

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

James Terhune	)	State File Number: L-07862
	)	
	)	By: Amy Reichard
	)	Staff Attorney
v.	)	
	)	For: Steve Janson
	)	Commissioner
Ames Department Stores, Inc.	)	
	)	Opinion No. 15-99WC

Heard in Montpelier, Vermont on January 6, 1999.  
Record Closed: February 3, 1999

**APPEARANCES:**

Douglas K. Bishop, Esquire for Claimant  
William C. Dagger, Esquire for the Employer

**ISSUES:**

1. Whether claimant suffered an injury by accident arising out of and in the course of his employment on October 12, 1997.
2. If the answer to the preceding issue is in the affirmative, whether the left knee surgery performed on May 20, 1998 was reasonable treatment for that work injury, pursuant to 21 V.S.A. § 640.
3. Whether claimant received and subsequently refused an offer of suitable employment.
4. Whether claimant's earned wages from the Vermont Army National Guard were incorrectly omitted from the calculation of average weekly wage, thereby entitling claimant to additional temporary disability benefits.
5. Whether claimant sustained a permanent partial impairment, and in what degree, as a result of his October 12, 1997 work injury.

**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 benefits pursuant to 21 V.S.A. § 640.
5. Mileage reimbursement pursuant to Rule 12(b)(1).
6. Attorney fees and expenses pursuant to 21 V.S.A. § 678.

**EXHIBITS:**

Joint Exhibit I: Medical Records

Claimant's Exhibit A: Physician Certification

Claimant's Exhibit B: Job Analysis

Claimant's Exhibit C: Vocational Rehabilitation Entitlement Assessment

Claimant's Exhibit D: Referee's Findings and Decision: Department of Employment and Training

Claimant's Exhibit E: Medical Billing: Department of Veterans Affairs

Claimant's Exhibit F: Ames Accident/Incident Documentation

Claimant's Exhibit G: 9/17/98 correspondence from W. E. Minsinger, M.D.

Claimant's Exhibit H: Form 25 Wage Statement for Vermont Army National Guard - 12/23/98

Claimant's Exhibit I: Affidavit of Douglas K. Bishop, Esquire

Defendant's Exhibit 1: Vermont Army National Guard - Duty performance and pay summary for claimant

Defendant's Exhibit 2: Deposition transcript of W. E. Minsinger, M.D.

Defendant's Exhibit 3: Curriculum Vitae of John R. Johansson, D.O.

Defendant's Exhibit 4: Ames Training Matrix

**FINDINGS OF FACT:**

1. Notice is taken of all forms filed with the Department in this matter. The exhibits are admitted into evidence.
2. At all times relevant to this case, claimant was an employee within the meaning of the Vermont Workers' Compensation Act. In addition, defendant Ames was an employer within the meaning of the Vermont Workers' Compensation Act.
3. The claimant has been employed by defendant Ames since 1985. Originally, claimant worked in the shipping and receiving department sorting merchandise. Subsequently, he became a floor associate. In this position, his duties included stocking shelves, assisting customers, and collecting shopping carts.

**A. CLAIMANT'S PRIOR MEDICAL CONDITION:**

4. In 1972, during his service in the military, the claimant was injured as a result of a battery explosion. At this time, claimant first experienced left knee pain, with a symptomatology localized on the top of his knee cap.
5. A comprehensive review of the claimant's medical notes included within the Veterans'

Administration's records indicates a steady progression of left knee pain through the years following the 1972 explosion. Most notably, in the spring of 1984, claimant began to experience intermittent buckling of his left knee.

