STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Carol J. Weingart	)	State File Nos. D-16611, F-18746
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Northeast Kingdom Mental	)	
Health Services	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 02-99WC

Hearing held at Montpelier, Vermont, on September 11, 1998.
Record closed on October 7, 1998.

APPEARANCES:

Carol J. Weingart, R.N., Ph.D., Pro se
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Whether claimant's 1993 work related fall was an "aggravation" of a pre-existing work related injury and if this 1993 work related fall resulted in a compensable injury itself.

2. Whether claimant is entitled to temporary total disability from February 1994 through her 1998 renewed finding of end medical result.

3. Whether claimant's 1998 permanency rating of her lower extremity is accurate.

CLAIM:

1. Claimant seeks temporary total disability, TTD, compensation pursuant to 21 V.S.A. §§ 642 and 650 (c) from February 12, 1994 to May 5, 1998.

2. Claimant seeks permanent partial disability, PPD, benefits pursuant to 21 V.S.A. § 648 (7% of the hip).

3. Claimant seeks reimbursement for medical benefits pursuant to 21 V.S.A. § 640 ($12,717.32).

UNCONTESTED FACTS:

1. Claimant was an employee of defendant, Northeast Kingdom Mental Health Services.

2. Defendant and claimant meet the requisite definitions under the Workers' Compensation Act for an employer and employee, respectively.

3. Aetna/Travelers Insurance Company is the insurance carrier in this proceeding.

4. For the 12 week period prior to February 21, 1991, claimant's average weekly wage was $721.28. This resulted in an initial compensation rate of $480.88.

EXHIBITS:

The following exhibits were admitted into evidence:

Claimant's Exhibits:

Exhibit 1:	Medical Records
Exhibit 2:	Physical Therapy Records
Exhibit 3:	Medical, Therapy, Economic, VR and Other Records
Exhibit 4a:	Video deposition of Dr. Arata
Exhibit 4b:	Transcript of Dr. Arata's deposition testimony
Exhibit 5a:	Transcript of Dr. Harris' deposition testimony
Exhibit 5b:	Transcript of Dr. Harris' trial testimony
Exhibit 6:	Transcript of deposition of David Smith, Economist
Exhibit 7:	Letter from Jeffrey Tobin, Esq. to Bob Ronan at Aetna, dated July 6, 1996 (submitted by claimant after the hearing)

Defendant's Exhibits

Exhibit A:	Medical Records
Exhibit B:	Letter from Jean Perrigo dated May 12, 1994

FINDINGS:

1. Claimant has an extensive educational and work background in counseling. She received a Diploma in Nursing from Parkview Methodist School of Nursing in 1965, a B.S. from Defiance College in 1976, and an M.A. from Vermont College of Norwich University in 1990. She has also recently received a Doctorate in Marriage & Family Counseling from Summit University of Louisiana in 1995 which took from 1993 to 1995. She is licensed as a Registered Nurse and Counselor in the State of Vermont. The claimant has also been awarded several Who's Who of American Women honors.

2. While working for the defendant in February 1991, claimant slipped and landed on her left hip on the way to see a client. Claimant had chronic pain and discomfort due to this fall and has been examined by numerous doctors and therapists. She has incurred pain that radiated down along the outside of her thigh from the lower back and sometimes continued down to her foot. Claimant had varying degrees of pain which flared up unpredictably. During the course of her treatment, she received some relief from whirlpools, TENS units, traction, and a bicycle. Cortisone was not a treatment option

since it caused GI bleeding. She has also been prescribed Codeine which she has taken rarely, as well as Amitriptyline.

3. Claimant had various diagnoses for her hip condition which ranged from unknown origin, nerve damage, fibromyalgia, to bursitis. The most prominent and accepted diagnosis by both claimant's and defendant's experts has been chronic bursitis and tightness of the iliotibial band. She underwent surgery on September 9, 1997 to release this band. The records show that this operation was successful and resulted in symptomatic relief.

4. Claimant's renewed claim pertains to a second fall which occurred on her way to see a client at the St. Johnsbury Correctional Center on March 21, 1993. Claimant's First Report, received by the Department on March 31, 1993, states that claimant fell on her knee. Claimant believes that this fall aggravated her pre-existing hip injury. She also states that her subsequent arthritic knee condition was causally related to this work related fall.

