STATE OF VERMONT
DEPARTMENT OF LABOR

Judith Skovira

v.

Mylan Technologies, Inc.

Opinion No. 09-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-02280

OPINION AND ORDER

Hearing held in Montpelier on January 9, 2012
Record closed on February 13, 2012

APPEARANCES:

Ron Fox, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUE PRESENTED:

1. Did Claimant suffer a compensable left knee injury on or about February 26th and/or March 2, 2011?

2. If yes, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	List of Claimant's absences from work
Claimant's Exhibit 2:	Time Detail, 12/19/10-5/5/11
Defendant's Exhibit A:	*Curriculum vitae*, Leonard Rudolf, M.D.
Defendant's Exhibit B:	Deposition of Thomas Rivers, December 6, 2011
Defendant's Exhibit C:	Deposition of Lise Canevari, December 6, 2011
Defendant's Exhibit D:	Deposition of Monique Brigante, December 6, 2011
Defendant's Exhibit E:	Deposition of Vicki Shepard, December 6, 2011
Defendant's Exhibit F:	Deposition of Chad Cichomski, December 6, 2011

CLAIM:

Temporary disability benefits pursuant to 21 V.S.A. §§642 and 646
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

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

3. Claimant began working as a production operator for Defendant, a manufacturer of transdermal medication patches, in March 2007. Her duties included cutting, pouching, sealing and boxing patches on a large production line. Claimant routinely worked the second shift, from 3:00 PM to 11:00 PM. For certain tasks on the line she could alternate sitting and standing, though for most of her shift she was on her feet.

Claimant's Work-Related Slip-and-Falls

4. On Saturday evening, February 26, 2011 Claimant was walking through Defendant's parking lot after completing her shift. It had been snowing, and the pavement was slushy. As Claimant reached her car, she slipped and fell forward onto both knees. Two or three of her co-workers, including Lise Canevari and Tina Menard, came to her aid. As they did so, Ms. Canevari recalled Claimant exclaiming that she had fallen on her "f---ing bad knee."

5. After this event Claimant's left knee was swollen and painful, but not to the point where she sought medical treatment. She did report the injury to her supervisor when she returned to work as scheduled on Monday afternoon.

6. Claimant worked her scheduled shifts on Monday, Tuesday and Wednesday, February 28th through March 2nd, 2011. As she was leaving work on Wednesday with Ms. Canevari, again she slipped in the parking lot. Her left foot slid forward as if she was squatting, but Ms. Canevari was able to catch her before she fell to the ground.[1]

7. After this event, Claimant's left knee was even more swollen and painful than it had been prior to her fall the previous Saturday. Her symptoms prompted her to seek medical treatment, and ultimately restricted her function to the point where she was unable to work.

[1] Claimant testified that Ms. Canevari did not keep her from falling, and that her left knee did in fact hit the pavement. Given other discrepancies in Claimant's testimony, *see infra* at Finding of Fact No. 23, I have reason to question her recollection. Therefore, I find Ms. Canevari's testimony more credible in this regard.

8. Defendant denied Claimant's claim for workers' compensation benefits, citing preexisting degenerative pathology in her knee as the cause of her complaints.

Claimant's Prior Medical History

9. Claimant has a long, complicated medical history involving her left knee. In 1979 she underwent patellar realignment surgery as treatment for recurrent dislocations. She has experienced occasional episodes of left knee pain, swelling and clicking ever since.

10. In October 2000 Claimant's left knee symptoms again compelled her to seek treatment, ultimately culminating in arthroscopic surgery in April 2001. Diagnostic imaging studies at the time revealed moderate to severe degenerative changes throughout the joint. These changes most likely were caused by the particular type of patellar realignment surgery Claimant had undergone years earlier. By changing the mechanism of the joint, that type of procedure can cause the surface cartilage in the knee to break down, leading to the accelerated development of degenerative arthritis. For that reason, it is no longer considered an effective treatment for recurrent patellar dislocations.

11. Claimant's 2001 surgery also addressed a lateral meniscus tear, which had been documented as well on her imaging studies at the time.

12. Though she continued to suffer from persistent, generalized left knee pain, following her 2001 surgery Claimant did not seek medical treatment for many years. Then, in October 2009 she presented to her primary care provider complaining of increased discomfort in her knee and sharp pains under her left kneecap. Claimant did not ascribe her symptoms to any recent acute injury.

