

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

|                      |   |                        |
|----------------------|---|------------------------|
| Bonnie Bowen         | ) | State File No. M-09440 |
|                      | ) |                        |
|                      | ) | By: Margaret A. Mangan |
| v.                   | ) | Hearing Officer        |
|                      | ) |                        |
| Jobsite Services and | ) | For: R. Tasha Wallis   |
| Travelers            | ) | Commissioner           |
|                      | ) |                        |
|                      | ) | Opinion No. 23-00WC    |

Hearing held in Montpelier, Vermont, on February 2, 2000  
Record Closed on February 17, 2000

**APPEARANCES:**

Heidi S. Haught, Esq. for the claimant  
Edward R. Kiel, Esq. for the defendant

**ISSUE:**

Was claimant's January 15, 1999 fall on the stairs caused by her work related knee condition or was it an independent intervening event?

**Claimant seeks:**

1. Temporary total disability benefits pursuant to 21 V.S.A. § 642.
2. Medical and hospital benefits pursuant to 21 V.S.A. § 640.
3. Attorney's fees and costs.

**EXHIBITS :**

|                       |  |
|-----------------------|--|
| Joint Exhibit I:      | Medical Records  |
| Claimant's Exhibit 1: | Letter from Insurance Adjuster to Attorney Joseph Galanes (for i.d.) |

Department's Forms:

1. Form 21, Agreement for Temporary Total Disability Compensation, signed by both parties and approved by the Department on December 11, 1998.

2. Form 27, Notice of Intention to Discontinue Payments, filed on March 31, 1999 and approved by the Department on March 8, 1999.

**STIPULATION:**

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") at all relevant times.
2. Defendant was an employer within the meaning of the Act at all relevant times.
3. Travelers Insurance was the workers' compensation insurance carrier for defendant at all relevant times.
4. On or about November 4, 1998, claimant suffered a personal injury by accident arising out of and in the course of her employment with defendant.

**FINDINGS OF FACT:**

1. At times relevant to this action, claimant was an employee of Jobsite Services, Inc., a company which had a contract with Price Chopper Supermarket of Morrisville, Vermont, to clean the floors, employee break room and bathroom of the store. Claimant began working as a floor maintenance worker for Jobsite on May 12, 1998.
2. Claimant's duties were to edge, sweep, dust, mop, and buff the aisles at Price Chopper. On November 4, 1998, she was working the nightshift, from 11:00 p.m. to 7:00 a.m. As she was cleaning the floor, claimant slipped on a small piece of cardboard on the floor and fell. She landed on her buttocks with her left leg underneath her and her right leg straight. Claimant testified that she immediately felt pain in her left knee and back.
3. Claimant's supervisor, her son, witnessed the fall, then helped her to her car where she iced her knee until the end of the shift when she went home. Shortly after she arrived home, a Jobsite Services employee telephoned her to discuss what had happened.
4. The next day the claimant saw the physician's assistant at her primary physician's, Dr. Philip Kiely's, office. The note for that visit describes the fall with resultant back and knee pain. Claimant then received an immobilizer for her leg, instructions to use crutches as needed, as well as ice, ibuprofen and elevation.
5. Claimant's back pain seemed to resolve, but her knee pain persisted, prompting Dr. Kiely to note at a November 17, 1998 visit, that "popping in her left knee is an ongoing problem." Claimant was then referred to Dr. Anthony Lapinsky, an orthopedic surgeon, who first saw her on November 20, 1998 and noted swelling, effusion, clicking and popping in her left knee. The next day, in his November 21, 1998 note, Dr. Lapinsky recorded that claimant had "noted locking symptoms, clicking and popping in her knee associated with swelling." His examination revealed moderate discomfort and an

antalgic gait. After finding that the claimant had "mainly medial knee pain and ... some pseudo instability symptoms," he recommended a left knee arthroscopy with debridement or repair.

6. On November 27, 1998 Dr. Lapinsky performed the arthroscopy and debrided two areas in the knee which had become hypertrophic, the synovium (a membrane) and plica, to form a stable rim.
7. In his follow-up note of December 7, 1998, Dr. Lapinsky noted that claimant's surgery had been for post-traumatic synovitis. On examination her knee had full extension and swelling was nearly resolved. To help her regain movement and maintain strength, he recommended three to four weeks of physical therapy.
8. The claimant testified that she had symptoms of her left knee clicking, locking and giving way after the surgery in November 1998 but may not have reported those symptoms to Dr. Lapinsky because she was using crutches and, consequently, was less concerned about the instability.
9. In the January 6, 1999 physical therapy note is the entry that claimant was ambulating with a limp, had an increase in the range of motion in her knee, and had hamstring weakness. By January 10, 1999 the therapist recorded that claimant could go up and down stairs and that her strength was improving, although she was still walking with a slight limp. She was discharged from physical therapy that day. Claimant testified that her physical therapist, Peter Kramer, told her that doing stairs would help her strengthen her knee and leg muscles.
10. On January 11, 1999 Dr. Lapinsky wrote that the claimant could return to work part-time on January 18, then full time on February 1, but that she was not to climb ladders until February.
11. On January 15, 1999 claimant fell on the steps that lead up to her second floor apartment from the outside. She testified that she was walking down the narrow stairway to take her dog for a walk, although she was not holding the dog's leash. She had one hand on the handrail and the other on the opposite wall. Without warning or any sign of pain, she testified, her left knee gave way under her. She fell down eight to nine stairs to the bottom, scraping her knee in the fall. When she landed, her left knee was under her.
12. The next day, on January 16, 1999, claimant went to Dr. Kiely's office where the examiner noted that she had fallen down stairs the previous night. The note for that visit also documents that her left knee "gave out" and was swollen and very painful.
13. On January 18, 1999 claimant saw Dr. Lapinsky who documented a left knee contusion and took claimant out of work for another six weeks. A month later, on February 17, 1999, Dr. Lapinsky examined and manipulated claimant's knee under general anesthesia.
14. On March 11, 1999 Dr. Lapinsky wrote:

