Leahy v. Central Vermont Hospital (April 5, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Linda Leahy	)	*File #: G-21958*
	)	*By: Barbara H. Alsop*
v.	)	*Hearing Officer*
	)	*For: Mary S. Hooper*
Central Vermont Hospital	)	*Commissioner*
	)	
	)	*Opinion #: 6-96WC*

Hearing held at Montpelier, Vermont, on February 9, 1996.
Record closed on February 27, 1996.

APPEARANCES

Rodney F. Vieux, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUE

Whether the claimant's current complaints and surgery are causally related to
an incident at the defendant hospital on or about May 16, 1991.

THE CLAIM

1. *Temporary total disability compensation pursuant to 21 V.S.A. §642.*

2. *Temporary partial disability compensation pursuant to 21 V.S.A. §646.*

3. *Permanent partial disability compensation pursuant to 21 V.S.A. §648.*

4. *Medical and hospital benefits pursuant to 21 V.S.A. §640.*

5. *Vocational rehabilitation pursuant to 21 V.S.A. §641(b).*

6. *Attorneys fees and costs pursuant to 21 V.S.A. §678(a).*

STIPULATION

1. *On May 16, 1991, the claimant suffered an injury while employed at the defendant Central Vermont Hospital.*

EXHIBITS

1. *Joint Exhibit 1 Medical records*
2. *Joint Exhibit 2 Confidential Report of Incident*

FINDINGS OF FACT

1. The above stipulation is accepted as true and the above exhibits are admitted into evidence. Judicial notice is taken of a letter from Susan LaFlamme, Workers Compensation Specialist, of August 7, 1995. Notice is taken of all forms filed with the Department in relation to this claim.

2. On May 16, 1991, the claimant felt a pop and sudden sharp, severe pain in her left knee when she squatted to move under some wires attached to a mobile monitor next to a patient, while working in the post-anesthesia care unit at Central Vermont Hospital. She reported the incident immediately to supervisory personnel, and an internal incident report was prepared. For reasons that have never been adequately addressed by the defendant, no First
Report of Injury was filed with the Department of Labor and Industry by the employer until 1994.

3. The claimant was seen on the day of injury by Dr. Russell P. Davignon, an orthopedist affiliated with the hospital. The note of his physical examination of the claimant reads: The left affected knee shows no frank effusion, maybe a little bit starting but nothing immense, a lot of medial joint line tenderness. Hyperextension McMurray's are benign, but they do give a grating sensation medially although not a lot of pain. She has no obvious instability, drawer sign, Lachman's maneuver, some joint line tenderness medially but none laterally. Full range of motion to the knee without pain. The examination was performed approximately two hours after
the incident.

4. Dr. Davignon's impression at the time of the exam was that there was a possible medial meniscal tear, and he recommended a watchful waiting course
before contemplating surgery. He saw the claimant again on May 23 and June
10. On May 23, he noted that there was still some question about the McMurray's and that she was still experiencing a lot of medial joint line tenderness. When he saw her on June 10, apparently a chance encounter in the
unit where she worked, he noted that her symptoms were diminishing, and that
they would continue to watchful wait.

5. The claimant testified to her recollection of these meetings, including her understanding that an arthroscopy might not be helpful, and that she should not do aggressive sports. She indicated that she told the doctor that her two main sporting activities were hiking and skiing, and that he indicated that these were acceptable activities. He cautioned her against activities such as squash or tennis or jumping around.

6. The claimant had a prior history of knee pain that had been diagnosed as
chondromalacia, in all likelihood. The claimant indicated that the pain from that condition was a diffuse pain, whereas the pain after the injury at CVH was more like point tenderness, with aching and an occasional sensation of something flipping in the knee. She indicated that there was a definite change in the quality of the pain after the injury.

7. The claimant's work at CVH had been per diem, and she left the hospital after the number of shifts available began to drop off in the fall of 1991. She had been working per diem at Copley Hospital during the same period of time, and a part-time job opened up at Copley in January of 1992, which she accepted. Copley had the advantage of being much closer to her home than CVH
and the position offered her benefits.

8. In March of 1993, the claimant consulted with Dr. Leonard P. Jennings, a board certified orthopedic surgeon who practices at Copley Hospital. He found that she had pain on a McMurray's test, which is a test for torn cartilage. He had her sent for an MRI, which was normal and negative for a torn meniscus. In his opinion, the MRI was not conclusive. However, the combination of the physical examination and the MRI led him to suggest a further period of waiting.

