

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. D.)	Opinion No. 11-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
State of Vermont,)	For: Patricia A. McDonald
Agency of Human Services)	Commissioner
)	
)	State File No. W-04045

Pretrial Conference held on August 8, 2005
Hearing held in Montpelier on December 20, 2005
Record Closed on December 30, 2005

APPEARANCES:

Scott Skinner, Esq., for the Claimant
Keith Kasper, Esq., for the Defendant

ISSUE:

Whether Claimant's injury of November 9, 2004 was a recurrence of her prior work injuries and therefore compensable.

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit A:	Curriculum Vitae of Jonathan E. Fenton, D.O.
Claimant's Exhibit B:	Curriculum Vitae of Bruce V. Foerster, M.D.
Claimant's Exhibit C:	April 22, 1994 permanency evaluation by Dr. Foerster
Claimant's Exhibit D:	Form 1, State File No. J-07872
Defendant's Exhibit 1:	Curriculum Vitae of Victor Gennaro, D.O.
Defendant's Exhibit 2:	Curriculum Vitae of Verne Backus, M.D.

CLAIM:

1. A determination of compensability.
2. Medical and hospital benefits under 21 V.S.A. § 640.
3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS:

1. Claimant has been an employee of the State within the meaning of the Vermont Workers' Compensation Act (Act) since 1980.
2. At all relevant times, Defendant has been the employer of Claimant within the meaning of the Act.
3. Claimant had three prior relevant compensable workers' compensation claims in 1991 (State File No. E-04697), 1995 (State File No. J-07872), and 2000 (State File No. R-05326).
4. On November 9, 2004, Claimant collapsed at work.
5. On January 21, 2005, Claimant underwent a third surgery on her left knee.
6. Claimant seeks a determination from the Commissioner that her November 9, 2004 incident was a recurrence of her prior work injuries and therefore a compensable claim. Claimant seeks all workers' compensation benefits associated with this injury, including medical benefits pursuant to WC Rule 40, and if successful, an award of attorney fees, costs and interest.
7. The issue to be determined in this matter is: Was Claimant's November 9, 2004 incident a recurrence of her prior work injuries and therefore compensable?
8. The parties agree to the admission of a Joint Medical Exhibit and that the Commissioner can take judicial notice of all official forms and all other workers' compensation claims Claimant has filed with this Department.

FINDINGS OF FACT:

1. At issue is how to characterize Claimant's November 2004 collapse at work. An appreciation of its significance requires an examination of her history.
2. Claimant had a work-related back injury on September 6, 1991 (State File No. E-04697). This compensable back injury resulted in a compensable left knee injury on or about August 25, 1993, while claimant was engaged in physical therapy for the back injury.
3. Claimant experienced no knee problems prior to the August 25, 1993 injury. She had no symptoms of osteoarthritis (degenerative disease) prior to 1993 and was first diagnosed with osteoarthritis in 1994.

4. Claimant had surgery for the compensable left knee condition on November 17, 1993 at which time the post-operative diagnosis was medial and posterior meniscus tears in left knee and chondromalacia. She recovered range of motion and strength, gained some pain relief and was given a 9% impairment rating of the left lower extremity by Bruce V. Foerster, M.D. She continued to have pain in her left knee and continued to treat in 1994; however, by August of 1994 her left knee pain was increasing. At this time, Claimant was diagnosed with early osteoarthritis.
5. Claimant was never informed that she had a permanency rating for her left knee and did not become aware of this fact until December of 2005. Claimant was not represented by counsel in connection with State File No. E-04697.
6. Prior to the knee injury in August of 1993, Claimant engaged in league bowling, walking, and travel.
7. Claimant had another work-related injury to her left knee on February 6, 1995 (State File No. J-7872) when she fell on ice at work. The Form 1 noted that she fell on her knees although the primary issue listed was her thumb.
8. Claimant did not receive medical treatment for her knee injury as part of the 1995 claim. After the fall, however, Claimant had to curtail her physical activities even more than after the August of 1993 incident; she was no longer able to bowl and had to give up recreational walking.
9. Claimant's third work-related injury to her left knee on August 25, 2000 (State File No. R-05326) was the result of a chair moving out from under her as she tried to sit down. Claimant fell to her knees sustaining injuries that required surgery on the left knee; she continued post-operative treatment on the left knee into 2002.
10. Claimant has not reached medical end for the August of 2000 injury. Claimant was not represented by counsel in connection with State File No. R-05326.
11. The State of Vermont has accepted all claims for the prior work-related injuries to Claimant's knees as compensable, paid medical bills pursuant to the workers' compensation fee schedule, and has most recently paid for the injections she had to her knees in 2002.
12. On November 9, 2004, Claimant experienced extreme pain in her left knee while walking at work that sent her to the emergency room at Northwestern Medical Center.
13. Claimant's doctor, Bruce V. Foerster, M.D., a Board Certified orthopedist who had operated on her left knee twice before, performed surgery on January 21, 2005. The post-operative diagnosis included left knee medial and lateral degenerative meniscal tears, Grade II chondromalacia, and cartilaginous loose body in the left knee.