Follow up from Bonnie's course of treatment for a knee flexor contracture. Unfortunately, she fell while walking down some stairs when her knee gave out on her. This and her previous injury, I believe are secondary to her original Worker's Compensation injury. Prior to the Worker's compensation injury which started all the problems, she did not have any giving way of her knee. Since I have visualized her knee arthroscopically, I do not feel that she has a true ligamentous giving way but most likely a quadriceps partial giveaway but certainly enough to cause her further injury as has been demonstrated.

15. On July 22, 1999 Dr. Lapinsky wrote that the claimant had reached a medical end result.
16. Claimant is not seeking any compensation for permanent partial impairment for the November 4, 1998 or the January 15, 1999 injuries.

### **Other injuries**

17. In September 1999 the claimant returned to work at a job at the Yankee One Dollar Store in Morrisville, Vermont. During the week of September 26, she re-injured her left knee while kneeling to stock shelves. Claimant does not assert that the September 26 injury is related to the work injury of November 4, 1998 or the subsequent fall in January 15, 1999.
18. Prior to any of the events described above, the claimant had injured her left knee, as evidenced by a June 19, 1997 visit to Dr. Neale who reported that she had given a long history of increasing knee pain. She first had a left knee arthroscopy on July 29, 1997 when no "marked abnormalities" were found. The medical evidence shows that claimant had no left knee problems after that time and before the fall at Price Chopper in November 1998.

### **Independent Medical Evaluation**

19. At the defendant's request, Dr. Jonathan Fenton reviewed claimant's medical records and examined her on December 13, 1999. In his report that followed, Dr. Fenton concluded, "it does appear that the claimant's complaints after her 11/4/98 fall were causally related to that injury. It is not clear that the arthroscopic findings were directly causally related to that injury, but certainly the procedure of arthroscopic evaluation was reasonable and necessary, as was the physical therapy subsequent."
20. Dr. Fenton opined that "there is not enough evidence to support that her preexisting 1997 knee injury was or was not causing continued symptoms..." He concluded with the opinion that "I cannot, within a reasonable degree of medical certainty, state the fall of 1/15/99 was clearly secondary to her workplace injury."

## Attorney's Fees and Costs

21. The claimant submitted evidence of \$231.51 in disbursements and a copy of her fee agreement with her attorney. In addition, she submitted an itemized statement to document that counsel's time litigating this claim totaled 44.9 hours. She requests an award of attorney's fees at the rate of \$60 per hour.

## 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). She 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. Once a claimant has established her right to recover, and her symptoms had not been stable for years, the burden shifts to the defendant to prove that either the injury is not causally related or that an aggravating intervening event has occurred. *Miller v. Cersosimo Lumber Co.*, Opinion No. 55-96WC (Oct. 5, 1996); but see, *Drown v. Cabot Farmers Cooperative Creamery*, Opinion No. 13-95WC (Apr. 26, 1995). (When symptoms have been stable for several years, the claimant has the burden of producing evidence that establishes the lack of a causal connection with an intervening event.)
3. "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause." 1 Larson's Workers' Compensation Law, Chapter 10.
4. The issue in this case is whether claimant's fall on the stairs was a sufficient intervening cause to terminate the employer's obligation to provide her with workers' compensation benefits. The defense suggests that in an attempt to avoid returning to work, the claimant had a fall that was not related to the November 1998 fall or its treatment. The medical evidence in support of this theory was from Dr. Fenton who was unable to say that the fall was caused by the work place injury. He never said that it was not. The defense also argues that any weakness claimant may have suffered in her leg was due to preexisting knee problems and not to the November 1998 injury.
5. Contrary to the defendant's argument, the record supports the claimant's contention that her left leg had stabilized after her 1997 surgery and before the work-related injury in November 1998. Consequently, the fall on the stairs cannot be attributed to that earlier injury.
6. The parties agree that the November 1998 surgery was a reasonable response to the

workplace injury at Price Chopper. The medical records document claimant's left leg weakness following that surgery. Obviously to avoid an accident from a weakened leg or one with restricted movement, claimant was specifically instructed not to climb ladders. A week before the fall, she was observed walking with a limp. The day after the accident she told an examiner that her knee had given out the evening before, causing her to fall. Even if claimant had no history of her leg giving way before the fall, the inescapable conclusion is that a leg still recovering from the surgery gave way under her. The defense, therefore, has not met its burden of proving that the fall was due to a non-work-related intervening cause. Accordingly, the claimant prevails.

7. Because claimant has prevailed due to the efforts of her attorney, she is awarded her expenses as a matter of law and attorney's fees as a matter of discretion. 21 V.S.A. § 678; Workers' Compensation Rule 10 (a)(2). She is awarded \$231.51 in expenses and attorney's fees of \$2694 (44.9 hours x \$60/hour).

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, Jobsite is ORDERED to pay claimant all benefits to which she is entitled under the Vermont Workers' Compensation Act and consistent with this opinion, including temporary total benefits, medical benefits and attorney's fees.

Dated at Montpelier, Vermont, this 31<sup>st</sup> day of July 2000.

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R. Tasha Wallis  
Commissioner