13. Claimant treated for her symptoms, which she described as having gotten much worse over the course of the prior three years, with Dr. Kaplan, an orthopedic surgeon. She reported intermittent stabbing pain in her knee, severe enough to "stop me dead," and worsened by such activities as climbing stairs, arising from a chair or kneeling. As had been the case in 2001, diagnostic imaging studies performed in February 2010 documented moderate to severe arthritis throughout the joint, this time evidenced by partial- and full-thickness cartilage degeneration, joint space narrowing and bone spurs. In addition, the studies revealed what was described as a "probable degenerative" medial meniscus tear.

14. Dr. Kaplan explained Claimant's treatment options in a telephone conference with her on March 1, 2010. His written summary of the conversation states:

> In addition to her arthrosis she has meniscal tears medially. She understands that we may not be able to turn back the clock on her arthrosis, but we may consider doing something arthroscopically if injectable type treatments (such as a steroid injection) were not acceptable to her, given that she had a previous poor reaction [in 2001]. I understand her reluctance to do that, though I think it may help her.
>
> She will see how she does over time. If she is not any better she will consider arthroscopy to see if a debridement of the left knee helps her pain at all.

15. Some months later, during an August 2010 follow-up appointment with her primary care provider for migraine headaches, Claimant also complained of chronic left knee pain. She reported that only a combination of Vicodin and OxyContin (both of which she had been prescribed at times previously for a shoulder injury) provided effective pain relief. As these medications are not recommended for chronic pain management, Claimant's provider instead prescribed a lidocaine patch.

16. Claimant next followed up with her primary care provider in September 2010. According to the provider's office note, Claimant reported that the lidocaine patch "did not help." In her formal hearing testimony, Claimant acknowledged that she likely told the doctor that she had used the patch, but in fact she probably had not, because she did not think it would be effective. In any event, from the medical records it is clear that at least as of September 2010 Claimant's chronic left knee pain was a troublesome medical issue for her. Claimant admitted as much at formal hearing, though she asserted that it was manageable with ibuprofen. I find this testimony credible.

17. That Claimant's chronic left knee pain was visibly bothersome to her for some time prior to the events at issue in this claim was corroborated not only by the medical records, but also by her co-employee, Ms. Canevari. Ms. Canevari testified that even before her falls in the parking lot Claimant frequently complained about her "bad knee" while at work, and "was always rubbing it, grabbing it." I find this testimony credible.

18. At the same time, however, both Ms. Canevari and the other co-employees who testified also corroborated that Claimant's knee pain appeared to worsen significantly after her falls. She walked more slowly and with a noticeable limp, and rested with her feet up more often. I find this testimony to be credible as well.

Claimant's Medical Course after March 2011

19. Claimant did not treat again for her left knee pain until March 4, 2011 – two days after her second fall[2] in Defendant's parking lot. Her symptoms at that point were similar in nature to what she had experienced chronically – tenderness and pain, particularly under her kneecap, with swelling and crepitus – though far worse in degree. She could not walk without limping and had difficulty standing. She was restricted from working full-duty, and could only maintain a part-time (four hours per day) work schedule. Functionally, her activities were significantly limited.

20. Claimant returned to Dr. Kaplan for further evaluation in late March 2011. Repeat diagnostic imaging studies again showed significant degenerative arthritis throughout her knee, as well as a non-displaced degenerative tear in her medial meniscus. Dr. Kaplan did not specifically comment on the progression of Claimant's degenerative disease as indicated on this imaging study as compared with her February 2010 study. He had this to say as to the significance of her recent falls, however:

> I do believe [Claimant's progressive pain] represents significant exacerbation of a meniscus tear and arthrosis from a work-related fall. She understands that her arthritis predates this but the meniscus tear becoming highly symptomatic again is likely due to her new fall and probably represents the propagation of her degenerative meniscus previously.

21. With worsened pain and decreased function, in May 2011 Claimant elected to undergo the arthroscopic surgery Dr. Kaplan previously had offered in March 2010. As he had before, Dr. Kaplan cautioned that the surgery would not "turn back the clock" on her arthritis, and also that she still might require a total knee replacement at some future point. Presumably he was hopeful, again as he had been in 2010, that by repairing the meniscal tear Claimant's pain would decrease to more manageable levels.