14. The claim for workers' compensation benefits following the November 9, 2004 injury was denied by the State of Vermont and is the subject of this action.
15. Claimant continues to work for the State.
16. Claimant continuously experiences a high level of baseline pain that increases with any walking. The treating surgeon, Dr. Foerster, and both of the independent medical examiners, Drs. Fenton and Backus, opined that Claimant requires a complete left knee replacement.

Medical Testimony

17. Dr. Foerster, a Board Certified orthopedic surgeon with many years experience, stated that in his experience and practice, he had witnessed "countless" instances where injuries hastened the progression of a degenerative disease; sometimes the degeneration is highly accelerated from an injury. Dr. Foerster has treated Claimant's knee injuries from 1993 until present as well as her back injury in 1991. He stated in his December 1, 2005 letter that Claimant's work injuries aggravated and accelerated her degenerative process because of the role of the meniscus in the distribution of force, the subsequent concentration of force in other parts of the knee as the meniscus is reduced by surgery and degeneration, and the resulting accelerated wear from the concentration of force. While conceding that other factors may contribute to the degenerative disease (e.g., obesity, natural progression of the disease, and heredity), Dr. Foerster was unable to ignore the fact that injuries certainly contribute, aggravate, and accelerate degenerative processes as they have in Claimant's case.
18. Dr. Fenton conducted an Independent Medical Review (IME) of Claimant on July 14, 2005. He opined after reviewing the medical records and conducting an examination that Claimant's degenerative disease was aggravated and accelerated by the documented incidents in 1995 and 2000. Further, he stated that her meniscal knee surgeries were traumatic to the degenerative disease in and of themselves because of the redistribution of force to other parts of the knee. Dr. Fenton further stated that Claimant's injury in November of 2004 was a recurrence of her prior symptoms of degenerative changes and a free cartilaginous body in the joint caused by previous injuries and surgeries aggravating and accelerating the degenerative disease; therefore, causally related to the work injuries of 1995 and 2000. Finally, Dr. Fenton's prognosis for Claimant's left knee is poor, opining that she will require a total knee replacement in the near future.

19. Dr. Backus conducted an IME on December 9, 2004. After reviewing Claimant's medical records and conducting an exam, he opined that Claimant has advancing degenerative changes of osteoarthritis in the left knee. He concurred with Drs. Fenton and Foerster regarding the existence of chondromalacia and loose bodies, which preexisted Claimant's November 9, 2004 fall. Further, he stated in the IME that the loose body moving into position would likely result in the acute pain Claimant experienced on that day. However, Dr. Backus disagrees with Drs. Fenton and Foerster regarding the significance of prior injuries and surgeries on the progression of Claimant's degenerative disease. While Dr. Backus concurs with Dr. Foerster's proposal for further surgery, he ultimately concludes this to be necessary only as a result of the natural progression of the degenerative disease.
20. Dr. Gennaro conducted an Independent Medical Records Review on November 6, 2005 of records dating from 1991 to 2005. Without examining the Claimant, he opined that the degenerative disease progressed to the current stage due to Claimant's obesity. Dr. Gennaro concluded the degenerative disease has run its natural course with minor aggravations from alleged injuries in 1995 and 2000, but that her obesity was the substantial contributing factor in the progression of the degenerative process.
21. Drs. Backus and Gennaro acknowledge Claimant's onset of the degenerative disease in 1993. However, neither doctor recognized the diagnosis as a natural consequence of a compensable work-related injury to the left knee.

Attorney fees and costs

22. Claimant's attorney submitted evidence of 75.2 hours worked on this case and \$1,540.48 incurred in necessary 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 Morse & Co.*, 123 Vt. 161 (1962).
2. 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).
3. 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 probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
4. Where the causal connection between an injury and an incident 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. The Workers' Compensation Act, having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983).
6. An employer takes each employee as is and is responsible under workers' compensation for an injury which disables one person and not another. *Morrill v. Bianchi*, 107 Vt. 80 (1935); *Perkins v. Community Health Plan*, Opinion No. 39-98WC (1998); and *Winckler v. Travelers & Foley Rail Co.*, Opinion No. 29-01WC (2001).
7. "Recurrence" means the return of symptoms following a temporary remission. WC Rule 14.9242.
8. Larson's Workers' Compensation Law § 10.syn Synopsis to Chapter 10 provides in the section captioned "Range of Compensable Consequences" as follows:

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.

9. Claimant has satisfied her burden to show the November 9, 2004 incident resulting in her third left knee surgery and subsequent current condition requiring further surgery are the natural consequence, progressive worsening and complication of the work-connected injuries and not caused by an independent intervening cause. Drs. Foerster and Fenton agree that Claimant's degenerative disease resulting in chondromalacia and cartilaginous loose body, which caused Claimant's November 9, 2004 incident, were a natural consequence, progressive worsening and complication of the work-connected injuries; thus, a recurrence of her prior compensable work-related injuries and surgeries.
10. Defendant asserts Claimant's obesity to be an independent intervening cause breaking the causal chain of the work-related injury. However, employers cannot escape responsibility for work-related injuries based on an employee's weight when it was the work that caused the injury because an employer takes a claimant as she is. See *Stannard v. Stannard Company, Inc.*, Opinion No. 33-01WC (2001).
11. The medical testimony is consistent. Claimant has suffered from osteoarthritis only since 1993. All four of the doctors agreed that she was asymptomatic for this condition prior to 1993. The four doctors disagree as to the origin of the osteoarthritis and the aggravating, accelerating, and complicating elements.