5. The record illustrates that claimant suffered several other non-work related falls around the same period as the second work related fall. According to physical therapy notes, she fell in her driveway and fell down her stairs at home. A March 15, 1993 note explains, "Patient states that she fell down her stairs at home last week and did injure herself and stir up the pain in her hip. She states that it since has resolved back to what is normally uncomfortable for her." See *Wyland P.T. Progress Notes*, Defendant's Exhibit A. None of the subsequent medical examiners after the 1993 work fall seem to have been informed of these other non-work falls that occurred within a week or two of the St. Johnsbury fall.

6. On April 6, 1994 Northeast Kingdom Mental Health Service, Inc. informed the claimant that she was terminated due to her inability to travel and perform the tasks required for her to do her job.

7. None of claimant's physicians including her treating physician, Peter B. Harris, M.D., or any of the specialists she was sent to, identified the March 1993 work fall as being distinct from her pre-existing hip injury. When asked in his deposition about the impact of the second fall, Dr. Harris explained that he did not observe any worsening of the claimant's condition. Her pain flair-ups were consistent throughout the five years he had treated the claimant.

8. Among the numerous physicians who examined claimant was Rex G. Carr, M.D. On April 8, 1993 he examined the left knee, proximal thigh, and trochanteric area. He found "exquisite tenderness" throughout. His diagnosis focused on the hip condition where he found the patient suffered from iliotibial band syndrome with myofascial pain particularly in the buttock area. He also noted that the claimant may have hit her head which resulted in a concussive-type syndrome since she could not remember the actual details of the fall.

9. Claimant was examined by Stephen P. Nicknish, M.D., in July of 1993 who performed an Independent Medical Exam, IME. By physical examination, as well as x-rays which he noted as essentially normal, he found that her hip problem was directly related to "both episodes in February of 1991 and March of 1993." In a later exam on March 30, 1994 he

concluded that claimant had reached maximum medical improvement.

10. Leonard P. Jennings, M.D., performed an IME in August 1994 at the request of the defendant. He performed a physical examination of the claimant and reviewed pre-1993 x-rays, a CT scan, and several MRIs which were all within normal limits. He also noted that the most common diagnosis has been a traumatic left trochanteric bursitis.

11. Dr. Jennings further explained that claimant stated that she hit her left knee and that most of the pain once again aggravated the hip area. In this IME he wrote, “Her symptoms were aggravated by this fall, but they were very similar to the symptoms which existed prior to this injury.”

12. Going by the patient’s medical history Dr. Jennings concluded that “[I]t appears that the second fall may have aggravated the problems which were already there and therefore one could make it 50-50, or possibly give the first fall more of a percentage.”

13. Claimant did not seek treatment specifically for knee pain until September 1995 when she was examined by Andrew S. Kaplan, M.D. He performed various range of motion tests and looked at the claimant’s x-rays. He saw no evidence of fractures, dislocation, or any other lesions. In his report he wrote, “[T]he lateral knee pain . . . has been going on for the last 3 months.” He focused on the iliotibial band pain and suggested that she work on stretching the band and strengthening the musculature around the knee.

14. In March of 1996 Dorothy E. Ford, M.D., performed a physical examination of the claimant. She stated that the claimant “gives a history of having had two falls.” In a March 20, 1996 addendum to her report, she stated that any permanency would be related to the first fall since it was “difficult . . . to sort out what, if any, were the consequences of the slip and fall at St. Johnsbury Correctional Facility.”

15. The claimant was not satisfied with the suggested treatment options which essentially told her that she would have to live with her chronic pain and she felt that none of the doctors was willing to help her. She heard about possible surgical options and inquired about these procedures from two out-of-state surgeons. After reviewing her MRI, they found her not to be a valid candidate since her MRI showed no abnormalities to the bursa/iliotibial band.

16. The claimant was then recommended by a friend to be examined by Indiana specialist, Michael A. Arata, M.D., a Board Certified Orthopedic Surgeon since 1983. He noticed snapping and soft tissue inflammation and also diagnosed claimant with chronic bursitis. He believed that surgery which would release the band could be helpful with a patient such as the claimant. He noted that surgery of this type was not used too often since symptoms rarely persist in patients as long as they did for the claimant.

17. Dr. Arata performed the surgery on September 9, 1997 and in follow-up examinations found remarkable improvement with her chronic bursitis. The surgery had removed the “snapping and catching around the greater trochanter,” and after the surgery he found that “she had minimal soreness over the hip area.” Dr. Arata also noted that “she had full motion in the left hip and excellent hip strength.”

