STATE OF VERMONT
DEPARTMENT OF LABOR

Patricia Hastings

v.

Green Mountain Log Homes

Opinion No. 03-09WC

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. C-04634

OPINION AND ORDER

Hearing held in Montpelier on February 29, 2008
Record closed on March 31, 2008

APPEARANCES:

Thomas Bixby, Esq., for Claimant
Jason Ferreira, Esq., for Defendant

ISSUE PRESENTED:

Are Claimant's total knee replacement surgery and ongoing medical treatment causally related to the compensable injury she suffered in May 1989?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Liberty Mutual Insurance Co. claim file
Claimant's Exhibit 2: Photographs
Claimant's Exhibit 3: Photographs
Claimant's Exhibit 4: Photographs
Claimant's Exhibit 5: Photographs
Claimant's Exhibit 6: Diary, May 1989 – December 1989
Claimant's Exhibit 8: Various invoices
Claimant's Exhibit 9: Notice of Injury and Claim for Compensation
Claimant's Exhibit11: Letter from Nancy Duprey to Claimant, October 25, 1989
Claimant's Exhibit 12: Report of Claimant Interview, November 11, 1989
Claimant's Exhibit 13: Letter from Claimant to Lenox Hill/3M, December 11, 1990
Claimant's Exhibit 14: Letter from Charles Peck to Lenox Hill/3M, January 3, 1991
Claimant's Exhibit 15: Recorded interview, March 21 (year not specified)
Claimant's Exhibit 18: Deposition of Elizabeth McLarney, MD, taken on February 12, 2008

Defendant's Exhibit 3: Letter from Leonard Rudolf, MD to Jason Ferreira, Esq., May 3, 2007; Independent Medical Evaluation, May 3, 2007; *Curriculum Vitae*

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640
Interest, attorney's fees and costs pursuant to 21 V.S.A. §§664 and 678(a)

FINDINGS OF FACT:

1. In May 1989 Claimant was an employee of Defendant and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.

3. Claimant began working for Defendant as a mechanical draftsperson in 1987. In addition to this work, Claimant also enjoyed a variety of recreational activities. Most notably, Claimant has long been an accomplished horseback rider. For most of her life, she has owned, boarded and trained horses. She also gives horseback riding lessons and guided trail rides.

Claimant's Prior Medical History

4. In 1984 or 1985 Claimant injured her right knee while playing racquetball. She underwent arthroscopic debridement of her medial meniscus, following which she experienced complete pain relief.

5. Although the medical records relating to the 1984 injury were not available, it is likely that Claimant also suffered a significant tear to her anterior cruciate ligament (ACL) at the time of her racquetball injury.

6. The ACL functions in a normal, uninjured knee to guide the joint through movement and protect against abnormal motions. When the ACL is absent, non-functional or incompetent, a knee brace may be prescribed to provide external support and restraint.

7. Following her 1984 injury, Claimant was prescribed a Lenox-Hill knee brace, which she wore while playing volleyball. The Lenox-Hill brace is a functional, hinged brace whose purpose is to stabilize an ACL-deficient knee. Had Claimant not torn her ACL in the context of the 1984 injury, she would not have been prescribed a Lenox-Hill brace.

8. After recovering from her 1984 injury, Claimant did not seek any medical treatment for her right knee until May 12, 1989.

Claimant's May 1989 Work Injury

9. On May 12, 1989 Claimant injured her right knee at work when she missed a step and fell down some stairs while en route from her office to Defendant's main office. Her knee swelled immediately and she felt "outrageous" pain.

10. Claimant reported her injury and then presented to her primary care provider for treatment. The medical record of that visit referred to Claimant's 1984 knee injury and reported that since that time Claimant's right knee had dislocated on two or three occasions in the past two years.

11. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

12. In June 1989 Claimant was referred to Dr. Shirreffs, an orthopedic surgeon, for further evaluation. An MRI study documented a medial meniscal tear and disruption of the ACL, both findings that Dr. Shirreffs believed probably were related to Claimant's 1984 injury rather than to her more recent fall at work.

13. Dr. Shirreffs performed arthroscopic surgery on Claimant's right knee in July 1989. His operative report documented the following findings:

    (a) an old medial meniscus tear;

    (b) a chronic ACL tear with less than 5% of the fibers intact;

    (c) a small lateral meniscus tear; and

    (d) significant Grade III and IV degenerative changes in the articular surfaces of the joint.

