STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Joseph Lumbra, Jr.	)	State File No. G-18304
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Steve Janson
Town of Waterbury	)	Commissioner
	)	
	)	Opinion No. 24-98WC

Hearing held in Montpelier, Vermont on May 4, 1998.
Record closed on May 18, 1998.

APPEARANCES:

Joseph C. Galanes, Attorney for Claimant
Barbara H. Alsop, Attorney for Defendant

ISSUE:

Did claimant suffer a recurrence of his March 1994 injury on July 24, 1997?

CLAIM:

1. Temporary total disability benefits from July 24, 1997 through August 5, 1997.
2. Medical and hospital benefits.
3. Attorney's fees of 20% of the total value of any award claimant may receive as a result of this action, not to exceed $3,000.

EXHIBITS:

Claimant's Exhibit 1: Medical Records
Claimant's Exhibit 2: Deposition of Dr. Johnson, January 23, 1998

Defendant's Exhibit A: Vermont League of Cities and Towns, Claimant's Report, March 16, 1994.

FINDINGS OF FACT:

1. Claimant was at all times relevant to this claim an employee and the defendant, Town of Waterbury, his employer. Claimant was a volunteer firefighter for the defendant.

2. On March 9, 1994, while returning from a house fire, claimant was injured when he stood

up from a bench inside a rescue van. Claimant heard a popping sound, then his knee locked which was followed by intense pain.

3. Emergency Medical Services (EMS) transported claimant to Central Vermont Hospital. Their report indicates that in addition to his extreme pain, claimant's left knee was swollen.

4. The emergency room report contains the same basic information concerning the claimant's injury except that it also indicates the claimant was twisting slightly when the injury occurred. Additionally, the report indicates that claimant reported a history of knee problems in the past and that there was no known trauma. X-rays taken then of claimant's knee showed no pathology.

5. On the following day, March 10, claimant saw Russell Davignon, M.D., who is an orthopedic surgeon. Dr. Davignon's notes show that claimant reported having knee problems for years, consisting of snapping and clicking noises, and at times, popping where the knee would "go out of place instantaneously and go back in." He also reported that the knee never really bothered him. The difference between the current injury and incidents in the past was that this time the knee locked when it went out and stayed that way. Dr. Davignon opined that it was his impression that claimant's injury was a "probable bucket handle tear several years old; a minor bucket handle until he torqued it in the ambulance and so it probably existed before but never locked, probably increased his tear somewhat and now it locked for the first time. So, it is an exacerbation of a pre-existing condition in part." Dr. Davignon recommended arthroscopic surgery.

6. On March 31, 1994, Dr. Davignon operated on claimant to repair his locking left knee. Arthroscopic examination revealed no pathology of the meniscus or any other pathology. However, a "very, very large fat pad" was found to obscure the intercondylar notch. Dr. Davignon shaved off most of the anterior portion of the fat pad and then it was fully removed while inspecting the lateral compartment. He opined that it was not known whether the fat pad was the cause of the locking knee.

7. On April 13, 1994, claimant saw Dr. Davignon for a follow up visit at which time the doctor noted, "Amazingly, considering what we found in his arthroscopy, this guy is better. He says it doesn't snap when kneels down. He doesn't feel a catching. It hasn't locked." Dr. Davignon states that the fat pad diagnosis may have been the correct diagnosis. A checkup was scheduled for May 24, 1994, but claimant did not keep the appointment. Claimant's wife testified that she was having an appendectomy at that time and this probably prevented him from keeping the appointment.

8. On April 7, 1994, defendant's carrier signed and filed a Form 21, an Agreement for Temporary Total Disability Compensation, which included agreement to pay for medical, hospital and surgical services. The Department approved the form on May 4, 1994. Claimant was never evaluated to determine if he had reached a medical end result, nor was he evaluated for permanent impairment.

9. William J. Cove, D.O. saw claimant on July 26, 1994 at which time the claimant reported

his knee surgery was disappointing. Claimant also reported grinding in his knee and increased pain with cold air.

10. Just over a year later, on July 11, 1995, claimant returned to Dr. Davignon to report ongoing difficulty with his left knee. In particular, he reported an incident at work where the knee popped as well as two more incidents. Dr. Davignon stated he was bewildered as to the cause of the pops. An MRI examination was suggested and perhaps a consultation with another physician. No follow up to this visit seems to have taken place.

11. On January 21, 1997, claimant saw Dr. Cove for sharp pain in his left knee. Dr. Cove referred him to Felix Callan, M.D.

12. Dr. Callan examined claimant and took x-rays of his left knee on February 6, 1997. Dr. Callan's impression was that there was "internal derangement of left knee, cause to be determined." The doctor deferred further surgery until the claimant could no longer reasonably tolerate the symptoms.

