

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID SWENSON,)
)
 Claimant,)
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 v.)
)
 HIDDLESTON & SON, INC.,)
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 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2004-518859

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

May 6, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho, on January 6, 2009. Richard S. Owen of Nampa represented Claimant. Bridget A. Vaughan of Boise represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on April 24, 2009 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432; and

2. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits (TPD/TTD).

The parties expressly reserve all other issues.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his left knee on October 1, 2003 when he fell as a result of his feet becoming tangled in a hose on the ground. Claimant contends that the injury aggravated his preexisting left knee condition and caused or accelerated his need for a partial left knee replacement performed on August 14, 2006. Claimant seeks medical and income benefits relating to his surgery.

Defendants contend that Claimant's industrial injury was limited to a left knee strain and temporary aggravation of his preexisting left knee condition that resolved without the need for medical treatment. Defendants maintain that Claimant's need for operative care in August 2006 resulted from preexisting and progressive osteoarthritis.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 8;
2. Defendants' Exhibits 1 through 5;
3. Testimony of Claimant taken at hearing;
4. The deposition of orthopedist Colin E. Poole, M.D., taken January 14, 2009; and
5. The Industrial Commission's legal file.

The hearing record was left open for the purpose of receiving and admitting Claimant's Exhibit 8 which was admitted post-hearing without objection. All other documentary evidence was admitted at hearing.

Claimant's objection on page 39 of Dr. Poole's deposition is overruled.

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

FINDINGS OF FACT

Background and Prior Left Knee Treatment

1. Claimant was born in 1956 in Mountain Home, Idaho, where he graduated from high school in 1974 and resided at the time of hearing. Claimant's work history includes carpentry, maintenance, farm work and welding.

2. Claimant sustained multiple prior injuries to his left knee. He initially injured his left knee in December 1980 while working for the Carnation Company in Nampa, at which time he lost his footing while carrying a heavy piece of equipment as he descended stairs. Claimant received treatment at the direction of orthopedic surgeon, Richard A. Klein, M.D.

3. Medical records available regarding Claimant's left knee treatment in the 1980s are incomplete and some of the records in evidence are illegible, in spite of the best efforts of the parties to obtain a clean set of complete records. However, it is undisputed that Dr. Klein performed three surgeries on Claimant's left knee. Claimant's initial surgery was in January 1981 and included the implantation of steel pins that subsequently caused complications and were removed during a second procedure in April 1981. Claimant's third surgery was in October 1981 at which time cartilage and other loose bodies were removed from his left knee.

4. Upon initial release by Dr. Klein, Claimant was limited to light-duty work. He gradually increased his work load and eventually resumed tasks that included climbing ladders, kneeling and squatting. In 1984, Claimant went to work for a trailer manufacturer called

Western World where he experienced a recurrence of left knee pain and locking of his left knee resulting from a September 1984 twisting injury. He returned to Dr. Klein who referred him to orthopedic surgeon E.R. Bowman, Jr., M.D.

5. On July 10, 1985, Dr. Bowman performed arthroscopic surgery with removal of loose bodies from Claimant's left knee. Operative findings included "[d]egenerative changes of the medial tibial plateau underlying the old area of osteochondritis dissecans, the surface of which was showing a great amount of chondromalacia..." (Defendants' Exhibit 2, p. 9). Claimant was released to return to work in August 1985. By January 1986, Claimant reported that his knee bothered him "off and on".

6. In April 1986, Claimant scraped his left knee at work while employed by TLK Farms. The abrasion became infected and Claimant was hospitalized for approximately ten days for treatment with IV antibiotics. Claimant was diagnosed with cellulitis and probable septic bursitis of the left knee. A left knee x-ray was performed that showed soft tissue swelling without acute bony injury or arthritis. Claimant received outpatient treatment through May 1986 after which there is no indication that Claimant had residual problems associated with his left knee infection.

