STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File Nos. J-8250, E-21820, C-12618
Iola Jarvis	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Town of Bennington and	)	For: Steve Janson
The Hartford	)	Commissioner
	)	
	)	Opinion No. 05-00WC

Hearing held in Montpelier on July 7, 1999.
Record closed on July 23, 1999.

APPEARANCES:

Patrick L. Biggam, Esq. for the claimant
Eric A. Johnson, Esq. for the employer/insurance carrier

ISSUES:

1. Did claimant's work-related injury on or about November 28, 1989 cause her seizure disorder?

2. If the answer to the previous question is in the affirmative, what degree of permanent partial impairment has she suffered as a result?

3. Is claimant entitled to legal interest on any part of her award?

4. Is claimant entitled to attorney fees and costs?

PRELIMINARY COMMENT:

At the time this case was assigned to the formal hearing docket, Commercial Union and Liberty Mutual were parties because they had insured the employer from 1992 through 1995. Over The Hartford's objection, Commercial Union and Liberty Mutual were dismissed from this case with a Form 15 approved by the Department on September 15, 1999. In the instant action, The Hartford has reserved its rights with respect to the other carriers.

FINDINGS OF FACT:

1. At all times relevant to this action, claimant was an employee and the Town of Bennington her employer as those terms are defined in the Workers' Compensation Act.

2. The Hartford was the workers' compensation insurance carrier for the Town of Bennington on November 28, 1989.

3. While performing work for the Town of Bennington on November 18, 1989 Iola Jarvis slipped on a wet, slippery floor at the Bennington Post Office, fell backwards, and struck her head against the hard floor. At the time, she had no recollection of losing consciousness, but does remember that the injury felt severe, more severe than any headache she had ever had before. After she collected herself, she returned to the Town Offices and continued her workday. She did not go to the hospital or seek medical treatment because she did not break anything, there was no bleeding, and because she does not like to visit doctors in general.

4. On May 29, 1992, the claimant was walking from the Bennington Police Department to the Town Offices when she suddenly fell forward without apparent reason. All that she recalls is that she was walking, then she recalls she was on the ground without having attempted to brace her fall with her hands. As a result, she injured her chin, lip and teeth. The First Report of Injury filed at that time simply states "fell on face." After the fall, she went to the local emergency department where the examiner recorded her belief that she had slipped. Nothing in the record suggests a basis for the fall. The weather was clear and walking surfaces dry. Claimant assumed that she must have slipped on something.

5. On May 3, 1994 claimant fell as she was leaving a shopping mall in Crossgates, New York. At that time, she was walking with her daughter and granddaughter when she inexplicably fell forward, striking the right side of her face. There is no evidence that she in any way attempted to brace herself for the fall. Her daughter testified that she watched her mother simply fall forward without slipping, without tripping, and without attempting to brace her fall, then struck her face on the ground. Claimant does not remember losing consciousness at that time, but her daughter believes that she did. From the parking lot, claimant was transferred by ambulance to the emergency department at St. Peter's Hospital where the records state that claimant "slipped on gravel" and "tripped in a parking lot." Neither claimant nor her daughter remembers that she slipped or tripped.

6. Six days later, on May 9, 1994, claimant saw David Gorson, M.D., for an evaluation. The note for that visit indicates that claimant was "not sure how she fell. Doesn't think she tripped. Doesn't think she twisted her ankle." Dr. Gorson clearly noted his question "why she fell?" And he recorded a fall from three years earlier when she had also fallen "for no reason." When Dr. Gorson saw claimant again on May 18, 1994 he noted that claimant was not sure why she had fallen. He also noted that claimant had "milliseconds" when she had blacked out. She told him that such spells had occurred about once a week for one to two years.

7. In his November 16, 1994 note, Dr. Gorson referred to claimant's "two syncopal [fainting] spells with a negative work up."

8. October 17, 1995 claimant had just left the Bennington Town Offices when she again suddenly fell forward on the sidewalk. Once again she fell without any attempt to break the fall with her hands, and landed on the right side of her face, breaking her eyeglasses.

