STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. D-23022
Maureen Brough	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
CNA Insurance/	)	For: R. Tasha Wallis
Fletcher Allen Health/RSKCo.	)	Commissioner
	)	
	)	Opinion No. 12-02WC

Hearing held in Montpelier, Vermont on November 8, 2001
Record closed on January 2, 2002

APPEARANCES:

Craig A. Jarvis, Esq. for the claimant
Christopher McVeigh, Esq. for the defendant

ISSUES:

1. Did Maureen Brough's fall on January 27, 1991 arise out of and in the course of her employment with Medical Center Hospital of Vermont (MCHV), now called Fletcher Allen Health Care (FAHC)?

2. If so, is this claim barred by the statute of limitations? Is the defendant estopped from asserting a statute of limitations defense?

3. Was the claimant's right patellofemoral arthritis caused by the January 29, 1991 fall?

4. If the injury from the 1991 fall is compensable, is the claimant's current condition a recurrence of the injury for which CNA is liable or an aggravation for which CNA is not liable?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 2:	First Report of Injury, knee injury, January 27, 1991
Claimant's Exhibit 3:	First Report of Injury, shoulder injury, September 10, 1994
Claimant's Exhibit 4:	Report of Benefits and Related Expenses Paid

CLAIMANT SEEKS:

1. Permanent Partial Disability Compensation under 21 V.S.A § 648 (percentage of impairment yet to be determined);

2. Medical and Hospital benefits under 21 V.S.A. § 640; and

3. Attorney Fees and Costs under V.S.A. § 678(a).

FINDINGS OF FACT:

1. Claimant is a registered nurse who began working for MCHV in 1971 and has worked in various departments of the hospital over the years. Since 1988 or 1989 her work has been in the maternity ward.

2. On January 27, 1991 claimant was on duty in the maternity ward. On her lunch break, she drove from the hospital to a deli to get sandwiches for herself and other nurses. Although it was not encouraged, nurses were allowed to leave the hospital to get lunch. When the claimant returned to the hospital she parked in the employee parking lot, then walked to the rear entrance of the Adams Building. That entrance was only accessible by a magnetic card which claimant did not have with her. So when she saw a person in front of her open the door, she picked up her pace to catch the door while it was still open. In the process, she caught her foot on an uneven section of the sidewalk and fell on her right knee.

3. Although immediately after the fall claimant's right knee swelled and bled, she worked for the rest of that day. The next day she went to the emergency department at the hospital where she complained of pain in her right kneecap. On examination, localized tenderness, but no effusion, was noted; x-ray revealed no fracture; claimant was "fully ambulatory." She was diagnosed with contusion of the right patella (knee), treated with pain medication and instructed to use ice and elevate the area. The medical records include nothing to indicate that the claimant had any follow-up care after the emergency department visit.

4. The First Report of Injury for the fall is dated June 5, 1991 and filed in this Department on June 6, 1991. The injury specified on that form is "Broken kneecap (diagnosed last week by her physician)."

5. Based on convincing medical testimony from Dr. John Lawlis, orthopedic surgeon, that a fractured knee cap would cause significant pain and would cause one to walk without bending her knee, the emergency department note that claimant was fully ambulatory and the x-ray revealing no fracture, I find that claimant did not fracture her knee cap in the 1991 fall.

6. Claimant has noticed that her right knee has been constantly swollen since the 1991 and that she has had episodes of pain that have worsened over time. She has also noted a "dent" in her right kneecap.

7. In 1993 the claimant was treated at the MCHV employee health department for her left shoulder and right knee. In 1994 she incurred a work-related shoulder injury for which she treated with Dr. John Lawlis. Also in 1994, Dr. Lawlis saw her for right knee pain and swelling.

8. CNA paid almost $6,000 for the treatment of the claimant's shoulder and two short periods of temporary total disability as reflected on the Form 13, Report of Benefits & Related Expenses Paid. That form includes an injury date of September 10, 1994 and a File number H-08427, clearly the shoulder claim. Because the claimant was treating for the shoulder and knee at the same time and because no bills were sent to her for payment, she assumed that CNA was paying for treatment of the knee as well. That payment continued at least until physical therapy ended on April 12, 1995. CNA did not challenge payment for treatment of the knee until 1999.

