

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Eva Quebec

Opinion No. 03-16WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

FCI Federal, Inc.

For: Anne M. Noonan
Commissioner

State File No. FF-54597

OPINION AND ORDER

Hearing held in Montpelier on June 12, 2015

Record closed on July 28, 2015

APPEARANCES:

William Skiff, Esq., for Claimant

J. Justin Sluka, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's proposed right total knee replacement surgery reasonable treatment for her October 8, 2013 compensable work injury?
2. Should Defendant have been allowed to discontinue temporary disability benefits effective either December 15, 2014 or February 5, 2015?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Deposition of Robert Beattie, M.D., May 22, 2015

Defendant's Exhibit A: Deposition of William Boucher, M.D., June 17, 2015

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640(a)

Temporary total disability benefits pursuant to 21 V.S.A. §642

Costs and attorney fees pursuant to 21 V.S.A. §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 and correspondence contained in the Department's file relating to this claim.
3. Claimant has worked for Defendant, a private contractor for the federal Immigration and Naturalization Service, for many years. Her duties, which are primarily administrative in nature, involve reviewing and processing petitions for immigrant and seasonal workers. Until four or five years ago, Claimant worked full time. More recently, she reduced her hours so that she could enjoy more time with her family. As of October 8, 2013, the date of the injury at issue in this claim, she regularly worked eight hours per day, three days per week.

Claimant's Prior Medical History

4. Claimant has an extensive prior medical history of treatment for right knee pain dating back at least to 1994. As early as 2001, her treating orthopedic surgeon, Dr. Beattie, diagnosed her with degenerative changes in her right knee, including some mild medial compartment osteoarthritis.
5. Following a work-related injury in October 2001, in June 2002 Claimant underwent right knee arthroscopic surgery. The surgical findings at that time included varying degrees of chondromalacia – a pre-arthritic condition characterized by softening or loss of articular cartilage – throughout the joint. In Claimant's case, at the time of her June 2002 surgery the chondromalacia in the medial compartment of her right knee was already at Grade IV, meaning that the cartilage was completely lost and the joint was articulating bone on bone in that area.
6. Both osteoarthritis and chondromalacia, its precursor, are progressive, degenerative conditions. Typically, the differentiating point between the two diagnoses occurs as the loss of joint surface cartilage becomes so extensive as to result in an inflammatory response and pain. It is not uncommon for an x-ray to reveal significant evidence of osteoarthritis in a joint even while the patient remains asymptomatic. For this reason, doctors typically advise against treating osteoarthritis until it becomes symptomatic. "Treat the patient, not the x-ray" is a common refrain.
7. In Claimant's case, following her June 2002 surgery she continued to experience pain, swelling and stiffness in her right knee. To address these complaints, between August 2002 and November 2003 she underwent three courses of viscosupplementation injections. Viscosupplements increase the lubricating value of the fluid in a joint, thus enabling freer, less painful movement. If effective,

viscosupplementation will reduce symptoms for at least six months and sometimes for substantially longer periods, even years.

8. Claimant derived significant symptom relief from viscosupplementation. After completing her final series of injections in November 2003, she did not treat for right knee pain for almost seven years. When, in October 2010 the pain and stiffness in her right knee worsened, she again sought treatment with Dr. Beattie. Thereafter, she underwent two additional courses of viscosupplement injections, first in January 2011 and then in September 2011.
9. Claimant credibly testified that after completing her September 2011 course of viscosupplementation, she was able to perform both job functions and daily living activities without difficulty. At work, she could walk, climb stairs, get in and out of her chair and lift and carry file boxes. At home, she could drive, shop, play tennis, and walk or ride a bike for exercise. The medical records do not document any treatment for right knee pain during this time.
10. Notwithstanding Claimant's positive response to viscosupplementation, as early as December 2002 Dr. Beattie had predicted that eventually she would need a total knee replacement. As noted above, osteoarthritis is a progressive, degenerative condition. Non-surgical treatments can, and often do, provide substantial symptom relief, but they are incapable of slowing the disease process itself. At some point, x-ray evidence of the joint's gradual deterioration, combined with the patient's failure to respond to conservative symptom management, will justify joint replacement surgery as the best treatment option.