Claimant testified that she was not sure why she had fallen. The First Report of Injury states that she tripped on a crabapple. Claimant corrected it by putting a question mark after "apples," to reflect her uncertainty about the cause of the fall.

9. Manindra Ghosh, M.D., who sutured claimant's face later that day wrote that claimant "does not recall any obvious slippage; however, lost balance, did not lose consciousness, and fell forward and hit side of face." He also noted claimant's report that she suffered "occasional lapse of alertness." His records further indicate that claimant reported two prior falling episodes where she was injured in the same way.

10. When claimant returned to Dr. Ghosh to have the sutures removed, she told him that she had experienced a "short few seconds of blink" which may have caused her fall. Then she speculated that the "blinks" could have explained two of her past falling incidents because she could not come up with a specific reason for them.

11. Claimant testified, and I find, that tripping or slipping did not precipitate claimant's falls in 1992, 1994, or 1995. They were spontaneous. This finding is based on the uncertainty reflected in the medical records, the active medical questioning as to etiology expressed contemporaneously with treatment, the fact that claimant in no way attempted to break the falls, and on the credible testimony of the claimant and her daughter.

12. Later claimant was referred to Dr. Keith Edwards, a neurologist, who, based on claimant's oral history, initially opined that claimant had a seizure disorder which was possibly post traumatic from the initial 1989 fall. Objective tests, including an EEG and MRI, confirmed the diagnosis of seizure disorder. Specifically, the EEG revealed a "single but clear episode of spike and wave activity … emanating from the right anterior temporal head region … ." The physician who interpreted the MRI found "at least one and possibly as many as three left basal ganglia lacunar infarcts which appear old" and a "questionable abnormality at the origin of the left middle cerebral artery."

13. On November 1, 1995 Dr. Edwards prescribed the anti-seizure medication Dilantin which he later changed to Neurontin. Claimant has continued to take Neurontin and has had no falls since the 1995 incident.

14. After the diagnostic testing, Dr. Edwards concluded that claimant's seizure disorder was "probably post traumatic from fall eight years ago." In his January 6, 1999 report, he explained that the 1989 fall was the only one without loss of consciousness, the other three falls were without apparent reason, and she had no falls since taking anti-seizure medication. He summarized his opinion as follows:

> [T]he patient had no falls or head trauma until 1989 when she clearly had significant head trauma which stunned her but was not significant to bring her to medical attention. The next three falls were unprovoked and probably seizures in retrospect, and the proof of this is that her seizures have been in control with medication.

15. Dr. Edwards concluded that claimant had reached a medical end result on July 1, 1996. In his note of July 31, 1996, he wrote, "She is stable on a modest amount of anti-seizure

medication and there is no reason to think that her condition will change at this point." Claimant continued to work, drive and do all activities of daily living that she did prior to the accident, with the exception of drinking more than minor amounts of alcohol. However, she has some drowsiness from the medication.

16. At the insurer's request, Dr. Van Uitert, also a neurologist, reviewed claimant's medical records. He did not perform an examination. Dr. Van Uitert concluded, "there is no indication that a minor bump to the head as was the case with Ms. Jarvis would be responsible for a post traumatic seizure disorder." Based on the MRI findings, he opined that the "likely source of Ms. Jarvis' seizure disorder is the ischemic infarcts of the brain rather than head trauma."

17. In response to Dr. Van Uitert's opinion, Dr. Edwards noted that the MRI did not indicate presence of cortical infarcts that could explain a seizure disorder, although an abnormality was found in the basal ganglia which rarely, if ever, is the focus for a seizure.