[2] I use the term "fall" in connection with Claimant's March 2011 mishap solely for ease of reference. In contrast to her fall some days earlier, in this incident Claimant slipped on the pavement but did not actually fall to the ground. *See* Finding of Fact No. 6 *supra.*

22. Claimant ceased working on May 5, 2011 and underwent Dr. Kaplan's suggested surgery one week later, on May 12, 2011. From the operative report, it is impossible to decipher to what extent, if any, the pathology he found was recent as opposed to long-standing. In his June 14, 2011 office note Dr. Kaplan described his findings and conclusions as follows:

> [Claimant] has Grade III to IV changes medially and laterally and she appears to have ongoing synovitis that is related to her arthritis, having gone through surgery with such a vulnerable knee. She has had longstanding problems with her knee and has old scars from her previous [patellar realignment] procedure and previous meniscectomy years ago.
>
> I have gone over her . . . findings with her so that she would better understand that she has a complex problem in her knee, not all of which is related to her work-related injury (that is only the meniscal tearing component) and that the arthritis alone predates this and – though she says she did not have much in the way of symptoms from it – this was mostly uncovered by her recent problem.

23. Given other evidence in the record, *see* Findings of Fact Nos. 15-17 *supra*, I do not accept as credible Claimant's statement to Dr. Kaplan that she "did not have much in the way of symptoms" from her left knee arthritis prior to her falls at work. And while I do not ascribe to her any bad motive or intent to deceive, this and other aspects of her testimony indicate to me that at times she was an unreliable historian. For example:

- In her formal hearing testimony Claimant denied having filed a workers' compensation claim relating to an alleged wrist injury in 2006, though both the contemporaneous medical record and the Department's files[3] reflect that she did;

- Claimant testified that she enjoyed her job, though she consistently reported exactly the opposite, in fairly strong terms, to her mental health counselor throughout the fall of 2010; and

- As noted above, Finding of Fact No. 16 *supra*, Claimant reported to her primary care provider that the lidocaine patch prescribed her in August 2010 had not helped her knee pain, but testified at hearing that she doubted having even tried it.

[3] State File No. X-5051 alleged a March 6, 2006 wrist injury causally related to Claimant's employment for Hannaford's; claim denials were filed in both April and May 2006.

24. Unfortunately, Claimant did not progress well with arthroscopic surgery. Despite her relatively young age (55), Dr. Kaplan concluded that the only remaining treatment option was a total knee replacement. As to the causal relationship between this surgery and Claimant's falls at work, he stated:

> With her recent injury, having I think tipped the scales given her preexisting arthritis and history of patellofemoral surgery, even though she was doing exceptionally well prior to this injury,[4] I think while the injury did tip her over in the feeling of extreme symptoms there was some preexisting problem. It is hard to say how much of the new problem is related to her injury and how much is related to her previous issue.

25. Claimant underwent total knee replacement surgery on August 17, 2011. From reviewing the operative report, I find that the specific purpose of that surgery was to address her left knee osteoarthritis. As of November 2011 Claimant still was reporting significant pain in her left knee. From the evidence presented at hearing, it does not appear that she has yet reached an end medical result.

26. As for whether Claimant would have elected to undergo arthroscopic surgery had she not fallen at work, her testimony was somewhat equivocal. On the one hand, she stated that prior to her fall she felt that her symptoms were not severe enough to warrant a surgery whose outcome Dr. Kaplan could not guarantee. On the other hand, she acknowledged that her symptoms had not improved since March 2010, when Dr. Kaplan first suggested arthroscopy, and that she regularly took ibuprofen to manage her pain. Given that she was suffering from a progressively degenerative condition, there is no way to predict when she might have chosen this treatment path had her symptoms not worsened when and in the manner that they did. I find that there is no basis for me to speculate in this regard.

Expert Medical Opinions

27. Both parties presented expert medical testimony as to the causal relationship, if any, between Claimant's work-related falls and her subsequent knee surgeries. Dr. Rudolf concluded that no such relationship existed; Dr. Backus concluded that it did.

(a) Dr. Rudolf

28. Dr. Rudolf is a board certified orthopedic surgeon. He has maintained a clinical practice since 1987, a significant part of which involves joint replacements, knee arthroscopies and related issues. At Defendant's request, Dr. Rudolf reviewed Claimant's medical records in October 2011.

[4] As noted above, Findings of Fact Nos. 15-17 and 23 *supra*, other evidence in the case casts doubt on Dr. Kaplan's assertion that Claimant was doing "exceptionally well" prior to her work injuries.