Claimant's October 2013 Injury

11. The injury at issue in this claim occurred on October 8, 2013. On that date, Claimant was descending a wet stairway at work, when she slipped from one stair to the next, landing hard on her right heel. Immediately, she felt something "give" in her right knee, with severe pain resulting.
12. Dr. Beattie first evaluated Claimant for this most recent episode of right knee pain in December 2013. He diagnosed a "traumatic aggravation" of her preexisting osteoarthritis, for which he recommended both physical therapy and viscosupplementation as treatment.
13. Unfortunately, this time Claimant's symptoms did not improve with conservative treatment. By April 2014, her knee was constantly painful, with lost motion, strength and function. She could not walk, stand, climb stairs or sit without significant pain and swelling. In Dr. Beattie's opinion, her complaints had finally worsened to the point that a total knee replacement was now the only viable treatment option.

14. Claimant was scheduled to undergo total knee replacement surgery on June 23, 2014. However, when her husband fell ill, she canceled the procedure. Her husband died some months later. As of the formal hearing, she testified that she is again ready to undergo surgery, as she feels she has “no choice.” Her lifestyle has changed dramatically as a consequence of her injury. She is in continual pain and cannot tolerate being on her leg for more than ten or 15 minutes at a time. She frequently uses a cane and describes herself as feeling “pretty homebound.” I find this testimony credible in all respects.

Expert Medical Opinions

15. The parties presented conflicting expert testimony regarding the causal relationship, if any, between Claimant’s October 2013 work injury and her need for total knee replacement surgery.

(a) Dr. Beattie

16. As noted above, Dr. Beattie has been Claimant’s treating orthopedic surgeon since 2001. He has maintained an orthopedics practice since 1988, specializing in knees, shoulders and hips, in that order. Dr. Beattie estimates that in recent years he has averaged approximately 80 knee replacement surgeries annually.
17. In his deposition testimony, Dr. Beattie described the process by which Claimant’s October 2013 injury likely accelerated the need for joint replacement surgery as the only viable treatment option for her worsened osteoarthritic symptoms. The knee is a homeostatic structure, meaning that it distributes forces upon it in such a way as to maintain balance within the joint. In a younger, non-arthritic knee, the articular surface cartilage is thicker and the soft tissue is more elastic; as a result, the joint is more resilient and less susceptible to traumatic injury. However, as osteoarthritis develops and gradually progresses, the surface cartilage thins at the same time that the soft tissues become thicker and less elastic. The result is a joint that is less able to maintain homeostasis and therefore more susceptible to trauma.
18. This is particularly true in the context of an axial load-type injury such as the one Claimant suffered, whereby a hard landing on her right heel resulted in the application of force to her right knee. In a younger, healthier knee, both the cartilage and the meniscus would have acted as axial load shock absorbers. However, Claimant’s older, osteoarthritic knee lacked both meniscal and articular cartilage cushioning. As a consequence, the axial load created by her slip was transmitted directly to the joint’s bony surfaces. The resulting trauma caused bone bruising, which in turn provoked a cascading series of symptoms – inflammation, swelling, stiffness and pain.
19. According to Dr. Beattie’s analysis, in the context of an already degraded, osteoarthritic knee, Claimant’s joint lacked sufficient resiliency to return to a homeostatic state with conservative measures such as viscosupplementation. The

only means of relieving symptoms at this point is to surgically replace the joint. To be sure, given the radiographic evidence of osteoarthritis in her knee, she likely would have come to this result eventually, as Dr. Beattie himself predicted as early as 2002, Finding of Fact No. 10 *supra*. However, prior to her injury, her symptoms would not have justified this treatment course. Now they do. With that in mind, and to a reasonable degree of medical certainty, in Dr. Beattie's opinion the October 2013 work injury has aggravated the preexisting osteoarthritis in Claimant's knee and thereby accelerated her need for joint replacement surgery. I find this analysis credible.