6. Consequently, in treatment of claimant's complaints and based upon a pre-operative diagnosis of chondromalacia of the left patella, claimant underwent an arthroscopy on his left knee in April of 1984. The operative report revealed mediopatellar plica syndrome, which resulted in the surgical removal of the plica.
7. In the years following this surgery, claimant continued to experience problems of consistent pain with his left knee. Once again, he was diagnosed with left knee chondromalacia.
8. In August 1991, since claimant's complaints of left knee discomfort did not abate, an X-ray was ordered and performed. The results of the test revealed no evidence of joint effusion, loose body, fracture, dislocation or degenerative change.
9. In the subsequent months, claimant's knee condition seemed to deteriorate. In a February 1992 Compensation and Pension Exam Report from the Veterans' Administration, the examining physician noted that claimant experienced a constant ache in his left knee. Furthermore, the doctor documented various limitations in claimant's abilities.
10. A few months later in April 1992, claimant sought additional medical care for his left knee at the Veterans' Administration. At this time, claimant was evaluated by William E. Minsinger, M.D. After examining claimant, the doctor suspected claimant was suffering from recurrent knee pain associated with the synovial plica. As treatment for this condition, Dr. Minsinger prescribed medication to claimant and suggested a re-evaluation if his pain and discomfort did not improve.
11. The next recorded incident of claimant's knee pain was in May 1993. In a Veterans' Administration's ambulatory encounter note, the medical personnel explained that claimant experienced difficulty when both standing and walking. Furthermore, this note documented claimant's reports of his left leg buckling and giving way every morning. In the end, claimant was prescribed medication and referred for an orthopedic evaluation.
12. In January 1994, since claimant's left knee pain and problems continued to persist, a second X-ray was performed on claimant's left knee. In comparison to the 1991 study, the results of the study only revealed degenerative changes with interval progression of the patellofemoral.
13. Claimant's leg give way did not improve over the next few months as evidenced by a June 1994 note of the Appletree Bay Medical Center. Specifically, the record revealed that claimant reported incidents of falling at work as a result of his knee giving out.
14. To treat his continuing knee condition, claimant, in July of 1994, was referred to Andres Kaplan, M.D. for an orthopedic consult. After evaluating claimant, Dr. Kaplan diagnosed claimant with severe quadriceps tendinitis of left knee. In accordance with

this diagnosis, the claimant was directed to wear a knee immobilizer and he was prescribed enteric coated aspirin. Finally, Dr. Kaplan arranged for claimant to initiate physical therapy treatments.

15. Still complaining of knee pain and episodes of leg give way in April of 1994, claimant was again examined and treated by Dr. Minsinger, M.D. Upon examination, the doctor suspected a possible medial meniscal tear in claimant's left knee. Therefore, he arranged for an MRI. Although the results of the MRI failed to identify a definite tear, they did reveal degenerative changes in the posterior horns of the lateral and medial menisci. Acting upon these results, Dr. Minsinger opted for a course of conservative treatment and as such, he prescribed a hinged brace and suggested physical therapy treatments.
16. The July 1994 report of Dr. Kaplan further illustrates the weakened condition of claimant's left knee. The history section, in particular, documented claimant's report of knee give way, which claimant explained had persisted for the past two years.
17. As a result of his involvement in a motor vehicle accident, claimant sustained another injury to his left knee in December of 1994. Specifically, the medical records indicate that claimant's left knee struck the driver's door handle. Upon examination, patella tenderness was documented. However, an X-ray of the left knee was negative for either fracture or dislocation.
18. Following this accident, claimant began treating with Patrick J. Mahoney, M.D. in January 1995. The doctor's records reveal claimant's continued complaints of knee pain, which resulted in claimant having difficulty in ambulating. Dr. Mahoney opined that claimant's symptoms were due to extra-articular trouble and, therefore, he recommended an exercise program and he directed the physical therapist to instruct claimant on the utilization of a TENS unit
19. During the course of 1995, claimant continued to treat for his left knee pain and problems. Specifically, claimant sought medical care from Dr. Minsinger in March and from Dr. Mahoney in July.
20. In a February 1996 consultation sheet from the orthopedic clinic of the Veterans' Administration, claimant's condition was described as chronic left knee pain. Since the medical provider determined that the patellofemoral pain was nonoperative, a course of strengthening was prescribed, in addition to a recommendation for acquisition of a new knee brace.
21. Continuing in his treatment with Dr. Minsinger, claimant's left knee condition was examined and evaluated again in August 1996. On this occasion, Dr. Minsinger questioned the etiology of claimant's symptoms.
22. Dr. Minsinger also examined claimant in February of 1997. During this visit, claimant complained of a left knee ache on a daily basis. Although claimant did not report leg give way at this time, Dr. Minsinger still contemplated a meniscal pathology as the cause of claimant's condition.