9. In the period between the initial injury and March of 1993, and ongoing after the 1993 appointment with Dr. Jennings, the claimant was actively engaged in sports and other physical activities. She was a fairly regular hiker and cross country skier, and she skied downhill whenever the opportunity and finances permitted. She denied any incident of traumatic pain during these activities. The claimant's testimony in this regard was credible.

10. The claimant also produced a witness, Denise Marcoux, who is a fellow nurse at Copley Hospital. Ms. Marcoux first met the claimant when she worked
with her in the Intensive Care Unit at Copley in the 1970's. She defines their relationship as professional friends and denies socializing with the claimant outside of work. She testified that when the claimant returned to

Copley in the early 1990's, she was limping. She indicated that she noted several pain behaviors in the claimant relating to her left knee, including grimacing when rising from a squatting or seated position, and the rubbing of her left knee. She has noticed no change in these behaviors since the claimant's return to work at Copley. She testified that the claimant told her fairly soon after her return that she had hurt her knee while at CVH. She never heard the specifics of the injury until the day of the hearing. She indicated that the claimant is not a complainer, and that the witness only way of evaluating the pain was from the claimant's behavior.

11. Dr. Jennings saw the claimant again in December of 1995, and determined that the symptoms he had noted in March of 1993 were still present, and that there was additionally a clicking sound now present which had been absent before. Based on her failure to improve and the continued positive findings, Dr. Jennings recommended an arthroscopy, and indicated that his impression was that ...most likely the patient does have a small tear in the medial meniscus and/or some plica formation or synovitis.

12. Arthroscopic surgery was performed on January 15, 1996, with a post-operative diagnosis of Small flap tear anterior horn left medial meniscus, Chondromalacia medial femoral condyle and lower pole of the patella, Grade I to II, also synovitis with plica formation medial compartment left knee. With the exception of the chondromalacia, the post-operative diagnosis confirmed Dr. Jennings pre-operative assessment of the claimant's condition.

13. Dr. Jennings testified that the course followed by Dr. Davignon was good orthopedic procedure. He further indicated that most meniscal tears are traumatic in younger people, and are usually associated with twisting or an acute flexion. Squatting alone was not all that common a cause, although he had seen this type of injury before. In light of the size of the tear that he found, he would expect that the most pain would have occurred at the time the trauma happened, and that thereafter the experience would be more of a chronic, low grade ache. He also stated that one would not expect to find much swelling associated with an injury such as this.

14. With regard to the finding of chondromalacia, Dr. Jennings testified

that he would expect to find it some time after the tear of the meniscus. In this case, the chondromalacia was found on the surface directly opposite the meniscal tear, suggesting that the wear in the cartilage was caused by abrasion from the tear.

15. Dr. Jennings testified that all of his findings were consistent with the claimant's original injury at CVH. While there might be alternative explanations for the claimant's symptoms, it was significant that her symptoms were reasonably consistent over the period from the initial injury and the time of the surgery. An increase in symptoms, which the claimant denied, would have suggested that her condition was being worsened by her other activity. He indicated that a nonsurgical treatment for her problem would consist of exercise and strengthening of her quadriceps.

16. Dr. Robert C. Shoemaker performed a records review for the employer, and
also read the depositions of the claimant and Dr. Jennings. Finally, he was provided, shortly before the hearing, with the operative note of the arthroscopy. Dr. Shoemaker opined that there was no substantial evidence of
a meniscal tear on May 16, 1991. He based this conclusion on the limited physical evidence as found by Dr. Davignon, the claimant's history of physical activity after the injury, and the unlikely tearing of the meniscus by a simple squatting incident. He further found that most of the claimant's reported symptoms over the years were consistent with a history of chondromalacia and plica formation.

17. Dr. Shoemaker indicated that the original treatment by Dr. Davignon represented appropriate conservative care. He noted that a traumatic event could make pre-existing chondromalacia symptomatic. He also noted that chondromalacia from nontraumatic sources is generally bilateral, and it was of some significance that the claimant had no symptoms in her left knee. He also agreed that there was no evidence in any of the records or in the depositions of any other trauma to the claimant's right knee after 1991. None of these factors altered his opinion that the claimant's injury of May 16, 1991, was not responsible for her need for surgery in January of 1996.

18. In evaluating the credibility of the two doctors, whose opinions are diametrically opposed, it is necessary to evaluate their credentials and the bases for their opinions. Dr. Jennings testified that he has performed hundreds of arthroscopies and is daily in the practice of medicine. Dr. Shoemaker, after many years in practice, now is no longer in the field of patient care. He is a consultant only, and 75% of his work is performed for defendants. Dr. Jennings opinion is based not only on his experience and training but also on his active participation in the claimant's treatment and

his knowledge of her from the workplace. Dr. Shoemaker's opinion, lacking as
it must the element of personal knowledge of the case, is hampered by the necessity for reliance on brief medical records and operative notes. His conclusions from the operative notes must pale in comparison to the opinions
of the doctor who performed the surgery and saw the actual damage.

