

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Rischell Bernick

Opinion No. 02-19WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

Northeast Kingdom Human
Services, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. JJ-59965

OPINION AND ORDER

Hearing held in Montpelier on November 27, 2018
Record closed on December 27, 2018

APPEARANCES:

Daniel D. McCabe, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's proposed right total knee replacement surgery reasonable treatment for her February 9, 2017 compensable work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Defendant's Exhibit A: *Curriculum vitae* of Daniel O'Neill, MD

Defendant's Exhibit B: *Curriculum vitae* of Leonard Rudolf, MD

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640(a)
Temporary total disability benefits¹ pursuant to 21 V.S.A. § 642
Costs and attorney fees pursuant to 21 V.S.A. § 678

¹ Claimant is seeking future temporary total disability benefits for an anticipated disability from work following the proposed right knee replacement surgery.

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. I take judicial notice of all relevant forms and correspondence in the Department's file relating to this claim.
3. Claimant is a 53-year-old woman who lives in Island Pond, Vermont. She works for Defendant full time as an administrative assistant.

Claimant's Prior Medical History

4. Claimant has a history of pain and arthritis in both knees. In October 2009 she was working at a fundraising event when someone stole a t-shirt from a rack of sale items. She tried to run after him, but tripped and fell, sustaining blunt force bruising to both knees. Her symptoms eventually subsided until April 2010.
5. In April 2010 Claimant began to have increasing left knee discomfort, and in August 2010 she began to have right knee discomfort. In October 2010 she saw Richard Gagnon, MD, an orthopedic surgeon. His records noted a meniscal tear in her left knee, and episodic pain and "clicking" in her right knee. X-rays taken in October 2010 revealed degenerative osteoarthritis in both knees, "right greater than left." *Medical records*, at 007. In November 2010 Dr. Gagnon performed arthroscopic surgery on Claimant's left knee.
6. In December 2013 Dr. Gagnon's physician's assistant described Claimant's left knee condition as "end stage osteoarthritis" with "bone-on-bone contact." *Medical records*, at 011. Dr. Gagnon performed a left total knee replacement on December 9, 2013.
7. One year post-surgery, in January 2015, Claimant followed up with Dr. Gagnon. He noted that her left knee replacement was doing "very well," but her right knee was becoming a "problem." *Medical records*, at 028A.
8. Claimant testified that she did not have any right knee complaints prior to February 2017. Given the other evidence in the record, *see* Findings of Fact Nos. 4, 5 and 7 *supra*, I do not accept her testimony on this issue as credible.

Claimant's February 2017 Injury and Subsequent Medical Course

9. The injury at issue in this claim occurred on February 9, 2017. On that date, Claimant left the office to run an errand for Defendant. As she was walking to her car, she slipped and fell in the icy parking lot, landing on her buttocks with her right leg beneath her. She immediately felt pain in her right knee. Claimant decided against completing the errand, and drove herself home. She did not seek medical attention.

