STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-18299
Lena Cote	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Steve Janson
	)	Commissioner
J. C. Penney	)	
	)	Opinion No. 06-99WC

Heard in Montpelier, Vermont, on November 19, 1998
Record Closed: December 28, 1998

APPEARANCES:

John J. Welch, Jr., Esq., for Claimant Lena Cote
Eric A. Johnson, Esq., for Defendant J. C. Penney

ISSUE:

1. Whether the nasal problems suffered by claimant are a result of her work related injury.
2. If so, whether the claimant's rhinoplasty surgery was reasonable pursuant to 21 V.S.A. § 640.

THE CLAIM:

1. Pursuant to 21 V.S.A. § 640, medical and hospital benefits equal to $13,698.11.
2. Attorney's fees and costs pursuant to 21 V.S.A. § 678 (a).

EXHIBITS:

Joint Exhibits:

I: Medical Records
II: Deposition transcript of Dudley J. Weider, M.D.
III: Itemization of medical bills
IV: Curriculum Vitae of Dudley J. Weider, M.D.

Claimant's Exhibits:

1: Sign substantially similar to the one which hit claimant
2: Bill for glasses
3: Correspondence (for identification only)
4: Photograph of claimant in 1983
5: Photograph of claimant in 1997
6: Photograph of claimant in 1997

FINDINGS OF FACT:

1. The exhibits, except claimant's three for identification, are admitted into evidence. Notice is taken of all forms filed with the Department.

2. At all times relevant to this case, J. C. Penney was an "employer" and Lena Cote its "employee" as those terms are defined in the Vermont Workers' Compensation Act.

3. At the hearing, claimant testified clearly and articulately with a slight accent.

4. In the summer of 1995 claimant's nose was hurt in a swimming pool when a child, who weighed between 60 and 70 pounds, came up from under the water and struck her, causing a nosebleed. Claimant invoked a family ritual to help stop the bleeding, but did not seek medical attention at that time. On August 31, 1995 she mentioned the swimming pool incident to Dr. Charnock whom she saw for an unrelated complaint. On examination, Dr. Charnock noted an absence of "significant septal or bony nasal injury."

5. No evidence was presented to suggest that claimant suffered any trauma to her nose between August and December 1995.

6. Claimant worked for defendant in its Rutland store during the evening of December 4, 1995. At about 10:00 p.m., as claimant was adjusting a sign holder, it fell from a shelf about three feet above her, onto her nose. The sign, which is equipped with a metal base, plastic stem and frame, weighs about 8 ounces with most of its weight in the base. At 10:30 p.m. she went with a coworker to the Emergency Department at the Rutland Regional Medical Center where the triage nurse noted that a sign holder fell on the bridge of her nose and that she had pain and a bruise on the bridge of her nose but no bleeding. Dr. Stephen Leffler then examined her.

7. In his note for that visit, Dr. Leffler documented information from claimant's history and physical examination. The medical history, he noted, was "significant for fractured nose last summer." On examination, the doctor observed a "small area of bruising and swelling over the bridge of the claimant's nose which, to him, seemed "slightly crooked." In his comment for that visit, Dr. Leffler wrote, "The swelling is actually quite minimal and the patient states that her nose looks similar to the way it has looked since her nasal fracture last summer. It has not been straight since that injury. It is unlikely that there is a nasal fracture tonight." Claimant was discharged at 10:55 p.m.

8. Claimant testified that when she arrived at the hospital, she had "raccoon eyes" which the physician and the coworker who accompanied her laughed about. However, neither the triage nurse nor the physician documented any finding consistent with discoloration, swelling, or any other observation around claimant's eyes. The records on this issue, prepared by two observers, must be accepted over claimant's uncorroborated testimony.

9. Claimant testified further that Dr. Leffler's notes are "full of mistakes." She denied ever telling him that she had fractured her nose in the swimming pool incident and attributed his statement to her inability to make herself understood. Claimant's clear and articulate testimony at the hearing belies her suggestion that a doctor would not understand her.