19. This determination of the importance of personal experience is not dispositive. Demeanor in testifying, while difficult to gauge over the telephone, can still be important in evaluating the merits of the respective testimonies. Dr. Jennings testimony was replete with references to his experience and the usefulness of that experience in evaluating the claims of Ms. Leahy. Dr. Shoemaker, on the other hand, made two absolute and categorical statements which were inconsistent with Dr. Jennings testimony. First he said the chondromalacia as extensive as the claimant's never develops from a three millimeter tear of the meniscus, and then he stated that a meniscal tear must be at least one centimeter to be painful. His basis for these conclusions was not established on the record. Experience with medical matters suggests that there are few absolutes in the practice of medicine, and that categorical statements are to be viewed with distrust.

20. Claimant's attorney has presented evidence of his fee agreement with the
claimant allowing for a contingency fee of 25% of the claimant's recovery for permanency and medical benefits. He has also presented evidence of expenses
in the amount of $500.00 for the testimony of Dr. Jennings. Subject to the statutory limitation on attorney's fees, these amounts are reasonable.

21. The claimant has also presented evidence of unreimbursed medical bills in the amount of $8,016.34, an amount which has not been contested by the defendant. This amount is accepted as the presently due medical benefits in this case. The claimant is therefore entitled to attorney's fees in the amount of $1,603.27.

CONCLUSIONS

1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant 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).

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. In this case, both the lay testimony and the medical testimony confirm that the more probable hypothesis is the claimant's 1996 surgery is causally related to the concededly work related injury of May 16, 1991. The two lay witnesses were both credible, the claimant as to the continuity of her symptoms and the lack of another explanation for the injury, and Ms. Marcoux
as to the consistency of her pain behavior over the duration of the claimant s employment at Copley. In the medical realm, the defense concedes that there is no evidence of another specific trauma to account for the claimant's meniscal tear, and interposes theoretical reasons for a finding contrary to the other evidence. Dr. Jennings testimony, based in his personal knowledge
and experience, is more credible. The claimant has met her burden of proof. It is not enough for the defendant to assert that there was the possibility of another cause for the claimant's condition, without more. See, e.g., Parker v. Corcoran Auto, Inc., Opinion No. 59- 95WC, and Gilligan v. Rutland Regional Medical Center, Opinion No. 84-95WC (It would require speculation to find that the claimant's physical condition arose in a manner other than that reported by her in this case. There is no evidence of duplicity on her part, only neglect, and that, in and of itself, is insufficient to defeat her claim.)

4. The claimant is not yet at an end medical result from her surgery of 1996. Hence, permanency has not been contested here, and is not specifically
awarded. When the claimant has reached an end medical result, the parties are to address the issue of the appropriate level of permanency at that time.

5. A prevailing claimant is entitled to her costs as a matter of law and legal fees as a matter of discretion. Expenses will be awarded in the amount of $500.00. Legal fees pursuant to a contingency fee agreement may not exceed 20% of the compensation awarded. As a result of this hearing, the only award of compensation is for medical benefits and any temporary total disability benefits to which the claimant may be entitled as a result of the successful prosecution of this claim. Based on the attorney's agreement with
the claimant, the claim is for 20% of the medical benefits awarded and for

20% of the permanency. As permanency is not being awarded here and there is
no claim against temporary total benefits, the claim is limited to a percentage of the medical benefits awarded. The insurer therefore will be ordered to pay attorney's fees in the amount of 20% of the medical benefits paid in this claim.

6. Although claimed, the claimant has produced no evidence as to the necessity of vocational rehabilitation in this matter. Therefore, this claim is denied for the present time. The insurer is to adjust this claim as required by the Rules, and to pay the claimant any amounts additionally due after the decision of this case.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, Travelers Insurance Company, or in the event of its default Central Vermont Hospital, is ordered to:

1. Pay such temporary total and partial disability benefits as the claimant is entitled to pursuant to this opinion;

2. Pay medical benefits in the amount of $8,016.34;

3. Pay attorney's fees in the amount of $1,603.27 and costs in the amount of $500.00; and

4. Otherwise adjust this claim in accordance with the Workers Compensation
Act.

DATED at Montpelier, Vermont, this 5th day of April 1996.

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Mary S. Hooper
Commissioner