23. In August 1997 claimant again sought medical care from the Veterans' Administration as a result of his left knee pain. Since claimant exhibited a very exaggerated pain response during the physical exam, the medical provider entertained a chronic knee pain diagnosis. Accordingly, claimant was prescribed a different medication and directed to secure a new knee brace. In addition, an X-ray was taken on claimant's left knee. In comparison to the 1991 and 1994 studies, no interval changes were detected and the X-ray revealed an otherwise normal appearance of the left knee.
24. In addition to the consistent reports of leg give way as documented by the collection of medical records generated in the care of claimant, claimant also testified on this issue during the Hearing. Specifically, prior to his October 1997 injury, claimant estimated that his left knee would give way once or twice a month.

B. THE OCTOBER, 1997 INCIDENT:

25. On October 12, 1997, claimant, acting within the scope of his employment duties, was collecting shopping carts, which were scattered about the parking lot, and returning them to the defendant's premises.
26. While performing this job duty, as explained during the Hearing, claimant fell to the ground and injured his left knee. Specifically, claimant stated that as he was pushing a series of shopping carts, they abruptly stopped. Subsequently, as he was attempting to move these carts, claimant's left knee gave way and he collapsed to the ground.
27. Rebecca Hurley, a co-employee of claimant, witnessed this incident. In her testimony, she described her observations. She saw claimant pushing the shopping carts and suddenly falling to the ground. She was unable to verify if the shopping carts were either lodged or caught in the pavement.
28. Claimant was thereafter transported by ambulance to the Fletcher Allen Health Care. The notes of the medical personnel who treated claimant indicate that the left knee was injured after it gave way and claimant fell to the ground. During this visit, an X-ray was performed on claimant's left knee, the results of which revealed minimal patellar spurring.
29. Subsequently, claimant sought follow up medical treatment for his left knee with the Veterans' Administration, his primary care giver. Within the majority of these records, the mechanism of claimant's injury was documented as left knee give way, which caused claimant to fall to the ground. Originally, the medical personnel opined that claimant sustained a knee strain, rather than a ligament tear. However, when claimant was still complaining of pain during a November visit, an MRI was ordered and thereafter performed in February of 1998. The results of this study revealed a probable tear of the posterior horn of the lateral meniscus.
30. In March 1998 claimant initiated physical therapy with Work Recovery Service, Inc. in an effort to treat his left knee condition. Initially, it is important to note that the physical therapist also explained that claimant injured his left knee after it gave way and caused

claimant to fall. To treat this injury, the therapist planned to utilize electrical stimulation, ultrasound, strengthening exercises, and functional activities.

31. After attending all of his scheduled physical therapy sessions, claimant's therapist determined that there was no significant progress to justify continuation of the program. As such, claimant was discharged to an independent home program.
32. Since the physical therapy was ineffectual in the treatment of claimant's condition, claimant underwent a left knee arthroscopy in May 1998 at the direction of Dr. Minsinger. During this procedure, a 5-mm radial tear involving the central portion of the lateral meniscus was identified. Thereafter, the edges of the tear were trimmed with the hope that this procedure would improve claimant's condition.
33. Since the surgical procedure, claimant still experiences problems with his left knee, including pain and episodes of knee give way.

C. EXPERT MEDICAL OPINIONS:

34. Both parties in the instant matter presented expert opinions to support and bolster their respective positions. Claimant proffered the testimony of Dr. Minsinger, claimant's treating physician. Whereas, defendant relied upon the opinion of John R. Johansson, D.O., who conducted an independent medical examination of claimant.
35. Dr. Minsinger testified, in his opinion, that claimant's meniscal tear was either caused or exacerbated by the October 1997 fall since claimant's symptoms after the October incident were most consistent with the small radial tear found during surgery. Moreover, in making his causal determination, Dr. Minsinger also relied upon the fact that following the October fall, claimant was unable to return to work on an eight hour per day schedule and, accordingly, he concluded that the October incident either created or exacerbated the meniscal tear.
36. In addition to addressing the cause of claimant's tear, Dr. Minsinger also commented on the cause of claimant's fall. When questioned during his deposition on the mechanism of claimant's fall, Dr. Minsinger related that claimant's leg gave way and he fell. When asked for more specifics, the doctor stated that he was unable to recall any further details about the incident.
37. Dr. Johansson, defendant's expert, also offered his comprehension of the cause of claimant's October 1997 fall. Specifically, he explained that claimant had a consistent history of leg give way, and that on the day of the incident, he understood that claimant's leg gave out and caused claimant to fall to the ground. Although Dr. Johansson did concede that pressure is exerted upon an individual as a result of a pushing action, he never went so far as to correlate the cause of claimant's fall with the pushing of shopping carts as opposed to simple leg give way.
38. Furthermore, Dr. Johansson also opined on the overall medical condition of claimant's left knee. After conducting his examination of claimant, Dr. Johansson determined that claimant's October 1997 injury was not related to the meniscus finding on the MRI, but