7. Claimant returned to Dr. Bowman in February 1989 and explained that his left knee was better but still not like he wanted it to be. Dr. Bowman noted mild swelling from the operative site; that Claimant had full range-of-motion and was not tender; that Claimant had returned to work; and that Claimant healed without measurable physical impairment.

8. Claimant did not receive medical treatment for his left knee from March 1989 through September 2003. During this period of time, Claimant participated in knee-intensive activities both at work and in his personal life without restriction or limitation. Claimant

experienced occasional soreness, but nothing more than general aches and pains. Claimant was seen in the emergency room on August 28, 2003 with complaints of chest pain at which time he reported, as part of his medical history, mild arthritic complaints to his knees and wrists without current acute exacerbation.

9. Claimant began working for Employer as a welder in mid-1989. Employer is in the business of constructing and maintaining drilling rigs. Claimant's job duties varied and the amount of welding needed on the rigs fluctuated. Claimant frequently performed welding work in the shop during the winter. When Claimant worked on the rigs, his job involved welding steel casings which required him to kneel and weld close to the ground.

Industrial Injury and Personal Illness

10. On October 1, 2003, Claimant welded casing for a well on a dairy farm. As he stepped backward from the rig, his feet got tangled in a hose and he lost his balance. His left leg twisted underneath him and he fell to the ground. He felt like he sprained his left knee. He reported the incident to his boss but "walked it off" and did not think that it was necessary to get medical attention.

11. Claimant continued to work and did not seek medical attention for his left knee for several months. He described off-and-on symptoms that became progressively worse. In the meantime, Claimant experienced a series of unrelated health problems. Claimant initiated treatment on March 26, 2004 with Layne Roberts, D.O., for coronary artery disease, hypertension, hyperlipidemia, anxiety and petit mal seizures.

12. During the March 2004 examination by Dr. Roberts, Claimant provided a detailed history of his past medical treatment and previous injuries. Claimant reported his 1980 knee injury and subsequent surgeries as well as other injuries to his left wrist, left clavicle and head.

He did not mention complications with his left knee after 1981 and did not indicate that he re-injured his left knee in October 2003.

13. The first time that Claimant sought treatment for his October 1, 2003 knee injury was on August 23, 2004. He reported to Dr. Roberts that he had been experiencing symptoms since he hurt his knee in September or October 2003. He mentioned his initial injury in 1980 and gave a description of his October 2003 injury that was consistent with his testimony at hearing. Dr. Roberts noted that recommended treatment was related to an industrial injury and sought clearance for treatment from Employer. He referred Claimant for an MRI.

14. Claimant's left knee MRI of August 30, 2004 revealed changes consistent with previous surgery; probable leaking or ruptured Baker's cyst; a vertical tear in the anterior horn of the medial meniscus that might be related to prior surgery; additional horizontal tearing and possible localized areas of vertical tearing; tricompartmental chondromalacia; osteoarthritis, worse in the medial compartment; and chronic patellar tendinosis with possible partial tear or mucoid degeneration.

15. Claimant was evaluated by orthopedist Michael J. Curtin, M.D., on September 9, 2004. Dr. Curtin diagnosed:

Left knee pain, work-related, an acute on chronic phenomenon. Clearly, the patient had degenerative changes in the left knee as a baseline, which were likely exacerbated by his work comp issue a year ago. At present, he is having pain and swelling, does have degenerative changes localizing anteromedially.

(Defendants' Exhibit 3, p.10). Dr. Curtin recommended a course of conservative care. He released Claimant to full-duty work and noted that Claimant had not previously been losing time from work due to his left knee condition.

16. Dr. Curtin re-evaluated Claimant in November 2004. Claimant continued to be symptomatic. Conservative care successfully decreased Claimant's pain during the day, but

Claimant continued to experience discomfort at night. He reported struggling at work and having difficulty walking on uneven surfaces. Dr. Curtin prescribed an unloader brace and felt that it was in Claimant's best interest to avoid surgical intervention, if possible.