29. Dr. Rudolf concluded, to a reasonable degree of medical certainty, that both Claimant's May 2011 arthroscopic surgery and her August 2011 total knee replacement were necessitated by her preexisting osteoarthritis, not by her falls at work. In support of this conclusion, Dr. Rudolf cited the following evidence:

- The mechanism of Claimant's falls at work conceivably might have affected her patellofemoral joint and surfaces, but would not likely be responsible for any progression of the preexisting tears in her medial meniscus;

- Claimant's imaging studies, which Dr. Rudolf personally reviewed, documented long-standing degenerative changes throughout the knee. Comparison studies taken both before (February 2010) and after (March 2011) her falls at work were not so "dramatically different" as to suggest any traumatically caused advancement. To the contrary, they strongly suggested that Claimant's exacerbated symptoms were related more to chronic degeneration in the joint than to any other process;

- Dr. Kaplan's May 2011 arthroscopic findings failed to reveal any clear evidence of recent meniscal tearing as opposed to long-standing degeneration; and

- The fact that Claimant failed to improve following the May 2011 arthroscopy, which was undertaken specifically to address her meniscal pathology, suggests that her symptoms were not related to that condition at all, but rather to her preexisting degenerative arthritis.

30. Dr. Rudolf likely would not have suggested arthroscopic surgery as a treatment option for Claimant, either in March 2010, when Dr. Kaplan first offered it, or in May 2011, when Claimant underwent it. Based both on his experience and on current medical literature, arthroscopy tends not to be beneficial in the context of advanced arthritis in the meniscus. Dr. Rudolf acknowledged, however, that a patient's decision to undergo arthroscopy is sometimes driven by pain, and in that respect it was not necessarily inappropriate for Dr. Kaplan to have offered it as a treatment option, either in 2010 or in 2011.

31. In Dr. Rudolf's clinical experience, patients who undergo arthroscopic knee surgery typically are disabled for two to four weeks, following which they are able to resume unrestricted activities. I find that given Claimant's complicated prior medical history, in her case this estimate likely would have been overly optimistic.

32. In Dr. Rudolf's opinion, the probability that Claimant would require a total knee replacement was "pretty high" no matter when she elected arthroscopic surgery. He refused to speculate whether she would have come to surgery any later had she not fallen at work when and as she did. In his experience, increased pain complaints such as those that Claimant experienced do not usually correlate to specific changes in either tissue structure or surface configuration when the knee is viewed surgically. Thus, the fact that certain events may be associated with increased symptoms does not mean that the underlying condition necessarily must have been exacerbated. Nor does the fact that a patient may require total knee replacement following such an event mean that the event rather than the preexisting degenerative process necessitated the surgery. I find this analysis credible in all respects.

(b) *Dr. Backus*

33. Dr. Backus is board certified in occupational and environmental medicine. At the request of her attorney, Dr. Backus reviewed Claimant's medical records in November 2011. He did not personally view her diagnostic imaging studies.

34. Dr. Backus concluded, to a reasonable degree of medical certainty, that Claimant's falls at work aggravated and accelerated the preexisting degenerative process in her knee to the point where both the May 2011 arthroscopy and the August 2011 total knee replacement became necessary sooner than they otherwise would have. In reaching this conclusion, Dr. Backus relied solely on the fact that although Claimant had suffered from chronic knee pain for years, after her falls at work her pain complaints increased markedly and her ability to function decreased correspondingly.

35. In Dr. Backus' opinion, it is impossible to discern exactly how Claimant's falls might have aggravated the specific structures in her knee, as neither diagnostic imaging studies nor physical signs are sophisticated enough to distinguish these features. He posited various theories – already weakened cartilage could have eroded further, an already stressed bone could have become further stressed, or a degenerative meniscal tear could have become more torn. Beyond noting that trauma to an arthritic joint often causes it to become more symptomatic, Dr. Backus was unable to offer any more specific insight into how the falls caused Claimant's condition to worsen. "Whatever it was," he concluded, "the knee was worsened by the falls."

36. Dr. Backus doubted that Claimant would have undergone arthroscopic surgery in May 2011 but for her falls at work, as she already had decided not to do so in March 2010. I am not persuaded by the logic of this testimony, nor do I consider it within the area of his expertise to make such a prediction.

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 first disputed issue in this claim is whether Claimant suffered a compensable injury when she fell in Defendant's parking lot. Defendant denied her claim on the grounds that she suffered from a preexisting condition. As will be seen, this fact is relevant primarily to the question whether Defendant is obligated to pay for either or both of Claimant's surgeries. It does not of itself preclude me from finding that a compensable injury occurred.