rather it was related to the patellar hypersensitivity. As such, after recommending a course of medication and physical therapy treatments for claimant, the doctor further opined that claimant was not a good candidate for an arthroscopic meniscectomy.

## CONCLUSIONS OF LAW:

1. In a worker's compensation claim, it is the burden of the claimant to establish all facts essential to support his 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). 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 to establish the claim. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
2. 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. *Austin v. Vermont Dowel & Square Co.*, Opinion No. 05-97WC (April 7, 1997) (citing *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941)). 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, supra*.
3. Accordingly, as a threshold matter in the instant case, claimant must prove, as the more probable hypothesis, that his fall in October 1997 was caused by his employment duty of collecting shopping carts as opposed to simple leg give way, which was a common manifestation of claimant's pre-existing knee condition.
4. After a thorough and comprehensive review of the evidence presented in this matter, it is clear that claimant has failed to satisfy his burden of establishing the causal link between his employment and the October 1997 fall.
5. At the outset, in determining the cause of claimant's October 1997 fall, it is significant to note that the unrefuted medical evidence revealed claimant's longstanding history of leg give way as a result of his left knee condition. In fact, claimant testified that prior to the October 1997 incident, his left leg was giving way on a consistent basis of once or twice a month.
6. In addition, the medical providers who treated claimant for his October 1997 injury documented the mechanism of claimant's fall as leg give way. Although the claimant insists that he fell as a result of attempting to move shopping carts after they had abruptly stopped, a witness to the incident, Rebecca Hurley, described the events differently. Specifically, Ms. Hurley explained that claimant simply fell to the ground suddenly. At no time did Ms. Hurley observe claimant either halting abruptly or attempting to dislodge shopping carts. The discrepancy between these two versions of events is resolved in favor of Ms. Hurley being the more credible and persuasive witness whose rendition of events was supported by the objective medical records. The conclusion that the fall was

spontaneous, unprovoked by anything involving the cart, is further bolstered by the overall unconvincing and contestable nature of claimant's testimony. *See Bruntaeger v. Zeller*, 147 Vt. 247 (1986) (concluding that as trier of fact, it is the province of the hearing officer to determine the credibility of the witnesses and weigh the persuasiveness of the evidence.)

7. Furthermore, both Dr. Minsinger and Dr. Johansson, the medical experts in this case, recollect that at the time of the October 1997 fall, claimant's leg simply gave way. In fact, neither expert witness correlated claimant's employment duties with the cause of the October 1997 fall.
8. In further analysis of this claim, a review of *O'Connor v. Town of Windsor*, Opinion No. 82-81WC (June 3, 1981) is both informative and instructive. In that case, a police officer whose leg buckled while on foot patrol brought a claim for his subsequent diagnosis of rotary instability of the tibia on the femur bone. Similar to the present matter, the claimant in *O'Connor* also had a history of knee problems, including intermittent buckling. In addition, the medical expert in the case testified that it was only conceivable that work duties caused the medical problem. As such, after evaluating the proffered testimony and medical records, the claim was denied because the evidence showed only a possibility, not a probability, that the claimant's job caused the injury.
9. Comparably, in the present matter, since acceptance of claimant's account of the cause of his fall would equate with nothing more than suspicion or surmise, his claim must be rejected for failure to proffer the necessary evidence.
10. Since claimant did not prevail in this matter, he is not entitled to an award for attorney's fees or costs.

**ORDER:**

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, all claims are DENIED.

DATED in Montpelier, Vermont, this 20th day of April 1999.

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Steve Janson  
Commissioner