

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GUNNAR JENSEN,)
)
 Claimant,)
)
 v.)
)
 DOUG ANDRUS DISTRIBUTING, INC.,)
 and EXPLORER INSURANCE)
 COMPANY,)
)
 Employer / Surety,)
)
 and)
)
 RICHARDSON TRUCKING, INC.,)
 and IDAHO STATE INSURANCE FUND,)
)
 Employer / Surety,)
 Defendants.)
 _____)

**IC 01-013879
03-519780**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed April 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to the Commissioners for hearing following the retirement of the original hearing officer Referee Bob Barclay. On August 22, 2005, Commissioner James F. Kile conducted a hearing in Lewiston, Idaho. Claimant was present and represented by Christopher Caldwell of Lewiston. Thomas V. Munson of Boise appeared on behalf of Defendant Doug Andrus Distributing (hereinafter "Andrus"). Mr. Munson also claimed to be representing Insurance Company of the West (hereinafter "ICW"). Upon review with the Industrial Commission Employer Compliance Bureau, it is unclear whether ICW actually has any standing in this case. As of the date of this decision, ICW was not listed as a workers' compensation surety for either party, nor was it a surety in the past for either party. Explorer Insurance Company (hereinafter "Explorer") is the surety of record for Andrus. Wynn R. Mosman of Moscow represented Defendant Richardson

Trucking (hereinafter “Richardson”) and Idaho State Insurance Fund (hereinafter “SIF”). Pre-hearing depositions of Claimant, Twila Patten and Marvin R. Kym, M.D., were taken. Post-hearing depositions of Michael T. Phillips, M.D., and Stanley J. Waters, M.D., were also taken. A second deposition of Dr. Kym was also taken after the hearing. Following submission of post-hearing briefs by the parties, the case came under advisement and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant suffered an accident arising out of the course and scope of employment;
2. Whether Claimant’s need for amputation of the left leg above the knee arose out of an accident in the course and scope of employment;
3. Whether Claimant is entitled to reasonable and necessary medical care in addition to that which has been provided by Defendants;
4. Whether and to what extent Claimant is entitled to temporary total disability (TTD) benefits; and
5. Whether Claimant is entitled to attorney fees from Explorer due to unreasonable denial of medical and income benefits pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends the first industrial injury to his left knee occurred in 1978 and resulted in an anterior cruciate reconstruction and lateral meniscectomy of his left knee. He suffered numerous injuries to his left knee in the following years resulting in further surgical intervention. Claimant further contends he suffered two, more recent industrial accidents – one on May 29, 2001 while working for Andrus, and a second on September 15, 2003 while working for

Richardson. Claimant argues a resulting total knee arthroplasty was the direct result of the May 29, 2001 accident and that said procedure was a temporary fix destined to fail. Claimant further argues the subsequent amputation of his left leg, above the knee, was a result of the May 29, 2001 accident. In the alternative, Claimant argues the September 15, 2003 accident necessitated the amputation. Claimant also contends he is due attorney fees under Idaho Code § 72-804, because Explorer unreasonably denied Claimant's request for amputation.

Defendant Andrus contends ICW is the surety responsible for Claimant's May 29, 2001 accident, whereas SIF is the surety responsible for Claimant's September 15, 2003 accident. Andrus argues that the amputation of Claimant's left leg was a direct result of the September 15, 2003 accident. Andrus points to the medical testimony of Drs. Kym, Waters and Phillips to conclude that Claimant's knee prosthesis failed due to the September 15 accident, necessitating amputation. Andrus argues Claimant was functioning normally until the September 15 accident hence the earlier accident of May 29, 2001 was not the reason for amputation. The September 15 accident was the "straw that broke the camel's back," and is thus the responsibility of SIF. Finally, Andrus contends ICW is not liable for attorney fees under Idaho Code § 72-804 since the only procedure denied by a surety was the amputation, which is the responsibility of SIF not ICW.