However, there is nothing in the medical records to support a finding that claimant had fractured her nose before the December 1995 visit to the emergency department. The most likely explanation for Dr. Leffler's note is that claimant herself suspected that she had fractured her nose in the pool incident and told him so, although now she believes otherwise. Significantly though, she also told him that her nose had not been straight since the pool incident, another statement that she denies having made. At the hearing, claimant produced no admissible evidence to corroborate her contention that the pool incident had no effect on her appearance.

10. Almost eighteen months later, on May 22, 1997, claimant who was complaining of localized nose pain where her glasses touched, again sought medical attention from Dr. Charnock at Mid-Vermont ENT. The notes for that visit reference the pool incident as well as the sign incident. Dr. Charnock wrote that the pool incident resulted in trauma to the columnella from striking from below, resulting in a nosebleed and pain at the columnella and dorsal nasal ***upper*** lateral cartilage junction. Dr. Charnock also wrote that she "subsequently sustained an injury after that [when] a sign at work fell on her nasal dorsum ***in the same region***" (emphasis added).

11. Dr. Charnock's May 1997 examination demonstrated some mild open book deformity and splaying of the upper lateral cartilage of the nasal bone junction. Examination of the inner nose was normal with the nasal valve region and nasal roof appearing intact. Records from mid-Vermont ENT document a June 3, 1997 telephone call from claimant with complaints of nasal pain, headaches, and pain over her left eye with a history of approximately four nosebleeds over the past year.

12. On July 1, 1997 Dr. Oliver Donegan saw claimant at the Lahey Hitchcock Clinic. He made no mention of the pool incident in his note for that visit, but did note that an object had fallen on her nose back in December 1995, that she had been seen in an emergency room that day, and "aside from some slight bruising, no other abnormalities were found on that examination."

13. Dr. Donegan also noted that claimant developed a left-sided nasal obstruction in June 1996 that was resolved with nasal spray. Claimant further reported to him that in April 1997 she developed daily pain in the left side of her nose that radiated to the supraorbital area on that side. On examination, the nasal dorsum and external nasal structures showed no abnormalities, the nasal mucosa was normal, and no abnormalities were seen on fiberoptic rhinoscopy. Dr. Donegan concluded his note with the statement, "I have been unable to identify any pathology related to her present complaints." He recommended consultation with a neurologist.

14. On November 7, 1997 claimant saw Dr. Dudley Weider, also at the Lahey Hitchcock Clinic, who wrote that claimant "got clobbered by a falling object that fell about three feet and hit her smack in the nose . . . She went to the emergency room, was black and blue and looked like a raccoon . . . " He noted that she was left with an obvious widened bridge, which he later characterized as a "post-traumatic nasal deformity." Because of her complaints of congestion that awakened her at night, Dr. Weider "decongested her turbinates" after which they shrunk "beautifully, showing . . . a pretty straight septum

with no significant septal irregularities." He could not relate her continued complaints of pain to his physical findings.

15. At several subsequent visits, Dr. Weider noted his attempts to treat claimant's nasal congestion and pain with the result that the external nasal swelling diminished. In January 1998, Dr. Weider noted plans to proceed with a rhinoplasty for her nasal deformity. He wrote "the deformity of the external nose and most of the septal deformity are believed to be the result of her accident mentioned in my first dictation."

16. On April 27, 1998 Dr. Wieder wrote a letter in which he stated unequivocally that claimant was scheduled to have a septorhinoplasty "because of trauma sustained . . . in the work place. It is being done for functional and restorative reasons as opposed to cosmetic reasons."

17. On May 14, 1998 claimant underwent a submucous resection and rhinoplasty for nasal septal deviation with obstruction and external nasal deformity. Dr. Forst Brown performed the rhinoplasty; Dr. Weider performed the submucous resection and outfracture of inferior turbinates. It is this surgery that is the basis for the claim.

18. The surgery has been considered a success, with the result that claimant's nose is straight and her pain is gone, although the breathing in her left nostril is not quite as good as it might be, according to Dr. Weider's September 1, 1998 note. At his deposition on October 8, 1998, Dr. Weider testified that the rhinoplasty portion of the surgery was done strictly for appearance. The septoplasty, he said, was reasonably necessary as shown by the improvement in her air way.