14. An ACL that has fewer than 5% of its fibers intact is one that is almost completely torn. An ACL in this condition is deficient and incompetent, meaning that the tension in the ligament is insufficient to guide the knee through movement in a normal fashion.

15. There is a strong correlation between the presence of an incompetent ACL and the development of degenerative joint disease, or arthritis, in the knee. A deficient ACL causes increased stress to the surfaces inside the knee, which creates an environment of accelerated wear to the cartilage. As the knee continues to move abnormally, the cartilage gets progressively thinner. A grading system exists to identify the increasing severity of cartilage degeneration. Grade IV degeneration indicates extreme thinning of the articular cartilage. The next step, Grade V, indicates exposed bone-on-bone degeneration.

16. At the time of the July 1989 arthroscopy, Dr. Shirreffs anticipated that because of the ACL laxity and degenerative arthritis from which Claimant already suffered as a result of her 1984 injury ultimately she would need a total knee replacement. By the same token, to the extent that Claimant suffered from residual pain and laxity following the July 1989 arthroscopy, Dr. Shirreffs attributed these symptoms to the degenerative arthritis that already was present when her May 1989 work injury occurred. In order to address these symptoms, and to delay the prospect of total knee replacement surgery for as long as possible, Dr. Shirreffs advised Claimant to wear her knee brace and to find employment that did not require prolonged standing, climbing or descending stairs, or heavy lifting.

17. Claimant recovered well from Dr. Shirreffs' July 1989 arthroscopy. By the end of 1989 she was able to resume full-time work. She also resumed her normal recreational activities, including horseback riding. In contrast to Claimant's experience following her 1984 arthroscopy, however, this time she found it necessary to wear her Lenox-Hill brace on a much more frequent basis. Whereas before Claimant had worn the brace only to play volleyball, now she wore it daily.

18. From December 1989 until 2006 Claimant held a variety of jobs. She worked as a cook, as a retail clothing store clerk, as a laborer and trail guide at a riding stable, and as an optic grinder in a manufacturing facility. She did odd jobs gardening, painting, house cleaning and babysitting. She also did work on her own property, assisting in the construction of two sheds. Last, she continued to ride, train and care for her own horses.

19. Claimant did not seek any medical treatment for her right knee from December 1989 until 2006. She occasionally took pain medications and continued to wear her knee brace daily. When the knee brace had to be refurbished in 1990, 1991, 1992, and again in 2003, Defendant paid for the cost of doing so.

Claimant's Medical Course since 2006

20. In early 2006 Claimant's knee brace again required refurbishment. This time, however, Defendant denied Claimant's request that it cover the cost of doing so. Defendant argued that Claimant's non-work-related activities, most notably horseback riding, had both aggravated her pre-existing knee injury and caused her knee brace to deteriorate. Therefore, Defendant asserted, it was no longer responsible for maintaining or replacing the brace.

21. Also in early 2006, for the first time since 1989 Claimant sought medical treatment for increased symptoms in her right knee. In February 2006 she reported to Dr. McLarney, the orthopedic surgeon who was treating her for an unrelated injury, that her right knee "continues to bother her" while horseback riding, and also that it "grinds" and "gives out on her." Claimant reported to Dr. McLarney that she had worn a knee brace since her 1989 work injury and arthroscopy. She did not inform Dr. McLarney that in fact the knee brace had been prescribed five years earlier, after the 1984 arthroscopy.

22. Initially Dr. McLarney prescribed conservative therapy for Claimant's right knee symptoms, but this proved ineffective. The only remaining treatment option being surgical, in August 2007 Claimant underwent a total knee replacement.

23. In Dr. McLarney's opinion, Claimant's 1989 work injury either caused or accelerated the need for her total knee replacement in 2007. Dr. McLarney acknowledged that Claimant must have partially torn her ACL in the context of her 1984 injury, as otherwise she would not have been prescribed a Lenox-Hill knee brace. She also acknowledged that Claimant suffered some loss of articular cartilage, or arthritis, as a consequence of that injury. However, based on her interpretation of Dr. Shirreffs' July 1989 operative report, Dr. McLarney concluded that Claimant's ACL did not tear completely until the May 1989 work injury. Once it did, this caused further loss of articular cartilage, which ultimately led to the need for a total knee replacement.