Defendant Richardson contends the need for Claimant's amputation was created by the May 29, 2001 accident, thus placing Andrus as the party responsible for the amputation and related benefits. Richardson relies on statements made by Dr. Kym indicating that amputation was inevitable following the May 29 accident. Richardson argues that Claimant's surgery following the May 29 accident was a temporary fix and Claimant's amputation was not directly related to the September 15, 2003 accident. Richardson further argues Claimant never

“recovered” following the May 29 accident as evidenced by the testimony of Claimant and his son at hearing where they both spoke of Claimant’s knee-related difficulties and pain following May 29, 2001. Finally, if the Commission finds the May 29 accident was not the sole cause of the amputation, Richardson argues the amputation and related benefits should be apportioned between Claimant’s previous knee injuries and the September 15, 2003 accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, and Gunnar Jensen, Jr.;
2. Joint Exhibits, as between Claimant and Defendant Richardson, 1 through 25 admitted at hearing; and
3. Defendant Andrus’ Exhibits A through PP admitted at hearing, excluding exhibits DD, GG, II, and JJ.

All objections made during the depositions of Drs. Waters, Kym and Phillips are overruled. Mr. Munson’s objection on page 43 of Twila Patten’s deposition is sustained, while all other objections throughout Ms. Patten’s deposition are overruled. After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 55 years of age and living in Orofino, Idaho. Claimant was unemployed at the time of the hearing and had not worked since September 15, 2003.

2. In 1983, Claimant received a total left knee replacement in Spokane, Washington. A second surgery was performed on Claimant's left knee in 1989. Neither of these procedures are at issue in this case but should be noted for reference.

3. Claimant began driving truck for Andrus in the mid-1990s hauling lumber, machinery, steel and grain. On May 29, 2001 Claimant was involved in an industrial accident while driving for Andrus. Claimant was driving a truck loaded with cedar when the truck rolled completely over coming to rest on its side. As the truck rolled, Claimant's left leg jutted out of the truck cab dragging along the pavement. The accident totaled the truck. For ease of reference, the May 29, 2001 injury shall hereafter be referred to as "Injury 1."

4. As a result of Injury 1, Claimant received emergency medical care at St. Joseph's Regional Medical Center in Lewiston, Idaho. After a number of days at St. Joseph's, Claimant was airlifted to Harborview Medical Center in Seattle, Washington where medical professionals attempted to repair his damaged left knee. The procedure at Harborview involved filling in weak areas with bone cement and also using standard knee hardware to repair Claimant's knee.

5. Claimant was off of work for roughly one year following Injury 1. Claimant was unable to return to work for Andrus.

6. Once Claimant was able to return to work, he did so for Sea-Nik as a truck driver hauling lumber. Claimant's son, Gunnar Jr., also worked for Sea-Nik and would often help Claimant with the heavy work of tarping loads.

7. Following Sea-Nik, Claimant went to work for Mangums hauling loads to the seaport in Lewiston. Claimant preferred this work as it was localized and closer to his home. Claimant's employer eventually became Richardson.

8. On September 15, 2003 Claimant was involved in an industrial accident while working for Richardson. After loading his truck with “chips,” Claimant noticed a portion of the tarp covering the load had come loose over a corner of the trailer. After climbing up a ladder on the trailer to fix the tarp, Claimant descended and caught his foot in some exposed “airlines.” Claimant was tripped up and fell to the ground. At the hearing there was some confusion as to whether Claimant fell onto his feet or directly onto his knees. As Claimant’s personal recollection is hazy on this matter, the Commission finds it irrelevant whether Claimant landed on his feet or knees. What is relevant is that Claimant tripped, fell roughly three feet to the ground and felt a distinct pop in the region of his left knee. Claimant drove his truck to Lewiston where he was taken to St. Joseph’s to receive medical treatment. Claimant has not worked since September 15, 2003. For ease of reference, the September 15, 2003 injury shall hereafter be referred to as “Injury 2.”

Medicals

9. Claimant first visited his treating physician, Marvin Kym, M.D., on June 14, 2001 following Injury 1. Dr. Kym opined Claimant “would best be treated” at Harborview in Seattle due to the combination of Injury 1 and Claimant’s prior knee problems. *See*: September 1, 2005 Deposition of Marvin R. Kym, M.D., p. 8, ll. 10-14.

10. Claimant saw Dr. Kym for a follow-up to the Harborview procedure on July 25, 2001. Dr. Kym was not entirely pleased with the procedure performed at Harborview and felt as though the procedure would not be effective in the long term.