9. Although the claimant had episodes of pain and swelling in her right knee, they did not appear serious to her until 1998.

10. Between 1991 and 1999 the claimant worked part-time, averaging 56 hours every two weeks. The amount of time she spent on her feet varied according to whether she was working as a charge nurse or staff nurse.

11. CNA provided workers' compensation insurance to FAHC until July 10, 1996.

12. On January 28, 1997 the claimant had an MRI of her right knee that revealed no meniscal tears, but evidence of early degenerative changes in the medial joint compartment and a collection of fluid in the knee.

13. In July or August of 1998 the claimant fell on her cousin's porch causing a bruise to her knee. She did not seek medical treatment.

14. In October 1998 the claimant again fell onto her right knee, this time inside the hospital.

15. A November 1, 1998 MCHV emergency department note documents a fall in 1991-92 and that she fell again on October 29, 1998 injuring her right knee. On examination, a big bruise was noted on the knee. A diagnosis of knee contusion was made.

16. In November 1998 the claimant twisted her knee when she fell out of a chair she later learned was defective.

17. It was in 1998 that claimant found she could no longer rise out of a chair without difficulty and was experiencing right knee pain all the time rather than intermittently.

18. On April 21, 1999 a standard MRI of both knees was performed. The scan of the right knee revealed severe degenerative changes, a meniscal tear, joint effusion and patellar tendon enthesophyte. Chronicity was deemed uncertain and clinical correlation with trauma recommended. On the left, degenerative changes, strained ligament, a Baker's cyst joint effusion and tendon enthesophyte were seen.

19. The claimant first filed a Notice and Application for Hearing on March 20, 2000 for the January 27, 1991 injury.

Past History

20. In 1986 claimant was in a motor vehicle accident after which her right knee was painful and swollen for a few days. X-rays at the time showed no degeneration. The clinical diagnosis was chondromalacia.

21. On a walking tour of Ireland in 1989, claimant noticed some right knee pain and swelling.

22. X-rays of both knees taken on January 17, 1990 were read as "radiographically within normal limits."

MEDICAL OPINIONS:

1. Dr. S. Glen Neale, a board certified orthopedic surgeon, opined that the fall on January 27, 1991 aggravated or accelerated claimant's right knee osteoarthritic condition. Dr. Neale started treating the claimant in January 1997 for her shoulder. On July 28, 1998 he began treating her right knee. Specifically he noted that the fall increased her symptoms and put her over a threshold where it became too painful not to mention. He also noted that she has reported symptoms predominantly in her right knee. Dr. Neale testified that arthroscopic surgery of the claimant's knee is a reasonable option if she chose to pursue it. In his opinion, she may need a total knee replacement in the future. He thought that the "dent" claimant described in her knee could have been caused by a thickening of bursa due to the formation of scar tissue. Thickening of the bursa would not contribute to arthritis, but is an indication that the force of a fall would be significant enough to accelerate arthritis.

2. Dr. Neale further testified that he could not say with medical certainty that claimant's subsequent work at MCHV/FAHC aggravated or accelerated her knee condition. He was aware of no medical studies that linked working on one's feet for long periods of time to acceleration of osteoarthritis. Furthermore, he could not say with medical certainty that the fall in October of 1998, twisting of her knee in November of 1998 or the fall on her cousin's porch in 1998 had accelerated claimant's knee condition. He found it possible that favoring her right leg over time accelerated the claimant's left knee condition.

3. Dr. John Lawlis, a board certified orthopedic surgeon, could not say with a reasonable degree of medical certainty, a standard he interpreted as meaning greater than 50%, that claimant's fall on January 27, 1991 accelerated or aggravated the claimant's osteoarthritic knee condition. That opinion was based on the following: If a traumatic event aggravated or accelerated the condition in her right knee, its severity would have been evident within approximately two years of the fall. Yet when he saw the claimant in 1993, her osteoarthritis was not severe. And at that time he noted no signs suggesting a meniscal tear. He also noted that the claimant has a tilt to her kneecap, which can cause arthrosis (condition commonly called arthritis but which lacks the inflammatory component) because the patella tracks abnormally.