12. In considering conflicting expert medical opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional treatment and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all the relevant records. *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997).
13. In analyzing conflicting medical opinions, we begin first with the length of time the physician has provided care to the claimant. Dr. Foerster is a Board Certified orthopedic surgeon who has provided care for the Claimant since her first work-related knee injury in 1993 and has performed three surgeries on the Claimant's left knee. Dr. Foerster has also been her primary physician for ongoing knee problems stemming from the 1993 injury. Drs. Fenton and Backus each spent approximately one hour with Claimant during their individual IMEs. Dr. Gennaro conducted an Independent Medical Records Review; thus, did not personally examine Claimant. Therefore, criterion one weighs heavily in favor of the Claimant.
14. Second, all four of the doctors have a similar degree of professional training and experience in the issues and medical conditions presented in this case. Although, Drs. Fenton and Backus are not surgeons, Dr. Fenton has extensively studied and lectured on the treatment of post-traumatic arthritis, while Dr. Backus has not conducted this level of research on this issue. Dr. Gennaro is a surgeon, but he did not conduct an examination of the Claimant. As a result, the most qualified expert offered by the defense did not conduct the most comprehensive IME and the Claimant's IME, though not a surgeon, has more knowledge of the relevant issues than the Defendant's independent physician. Thus, the expert medical testimony offered by the Claimant again weighs in her favor.
15. Third, all four doctors were provided a full set of relevant treatment records. Dr. Foerster performed a series of histories and physicals prior to the three surgeries as well as office notes over 12 years. He also wrote a two-page report in support of his statement that the 2005 left knee surgery was related to, aggravated, and accelerated by, her prior work-related knee injuries and surgeries. Dr. Foerster acknowledged that degenerative arthritis and weight were considerations in his analysis, yet he concluded the substantial factors contributing to Claimant's condition were the work-related injuries and subsequent surgeries. Dr. Fenton concurred with this opinion. The Defendant's argument that subjective reports by the Claimant are not reliable; thus, diminishing the credibility of Dr. Foerster's opinion are wholly inconsistent with their own expert's IME. Dr. Backus describes Claimant as a good historian who provides information consistent with her medical records. Moreover, the Department does not consider a poor memory to detract from the overall credibility as subjective reporters. *Worthen v. Newton Gas*, Opinion No. 48-04WC (2004).

16. In contrast, Drs. Backus and Gennaro opined that Claimant's condition is the result of degenerative arthritis progressing its natural course. Dr. Gennaro went on to further state that Claimant's degenerative arthritis was exacerbated, if not caused by, her obesity. Drs. Backus and Gennaro failed to recognize in their reviews the importance of the 1993 initial knee injury stemming from physical therapy undergone after a work-related back injury. This oversight is significant because it is the final want for objectivity on the part of Drs. Backus and Gennaro. Their rigid position on Claimant's condition were formed on the assumption that she already had symptomatic osteoarthritis before the 1995 and 2000 injuries, while overlooking the pertinent fact that the 1993 injury was also work-related and was the point in time when Claimant's osteoarthritis became symptomatic. Therefore, Drs. Foerster and Fenton's testimony is again given greater weight.
17. Finally, the comprehensiveness of the examinations inherently weighs in favor of Forester because he has been the treating surgeon and physician for over 12 years. Drs. Backus and Fenton completed similarly comprehensive IMEs, except for the oversight of the 1993 work-related injury on the part of Dr. Backus. Dr. Fenton concurred with Dr. Foerster's opinion. While Dr. Gennaro is an experienced surgeon, he did not conduct his own examination of the Claimant.
18. Based on the expert medical evidence provided and a balancing of the above criteria from *Miller* and *Gardner*, Drs. Foerster and Fenton's opinion that Claimant's degenerative disease resulting in chondromalacia and cartilaginous loose body, which caused Claimant's November 9, 2004 incident, were a natural consequence and thus a recurrence of her prior compensable work-related injuries is beyond the more probable hypothesis, with reference to the possibility of other hypothesis.

Attorney fees and costs

19. Based on 21 V.S.A. § 678 (a) and Rule 10.000, Claimant is awarded the fees of \$90.00 per hour for 75.2 hours and costs of \$1,540.48.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for compensability is GRANTED. Defendant is ORDERED to pay:

1. All workers' compensation benefits arising out of the recurrent injury of November 9, 2004, including medical and hospital benefits under 21 V.S.A. § 640 for claimant's left knee, temporary disability benefits for time out of work following her surgery in January 2005, and permanent partial disability benefits if and when such a determination is made;
2. Litigation costs of \$1,540.48 and attorney fees of \$6,768.

Dated at Montpelier, Vermont this ____ day of March 2006.

Patricia A. McDonald
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.