24. At Defendant's request, in May 2007 Claimant underwent an independent medical evaluation with Dr. Rudolf, an orthopedic surgeon. Based primarily on his interpretation of Dr. Shirreffs' July 1989 operative report, Dr. Rudolf concluded that Claimant's May 1989 work injury neither caused nor accelerated the need for a total knee replacement. According to Dr. Rudolf, Dr. Shirreffs' report clearly documented that as a result of her 1984 injury Claimant already had both a non-functioning, deficient ACL and advanced degenerative arthritis at the time of her May 1989 work injury. In Dr. Rudolf's opinion, had the 1989 work injury accelerated the progression of Claimant's arthritis in any appreciable way, she would have come to a total knee replacement within a far shorter period of time, not 16 or 17 years later. Dr. Rudolf concluded, therefore, that the 1989 injury played no role in the progression of the disease, and that the need for a total knee replacement already was firmly established before that injury occurred.

25. Dr. Rudolf concluded that the only new injury to Claimant's knee causally related to the 1989 work injury was the lateral meniscus tear noted in Dr. Shirreffs' operative report. Dr. Rudolf ascribed a 1% whole person permanent impairment to this injury.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. The issue in this claim is medical causation. Claimant argues that her 1989 work injury either caused or accelerated the necessity for her total knee replacement in 2007. Defendant contends that as a consequence of Claimant's prior, unrelated knee injury the conditions that necessitated a total knee replacement already existed and were unaffected by the 1989 work injury.

3. As a preliminary matter, Claimant argues that because Defendant accepted her 1989 work injury as compensable and in particular, because Defendant covered the cost of refurbishing her knee brace from 1990 until 2003, it has waived its right to contest responsibility for her 2007 total knee replacement. The law as to waiver is neither as broad nor as heavy-handed as Claimant would have it applied in this claim, however.

4. The burden is on the party asserting waiver to show "an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question." *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954), cited in *D.B. v. Vergennes Auto, Inc.*, Opinion No. 42-06WC (October 9, 2006). A waiver may be either express or implied, but if it is the latter, then "the facts and circumstances relied upon must be unequivocal in character." *Holden & Martin, supra.*

5. I cannot conclude from the fact that Defendant declined to dispute its responsibility for refurbishing Claimant's knee brace that it thereby intended to accept responsibility for her total knee replacement as well. The facts and circumstances surrounding the first decision, which involved relatively minor medical costs and no associated indemnity benefits, are too different from those attending the later issue to permit such an inference.

6. As to the causal relationship between Claimant's 1989 work injury and her need for a total knee replacement, the medical evidence was conflicting. Dr. McLaren asserted that Claimant's work injury caused her partially torn ACL to tear completely, thus accelerating the progression of her pre-existing arthritis and necessitating a total knee replacement. In contrast, Dr. Rudolf argued that the 1989 injury had no impact on the progression of the degenerative disease in Claimant's knee and that it did not hasten the need for a total knee replacement in any respect.

7. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

8. I find Dr. McLaren's opinion to be too speculative, and therefore I find Dr. Rudolf to be the most credible. In particular, I am swayed by Dr. Rudolf's assertion that had the 1989 work injury accelerated the progression of Claimant's degenerative arthritis in any measurable way, she would have come to a total knee replacement far sooner than 17 years subsequently. It is more reasonable to conclude that the natural progression of the disease, which already was clearly established and significantly advanced even before the 1989 injury, caused the need for the 2007 knee replacement surgery.

9. I conclude, therefore, that Claimant has failed to show the required causal relationship between her 1989 work injury and her 2007 surgery to trigger Defendant's responsibility for workers' compensation benefits related thereto. On those grounds, her claim must fail.

10. I do find, however, that Claimant suffered a 1% whole person impairment referable to her lateral meniscus tear as a result of the 1989 work injury. Dr. Rudolf's opinion in this regard was undisputed. Defendant owes permanent partial disability benefits in accordance with that rating, as well as interest from May 3, 2007, the date of Dr. Rudolf's impairment evaluation. *See Merchant v. A & C Enercom*, Opinion No. 27-04WC (July 20, 2004) (interest awarded from the date it became clear that claimant had incurred a permanent partial disability as a result of the work-related accident).

11. I find that Claimant has not substantially prevailed, and therefore she is not entitled to an award of costs or attorney's fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits in accordance with a 1% whole person impairment referable to Claimant's right knee lateral meniscus tear; and

2. Interest on the above amount from May 3, 2007 forward, in accordance with 21 V.S.A. §664.

DATED at Montpelier, Vermont this 21st day of January 2009.

_____
Patricia Moulton Powden
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.