from a confluence of both personal and employment risks. The personal risk was a pre-existing condition that likely predisposed the claimant to an acute injury. The employment risk was the route he needed to traverse in order to accomplish his work tasks. The two together were sufficient to establish work-related causation.

9. The commissioner's recent decision in *Lehneman, supra*, to which Defendant cites in support of its position, is not inconsistent with this reasoning. In that case, the connection between the claimant's injury – breaking a tooth while eating at his desk – and his work was deemed insufficient to establish that one arose out of the other. The key fact was that the instrumentality by which the claimant was injured – a piece of hard, overcooked food – was neither supplied nor suggested by the employer. Thus, while the conditions and obligations of his employment may have required that he eat while on duty, the source of his injury was his own, purely personal menu decision.[1]

10. In contrast, it was the conditions of employment that supplied both the desk around which the claimant in *Boucher* had to maneuver and the chair from which Claimant here had to arise. This might be considered too tenuous a connection to support compensability in a neutral risk state, but I conclude that it is sufficient for positional risk purposes. I therefore conclude that Claimant's April 2011 re-injury arose out of her employment.

Claimant's 2003 Re-injury as an Intervening Cause

11. Defendant's second argument – that Claimant's 2003 re-injury broke the causal link back to her original injury in September 2000 – is also unpersuasive. Having accepted the prior injury as compensable, Defendant remains responsible for the direct and natural consequences that flow from it. *Bower v. Mount Mansfield*, Opinion No. 03-12WC (January 18, 2012), citing 1 Lex K. Larson, *Larson's Workers' Compensation* §10 (Matthew Bender, Rev. Ed.) at p. 10-1. For an intervening, non-work-related event to sever the connection back, the claimant must be shown to have acted unreasonably under the circumstances. *Bower, supra*; *McNally v. State of Vermont Department of PATH*, Opinion No. 37-11WC (November 15, 2011). That was not the case here. I conclude that the 2003 incident did not break the causal link back to the original compensable injury.

Medical Causation

12. Defendant's third argument is that the more credible medical evidence fails to establish a causal connection between Claimant's most recent re-injury and any of her prior work injuries. Rather, it argues that the sole cause, not only of this knee injury but of all of her prior injuries as well, is her pre-existing degenerative joint disease.

[1] To illustrate the difference between these two concepts, had the claimant in *Lehneman*, a police officer, choked on his food while rushing to his cruiser to answer an emergency call, the origin of any resulting injury may well have been deemed work-related rather than personal, and therefore compensable.

13. The parties presented conflicting expert testimony on medical causation, both as to Claimant's most recent re-injury and as to her prior locking episodes. Where expert medical opinions are conflicting, 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).

14. Applying these factors here, I conclude that Dr. Beattie's opinion is the most credible. He has been Claimant's treating orthopedic surgeon since her original injury, and therefore is well positioned to evaluate how her condition has progressed through subsequent locking episodes. He provided a clear, concise and thorough analysis of the manner in which surgically removing the flap created by Claimant's September 2000 injury caused additional stress to the surrounding cartilage, thus increasing the potential for exactly the type of re-injuries that she has since experienced. Dr. Beattie's training and experience as an orthopedic surgeon lend an extra measure of credibility to his analysis.

15. Dr. Backus' analysis was less clearly stated. He focused solely on Claimant's pre-existing chondromalacia as the origin of her injuries, and thus failed to address whether removing the cartilage flap created by the first, compensable locking episode may have weakened the joint and thereby contributed to her subsequent episodes. His opinion is less persuasive as a result.

16. As for the cause of Claimant's April 2011 re-injury, furthermore, Dr. Backus' opinion failed to provide the very perspective for which his expertise was solicited. The medical question presented by the pending claim is whether the act of getting up from a chair likely caused Claimant's knee to lock and if so, why. Dr. Backus' opinion – that because the act of arising from a chair is a normal work activity, it does not constitute a new injury – states a legal conclusion, not a medical one.

17. I conclude that Claimant has sustained her burden of proving that her April 2011 re-injury arose out of and in the course of her employment. Consistent with Dr. Beattie's opinion, I further conclude that it occurred as a natural and direct consequence of her original compensable injury in September 2000 and that therefore it is itself compensable.

18. In reaching this conclusion, I reject Defendant's assertion that the only injuries it acknowledged as compensable were the September 2000 and July 2001 locked knee episodes, and not the underlying medical diagnoses to which those episodes were attributable. Defendant was well aware of Dr. Beattie's diagnosis – a traumatic cartilage tear superimposed on pre-existing chondromalacia – at the time it executed the compensation agreement relating to Claimant's first injury. Less than a year later, it reaffirmed the compensability of that condition, specifically referencing the original date of injury in the compensation agreement referable to her second locking episode. Once approved by the Department, those agreements became binding contracts. Workers' Compensation Rule 17.000; *Coronis v. Granger Northern, Inc.*, Opinion No. 16-10WC (April 27, 2010). Defendant has long since waived its right to contest the material portions of those agreements, and cannot now attempt to limit its exposure for further episodes arising from the same diagnosis.

19. As a result of her April 2011 injury, Claimant has established her right to temporary total disability benefits from April 5, 2011 through August 2, 2011. She also is entitled to medical benefits covering all reasonable medical services and supplies causally related to treatment of that injury. Claimant's entitlement to additional benefits, including permanent partial disability, must await further proof.

20. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

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

1. Temporary total disability benefits from April 5, 2011 through August 2, 2011, in accordance with 21 V.S.A. §642, with interest as calculated in accordance with 21 V.S.A. §664;

2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's April 5, 2011 compensable injury, in accordance with 21 V.S.A. §640; and

3. Costs and attorney fees in amounts to be submitted, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 6th day of June 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.