

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

)	State File No. M-09935
)	
Teresa Nielson)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Michael S. Bertrand
ITT Specialty Risk Services as)	Commissioner
insurer for Johnson Controls)	
)	Opinion No. 10-03WC

Hearing held in Montpelier on June 9, 2002
Record Closed on August 12, 2002

APPEARANCES:

Craig A. Jarvis, Esq. for the Claimant
Keith J. Kasper, Esq. for the Defendant

ISSUES:

Is the Claimant's left knee condition causally related to her work related right knee injury and, therefore, compensable?

EXHIBITS:

Joint I	Medical Records
Claimant's 1:	Photographs; a-f: stairs; g & h: brace
Claimant's 2:	Transcript of deposition of Anthony Lapinsky, M.D.
Claimant's 3:	Medical bills

STIPULATION OF FACTS:

1. Claimant Theresa Nielson was an employee of Johnson Controls at all times relevant to this claim.
2. ITT Specialty Risk Services was Johnson Control's workers' compensation carrier at all times relevant to this claim.
3. Claimant has a compensable work injury to her right knee on August 31, 1998 while in the employment of Johnson Controls.
4. Claimant's average weekly wage for purposes of this claim is \$295.20, which was calculated as of March 18, 1999.
5. Claimant's weekly net income for purposes of this claim is \$248.62.
6. Claimant reached medical end result and maximum medical improvement with respect to her left knee condition on April 24, 2002.

CLAIM:

Claimant alleges that she took two falls that led to her left knee condition as a result of her right knee problems.

FINDINGS OF FACT:

1. The defendant employed claimant as a head house cleaner. On August 31, 1998 claimant injured her right knee in the course of her employment. The parties agree that the right knee injury was compensable. Benefits related to the right knee, including payment for surgical procedures, have been paid. The operations on the right knee were performed on March 26, 1999, July 27, 1999 and December 14, 1999.
2. Crutches were prescribed following the December 14, 1999 operation for two days, then as needed. According to Dr. Lapinsky, he would have put the Claimant on crutches through the end of January.
3. The first medical documentations of a left knee problem are in a February 2, 2000 physical therapy form, noting that the claimant was then complaining of left knee pain "as well" and a letter from Dr. Lapinsky to Dr. Bruno dated February 7, 2000. In the letter, a three-month history of knee pain and snapping is documented, although there is no mention of a fall or any other type of trauma in either the physical therapy note or Dr. Lapinsky's letter.

4. At the hearing Claimant described a sudden onset of knee pain.
5. Claimant remembers falling down the stairs at home, but concedes that her memory about the timing of those falls is not clear. At the hearing, she placed the falls in the weeks following her December 1999 surgery. However, with no medical documentation of a fall at that time, no corroborating evidence, prior inconsistent deposition testimony and a faulty memory as to dates, that testimony cannot be accepted as fact.
6. Dr. Lapinsky treated claimant for left knee synovitis, a plica syndrome and chondromalacia of the medial femoral condyle.
7. Claimant has had four surgical procedures on her left knee, on February 15, 2000, May 31, 2000 and January 4, 2002.
8. A March 3, 2000 physical therapy record notes that the claimant was wearing a left knee brace and walked with crutches.

Expert Medical Opinions

9. Dr. Anthony Lapinsky, a board certified orthopedic surgeon and claimant's treating physician, opined that Claimant's left knee condition was related to her right knee condition. That opinion is based on a combination of factors, specifically the falls Claimant allegedly had and increased stress put on the left knee because of protective weight bearing or an antalgic gait due to her right knee injury. When he first saw her for a left knee problem and diagnosed synovitis, he concluded, "it was overstress due to compensation for her right knee." In two other patients he had seen a similar knee problem arising from a combination of degenerative processes, a new injury and increased stress placed on the knee.
10. Dr. Lapinsky's theory of compensatory stress presupposes a gradual onset of symptoms. Although such a theory seems to be supported by a three month history of left knee pain Claimant gave to Dr. Lapinsky when she saw him in February 2000, it cannot explain her failure to ever have mentioned left knee pain when she sought care in those intervening months.
11. Dr. Victor Gennaro, the defense expert and board certified orthopedic surgeon, first saw the Claimant on December 6, 1999 before the surgery she had that month on her right knee. Claimant reported to Dr. Gennaro that she had fallen down a flight of stairs, a report that casts further doubt on her hearing testimony about a fall after the December surgery.

12. After a second IME January 14, 2002, Dr. Gennaro found that he could not reconcile the records with the history Claimant provided, nor was he able to find a causal connection between her left knee problem and her right. He justified his opinion with the absence of a medical report substantiating the Claimant's history that she had fallen and injured her knee and the lack of medical literature supporting Claimant's theory that her left knee was injured as a result of stress on the work-related right knee.
13. Claimant submitted an affidavit as to attorney hours and costs supporting his claim for fees of \$9,000 hours and \$1,654.17 in costs.

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*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence 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. 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. The claimant must establish by sufficient credible evidence 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).
4. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
5. Medical evidence was received from well-qualified orthopedic surgeons with experience treating conditions such as the Claimant. The experts reviewed the records, were familiar with the literature and pulled on experience treating other patients. Their opinions must be evaluated in light of guidelines established by this Department and without the aspect of the Claimant's history that I reject, which is that she had fallen after her December 1999 right knee surgery.

6. The factors considered when faced with differing medical opinions are: whether the expert had a treating physician relationship with the claimant; the professional education and experience of the expert; the comprehensiveness of the evaluation performed, including whether the expert considered all relevant records in making the assessment; and the clarity and thoroughness of the evaluation, including the objective bases underlying the opinion. *Walker v. Johnson Fuels Services, Inc.* Opinion No. 39-00WC (Nov. 30, 2000). Dr. Lapinsky has the advantage as the treating physician; Dr. Gennaro as the more objective examiner. Both are well qualified by evidenced by their education, training and experience. When the unreliable aspects of the Claimant's history are stripped from Dr. Lapinsky's opinion, the connection between the right and left knee becomes no more than impermissible speculation. Claimant did not fall after the December 1999 right knee surgery, as she would now like to remember. Once the falls are removed from the analysis, to accept Dr. Lapinsky's theory of causation requires accepting that the onset of the left knee pain was gradual. Yet such a conclusion is inconsistent with medical records where a three-week history is described without any evidence that in that three-week period that she mentioned left knee pain to a health care provider, although she had surgery and contact with health care providers in the interim. Claimant's left knee pain could not have developed gradually, which would support her overstressed causation theory, without her having reported it to someone before February 2000.
7. The facts, medical records and logical inferences, therefore, support Dr. Gennaro's opinion regarding a lack of causation between the work-related right knee injury and Claimant's subsequent left knee problems.
8. Pursuant to § 678(a) and WC Rule 10, a prevailing Claimant is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion when supported by evidence, including the fee agreement. Because she has not prevailed, however, Claimant is not entitled to fees or costs.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 27th day of February 2003.

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.