10. Claimant reported the incident to her employer, and her injury was accepted as compensable. She did not lose any time from work as a result of the injury except for medical appointments later on.
11. On February 21, 2017, Claimant first sought medical treatment for her right knee injury from osteopathic physician Bruce Latham, DO. Dr. Latham diagnosed her with a "contusion" with "no swelling or bruising." *Medical records*, at 033-034. He offered no treatment beyond a recommendation to follow up in two weeks.
12. On March 14, 2017, Claimant followed up with her primary care provider, family nurse practitioner Tina Heck. Ms. Heck noted that when Claimant fell, "she was able to get up and walk immediately afterward." *Medical records*, at 036. Ms. Heck's examination noted no gross bony abnormality, no effusion (*i.e.*, swelling from fluid buildup), no heat or warmth in the knee joint, and no ligament laxity. Claimant's active range of motion was intact. The only positive finding was mild tenderness in the kneecap area on deep palpation. *Medical records*, at 037. Ms. Heck referred Claimant to physical therapy.
13. On April 28, 2017, physical therapy records noted that Claimant denied significant right knee pain over the previous few weeks. *Medical records*, at 045.
14. Claimant's physical therapy records noted that she took a motorcycle ride from Vermont to Virginia Beach in May 2017. *Medical records*, at 046, 048. At the hearing she explained that she rode on the back of her husband's motorcycle. Also, because it was cold and rainy, she spent more time riding in the accompanying car with her friend than on the motorcycle. I find this testimony wholly credible.
15. In June 2017 Claimant returned to her primary care provider. The provider documented "marked improvement in her symptoms," noting that she had "started a walking program, she walks a mile on her lunch daily, then again after dinner. . . . She has lost about 30 pounds." *Medical records*, at 051. The provider noted no right knee symptoms, not even tenderness. *Id.*, at 052.
16. In July 2017 Claimant's physical therapist noted that she was walking several miles per day, gaining strength and endurance, and losing weight. *Medical records*, at 054-055. At the hearing, Claimant testified that she was never able to walk more than one-eighth to one-quarter mile and that her medical records were wrong. However, given that she was losing weight, gaining endurance, and reporting significant walks to different providers over a period of months, I do not find her testimony credible on this issue.²
17. Claimant resumed physical therapy in September 2017. In October 2017 she reported her hobbies as walking and weight training. *Medical records*, at 071. In November 2017 her primary care provider noted that her right knee was "non-tender." *Medical records*, at 075. A February 2018 physical therapy record noted that she was "carrying coal and shoveling snow." *Medical records*, at 105.

² Claimant testified that providers sometimes enter incorrect information into a patient's medical records, which they then carry forward from record to record. Although that sometimes happens, that does not appear to be the case here. Here, reports of Claimant's walking a mile or more appear with different phrasing, in different contexts, among multiple providers.

18. On March 21, 2018, Claimant saw Dr. Gagnon to report an increase in her right knee pain with weight bearing. New x-rays showed a complete loss of the medial joint space in her right knee and other severe degenerative changes. Dr. Gagnon recommended a right total knee replacement. Claimant has not yet undergone the procedure.
19. Claimant testified at the hearing that she did not experience any improvement in her right knee symptoms following her February 2017 work injury. Given the other evidence in the record, *see Findings of Fact Nos. 9 through 17 supra*, I do not accept her testimony on this issue as credible.
20. In July 2018 Claimant's primary care provider recorded her body mass index of 55.13 kg/m². *Medical records*, at 125.

Expert Medical Opinions as to Whether Knee Replacement Surgery Is Medically Necessary

21. The parties presented expert testimony as to whether Claimant's proposed right knee replacement surgery is medically necessary.
 - (A) *Richard Gagnon, MD*
22. Dr. Gagnon is a graduate of Brown University Medical School and a practicing orthopedic surgeon in St. Johnsbury, Vermont. Since 1982, he has performed over 2,000 total knee replacement surgeries. Dr. Gagnon performed Claimant's left total knee replacement surgery in 2013.
23. In Dr. Gagnon's opinion, total knee replacement surgery is a medically necessary treatment for Claimant's right knee. He testified that she has end stage osteoarthritis in her knee that causes pain and interferes with her work and activities of daily living. In his opinion, more conservative treatments would not help her, and "the time has come" for total knee replacement surgery. Further, she had an "excellent" outcome with her left total knee replacement surgery in 2013.
24. Dr. Gagnon did not address Claimant's elevated body mass index as a risk factor for the proposed surgery. However, her body mass index did not prevent her left knee replacement surgery from being successful.
25. I find Dr. Gagnon's opinion on the appropriate treatment for Claimant's right knee to be well-supported by his training and experience as an orthopedic surgeon, as well as his specific experience performing the same procedure on her left knee. His opinion is clear and persuasive.