3. For an injury to be compensable under Vermont law, it must arise out of and in the course of the claimant's employment. 21 V.S.A. §618; *McNally v. Department of PATH*, 2010 VT 99, ¶10. This is a two-pronged test, requiring a sufficient showing of both (1) a causal connection (the "arising out of" component); and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to his or her injuries. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM*, 161 Vt. 213 (1993).

4. Defendant does not dispute that Claimant's injury here occurred in the course of her employment. Instead, by asserting that her symptoms resulted from preexisting pathology rather than her falls, it questions the "arising out of" prong of the compensability test.

5. Claimant presented undisputed evidence that the slushy conditions in Defendant's parking lot caused her to fall, and that her knee symptoms markedly increased almost immediately thereafter. These were by no means idiopathic falls, ones that occurred for purely personal reasons. *Compare Carlson v. Experian Information Solutions*, Opinion No. 30-07WC (October 23, 2007) *with Boucher v. Peerless Insurance Co.*, Opinion No. 16-08WC (April 16, 2008). To the contrary, they happened because Claimant's employment provided the positional risk – an icy parking lot – that caused the events to occur. *Miller, supra* at 214, citing *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993). Her accidents thus arose out of her employment, and Defendant is thereby responsible to pay whatever workers' compensation benefits the statute requires as a result. This includes, of course, the obligation to pay for reasonable medical treatment. 21 V.S.A. §640(a).

6. For a treatment to be reasonable, it must be both medically necessary and causally related to the work injury. *Pelissier v. Hannaford Brothers*, Opinion No. 26-11WC (September 9, 2011). Whether either or both of Claimant's surgeries qualify as reasonable is the second disputed issue in this claim. With support from both Dr. Kaplan and Dr. Backus, Claimant contends that her falls aggravated or accelerated the preexisting pathology in her knee, such that but for those events she would not have come to either surgery as quickly as she did. Supported by Dr. Rudolf, Defendant argues that the falls did no such thing, and that the surgeries were necessitated solely by the progression of her underlying disease.

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 (September 17, 2003).

8. I consider first Claimant's May 2011 arthroscopic surgery. The purpose of that surgery was to address what Dr. Kaplan suspected was a further tear in her medial meniscus caused by her work-related falls. Given Claimant's markedly increased symptoms, and even notwithstanding Dr. Kaplan's misunderstanding as to the extent of Claimant's knee pain in the months previous, I conclude that this was a reasonable supposition for him to make.

9. I acknowledge the persuasive logic of Dr. Rudolf's opinion to the contrary – that the falls likely *did not* cause further damage to Claimant's already-torn meniscus. However, that determination was based at least in part on (a) Dr. Kaplan's operative findings, which failed to reveal clear evidence of a recent tear; and (b) the fact that Claimant's symptoms did not improve after arthroscopy. Dr. Kaplan could not have known either of these facts at the time the decision to proceed with surgery was made.

10. In the workers' compensation context, the test for determining the reasonableness of a particular medical treatment is what was known at the time the treatment was undertaken, not what became known later with the benefit of hindsight. *Avdibegovic v. University of Vermont*, Opinion No. 06-09WC (February 23, 2009). With due deference to Dr. Kaplan's status as Claimant's treating orthopedic surgeon, and considering what he knew at the time, I conclude that the May 2011 arthroscopic surgery constituted reasonable treatment for the symptoms induced by Claimant's work-related falls.

11. Claimant's August 2011 total knee replacement surgery, the purpose of which was to address her underlying arthritis, stands on a different footing, however. Even Dr. Kaplan appears to have questioned the relationship between Claimant's falls at work and the progression of that condition. Without credible evidence establishing that the falls aggravated or accelerated that pathology, the surgery to correct it is not compensable. *Stannard v. Stannard Co., Inc.*, 175 Vt. 549 (2003).

12. Dr. Backus found such evidence solely in the fact that Claimant's symptoms worsened after her work-related falls. Essentially his opinion amounted to an assertion that the falls must have caused something to occur in Claimant's knee, though he could only speculate as to exactly what that was.

13. I cannot accept Dr. Backus' opinion as persuasive evidence, to the required degree of medical certainty, that the preexisting pathology in Claimant's knee was aggravated by her work-related falls. It does not take an expert opinion to observe that symptoms have worsened. Rather, the expert's role is to identify with certainty the causal relationship between a work-related accident and a resulting injury. *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964). This Dr. Backus failed to do.