18. In a follow-up exam claimant asked Dr. Arata to look at her knee which had been bothering her again. He examined her knee through arthroscopic surgery and found a degenerative arthritic condition which had not shown up through x-rays.

19. When asked if the 1993 work related fall could have caused her arthritic condition, he explained that it was unlikely. In order for there to be a causal relation, he stated that he would have expected the medical records to show specific symptoms (swelling, bruising, etc.) at the time of the 1993 work related fall. Dr. Arata stated that the knee and hip conditions were distinct and unrelated. He also found that this type of knee condition was consistent with normal aging and opined that the impact of the March 1993 work fall would not cause an aggravation of her pre-existing hip condition.

20. Dr. Arata was also asked by the claimant to perform an IME to determine any increased permanency for the hip condition. He used Table 64 of the Fourth Edition of the AMA Guides *(AMA Guide)* and concluded that she had "Trochanteric bursitis (chronic) with abnormal gait" which would result in a 3% whole person or 7% lower extremity impairment. See *AMA Guide* at 3/85.

21. He was also asked by the claimant to rate her knee as well, but he was unable to since the *AMA Guide* relies on x-ray differentiation. Claimant's x-rays were essentially normal. However, claimant feels that her knee is 100% damaged from the 1993 work related fall since she will likely need reconstructive surgery at some point.

22. Eric White, M.D., reviewed claimant's vast medical records including Dr. Arata's written and video deposition at the request of the defendant. Dr. White is a member of the American Board of Orthopedic Surgery and has been certified since 1974. He did not examine the claimant in person.

23. The claimant objected to his testimony at the hearing. She had been informed in early August that he would provide testimony on this matter. In a letter dated August 13, 1998 claimant was notified that defendant arranged his telephonic deposition for the hearing.

24. At the hearing Dr. White stated that there was no causal link between the claimant's degenerative knee condition and the work fall in 1993 or the 1991 fall. He further agreed with Dr. Arata that the impact of 1993 work injury did not relate to the iliotibial band tightness.

25. In his telephone deposition, he reiterated Dr. Arata's findings that in order for there to be a causal relationship with the 1993 work fall and the 1997 finding of arthritic knee pain, he would have expected to see specific symptoms and complaints concerning the impact of the fall on her knee. As did Dr. Arata, he found no documentation of medical symptoms directly related to the knee at the time of the fall. He further opined that the instances of lateral pain on the outside of the knee were likely related to the bursitis/iliotibial band tightness.

26. Dr. White disagreed with Dr. Arata's renewed permanency finding. He explained that Table 64 calls for a finding of chronic bursitis with an abnormal gait. Dr. White did not

find any evidence of an abnormal gait in her medical records so he concluded that claimant could not have any level of permanency under Table 64.

27. Claimant introduced other types of evidence to show that she suffered a loss of functioning due to the 1993 work related incident. Several of her friends, including her ex-husband, testified that there was a marked difference in her level of functioning after the 1993 work related fall.

28. She has provided a statistical analysis of the hours worked to show that she suffered a loss of functioning after the 1993 fall. The carrier has compensated claimant for all lost time from work between the 1991 injury up until the agreed 1994 medical end result. Claimant has also received a permanency award with payments that continued through 1997.

29. In February 1994 claimant signed a Form 22 agreement which stated that she reached an end medical result for the 1991 injury. This agreement provided claimant with Permanent Partial Disability, PPD, benefits for 165 weeks which was based on a 50% impairment of the lumbar spine for 330 weeks. Carrier has compensated claimant for over $135,000 for her injuries and related expenses.

30. In a prior personal injury claim against the North Country High School and the Vermont Department of Corrections, claimant received a $50,000 settlement. Pursuant to an agreement with the carrier, claimant paid 25% of the total award ($12,500) to the carrier to satisfy the $135,000 lien the carrier held.

31. Defendant concedes compensability of 1997 hip surgery and a 12 week TTD period following the surgery, yet the carrier has not reimbursed claimant. Defendant claims that any new award, including the conceded 12 week TTD period and related medical bills to the hip surgery, should be offset by the remaining $37,500 from her settlement. Claimant argues that this issue was not brought up during the hearing and that it should not apply to the present proceeding.