18. Next, Dr. Van Uitert responded to the critique Dr. Edwards had written. In his May 10, 1999 report, he stated that "the records clearly indicate that in 1992 she slipped and fell." Dr. Van Uitert agreed that the MRI did not reveal cortical infarcts and that infarcts in the basal ganglia do not generally cause seizure. However, he concluded that the fact that she has "lacunar infarcts in the basal ganglia on the MRI scan could indicate that she also has cortical infarcts which could act as a seizure focus." In a follow-up report, Dr. Van Uitert stated that the records do not indicate a specific cause for claimant's seizure disorder. In his opinion it is medically probable that a small cortical infarct caused the disorder. And he also opined that another possible cause for claimant's seizure disorder was idiopathic, which in its medical sense means unknown.

19. Although he found it unlikely that claimant's seizure disorder has a traumatic origin, Dr. Van Uitert wrote that "if a seizure disorder would result from a head injury, it is more likely that the fall of 5/29/92 which brought her to medical attention would be a cause of a seizure disorder than the fall of November 20, 1989 which was of such minor consequence that she did not even seek medical attention.

20. At the hearing, Dr. Van Uitert testified that the reason claimant fell on the three occasions following the 1989 incident was that she slipped and fell each time. He speculated that Dr. Edwards must not have read the medical records since Dr. Edwards described three of the falls as having occurred for no apparent reason and that nothing in the records supports that position.

21. Dr. Van Uitert further explained that the location of the seizure focus in the temporal area of claimant's brain cannot be explained by a fall in which she struck the back of the head. He also said that the blow was not significant enough to have caused a countercoup injury, i.e., one that occurs when trauma to one part of the head causes the opposite part of the brain to strike the skull. Next, he explained that trauma induced seizure disorders typically appear within days or weeks of the trauma. Finally, he said that trauma to the head that does not induce unconsciousness or amnesia typically is not severe enough to induce a seizure disorder.

22. Dr. Edwards found that claimant had reached a medical end result on July 1, 1996 and has a permanent impairment of 15% in accordance with the 4th edition of the *AMA Guides to Permanent Impairment*. The basis for his opinion, as explained in his January 6, 1999 report is "a permanent epilepsy condition from head trauma requiring the need of medication, limitation of activity relative to potential medication side effect, potential breakthrough seizure, and altered lifestyle … ." He noted that claimant "has had some side effects of sedation involved with her treatment." The claimant testified that daily medication causes her drowsiness and fatigue and that those symptoms have caused an alteration in her lifestyle.

23. Dr. Van Uitert assessed claimant's permanency as 0-5% impairment, depending on whether she is assessed with impairment for the potential of breakthrough seizures. He testified that his rating, too, is based on the 4th edition of the *AMA Guides*. The difference between his opinion and the opinion of Dr. Edwards is that Dr. Van Uitert does not believe that claimant has any side effects to medication.

24. The claimant has submitted evidence of her contingency fee agreement with her attorney.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co*., 123 Vt. 161 (1963). She must submit sufficient competent evidence which establishes a 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.,* 112 Vt. 17 (1941).

2. The claimant in this case has the burden of establishing as the more probable hypothesis that her seizure disorder is causally related to her fall on November 18, 1989 at the Bennington Post Office.

3. On this crucial disputed issue, both parties have offered expert medical opinions on causation as well as on the issue of permanency. Traditionally this Department has considered the following factors when evaluating and choosing between conflicting medical opinions: 1) the nature of treatment and length of time there has been a physician-patient relationship; 2) whether accident, medical and treatment records were made available to and considered by the examining physician; 3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts, including professional training and experience." *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997); *Martin v. Bennington Potters*, Opinion No. 42-97WC (Dec. 30, 1997).

4. Dr. Edwards has the advantage as claimant's treating physician and, as such, has been able to interview and observe her over time. He has obviously reviewed results of all crucial diagnostic tests, which he ordered, as well as the emergency department records. Dr. Van Uitert has reviewed all available medical records on this claimant. Both physicians prepared clear, thorough evaluations supported with objective evidence. However, Dr. Van Uitert based his opinion on the premise that claimant's falls in 1992, 1994, and 1995 were the result of tripping, a premise that is contrary to facts found in this case. Also, his theory that the source of claimant's seizures is from a cerebral infarct must be rejected as pure speculation. No objective evidence shows the presence of an infarct in the area of the seizure focus. Both experts prepared comprehensive evaluations. Both are qualified in the field of neurology by professional training and experience.