17. On January 31, 2005, Claimant was evaluated by orthopedist Joseph G. Daines, Jr., M.D., at the request of Surety. Dr. Daines reviewed medical records, obtained a history from Claimant and performed an examination. He felt that Claimant would eventually need a left total knee replacement and that arthroscopic surgery would not be beneficial.

18. Dr. Daines was requested to comment on causation and concluded that:

...as to the etiology of his knee arthritis, it is clearly related to his 1981 injury. The October 1, 2003, industrial injury may have stirred up symptoms, but any effect of that injury has long ago worn off. The ongoing problems are wholly related to the osteoarthritis and chondrocalcinosis that predate the October 1, 2003, industrial injury. I view the October 1, 2003, incident as a knee strain that would have completely resolved in a matter of a few weeks to months. The promulgation of the left knee symptoms falls back on the pre-existing osteoarthritis of the left knee.

(Defendants' Exhibit 3, p.25).

19. Claimant returned to Dr. Curtin for treatment in April 2006. Claimant described progressive left knee discomfort and a decline in activity tolerance. Claimant reported that he had been laid-off by Employer in early April 2006, in part because of his decreased abilities. Significantly, Claimant had continuing issues with his cardiac disease and was diagnosed with an abdominal aortic aneurism.

20. Dr. Curtin recommended a unicompartmental arthroplasty and referred Claimant to Colin E. Poole, M.D., in the same practice. Dr. Curtin's final word on causation was:

Left knee medial compartment arthrosis, posttraumatic, related to previous surgical intervention in 1981, likely aggravated in small part by a work-related injury two years ago.

(Defendants' Exhibit 3, p.27).

21. In May 2006, Claimant was evaluated by Dr. Poole. Dr. Poole diagnosed advanced left knee degenerative osteoarthritis and concurred that Claimant was an appropriate candidate for joint replacement surgery. His initial opinion on causation was:

As regards the contribution of the previous injury in 1981 [sic] and the injury in October 2003, granted he did have osteoarthritis in the knee. I do not have any radiographs to assess the severity of this prior to 2003. Obviously, the injury of October 2003 significantly accelerated his disease and has left him with his current symptom complex and current disabling features.

(Defendants' Exhibit 3, p.30).

22. On August 14, 2006, Dr. Poole performed a left cemented unicompartmental arthroplasty, also referred to as a partial knee replacement. Claimant's post-operative care was uneventful. At follow-up examinations, Claimant condition was described as "excellent" and as doing "unbelievably well."

23. Claimant continued to be plagued by unrelated medical conditions including bilateral carpal tunnel syndrome, placement of coronary artery stents and problems with his kidneys. Claimant has not returned to any type of employment since April 2006.

24. Surety sought clarification from Dr. Poole's opinion regarding causation on at least two occasions during the summer of 2008. Copies of letters sent by Surety and/or an itemization of additional records sent to Dr. Poole are not in evidence. However, based on Dr. Poole's responsive letters, it appears that he was forwarded records and/or diagnostic studies from the 1980s.

25. Dr. Poole flip-flopped on his causation opinion. In June 2008, he stated that:

In light of these new findings and this new information, it would now force me to change my medical opinion. This injury in October 2007 [sic] obviously contributed to his preexisting arthritis, but was not the most significant factor in accelerating this.

(Defendants' Exhibit 3, p.51). In August 2008, Dr. Poole provided clarification of his change in opinion and stated:

In my initial assessment, I had delayed a final opinion on the need for surgery due to the lack of adequate information available to me at that time. In the light of new information that I have received, it was evident that the preexisting condition necessitated a surgery and was not related to this industrial accident of October 1, 2003. There are obviously clinical and radiographic features that are the basis for my decision regarding this.

(Defendants' Exhibit 3, p. 52).