11. On October 4, 2001 Claimant visited Michael T. Phillips, M.D. Dr. Phillips found “no atrophy of the thigh muscles or the quadriceps muscles in the left leg” of Claimant, opining this meant Claimant was “using the extremity in a reasonably normal manner.” *See*: Deposition

of Michael T. Phillips, M.D., p. 9, ll. 2-9. Dr. Phillips found no evidence of loosening in Claimant's left knee in October of 2001, following Injury 1. *Id.*, p. 16, ll. 6-8.

12. Claimant's next visit to Dr. Kym was on October 14, 2003 following Injury 2. In his notes Dr. Kym referred to Injury 2 stating, "since that point in time, he has had severe pain." *See:* Defendant Andrus' Exhibit O. Dr. Kym also opined Claimant was suffering with a "failing prosthesis of a left knee." *Id.* During his deposition, Dr. Kym espoused his belief that Claimant's knee started downhill after the Harborview fix when he stated, "I think the thing started loosening the minute it was put in." *See:* September 1, 2005 Deposition of Marvin R. Kym, M.D., p. 17, ll. 11-12. However, Dr. Kym did refer to "an event that was the straw that broke the camel's back...." *Id.*, p. 22, ll. 3-4. Dr. Kym also spoke of a nonspecific, ambiguous "failure point" that might necessitate the amputation of Claimant's leg. *Id.* p. 14, ll. 1-14.

13. On November 19, 2003 Claimant visited Stanley J. Waters, M.D., a general orthopedic surgeon. Claimant complained of left knee pain. Dr. Waters found a loosening of Claimant's left total knee arthroplasty attributable to events prior to Injury 2. Dr. Waters opined Injury 2 was not "the major cause of the loosening of the component," and the need for the above knee amputation was not directly related to Injury 2. *See:* Deposition of Stanley J. Waters, M.D., p. 19, ll. 2-4 and 13-15.

14. On February 20, 2004, Claimant's left leg was amputated just above the knee. Dr. Kym's partner, Timothy J. Flock, M.D., performed the procedure.

15. Claimant once again visited Dr. Phillips on May 5, 2005 following Injury 2 and the amputation of Claimant's left leg. In his deposition, Dr. Phillips expressed the following opinion as gathered from his two visits with Claimant:

In my opinion, the need for amputation was the result of his initially having to undergo a total knee arthroplasty in the early 1980s and subsequent revision. I

believe he did well after the incident in 2001, and clinically, the incident in 2003 seemed to produce rather significant loosening of the extremity, which then resulted in the need for amputation.... I think a critical statement of the individual was made when he was seen in the emergency room following the September 2003 incident when he describes something as loose in the knee following that accident, and prior to that, he had been working, doing well, not seeking medical care nor describing any type of circumstances that would suggest loosening of the device or failure of the prosthesis prior to that accident.

See: Deposition of Michael T. Phillips, M.D., pp. 15-16.

DISCUSSION

Accident and Causation:

1. As the Defendants do not dispute the occurrence of the industrial accidents resulting in Injury 1 and Injury 2, the focus of this discussion shall be on causation and the amputation of Claimant's left leg above the knee. All parties involved agree that the primary issue to be resolved is the determination of responsibility for the amputation of Claimant's left leg and all related benefits. Therefore, the discussion will focus on that primary issue.

The burden of proving causation rests with Claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

2. It is clear that the majority of medical professionals involved in this case agree that Claimant's amputation was a reasonable treatment for Injury 1. It is also clear that none of the doctors involved could pinpoint when failure in Claimant's knee actually occurred, creating the need for amputation. The mere fact that amputation would be an eventuality due to Injury 1 is

not enough for causation. As stated above in *Hart*, there must be more than a possible causal link to implement liability. To simply say that Claimant's amputation was a reasonable inevitability of Injury 1 is not sufficient to overcome evidence that Injury 2 was actually the "straw that broke the camel's back." Given the context of the deposition questioning and testimony, it is clear that Dr. Kym was alluding to Injury 2 as the type of event that could "break the camel's back." Injury 2 was the "failure point" Dr. Kym spoke of when discussing the amputation of Claimant's leg. *See*: September 1, 2005 Deposition of Marvin R. Kym, M.D., p. 14, ll. 1-14.