5. On the issue of causation, the real difference between the two opinions relates to the severity of claimant's fall in 1989 and the temporal onset of the seizures. In Dr. Van Uitert's opinion, when a seizure disorder is traumatically induced, seizures usually result soon after the fall. Furthermore, he opined that trauma severe enough to cause a seizure disorder is expected to cause unconsciousness or amnesia, factors that are absent in this case.

6. Dr. Edwards obviously disagreed. He considered the trauma in 1989 to be significant, even though claimant had neither loss of consciousness or amnesia. He found the causal link despite the fact that claimant did not have seizures within days or weeks. What Dr. Van Uitert described as the usual course of events for the onset of seizures, Dr. Edwards obviously found inapplicable to this particular patient. He found that claimant had one fall with a reason and three for unknown reasons. A cardiac evaluation was negative. He interpreted the MRI as having unremarkable changes. Dr. Edwards accepted the claimant's history as sufficient to explain the onset of traumatically induced seizures, even though the seizures themselves were not evident for some time afterwards.

7. Both opinions are well reasoned and clear. They present a very close case. On balance, I find that the opinion of Dr. Edwards is more credible than that of Dr. Van Uitert because it has been developed on facts specific to this individual claimant. As such, I find that claimant has met her burden of proving that the more probable hypothesis is that claimant's seizure disorder was caused by her 1989 fall.

8. The next issue for decision is what degree of permanency is due claimant. Claimant objects to the admissibility of Dr. Van Uitert's opinion on permanency on the basis that it was not disclosed prior to the hearing as is required in this Department. However, it is clear from two of the three reports Dr. Van Uitert prepared prior to the hearing, and which had been disclosed to claimant's counsel, that Dr. Van Uitert specifically disagreed with the rating assessed by Dr. Edwards. Consequently, I will not exclude Dr. Van Uitert's opinion on that subject.

9. The applicable *Guides* provision is on page 4/143, Table 5 entitled "Impairments Related to Epilepsy, Seizures and Convulsive Disorders." Dr. Edwards based his 15%

permanency rating on the fact that claimant's seizure disorder is lifelong, that she is on a modest amount of anti-seizure medication, that her activity has been limited "relative to potential medication side effect," that there is the potential for breakthrough seizures, and that her lifestyle alteration is significant. The *Guides* provision in Table 5 that correlates with a 15% to 29% rating states "Paroxysmal disorder that interferes with some activities of daily living."

10. Dr. Van Uitert's 0-5% rating is premised on his conclusion that claimant's seizure disorder has not interfered with her activities of daily living. His rating would fall into the category in Table 5 which states that one has a 0-14% impairment with a "Paroxysmal disorder with predictable characteristics and unpredictable occurrence that does not limit usual activities but is a risk to the patient or limits performance of daily activities."

11. The sparse explanatory provision in the *Guides* specifies that "Minor seizures with alterations of awareness or consciousness, transient manifestations of unconventional behavior, or interruptions of daytime activity may indicate impairment. The severity of major or minor seizures should be judged as they interrupt or affect daily activities." *Id*.

12. The claimant's explanation of how the treatment for her seizure disorder affects her activities of daily living was vague and unconvincing. Any adverse effect on those activities has been minimal. As such, Dr. Van Uitert's opinion that her permanency is 5% whole person shall serve as the basis for the award.

13. Interest on this award shall run from the date of this order.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, this Department finds that claimant's seizure disorder is causally related to her November 18, 1989 work related injury, The Town of Bennington/The Hartford, therefore is responsible for benefits and is ORDERED to pay claimant:

1. Medical benefits and a 5% permanent partial disability award; and

2. Legal fees of 20% of the amount awarded.

DATED at Montpelier, Vermont, this 24th day of March 2000.

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Steve Janson
Commissioner