4. Dr. John Johansson, an osteopathic physician specializing in rehabilitation medicine, examined the claimant on August 12, 2000 and reviewed her medical records, x-rays and MRI reports. To a reasonable degree of medical certainty, he opined that the fall on January 27, 1991 was not the cause of the claimant's osteoarthritic condition. He based that opinion on: knee pain claimant had before the 1991 fall, the bilateral nature of her osteoarthritis as evidenced by Grade IV degenerative changes noted in both knees on the 1999 MRI and the bilateral malaligned patellas. He reasoned that had the 1991 fall been the causative agent, deterioration in the right knee would have occurred rapidly, probably within two years of the trauma, which did not occur here. Dr. Johansson agreed that the claimant suffered from an antalgic gait, favoring her right leg, when he saw her. An antalgic gait can be an indication that the right knee was worse than the left. He also noted crepitus in her right leg that was not present on the left, another indication that the right leg was worse. Similarly he noted tenderness to palpation on the medial and lateral joint line of the right knee but not the left and said that this was an indication that the arthritis in the right knee was worse than the left.

5. Dr. Jon Thatcher, a board certified orthopedic surgeon, reviewed the claimant's medical records and radiographs at the request of the defendant. He testified to his opinion, based on radiographs from January 1991 and May of 2001, that claimant has a bilateral patellar tilt, meaning that the claimant's kneecaps do not track with upward and downward motion the same way a normal kneecap would. That confirmed his impression that the claimant has a congenital problem with her knees. He also testified that claimant's work at FAHC and the falls she incurred after 1991 could have aggravated or accelerated her osteoarthritic knee condition.

6. Dr. Thatcher, Dr. Lawlis and Dr. Johansson all testified that twisting injuries cause meniscal tears.

DISCUSSION:

Burden Of Proof

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. It is the defendant's burden to prove that the statute of limitations bars this claim. *Bull v. Pinkham Engineering Assocs.*, 170 Vt. 450 (2000).

Did the 1991 fall arise out of and in the course of the claimant's employment?

4. It is undisputed that under the authority of *Miller v. IBM*, 161 Vt. 213 (1993), a fall on hospital premises when an employee is returning from picking up lunch is a compensable claim. However, the defendant argues that *Miller* does not apply to this case because it was decided after the claimant's fall.

5. In support of its position, defendant cites to *Montgomery v. Brinver Corp.* where it is stated "[t]he right to compensation for an injury under the Workmen's Compensation Act is governed by the law in force at the time of occurrence of such an injury." 142 Vt. 461, 463 (1983) (citing 1 V.S.A.§213, 214; other cites omitted). The *Montgomery* rule applies to statutory changes and not to judicial decisions that are applied retroactively except when they establish a new rule of law or where such an application would be inequitable. *In re Estate of Gillin* ___Vt___(2001), 773 A.2d. 270,272 (2001) 0-373, citing *In American Trucking Ass'ns, Inc. v. Conway*, 152 Vt. 363, 377, 566 A.2d 1323, 1332 (1989).

6. The premises rule articulated in *Miller* is a well-established exception to the going and coming rule of excluding from coverage off-premises injuries when one is commuting to work. The Court adopted the standard: "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunchtime are compensable." *Miller*, 161 Vt. at 216, citing 1 A. Larson, The Law of Workmen's Compensation § 15.00. The Court explained:

> This rule promotes the broad policy of remediation because it covers workers for part of the necessary job-related activity of commuting to and from work. It clearly delineates the employer's liability for injuries to commuting employees as coextensive with the employer's premises. By limiting liability to areas within the employer's control, this test incorporates a fair compromise in allocating the cost of worker injuries. Finally we note that this "premises rule is the law in the majority of jurisdictions."

Id. (citing Larson, § 15.11)

7. There is nothing inequitable to applying this longstanding rule of Workers' Compensation Law to a case that predates the *Miller* decision.