3. An employer takes an employee as it finds him. A preexisting disease or infirmity does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. As this case turns on this concept, it should be reiterated - an employer takes an employee as it finds him. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). Defendant Richardson hired an employee with a poor left knee. As medical evidence has shown, when Claimant suffered Injury 2, he immediately and subsequently experienced an onset of symptoms leading to the amputation of his left leg above the knee. Injury 2, on September 15, 2003, was the causal event leading to the amputation of Claimant's leg.

4. Even though amputation may have eventually been a reasonable treatment for Injury 1, there is no medical evidence to directly link Injury 1 to the February 2004 amputation of Claimant's leg. To the contrary, there is evidence that Injury 2 was the "straw that broke the camel's back," necessitating the amputation of Claimant's leg. Richardson argues that Injury 1 was the event leading to the amputation of Claimant's leg. This argument is logically flawed. If Injury 1 necessitated the amputation, why was the amputation performed so near in time

following Injury 2 and not after Injury 1? It is mere speculation that Injury 1 necessitated the amputation, whereas Injury 2 was clearly the precipitating event to the amputation.

Medical Care:

5. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

6. The reasonableness of Claimant's amputation is hardly in question. Although the doctors may not be able to fully agree on whether Injury 1 or Injury 2 necessitated the amputation, virtually all agree that the amputation was a reasonable medical step. Claimant was employed by Richardson when he suffered Injury 2, therefore Defendant Richardson is liable for the cost of amputating Claimant's left leg above the knee. Defendant Richardson is also liable for any and all medical costs and treatment resulting from the amputation, as defined by Idaho Code § 72-432.

TTD Benefits:

7. Idaho Code § 72-102(10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho

Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 614, 621 (2001).

8. In his brief, Claimant states his period of recovery was from September 15, 2003 (Injury 2) until May 8, 2005, when Dr. Phillips rated Claimant. *See*: Defendant Andrus' Exhibit X. None of the Defendants dispute Claimant's accounting regarding income benefits. Claimant should be awarded TTD benefits for the period of September 15, 2003 to May 8, 2005 with credit to Defendants for any benefits paid to date.

Attorney Fees:

Idaho Code § 72-804 provides for attorney fees in the event that an employer or surety contests a claim for compensation without reasonable grounds to do so. If Injury 1 had indeed necessitated the amputation of Claimant's leg, Claimant would have a solid argument that the party responsible for Injury 1 would be responsible for fees. As it stands, however, Injury 2 was the causal event leading to Claimant's amputation, thus rendering Claimant's argument for fees moot. The surety for Injury 1 could not unreasonably deny a claim arising from an injury for which it is not responsible.

CONCLUSIONS OF LAW

1. Claimant suffered an industrial accident on May 29, 2001 while employed with

Andrus. Claimant suffered another industrial accident on September 15, 2003 while employed with Richardson.

2. Claimant's need for amputation arose from the industrial accident of September 15, 2003, while Claimant was employed with Richardson.

3. Claimant is entitled to all reasonable and necessary medical care related to the amputation of his left leg above the knee, pursuant to Idaho Code § 72-432.

4. Claimant is entitled to TTD benefits for the period of September 15, 2003 to May 8, 2005 with credit to Defendants for any TTD benefits paid to date.

5. Claimant is not entitled to attorney fees under Idaho Code § 72-804.

* * * * *

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant suffered an industrial accident on May 29, 2001 while employed with Andrus. Claimant suffered another industrial accident on September 15, 2003 while employed with Richardson.

2. Claimant's need for amputation arose from the industrial accident of September 15, 2003, while Claimant was employed with Richardson.

3. Claimant is entitled to all reasonable and necessary medical care related to the amputation of his left leg above the knee, pursuant to Idaho Code § 72-432.

4. Claimant is entitled to TTD benefits for the period of September 15, 2003 to May 8, 2005 with credit to Defendants for any TTD benefits paid to date.

5. Claimant is not entitled to attorney fees under Idaho Code § 72-804.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 7th day of April, 2006.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

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