(B) Leonard Rudolf, MD

26. In September 2018, at Defendant's request, Claimant underwent an independent medical examination with Dr. Rudolf. Dr. Rudolf is an orthopedic surgeon whose practice focuses on adult reconstructive surgery, including total knee replacement surgeries. He is a fellow of the American Academy of Orthopedic Surgeons, an organization that provides professional education in that field.
27. Dr. Rudolf reviewed Claimant's medical records from 2010 through 2018, interviewed her, and physically examined her lower extremities. In his opinion, total knee replacement surgery is the most appropriate treatment for the advanced degenerative arthritis of her right knee. However, he expressed reservations about her undergoing the procedure based on her elevated body mass index.
28. Dr. Rudolf testified that Claimant's body mass index is about 53 or 54.³ He explained that under the American Academy of Orthopedic Surgeons' guidelines for knee replacement surgery, the procedure is recommended for patients with a body mass index of 40 or lower. Patients with a higher body mass index face an increased risk for surgical complications, including blood clots, infections and failure of the surgical wound to heal. They also face an increased risk of the new joint wearing out prematurely.
29. Dr. Rudolf testified that many of his own knee replacement patients are overweight and that his experience with them has been relatively positive. Accordingly, he has extended the cutoff for surgery to a body mass index of 44 or 45, *if* the patient has demonstrated the ability to lose weight. However, in his opinion, a body mass index higher than 47 or 48 is "really excessive," and he would not likely perform surgery on a candidate in that range. Although he declined to state that a total knee replacement would be unreasonable for Claimant based on her body mass index, he testified that he would not perform the surgery unless she lost weight.
30. Dr. Rudolf agrees with Dr. Gagnon that total knee replacement surgery is the best treatment for Claimant's right knee. Their opinions differ only to the extent that Dr. Rudolf expressed concerns about the procedure based on Claimant's elevated body mass index. I find that Dr. Rudolf's concerns are supported by the applicable medical guidelines and his own practical experience. However, he did not address Claimant's successful experience with her left knee surgery, nor did he indicate a reasonable alternative treatment to remedy her pain. Thus, I find that his opinion is not as helpful as Dr. Gagnon's.

³ His independent medical examination report documents her body mass index at 55. *Medical records*, at 135.

(C) Daniel O'Neill, MD

31. In March 2018, at Defendant's request, Claimant underwent an independent medical examination with Dr. O'Neill, a board-certified orthopedic surgeon and sports psychologist. Dr. O'Neill completed medical school at Stony Brook, followed by a four-year residency in orthopedic surgery. He is a member of an orthopedics practice affiliated with the Littleton (NH) Regional Hospital and has experience performing total knee replacement surgeries.
32. Dr. O'Neill reviewed Claimant's medical records, interviewed her, and performed a physical examination. In his opinion, total knee replacement surgery is the best treatment for her right knee condition. He voiced concern about the potential dangers of the procedure given her high body mass index, but he did not rule out the surgery on that basis. He just noted that it would be preferable if she lost weight prior to surgery.
33. Thus, Dr. O'Neill agrees with Dr. Gagnon that total knee replacement surgery is the most appropriate treatment for Claimant's right knee. He shares Dr. Rudolf's concerns about her elevated body mass index but did not rule out the procedure on that basis. I find Dr. O'Neill's opinion on the medical necessity of the surgery for Claimant to be clear and well-supported by his experience as an orthopedic surgeon.

Expert Medical Opinions as to Whether the Proposed Right Knee Replacement Surgery Is Causally Related to Claimant's February 2017 Work Injury

34. The parties presented conflicting expert testimony regarding the causal relationship, if any, between Claimant's February 2017 work injury and her need for right total knee replacement surgery.

