

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERNEST HILL,)	
)	
Claimant,)	IC 2005-525660
)	
v.)	
)	
COEUR SILVER VALLEY,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
)	Filed January 18, 2007
STATE INSURANCE FUND,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on July 25, 2006. Claimant was present and represented by Starr Kelso of Coeur d'Alene. Paul J. Augustine of Boise represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on November 15, 2006.

ISSUE

The sole issue to be decided as the result of the hearing is whether Claimant's right knee surgery of December 20, 2005, was necessitated by an industrial accident occurring on November 11, 2005.

CONTENTIONS OF THE PARTIES

Claimant contends that as a result of an undisputed accident wherein he slipped and hurt his right knee, he underwent right knee surgery for which Defendants should be responsible.

Defendants contend that the need for Claimant's right knee surgery was the ongoing underlying degenerative process occurring in his knee, not the temporary aggravation he experienced as the result of his accident.

Claimant counters that, according to his treating physician, Claimant's accident resulted in a permanent aggravation and an employer takes an employee as found.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;
2. Claimant's Exhibits 1-15 E admitted at the hearing;
3. Defendants' Exhibits A-C admitted at the hearing; and
4. The post-hearing deposition of Robert C. Brewster, M.D., taken by Claimant on July 25, 2006, and that of Joseph G. Daines, M.D., taken by Defendants on September 6, 2006.

Claimant's objections at pp. 26 and 54 of Dr. Daines' deposition are sustained. Any reference to an addendum to his report dated July 28, 2006, (Exhibit 3 to Dr. Daines' deposition) is stricken and will not be considered. All other objections are overruled.

FINDINGS, CONCLUSION, AND RECOMMENDATION - 2

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 54 years of age and resided in Wallace at the time of the hearing. He is a Gyppo Miner.

2. On Friday, November 11, 2005, Claimant slipped on a muddy incline and, " . . . I slipped with it [right foot] and I planted it again, and it went out from under me, it [right knee] twisted inwards, and popped in, and when I straightened back up it popped back out." Hearing Transcript, p. 18. Claimant was able to finish his shift because of, in his opinion, the high heat and humidity in his work area. Later that day he filled out a minor accident report pursuant to company protocol.

3. The following Monday, the condition of Claimant's right knee had worsened and he was unable to perform his duties. He filed a major accident report and someone in the safety department took him to see his family physician, Anthony Branz, M.D. Dr. Branz noted a grade 1 effusion and suspected a meniscal tear. He then referred Claimant to orthopedic surgeon Robert C. Brewster, M.D, who Claimant had seen before for knee problems.

4. Claimant saw Dr. Brewster on November 23, 2005. Dr. Brewster noted that Claimant had to go on light duty after the accident that Claimant believed caused a new injury.¹ Dr. Brewster further noted that prior to his accident, Claimant did not have any catching or popping, or significant swelling or pain. After his accident, Claimant had some clicking and catching of his right knee. Dr. Brewster diagnosed either a loose body or a further tear of his medial meniscus. On December 20, 2005, Dr. Brewster performed a partial medial meniscectomy of Claimant's right knee.

¹ Dr. Brewster had previously performed an arthroscopic partial medial meniscectomy on Claimant's right knee.

DISCUSSION AND FURTHER FINDINGS

Defendants do not dispute Claimant's November 11, 2005, accident. They do dispute that the December 20, 2005, surgery was causally related to that accident, but argue instead that it was related to the natural progression of Claimant's documented underlying osteoarthritis.

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217-218 (2001). An employee may be compensated for the aggravation or acceleration of a pre-existing condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(17). *See, Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

5. Claimant's treating physician, Dr. Brewster, has been practicing orthopedic surgery for 30 years and is board certified in that specialty. He performs between 200-500 knee surgeries a year. He took pictures of the right knee surgeries he performed on Claimant in June and December 2005. In support of his opinion that the December surgery was necessitated by the November 11 accident, he testified, "Well, you can see the torn meniscus that wasn't there when we finished the one in June that was there in December. So trauma of some sort happened and there was a tear there. So that would be the significant difference that is there that is irrefutable." Dr. Brewster Deposition, p. 11. He further testified that it would take five to six

years to wear down the meniscus to the extent he found it in December, not the few months between June and December, and that trauma is a common cause of a torn meniscus.