32. At the pre-trial conference, the third party settlement was brought to the hearing officer's attention. The record indicates that claimant was aware of the possibility of statutory set-off. In a July 10, 1996 letter confirming the settlement agreement, claimant's attorney acknowledged that: 1) the 25% would satisfy the workers' compensation lien that existed at that time; 2) the agreement would have no effect on the TTD benefits expected to continue for a year; and 3) the carrier "could not agree to waive any future statutory set-off which your company (Aetna) might be entitled to." (Claimant's Exhibit 7).

CONCLUSIONS OF LAW:

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 (1962). 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. *Burton v. Holden & Martin Lumber Co.,* 112 Vt. 17 (1941). Furthermore, the inference from the facts proved must be the more probable hypothesis. *Id.*

2. The burden is on the employer to demonstrate that the claimant has reached a medical

end result. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). The claimant then has the burden of determining, by sufficient medical evidence, the degree of permanent impairment. Where the claimant's injury is obscure and a layperson could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). Moreover, the causal connection between employment and a work related injury is determined by expert medical testimony. *Martin v. Woodridge,* Opinion No. 11-97WC (June 13, 1997).

3. According to *Vermont's Workers' Compensation and Occupational Disease Rules (Rules),* medical end result "means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Rule 2(h)*; Miller v. Cornwall Orchards,* Opinion No. 20-97WC (Aug. 4, 1997).

4. Rule 2(i) explains that an "aggravation" is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." A "recurrence" is defined as "the return of symptoms following a temporary remission" Rule 2(j).

5. The Department looks at five factors in determining whether an injury is an aggravation or a recurrence. The factors supporting a finding of aggravation, with the final factor receiving greatest weight, are: 1) whether there is a subsequent incident or work condition which destabilized a previously stable condition; 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached an end medical result; and 5) whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998); see also *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997).

6. Defendant has paid for some of the initial examinations of claimant's knee. They appear to have been in good faith and the fact that the carrier has done so does not serve as a waiver of defendant's right to dispute the claim. See *Morrow v. Vermont Financial Services Corp.*, Opinion No. 50-98WC (May 15, 1998); see also *Sandra Valley v. Orleans Central Supervisory Union,* Opinion No. 55-98WC (Sept. 15, 1998).

7. Furthermore, Dr. White's telephonic testimony is admissible. Claimant had the opportunity to cross-examine him at the hearing. Before the hearing, she could have deposed him but made no effort to do so. Consequently, her informal motion to exclude is unfounded.

8. The first issue of compensability is whether claimant's March 1993 work fall "aggravated" her hip condition. None of the medical testimony suggests that this injury conclusively affected her pre-existing hip injury. Her bursitis symptoms had stayed relatively constant with unpredictable flare-ups from the initial onset of her 1991 condition until her surgery in September 1997. Furthermore, she did not reach a level of stability until February 1994 which is evidenced by the Form 22 agreement.

9. The work fall in 1993 was not identified by claimant's medical examiners as having independent significance. In fact, physical therapy notes within two weeks of the work

fall illustrate that there could have been other intervening injuries that initiated a recurrence of pain in her hip. The fact that she fell down her stairs at home within a week of falling at work raises serious questions about whether the work related fall worsened her hip condition. In taking into account the fifth factor which carries the most weight, as well as the first, second, and fourth factors, the department uses to determine an "aggravation," the most convincing explanation is that the 1993 work fall did not "aggravate" her existing hip condition. The claimant had consistently gone through periods of recurring hip pain before and after the 1993 work fall and there is nothing to suggest that this contributed to a new distinct condition that would constitute an "aggravation."

10. The next issue of compensability is for claimant's January 1998 knee surgery. Both claimant's and defendant's experts, Dr. Arata and Dr. White, agree that symptoms are missing for there to be a causal link with the arthritic condition in the knee and the 1993 work related fall. They would expect to see evidence of impact, such as swelling or bruising at the time of 1993 work fall, for the arthritic condition to be causally related to the arthritic condition. Moreover, both doctors stated that this type of arthritic knee condition is often the result of normal physical activity over time. Accordingly, since no causal relationship has been established, the 1998 knee surgery is not compensable.