(A) Dr. Gagnon

35. In Dr. Gagnon's opinion, Claimant's need for a right total knee replacement is causally related to her work injury. The basis for his opinion is his understanding that her right knee was only mildly symptomatic before she fell, but continuously and severely painful after she fell. He therefore concluded that her work injury aggravated her preexisting osteoarthritis and accelerated her need for total knee replacement surgery.
36. Dr. Gagnon offered no testimony on whether Claimant's fall at work caused any anatomical or structural change to her knee joint or worsening of her preexisting osteoarthritis, beyond the increase in symptoms that she reported to him.

37. Dr. Gagnon acknowledged that he did not review Claimant's medical records or physical therapy records from other providers. Those records do not document continued severe knee pain following her work injury. To the contrary, they document complete resolution of any swelling or bruising within twelve days of her fall and continuous improvement after that. *See Findings of Fact Nos. 11 through 17 supra.* Accordingly, I find that Dr. Gagnon's opinion is significantly undermined by the inaccurate medical history upon which it is based. His failure to address whether her fall at work worsened her underlying osteoarthritis further weakens his opinion.

(B) Dr. O'Neill

38. In Dr. O'Neill's opinion, Claimant's need for a right total knee replacement is not causally related to her work injury based on two factors. First, both of her knees have osteoarthritis, a progressive condition that worsens over time. In 2010 her right knee was worse than her left knee. She had her left knee replaced in 2013, and it was only a matter of time until her right knee required replacement as well. In his opinion, Claimant's current need for a right knee replacement is just the result of the natural progression of her longstanding osteoarthritis.

39. Second, in Dr. O'Neill's opinion, Claimant's work injury was mild. By the time she sought medical treatment, her knee had fully recovered from any bruising or swelling and was rapidly returning to baseline. Further, her medical records document no significant tissue pathology. In Dr. O'Neill's opinion, therefore, Claimant's workplace fall caused an insignificant injury that did not accelerate her need for a total knee replacement.

40. In summary, Dr. O'Neill testified that Claimant's current need for a right total knee replacement is consistent with her history of advanced osteoarthritis and is unrelated to her minor work injury, which did not cause any structural change to her knee joint. I find his analysis clear, thorough and consistent with her medical records.

(C) Dr. Rudolf

41. Dr. Rudolf agrees that Claimant's need for right knee replacement surgery is not causally related to her work injury. He explained that her x-rays from 2010 and 2018 show a substantial, long-term progression of her right knee arthritis. In particular, the 2018 x-rays showed osteophytes, or bone growths, which develop gradually and take years before they appear on an x-ray. The complete loss of cartilage in her medial joint space and her bow-legged alignment are also evidence of the longstanding and progressive evolution of her arthritis, rather than evidence of joint changes occurring within the year following her fall.

42. Dr. Rudolf further explained that Claimant hyperflexed her right knee when she fell, meaning that she bent it back further than she normally would. Hyperflexion might have caused her knee to be more symptomatic, but this mechanism of injury did not cause any actual progression of her underlying arthritic condition, which was already sufficiently advanced to justify a total knee replacement before she fell.

43. In summary, Dr. Rudolf's opinion is that osteoarthritis is a gradual progressive disease, and that the mechanism of injury here did not cause any structural change that would have accelerated Claimant's need for a new knee. I find his opinion to be logical, well-explained and persuasive.

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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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, supra* at 19; *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 February 2017 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 disagree as to both the medical necessity of knee replacement surgery in Claimant's case and the causal relationship between her need for surgery and the work injury. They proffered conflicting expert medical opinions on both issues. 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).

Medical Necessity of the Proposed Knee Replacement Surgery

4. Claimant contends that right total knee replacement surgery is a medically necessary treatment for her condition. Defendant contends that the proposed surgery is contraindicated due to the potential complications that can flow from her significantly elevated body mass index.