26. During his post-hearing deposition, Dr. Poole was asked to give his ultimate opinion regarding causation and to explain his previous inconsistent opinions. His general opinion is that a meniscal tear that is superimposed on osteoarthritis significantly accelerates the development of the osteoarthritis and compounds the symptoms. He concluded that Claimant suffered a meniscal tear as a result of the October 2003 injury as shown on the August 2004 MRI. The meniscal injury accelerated Claimant's degenerative arthritis and caused the need for surgery.

27. Dr. Poole has not evaluated Claimant since April 2007. He does not have a specific recollection as to what information was sent to him by Surety during the summer of 2008 which prompted him to indicate that the surgery was *not* related to the October 2003 injury. Dr. Poole explained that his opinions are subject to change when he receives new evidence or information. At the time of his deposition he was provided with information regarding Claimant's testimony at hearing which is what prompted him to conclude that the October 2003 injury accelerated Claimant's condition to the point that a partial knee replacement was necessitated. Specifically, he learned that Claimant reported the absence of left knee symptoms for approximately 17 years prior to the industrial injury. He does not think that Claimant would

have been asymptomatic during that period of time if the post-injury MRI findings had been in existence before the October 2003 injury.

28. Dr. Poole stands by his opinion as articulated during his deposition. His deposition testimony was based on the most complete information including Claimant's post-injury MRI, the mechanism of injury, Claimant's testimony at hearing, knowledge of Claimant's preexisting osteoarthritis and his treatment of Claimant.

29. Claimant was doing well six weeks post-operatively. He was likely at medical stability eight weeks after surgery.

Claimant's Credibility

30. Claimant was a good historian and exceptionally credible witness. His testimony was consistent with the documentary evidence. He was not prone to exaggeration. Claimant was not easily led by the phrasing of questions posed and did not limit his testimony to self-serving information. For example, he was honest about stopping work for reasons other than his knee injury and did not attempt to inflate his period of industrial injury-related disability. He accurately relayed information about a settlement for his 1980 injury.

31. Claimant admitted that he did not immediately seek treatment for his injury and agreed that it was ten months before he pursued left knee treatment. He explained that he initially thought the condition was not serious and then became preoccupied with his other health concerns. He described a slow but consistent worsening of his left knee condition after the October 2003 injury.

DISCUSSION AND FURTHER FINDINGS

Medical Care

32. Idaho Code § 72-432(1) mandates that an employer provide reasonable medical care that is related to a compensable injury. The claimant bears the burden of proving that medical expenses were incurred as a result of an industrial injury and 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). The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson V. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

33. It is not uncommon for a seemingly minor industrial injury to aggravate a progressive preexisting degenerative condition. The Industrial Commission has held on numerous occasions that when the need for a total knee replacement surgery is hastened by an industrial injury, such surgery is compensable even if there evidence to indicate that the claimant would eventually have needed the surgery in the absence of the compensable injury. *See Terry*, 2008 IIC 0692, *Rupp*, 2006 IIC 0422, *Van Sickel*, 1987 IIC 0241, and *Smith*, 1989 IIC 0626. In such circumstances, there is statutory authority to permit apportionment of benefits paid to a

claimant for permanent impairment and permanent disability benefits. However, there is no similar legal authority upon which medical or temporary disability benefits may be reduced under this scenario.

34. In the present case, both parties offered plausible expert medical opinions to support their respective positions. Dr. Daines opined that any aggravation to Claimant's preexisting left knee condition resulting from the October 2003 industrial injury resolved within a few months and that his need for partial joint replacement surgery was entirely related to his progressive arthritis. Dr. Daines' opinions are supported by the fact that Claimant continued to perform knee-intensive work for several months following the injury and failed to either seek treatment for his knee or at least mention his October 2003 injury during his treatment for unrelated health conditions from October 1, 2003 through August 23, 2004.

35. In order to adopt the opinions of Dr. Daines, it is necessary to attribute all of Claimant's August 2004 left knee MRI findings to preexisting conditions and to conclude that Claimant was not as asymptomatic from 1986 through 2003 as he describes.