8. Therefore, under the well-recognized premises rule, the claimant's fall on the hospital walk way in 1991 arose out of and in the course of her employment. Such a conclusion is particularly vital in this case where the defendant never filed a denial to the First Report of Injury filed in 1991. The first denial was filed when in an apparent response to the claimant's request for benefits in 1999.

Causation and Aggravation/Recurrence

9. Several physicians have testified in this matter on the issue of causation. When I consider the five factors typically considered when evaluating conflicting opinions, See, e.g. *Miller v. Cornwall Orchards,* State File No. E-20431 (Aug. 4, 1997), I find that none had a physician-patient relationship dating back to the 1991 injury, all had relevant records and films available to them, all but Dr. Thatcher examined the claimant, all are well qualified to give opinions in this matter, with the orthopedic surgeons having slightly greater advantage than the rehabilitation specialty of Dr. Johansson. Choosing which opinion is the most persuasive, therefore, turns on the clarity, thoroughness and objective support of the opinions rendered as well as on the elements on which there is agreement.

10. All experts agree that trauma to the knee can accelerate an underlying osteoarthritic condition in the patellofemoral joint. Doctors Neale and Thatcher agreed that the claimant's 1991 fall accelerated claimant's knee condition. Dr. Johansson testified that the 1991 fall did not accelerate her condition, a conclusion supported by the reasoning underlying Dr. Lawlis's opinion. The 1991 fall was not as serious as the claimant alleges. She walked normally and had no need to seek medical care after the initial emergency department visit until she saw Dr. Lawlis two years later. At the visit to Dr. Lawlis in 1993 claimant had symptoms in her right knee, but no sign of a meniscal tear and evidence of only mild osteoarthritis. Had the fall in 1991 been sufficient enough to have worsened her osteoarthritis signs would have emerged sooner than they did, and certainly within two years. The objective support underlying the opinions rendered by Dr. Lawlis and Dr. Johansson convince me that the fall in 1991 did not accelerate the claimant's osteoarthritis.

11. And if the 1991 injury had accelerated the condition, events after that time intervened to break any causal chain.

12. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Workers' Compensation Rule 2.1110. "Recurrence" means the return of symptoms following a remission. Rule 2.1312.

13. This Department traditionally considers five factors in determining whether a medical condition is an aggravation or recurrence: whether there is a subsequent incident or work condition which destabilized a previously stable condition; whether the claimant had stopped treating medically; whether the claimant had successfully returned to work; whether the claimant had reached an end medical result; and whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998). In this case, there is no evidence that the claimant had reached a medical end result or stopped treating medically. However, there were three subsequent incidents that caused knee symptoms, claimant had successfully returned to work, and objective tests demonstrate a worsening. On balance, the factors devolve in favor of an aggravation.

14. In support of its theory of aggravation, defendant proposes two theories: first that the claimant's subsequent work as a nurse accelerated her knee condition. Second, defendant contends that one or more specific incidents--a fall on her cousin's porch, a fall and a twisting injury at work-- aggravated the claimant's condition. It is not necessary or even possible to identify a specific incident to find an aggravation on the record in this case.

15. Claimant's January 1997 MRI did not demonstrate any meniscal tear in the right knee, yet the April 1999 MRI did. And it was in 1998 that the claimant noticed a sudden change in symptoms to the point where getting out of a chair was problematic. Whatever the specific cause, claimant's right knee condition worsened at some time between 1997 and 1999. Physicians who reviewed the 1999 MRI film or report agree that the claimant had advanced osteoarthritis, a condition that was not present even two years after the 1991 fall. It defies logic to conclude that a 1991 fall led to the advanced osteoarthritis in the face of three subsequent incidents and the developmental mal-alignment of her knees. To accept Dr. Neale's conclusory opinion that the 1991 fall accounts for the claimant's current condition would be to ignore the objective evidence to the contrary, evidence interpreted by other, more persuasive medical opinions.

16. Without proof of causation, therefore, the claimant cannot prevail. And given this denial, it is not necessary to address the statute of limitations issue presented.

ORDER:

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

Dated at Montpelier, Vermont this 21st day of March 2002.

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R. Tasha Wallis
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.