11. The third issue is the claimant's degree of permanency. "Any determination of the existence and degree of permanent partial impairment shall be made only in accordance with the whole person determinations as set out in the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment." 21 V.S.A. § 648 (b); See also *Rule 14, Workers' Compensation and Occupational Disease Rules.*

12. In addition to relying on 21 V.S.A. § 667, the Department has suggested that when there are conflicting permanency evaluations, we should look to the following factors: 1) the length of time the evaluator has provided treatments; 2) the qualifications of the evaluator; 3) whether the evaluator had all the previous medical records; 4) the evaluator's training in making assessments; and 5) the objective report for the evaluator (such as test results). See *Miller v. Cornwall*, Opinion No. 20-97WC (Aug. 4, 1997). Only one rating may be used when there are two conflicting diagnoses. *Thivierge v. Groleau*, Opinion No. 67-94WC (April 20, 1998).

13. The claimant raises the issue of permanent impairment for her knee. For there to be a permanency rating for the claimant's knee, the arthritic condition would have to be causally related to work; it is not. Even if it were a work related injury, claimant would not be entitled to any permanent impairment rating. For the department to approve a permanency rating, the *AMA Guide* must be followed and the *AMA Guide* requires an objective comparison of x-ray films. In the instant case, all of the claimant's films were essentially normal. Moreover, claimant's expert would not rate the knee, yet claimant believes she is entitled to 100% compensability. Under our *Rules* and the Vermont Workers' Compensation Statute, permanency must be determined according to *the AMA Guide* and not the claimant's personal feelings of permanency.

14. The next issue is the degree of permanency for claimant's hip. In performing a

permanency evaluation for claimant's hip, Dr. Arata rated her according to Table 64 of the *AMA Guide*. See *The Guide* at 3/85. He followed the criteria for "Trochanteric bursitis (chronic) with abnormal gait" which resulted in his determination of 3% whole person or 7% lower extremity impairment. Dr. White, defendant's expert, found this rating to be inaccurate and rated her at 0% impairment.

15. Table 64 relies on a finding of chronic bursitis. This is contrary to Dr. Arata's findings that the surgery was a success. The claimant's bursitis had essentially been cured in that he removed the snapping and catching around the greater trochanter and found that she had minimal soreness over the hip area. Dr. White evaluated these findings and looked through the claimant's medical and physical therapy notes as well. He found no evidence of an abnormal gait and this is reasonable. There has been no observation in any of the claimant's doctor or physical therapist notes; therefore, there can be no finding of an abnormal gait. Moreover, without an abnormal gait and given the fact that the surgery cured the bursitis, Dr. White's finding that there was no increased impairment is more probable than Dr. Arata's finding under Table 64.

16. Total disability benefits are also claimed. Pursuant to the Form 22 Agreement between claimant and defendant, claimant received benefits up until February 4, 1997. This agreement reflected claimant's understanding and approval that she had reached an end medical result for her hip condition. Claimant now advances the argument that she is entitled to TTD for the 1993 injury to her left knee and for the alleged "aggravation" of her hip condition. Since the knee condition was not compensable by itself and since claimant's work fall was not shown to increase the compensability of the hip condition, TTD payments related to the knee injury are not possible.

17. The final issue to be decided is whether the 12 weeks of TTD and the outstanding hip surgery payment to Dr. Arata should be offset by the remainder of claimant's third party settlement ($37,500). The Vermont Workers' Compensation Act sets forth:

> In an action to enforce the liability of a third party, the injured employee may recover any amount which the employee or the employee's personal representative would be entitled to recover in a civil action. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

21 V.S.A. § 624 (e).

18. Section 624 (e) "[c]learly extends the potential liability from a third party settlement, for it envisages the availability of 'any recovery against the third party' . . . for reimbursement to the employer for any payments due under the Workers' Compensation Act. Moreover, the statute does not limit the

reimbursement to amounts already paid by the employer." *Jennings v. Vermont Department of Public Safety*, Opinion No. 35-95WC (Aug. 3, 1995).

19. The 1996 agreement between the claimant and the carrier illustrates the claimant's awareness that Aetna had not waived "future"statutory set-offs over and above the $135,000 lien. The 1997 hip surgery and 12 week period of disability that followed are clearly "future" compensation over and above that lien. Accordingly, as "future" compensable claims, the hip surgery and following 12 week period of temporary total disability must first be offset by the remaining $37,500 settlement.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, all the claims related to the alleged knee aggravation are DENIED. The related expenses for the 1997 hip surgery, subsequent 12 week temporary total disability benefits, as well as any future benefits related to the hip condition, are not compensable until the full amount of the statutory set-off is exhausted.

DATED at Montpelier, Vermont, this 8th day of January 1999.

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Steve Janson
Commissioner