13. On July 24, 1997, claimant injured his left knee again while stepping out of the tub at home. Dr. Cove treated the claimant and noted that claimant had a limp, pain and guarding. He also indicated that claimant had internal derangement of the left knee and he would discuss this with the orthopedist. On the 28th, Dr. Cove wrote an open letter in which he stated that claimant's injury on the 24th was the consequence of his March, 1994 injury and, therefore, was not a new injury.

14. Dr. Davignon examined claimant on August 4, 1997 for the injury on July 24, 1997. He opined that he was not sure his procedure on the claimant in 1994 resolved the problem and that he was not sure what the problem was with the knee. He subsequently arranged for another opinion by Robert J. Johnson, M.D.

15. Dr. Johnson saw claimant on September 11, 1997 and reviewed his history, some medical records including the 1995 MRI and examined claimant's knee. After his evaluation, Dr. Johnson concluded that it seemed most likely that "something was wrong" with claimant's medial meniscus even though the arthroscopy in 1994 and 1995 MRI failed to indicate this pathology. An x-ray taken the same day showed no bone or soft tissue abnormality beyond minimal spur formation.

16. Claimant subsequently saw Dr. Johnson three times between October 21, 1997 and December 4, 1997. These visits resulted in more objective tests--x-rays and another MRI, all of which showed no evidence of pathology or an explanation for claimant's knee pain. Dr. Johnson opined on December 11, 1997 that despite claimant's ongoing problems, he had no "specific diagnosis or reason to perform any surgery on this knee." He ended his note on the 11th by stating he would be willing to review claimant's situation again if he should request it.

17. When claimant was injured on March 9, 1994, he told EMS staff and doctors at the

hospital that he had injured his knee while riding in the rescue van after a fire. The next day he told Dr. Davignon the same thing. On March 16, 1994, he also told the Vermont League of Towns and Cities, defendant's insurer, that he injured his knee in the van. Claimant, however, approximately four and a half months later on July 26, 1994 told his family doctor, Dr. Cove, that he had injured his knee when he fell through the roof of a burning building. Medical records from Drs. Johnson and Callan show that claimant also told them he was hurt while fire fighting. Claimant testified that he had indeed injured his knee when he slipped off the 2" x 6" board he was kneeling on while fighting the house fire preceding the ride in the van. He further testified that he did not think much about the incident until he was talking to Dr. Cove when he "put two and two together" and realized that the slip and the knee locking in the van were connected.

18. In his deposition, Dr. Johnson agreed with defendant's attorney that he could not tell if claimant's ongoing problems were caused by a specific incident because he did know what was causing the problems themselves. Yet, he also agreed with claimant's attorney, that put together, claimant's history and symptoms added up to a causal connection between claimant's knee falling through the floor and his condition today. Upon re-examination by defendant's attorney, Dr. Johnson opined that had claimant had a history of knee locking prior to the fall, then claimant's problem "probably pre-existed." But, he said, he had no knowledge of that. Dr. Johnson, further opined, that it would not matter if claimant had not fallen through the floor, because knees lock and catch when they want to, without good reason.

19. The most recent entry in claimant's medical records from December 11, 1997 shows that Dr. Johnson anticipated that he would continue to experience problems with his left knee.

20. Claimant's attorney submitted a request for attorney's fees of 20% of the total value of any award, not to exceed $3,000 and a statement of costs.

CONCLUSIONS OF LAW:

21. The claimant has the burden of proving his injury and disability and of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984); *Goodwin v. Fairbanks, Morse, Co.*, 123 Vt. 161 (1962). He must establish by sufficient credible evidence the character and extent of his injury as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

22. 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).

23. 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).

24. Once a claim has been accepted by a carrier or employer, the burden of proof is on that party to establish the propriety of terminating temporary benefits. See, e.g., *Merrill v.*

University of Vermont, 133 Vt. 101 (1974).

25. Since claimant's temporary total disability and medical bills were accepted and covered by defendant's carrier, the issue in this case is whether the carrier is responsible for benefits due to events subsequent to claimant's surgery and his release to work on April 13, 1994.

26. The defendant argues that compensability turns on Dr. Johnson's opinion and that this in turn depends upon the credibility of the information provided to him by the claimant. The defendant further argues that the claimant had a prior history of knee problems. I accept Dr. Davignon's records which indicate that the claimant related a past history of knee problems which included snapping or clicking and that the knee would also go out of place instantaneously and then it would go back in again. I also accept that the difference between these events and the knee injury on March 9, 1994 was that claimant's knee locked in the out position. The defendant produced no evidence that claimant suffered prior locking incidents.