(b) Dr. Boucher

20. At Defendant's request, in May 2014 Claimant underwent an independent medical examination with Dr. Boucher, a board-certified occupational medicine specialist. Later, he reviewed Claimant's prior medical records. Dr. Boucher has treated thousands of knee injuries, many involving degenerative arthritis. Although not an orthopedic surgeon himself, he is experienced at identifying the point at which a patient's failure to respond to conservative measures warrants surgical evaluation and treatment instead.
21. To a reasonable degree of medical certainty, Dr. Boucher concluded that Claimant likely suffered only a knee strain as a consequence of her October 2013 work injury. Considered separately from her preexisting osteoarthritis, in his opinion that injury itself required no treatment, and likely had resolved by December 2013.
22. According to Dr. Boucher's analysis, Claimant's work injury and resulting knee strain did nothing to worsen or accelerate her underlying osteoarthritis, which had been "end stage" and severe for some years previously. Consequently, while he concurred with Dr. Beattie's recommendation for total joint replacement, Dr. Boucher disagreed that it was in any way causally connected to the October 2013 incident. In his opinion, replacing the joint will eliminate the irritation caused by bone-on-bone friction, which is a function solely of osteoarthritis, not of the knee strain.
23. Dr. Boucher thus disagreed with Dr. Beattie's characterization of Claimant's worsening condition after October 2013 as a "cascade" of symptoms. According to his analysis, Claimant's osteoarthritis was primed to "go really bad," and would have worsened to the point of requiring surgery even had her work injury never occurred when it did.
24. Dr. Boucher could not identify a specific medical record to support his determination that Claimant had reached an end medical result for her work injury by December 2013. Instead, he based his opinion primarily on his experience treating knee strains of the type he concluded she had suffered. His determination that Claimant would have come to need a total knee replacement at approximately the same time even had she not suffered an injury in October 2013 was likewise

based solely on his clinical experience treating similar cases of osteoarthritis in other patients. Without more, I find this to be only minimally persuasive support for his opinions.

25. With Dr. Boucher's opinion as support, on June 6, 2014 Defendant filed a Denial of Workers' Compensation Benefits (Form 2), in which it denied responsibility for Dr. Beattie's proposed knee replacement surgery as not causally related to her accepted October 2013 compensable work injury. Upon review, the Department's workers' compensation specialist approved the denial. However, the specialist rejected Defendant's proposed discontinuance of temporary disability benefits, on the grounds that the accepted work injury had caused a flare-up of symptoms and resulting disability which had not yet resolved. Similar discontinuances were filed and rejected in December 2014 and February 2015.

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 disputed issue here is whether Claimant's proposed right total knee replacement surgery constitutes reasonable medical treatment for her October 2013 compensable work injury, such that Defendant is obligated by statute, 21 V.S.A. §640(a), to pay for it. For a treatment to be reasonable, it must be both medically necessary and causally related to the work injury. *Skovira v. Mylan Technologies, Inc.*, Opinion No. 09-12WC (March 29, 2012).
3. The parties do not disagree as to the medical necessity of joint replacement surgery in Claimant's case. However, on the question whether the need for surgery is causally related to the work injury, they proffered conflicting expert medical opinions. In such cases, 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).

4. I conclude here that Dr. Beattie's opinion is the most persuasive. As Claimant's treating physician since 2001, he had firsthand knowledge, both before and after her work injury, of the pathology in her right knee, the symptoms she reported and the treatments she underwent. His experience with surgically treated knee joints was impressive. Most important, his analysis of the complex processes, both biochemical and mechanical, by which the traumatic injury Claimant suffered likely aggravated her underlying osteoarthritis and accelerated her need for knee replacement surgery, was convincingly articulated and objectively supported.
5. In contrast, the record provided only minimal support for the assumptions upon which Dr. Boucher's opinion was based. His assertion that Claimant suffered only a knee strain as a consequence of the October 2013 work injury, for which she likely had reached an end medical result by December 2013, was founded solely on his experience with other patients. The contemporaneous medical records paint a different, more accurate and thus more persuasive picture of how Claimant's actual experience unfolded, however. They document a two-year hiatus following the most recent prior episode of exacerbated symptoms, and then a straight line of treatment from the date of the injury forward and continuing to the present.
6. Dr. Boucher's assertion that Claimant probably would have developed sufficiently severe symptoms to justify knee replacement surgery at around the same time that she did even had her injury never occurred was similarly unsupported. Claimant's credible testimony and the contemporaneous medical records establish just the opposite – that for at least two years prior to October 2013 she had no knee pain, no functional limitations and no treatment. There is nothing at all to justify Dr. Boucher's prediction that without the trigger of a traumatic injury, Claimant's osteoarthritic symptoms would have worsened so dramatically and spontaneously on their own. For that reason, I must reject his analysis.
7. It is a well-settled tenet of Vermont's workers' compensation law that the aggravation or exacerbation of a degenerative disease such as osteoarthritis can qualify as a work-related injury. *Stannard v. Stannard*, 2003 VT 52, ¶11, citing *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989) (internal quotations omitted). The causation test in these circumstances is “whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred.” *Id.* (internal citations omitted). Continued or exacerbated symptoms alone will not establish compensability unless the underlying disability has also worsened. *Id.*
8. Having determined that Dr. Beattie's expert medical opinion is both credible and convincing, I conclude here that the causation test enunciated in *Stannard* has been met. I accept as persuasive his analysis that the mechanism of Claimant's October 2013 injury, particularly the axial load transmitted from her heel to her knee as a result of her slip on the stairs, caused the bones within the joint to become bruised and inflamed. The added trauma precipitated a worsening of the underlying disability, as manifested by functionally limiting pain, swelling and stiffness. *See*