19. Regarding causation, Dr. Weider at one point said that he could not conclude to a reasonable degree of medical certainty which of the two incidents, pool or sign, caused the nose problems that resulted in the surgery. Either the sign incident or the pool incident could have caused the deviated septum. He also said that the rhinoplasty was "occasioned" by the sign falling on claimant's nose. After reviewing records from April 1997, he conceded that a temporal relationship was lacking between her complaints to him on November 7, 1997 and the December 1995 sign incident and nose injury.

20. Claimant presented photographs to show the difference in her nose before and after the surgery. However, despite requests from the defendant, not one was produced to show the appearance of her nose between the time of the pool incident in the summer of 1995 and the sign incident the following winter. Nor was there a photograph to show the difference in her nose between the time of the sign incident in 1995 and the spring and summer of 1997 when she again sought medical attention for her nose.

CONCLUSIONS OF LAW:

1. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support her claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. 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. Claimant argues that the sign incident caused the problems that necessitated her nose surgery. In support of that contention, she suggests that the pool incident only affected the columnella portion of her nose, whereas the sign incident affected the bridge of her nose. Although the pool incident was from below and the sign incident from above, it is clear from Dr. Charnock's May 1997 note that claimant remembered experiencing pain in the same area of her nose after both incidents. Her later hearing testimony to the contrary was not convincing.

4. Claimant further argues that the insignificance of the pool incident is shown by the fact that she felt no need to seek medical attention and that, even if it did result in injury to her nose, the sign incident aggravated that injury. Citing *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 421 (1980), claimant concludes that, at the very least, the employer is responsible for the septorhinoplasty because the sign incident aggravated an underlying condition.

5. Medical records demonstrate the complexity and subtleties of this case. Several physicians examined claimant's nose, but documented different observations which at first blush seem to support causation. For example, Dr. Charnock documented a normal nose examination after the pool incident and Dr. Leffler noted that the nose was "slightly crooked" after the sign incident. Such a difference seems to support claimant's assertion that the sign incident caused a deformity in her nose. But Dr. Donegan's note, several months later, clearly stated that she had no external abnormalities. The differences suggest that any "abnormality" in claimant's nose at the time of the emergency department note 1) resolved later, 2) was simply too subtle to allow for unanimity in medical opinion or 3) was not considered an abnormal finding by all physicians. In any event, those records do not support claimant's contention that the sign incident aggravated a preexisting condition that then warranted surgery.

6. Significantly, no medical records from 1996 or the first few months of 1997 were introduced in this case. Dr. Donegan documented claimant's history of nasal obstruction that began in 1996 and intermittent swelling in her nose that began a few months before he saw her in July 1997. The following November, Dr. Weider documented a history that included being clobbered by a sign that resulted in raccoon eyes. With such a history, he naturally concluded that the sign incident necessitated the surgery he was recommending. But his certainty waned at deposition when he was shown records reflecting the onset of nasal obstruction in 1996 and pain in 1997. His original opinion further loses strength since a crucial fact on which it is based, that she had "raccoon eyes," has been rejected.

7. After he considered the 1997 records, Dr. Weider modified his original opinion by stating that the sign incident could have caused claimant's nose problems. The pool incident could have caused those problems. However, the delay from December 1995 to July 1997 suggests that something else also could have caused those problems.

8. When all facts are considered, we are left with no more than a possibility that the sign incident caused the nose injury that led to claimant's surgery. Possibility, however, is an insufficient basis for an award. Under the standard established in *Burton*, 112 Vt. 17 and its progeny, requiring that the inference from the facts proved must be the more probable hypothesis, this claim must fail.

9. Without the necessary finding of causation, it is not necessary to address the issue whether the surgery was reasonable under 21 V.S.A. § 640.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, this claimant's request for the cost of the surgery and her attorney's fees is DENIED.

Dated at Montpelier, Vermont, on this 29th day of January 1999.

_____

Steve Janson
Commissioner