6. Defendants retained orthopedic surgeon Joseph G. Daines, M.D., to perform a records review and provide a causation opinion. Dr. Daines is also board certified in his specialty and has practiced for 27 years. Upon his examination of various medical records provided by Surety, Dr. Daines determined that Claimant's right knee was osteoarthritic in all compartments prior to his November 11 accident. He testified as follows regarding causation:

Q. (By Mr. Augustine): Now, was that tear, in your opinion, caused by his accident of November 11, 2005, or some other or is it relating to his degenerative condition?

A. Well, if you look at the picture on Exhibit 6 after the initial trim job on the meniscus, the tear is not present. So we know that this particular tear occurred sometime after the arthroscopy that was done in June of 2005. But I would point out that the meniscus tissue is degenerative. It has both vertical and horizontal tears in it that or at least degeneration in it makes it very friable and very much, you know, prone to tearing.

The tear that he got now is an inner-edge tear that's seen, rather, on the December 2005 arthroscopy is an inner-edge tear. In the face of all the degenerative changes that are evident on the knee, it's a little bit hard for me to decide what would be causing the symptoms.

So I don't really know, other than the fact that that tear on the inner edge occurred sometime after the arthroscopy in June. When it occurred, I don't think it's a big enough tear that it would necessarily cause a lot of symptoms. I don't think it's what you call an unstable tear that would get caught in the knee. It's a degenerative tear. It's a tear of very soft, friable, degenerative medial meniscus. And it's or you know, it's hard to know how long it's been there and when it happened.

Dr. Daines' Deposition, pp. 34-35. Emphases added.

7. The Referee is more persuaded by the opinions expressed by Dr. Brewster than those of Dr. Daines. Dr. Brewster expressed his opinions forthrightly and logically whereas, as the emphasized portions of his above testimony indicates, Dr. Daines equivocates. Dr. Daines recognizes that the tear of whatever kind was repaired in the June 2005 surgery, but does not know when the tear repaired in the December 2005 surgery occurred. What we do know is that

Claimant returned to work shortly after the June surgery and was able to perform the strenuous labor of a gyppo miner, albeit with pain. He missed no work and suffered no loss of production until November 11. The mechanics of his fall are consistent with tearing a meniscus. Without the accident, Dr. Daines' opinion regarding a degenerative tear would be entitled to more weight. However, as pointed out by Dr. Brewster, while it is possible to tear a meniscus without trauma (as was apparently the case with the tear repaired in the June surgery), that usually does not occur unless it is a minor trauma over years, where little parts are torn and it gets large enough to become symptomatic. Here, we have an admitted accident that immediately caused different and more painful symptomatology than Claimant was experiencing before his accident.

8. Dr. Brewster was in a unique position. He operated on Claimant's knee on both occasions and had the opportunity to observe the condition of his knee personally, and also had the opportunity to examine and treat Claimant over time. Dr. Daines concedes that one can obtain more complete records with a physical examination. Further, Dr. Daines was somewhat confused regarding the nature of his retention. He initially thought he was to render an opinion regarding whether Claimant's need for an eventual total knee replacement would be related to Claimant's accident; not whether the December surgery was so related. Further, Dr. Daines admitted on cross-examination that Dr. Brewster did not use the word "degenerative" in describing the tear in his December 20, 2005, operative report as Dr. Daines indicated he did in his (Dr. Daines's) report. Finally, Dr. Daines testified, "I think a lot depends on how much personal stress the person that has the arthritis is putting his knee under as to how soon or how severe the symptoms may pile up." Dr. Daines's Deposition, p. 20. Claimant's accident caused stresses that created immediate and severe symptoms. Merely because Claimant's underlying osteoarthritis may have predisposed him to a medial meniscus tear, the aggravation of a pre-

existing condition is compensable if by accident. An employer takes an employee as found. *See, Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

CONCLUSION OF LAW

Claimant has proven that, more probably than not, the need for his December 20, 2005, right knee surgery was caused by his November 11, 2005, industrial accident.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this __12th__ day of ____January____, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __18th__ day of __January____, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

_____/s/_____

ge

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __18th__ day of __January____, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

STARR KELSO
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COEUR D'ALENE ID 83816-1312

PAUL J AUGUSTINE
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