27. The defendant also argues that the claimant may not have slipped off a 2" x 6" board in the attic of a burning house at all or, if he did, then it was insignificant because he failed to report it to the emergency room, Dr. Davignon or the Vermont League of Cities and Towns, defendant's insurer, when he reported the injury to them several days later. Be that as it may, claimant's knee locked for the first time while he was in his employer's van, returning from the scene of a fire; it was the motion of the van combined with claimant's shift from sitting to standing that caused his injury.

28. Claimant's March 31, 1994 fat pad resection surgery relieved his knee problem for a period of months, but by July 26, 1994, claimant was feeling grinding and increased pain with cold air. The claimant, however, did not seek treatment again until July 11, 1995. The defendant argues that claimant's year long hiatus from treatment between July of 1994 and July of 1995 indicates that the true cause of claimant's injury was indeed the fat pad because Dr. Johnson testified that the pad could have grown back by that time. He also testified that a fat pad is part of normal knee physiology. He, however, never said the fat pad had grown back and specifically testified that no one knew if fat pads grew back to their original sizes because they generally were not studied. Despite this uncertainty, the defense assumes that the fat pad was and is the cause of claimant's knee problems. Therefore, because the fat pad is a normal part of claimant's physiology, the defense argues, claimant's continuing knee problems are not compensable and cites *Mattson v. C. E. Bradley Laboratories*, 52-95WC (wherein the claimant suffered two heart attacks, the first compensable because it was brought on by work exertion and the second not compensable because it was found to be caused by underlying pathology and not work). The defendant finds further support of this argument in that Dr. Johnson's hypothesis of a meniscus tear is not supported by the objective evidence provided by surgery and two MRIs.

29. The claimant argues that the medical evidence supports his claim. Specifically, claimant proffers the medical opinions of Drs. Cove, Davignon and Johnson. Dr. Cove clearly

stated his belief that claimant's current knee problems are connected to his injury in 1994. Dr. Cove's medical records, however, do not reflect that he considered all of claimant's records, including x-rays, two MRIs and surgical findings when he offered his opinion. I find, therefore, that Dr. Cove lacked relevant information when he stated his opinion. Additionally, claimant points to Dr. Davignon's notes in August of 1998 which is obviously a typographical error. Assuming that claimant meant to refer to the doctor's notes of August 1997, it appears that claimant misstated the doctor. While it may be inferred from the notes that he believes claimant's problems are related to the original injury, Dr. Davignon did not state that there is a direct causal connection. In fact, his records suggest that he is not sure what caused claimant's knee problems. Similarly, the claimant omits pertinent information when he states that Dr. Johnson opined in his deposition that claimant's knee problems are causally connected to the original injury to "a reasonable degree of medical probability." Dr. Johnson actually said, "Put it all together, it *seems* to be a reasonably medically probable type situation, yes." (emphasis added) That the knee injury in 1994 and the current problems *seem* causally connected is less certain then if he had said they *are* related.

30. I find that testimony given by Dr. Johnson leaves open the question of causation. Upon defendant's attorney's examination, Dr. Johnson agreed that he could not tell whether claimant's problems were caused by a particular incident. Later, upon examination by the claimant's attorney, he stated that it seems that claimant's problems are causally connected. Simply, these statements conflict. This is especially true, given his later testimony that knees lock and catch when they want to and that he did not know of any reason for it.

31. A possible cause cannot be accepted as the operating cause unless the evidence excludes all other causes or shows something in direct connection with the occurrence . . . . Unless the other evidence fairly warrants a finding of causation or excludes all other causes, a conclusion based upon medical evidence of 'possibility' would be entirely speculative. *Burton, supra,* at 20-22.

32. Essentially, claimant has an ongoing problem where his knee pops out and locks. His initial injury in March, 1994 seems to have been brought on by claimant's movements in his employer's van. The claimant argues that his current problem for which he seeks compensation is causally related to the original injury. The only support for his hypothesis is, however, the inconclusive opinions of his doctors. The defendant's argument that claimant's injury stems from his natural physiology is no more conclusive. The weight of the medical evidence neither adequately supports nor refutes the parties' arguments.

33. The defendant has shown that claimant's theory of causation is merely a possibility. Finding that the claimed injury is causally related to claimant's original injury would be speculative and, therefore, must be denied.

34. Nevertheless, defendant is responsible for a permanency evaluation related to claimant's 1994 injury.

ORDER:

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, defendant is ordered to have claimant evaluated for permanency related to his 1994 injury. Claimant's request for further compensation is **DENIED**.

Dated at Montpelier, Vermont, this 6th day of August, 1998.

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Steve Janson
Commissioner