14. Citing to the commissioner's decision in *Badger v. BWP Distributors, et al.*, Opinion No. 05-11WC (March 25, 2011), Claimant argues that her increased pain and decreased function provide sufficient evidence to establish that her underlying arthritis likely worsened as a result of her falls. I disagree.

15. In *Badger*, the credible medical evidence established that the claimant had suffered a work-related exacerbation of the degenerative disc disease in his lower back, notwithstanding that diagnostic imaging studies failed to reveal any acute changes. Instead, the commissioner accepted the claimant's sharply escalated pain complaints and corresponding need for treatment as a valid basis for concluding that the work injury had caused not only aggravated symptoms but also had aggravated the underlying condition.

16. The rationale that applied in *Badger* does not fit nearly as well in this claim. As workers' compensation practitioners are well aware, first of all, diagnostic imaging studies are notoriously inadequate at differentiating between symptomatic and asymptomatic lumbar disc disease. The same difficulties do not appear to attach to diagnosing arthritic knees. Here, Claimant's MRI studies documented extensive arthritis in her knee long prior to her work-related falls, of sufficient severity to account for her progressively worsening symptoms. In that respect, the circumstances here are more similar to those presented in *Stannard*, *supra*, than they are to the facts in *Badger*.

17. Of greater significance, in *Badger* there was no subsequent surgery or other treatment from which to confirm or deny whether in fact the underlying condition had been aggravated. Here, there was.

18. Where a claimant's preexisting condition is a progressively degenerative disease, the test for determining work-related causation is whether, "due to a work injury or the work environment 'the disability came upon the claimant earlier than otherwise would have occurred.'" *Stannard, supra* at 552, quoting *Jackson v. True Temper*, 151 Vt. 592, 596 (1989). Mere continuation or exacerbation of symptoms, without a worsening of the underlying disability, does not establish compensability. *Id.*

19. *Badger* stands for the premise that in appropriate circumstances evidence of aggravated symptoms can be sufficient to establish that a preexisting condition has been aggravated. Each case stands on its own facts, however, and I do not find that the facts support such a conclusion here.

20. I conclude that Dr. Backus' opinion as to the causal link between Claimant's work-related falls and the aggravation or acceleration of the underlying arthritis in her knee is far less persuasive than those expressed either by Dr. Kaplan or by Dr. Rudolf. As the treating surgeon, Dr. Kaplan was well positioned to determine whether such a causal relationship existed. The fact that he did not do so to the required degree of medical certainty is significant. As for Dr. Rudolf, his clinical experience with patients who suffer from conditions similar to Claimant's is highly relevant to the disputed issues here. For that reason as well, I find his opinion more credible than Dr. Backus'.

21. In summary, I conclude that Claimant has sustained her burden of proving that she suffered a work-related injury as a result of her falls in Defendant's parking lot on February 26, 2011 and/or March 2, 2011. I further conclude that her May 2011 arthroscopy constituted reasonable medical treatment causally related to the symptoms induced by that injury. Defendant is thereby responsible for the medical costs associated with this treatment. Defendant also is responsible for the period(s) of temporary total and/or temporary partial disability caused by the falls, which I conclude extended until August 17, 2011, the date on which Claimant underwent total knee replacement surgery.

22. I conclude that Claimant has not sustained her burden of proving that her work-related falls either aggravated the underlying arthritis in her knee or accelerated the need for total knee replacement surgery. That surgery was not causally related to her work injury, therefore, and Defendant is not obligated to pay any workers' compensation benefits associated with it.

23. Claimant has submitted a request under 21 V.S.A. §678 for an award of costs totaling $4,044.02 and attorney fees totaling $9,294.50. As she has prevailed only on her claim for workers' compensation benefits associated with her initial falls and subsequent arthroscopic surgery, she is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence,* Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting,* Opinion No. 7-97WC (June 13, 1997). I conclude that the costs associated with Dr. Backus' expert services, totaling $2,875.00, are not recoverable. The remaining amount, $1,169.02, is hereby awarded.

24. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Here I conclude that it is appropriate to award Claimant one-half of the total fees requested, or $4,647.25.

ORDER:

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

1. Temporary total and/or temporary partial disability benefits until August 17, 2011 in accordance with 21 V.S.A. §§642 and 646, with interest as calculated in accordance with 21 V.S.A. §664;

2. Medical benefits referable to Claimant's May 12, 2011 arthroscopic surgery in accordance with 21 V.S.A. §640(a); and

3. Costs totaling $1,169.02 and attorney fees totaling $4,647.25 in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 29th day of March 2012.

_____
Anne M. Noonan
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.