5. Applying the *Geiger* factors, particularly the first factor, I conclude that Dr. Gagnon's opinion is the most persuasive. As Claimant's treating physician, he has firsthand knowledge of her course of recovery from left total knee replacement surgery. Further, he is an experienced orthopedic surgeon who has performed over 2,000 total knee replacements during his career. Thus, I accept Dr. Gagnon's opinion that total knee replacement surgery is a medically necessary treatment for Claimant's right knee.
6. Further, both Dr. O'Neill and Dr. Rudolf agree that the end stage osteoarthritis in Claimant's right knee warrants a total knee replacement. They expressed concerns about the increased risk of surgical complications due to her elevated body mass index, but neither of them ruled out the surgery as an appropriate treatment for her. I thus conclude that their concerns do not outweigh the treating physician's opinion as to the medical necessity of the proposed treatment.

Causal Relationship Between Claimant's Knee Condition and her Work Injury

7. Next, the parties dispute whether Claimant's need for knee replacement surgery is causally related to her February 2017 work injury. It is a well-settled tenet of Vermont 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 Co., Inc.*, 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, without a worsening of the underlying disability, will not establish causation. *Id.* Applying this standard to the claim here, if Claimant's work injury worsened her underlying osteoarthritis and hastened her need for knee replacement surgery, then the proposed surgery would be causally related to her work injury.
8. Relying primarily on the third *Geiger* factor, I conclude that Dr. O'Neill's causation opinion that the surgery is not related to her work injury is the most persuasive. Dr. O'Neill credibly explained that Claimant's osteoarthritis was longstanding and progressive, having already led to her left knee replacement five years earlier. Thus, her need for a right knee replacement now is consistent with the natural progression of her disease. Further, her work injury was mild and insignificant, with her knee returning to baseline within a few weeks of her fall. Dr. O'Neill's opinion was convincingly articulated and objectively supported by Claimant's medical records. Dr. Rudolf's explanation of the natural progression of her osteoarthritis based on her 2010 and 2018 x-rays was also persuasive.
9. In contrast, Dr. Gagnon's causation opinion was not well-supported. The basis of his opinion was that Claimant had only mild symptoms before her fall, but had continued severe knee pain after the fall. Dr. Gagnon did not have Claimant's treatment records and relied on her report of continued severe knee pain to form his opinion. However, Claimant's report is contradicted by her treatment records. Thus, Dr. Gagnon's causation opinion is based on an inaccurate medical history.

10. Dr. Gagnon offered no other basis for his opinion. In particular, he did not address whether the work injury caused any structural worsening of her knee arthritis, or whether it merely caused an increase in her symptoms. I therefore cannot accept his opinion as persuasive evidence that the preexisting pathology in Claimant's knee was aggravated by her work-related fall. The expert's role here is to identify to a reasonable degree of medical certainty the causal relationship between a work-related accident and a resulting injury. *Skovira, supra*, citing *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964). Dr. Gagnon has failed to establish such a causal connection here.
11. Having determined that Dr. O'Neill's expert medical opinion is well-founded and convincing, I conclude here that the causation test enunciated in *Stannard* has not been met. I accept as persuasive his analysis that the mechanism of Claimant's work injury caused no structural or anatomical injury to her knee joint. Instead, the work injury was a minor event, the symptoms from which were already returning to baseline by the time she sought medical treatment. Thus, Claimant's need for right total knee replacement surgery is attributable to the natural progression of her osteoarthritis and is not causally related to her work injury.

Conclusion

12. I conclude that Claimant's proposed right total knee replacement surgery is a medically necessary treatment. However, she has not sustained her burden of proving that her work-related fall either aggravated the underlying arthritis in her knee or accelerated the need for total knee replacement surgery. The proposed surgery is not causally related to her work injury, therefore, and Defendant is not obligated to pay any worker's compensation benefits associated with it.
13. As Claimant has not prevailed on her claim for benefits, she is not entitled to an award of costs and attorney fees.

ORDER:

Based on the above findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits for right total knee replacement surgery is **DENIED**.

DATED at Montpelier, Vermont this 24th day of January 2019.

Lindsay H. Kurrle
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.