Stannard, supra at ¶12, citing with approval *City of Burlington v. Davis*, 160 Vt. 183, 186 (1993) (Dooley, J., dissenting) (noting that the acceleration rule must be viewed “in relation to the overall condition of the body, particularly as it relates to [the claimant’s] ability to work and function.”). Lacking sufficient reserves to recover from the imbalance thus created, the joint is no longer capable of responding to conservative treatment measures. Total knee replacement surgery has thus become medically necessary.

9. Even if the evidence was insufficient to establish that Claimant’s October 2013 work injury caused the underlying degeneration in her knee to worsen, under the circumstances of this case I conclude that the fact of her exacerbated symptoms alone is sufficient to trigger consideration under the flare-up doctrine. Under that theory of liability, when a distinct new work-related injury temporarily worsens the symptoms referable to a preexisting condition, the employer can be held responsible for workers’ compensation benefits until the condition returns to its pre-injury baseline. *Cehic v. Mack Molding, Inc.*, 2006 VT 12, ¶10. Liability under the flare-up doctrine extends to whatever medical treatment is necessary to restore the injured worker to his or her pre-injury functional status. In this case, both parties’ experts agree that knee replacement surgery is the only viable means of accomplishing this result.
10. Whether categorized as an aggravation or as a flare-up, I conclude from the credible medical evidence that Claimant’s October 2013 injury triggered a chain of events that led directly to her current disability and need for ongoing treatment. Defendant’s expert having conceded that knee replacement surgery is medically necessary, I thus conclude that it is both causally related and compensable.
11. As a final argument, Defendant asserts that even if Claimant’s proposed knee replacement surgery is found compensable, as I have now concluded, it should be relieved from responsibility to pay temporary disability benefits after June 23, 2014, the date on which Claimant canceled the scheduled surgery on account of her husband’s illness and subsequent death. Notably, Defendant had denied responsibility for the surgery even prior to the cancelation, Finding of Fact No. 25 *supra*, on the grounds that it was not causally related to her work injury. It therefore acted at its peril, that notwithstanding her personal reasons for doing so, Claimant likely would delay undergoing an expensive surgical procedure without having first secured a means of paying for it. Defendant is fully accountable for this result. I conclude that its various attempts to discontinue temporary disability benefits were appropriately rejected at the time, and remain unsupported now.
12. As Claimant has prevailed on her claim for workers’ compensation benefits, she is entitled to an award of costs and attorney fees, pursuant to 21 V.S.A. §678. Claimant has submitted a request for costs totaling \$1,437.62 and fees totaling \$5,714.45. Defendant shall have 30 days from the date of this opinion within which to file its objections thereto, following which an award of costs and fees shall issue.

ORDER:

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

1. All reasonable medical services and supplies referable to Claimant's proposed right total knee replacement surgery, in accordance with 21 V.S.A. §640;
2. Ongoing temporary disability benefits, in accordance with 21 V.S.A. §642; and
3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this _____ day of _____, 2016.

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.