36. Dr. Poole concluded that Claimant's need for joint replacement surgery was at least accelerated by the October 2003 injury and that the injury caused Claimant's preexisting conditions to become symptomatic. The fact that Claimant was able to work for Employer for approximately 15 years without seeking treatment for his left knee or requiring accommodations for knee problems supports Dr. Poole's opinions.

37. In order to adopt the opinions of Dr. Poole, it is necessary to accept his explanation for issuing inconsistent opinions regarding causation. It is also necessary to believe Claimant's testimony that his left knee was not symptomatic before the injury and that it became

gradually symptomatic following the injury, in spite of the fact that he waited more than ten months to have the condition medically addressed.

38. Dr. Curtin's opinions fall short of constituting a tie-breaker and can be argued either way. Overall, the opinions of Dr. Curtin favor Claimant's position that the October 2003 industrial injury aggravated Claimant's arthrosis and at least played a small part in Claimant's need for surgery.

39. After a careful weighing of the evidence, the final opinion of Dr. Poole is adopted over his previous opinions and over the opinions of Dr. Daines. Claimant's testimony regarding the absence of symptoms for several years and the gradual development of symptoms after the October 2003 injury is credible. Claimant's explanation for his failure to promptly seek medical attention following the injury or at least mention the injury during treatment for his other health conditions was believable. The fact that Claimant mentioned that he had a history of arthritis in his wrists and knees during a medical evaluation for a cardiac condition in August 2003 was considered and does not negate Claimant's testimony that his left knee was asymptomatic other than general aches and pains.

40. Claimant has met his burden of proof to establish that his partial knee replacement surgery of August 14, 2006 is causally related to his October 2003 industrial injury.

TTD/TPD

41. 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 617, 624 (2001).

42. Claimant was able to continue working for Employer until April 2006 at which time Claimant's personal health issues impacted his performance and raised safety concerns. Although Claimant's left knee condition was symptomatic at the time he stopped working for Employer, Claimant testified that he would have been able to continue working if his knee had been his only problem.

43. From the date of Claimant's August 14, 2006 surgery until Claimant reached medical stability eight weeks later, Claimant was totally disabled by virtue of his industrial injury alone and is entitled to TTD benefits. It is noted that there is a lack of factually similar case law analyzing entitlement to TTD benefits when a claimant is rendered totally disabled because of an industrial injury but was already off of work secondary to performance/safety issues associated with an unrelated personal medical condition.

44. Claimant has met his burden to establish by medical evidence that he was within a period of recovery and unable to work because of his industrial injury from August 14, 2006 through October 8, 2006.

CONCLUSIONS OF LAW

1. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including his left knee unicompartmental arthroplasty performed on August 14, 2006.

2. Claimant is entitled to temporary total disability benefits from August 14, 2006 through October 8, 2006.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 4 day of May 2009.

INDUSTRIAL COMMISSION

 /s/
Susan Veltman, Referee

ATTEST:

 /s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of May a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

BRIDGET A VAUGHAN
5011 N HERTFORD WAY
BOISE ID 83714

jc

 /s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID SWENSON,)	
)	
Claimant,)	IC 2004-518859
)	
v.)	
)	
HIDDLESTON & SONS, INC.,)	
)	
Employer,)	ORDER
)	
STATE INSURANCE FUND,)	
)	May 6, 2009
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is entitled to reasonable and necessary medical care for as provided for by Idaho Code § 72-432, including his left knee unicompartmental arthroplasty performed on August 14, 2006.
2. Claimant is entitled to temporary total disability benefits from August 14, 2006 through October 8, 2006.

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

DATED this 6 day of May, 2009.

INDUSTRIAL COMMISSION

/s/ _____
R. D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of May, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

BRIDGET A VAUGHAN
5011 N HERTFORD WAY
BOISE ID 83714

jkc

/s/ _____