BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHERYL DUNCAN, Claimant, v. IDAHO DEPARTMENT OF ADMINISTRATION, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-515250** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed Sept. 30, 2009

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 Boise on December 16, 2008. Darin G. Monroe of Boise represented Claimant and James A. Ford, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented, two post-hearing depositions were taken, and the parties submitted post-hearing briefs. This matter came under advisement on April 28, 2009, and is now ready for decision.

ISSUES

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

1. Whether the need for Claimant's total knee arthroplasty (TKA) was caused or accelerated by her May 1, 2006, industrial accident; and,

2. Whether Claimant is entitled to an award of attorney fees for Defendants' wrongful denial of her claim.

CONTENTIONS OF THE PARTIES

Claimant contends that even though she had prior left knee surgeries that left her with osteoarthritis, she was asymptomatic prior to the subject industrial accident that resulted in an arthroscopic surgery and the eventual need for a left TKA. Therefore, Defendants should be held liable for the costs associated with that procedure. Defendants should also be liable for Claimant's attorney fees because they relied upon the legal, as opposed to medical, opinion of their independent medical examiner to deny the claim. Further, Defendants failed to explore whether her industrial accident accelerated (versus caused) the need for her TKA until they were preparing for hearing.

Defendants contend that contrary to Claimant's assertions, she was, in fact, symptomatic prior to her industrial accident, and the need for her TKA was the natural progression of an underlying degenerative condition that arose as the result of a serious injury to her left knee in a 1989 skiing accident. Further, Defendants were entirely reasonable in relying on the medical opinions expressed by their medical expert. Attorney fees should not be awarded.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.

2. Joint Exhibits 1-45.

3. The post-hearing depositions of Ronald Kristensen, M.D., taken by Claimant on January 19, 2008, and that of Joseph G. Daines, M.D., taken by Defendants on January 26, 2008.

The objections made during the taking of Dr. Daines' deposition are overruled.

After having considered the 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

1. Claimant was 55 years of age and resided in Garden City at the time of the hearing. Her work history consists primarily of administrative assistant-type jobs.

2. In 1989, Claimant severely twisted her left knee in a skiing accident in California. She was taken to surgery the following day for repair of a torn medial collateral ligament, torn anterior cruciate ligament that had completely detached from the femur, and torn lateral meniscus. Post-surgery, Claimant was casted for eight weeks and wore a knee brace for an additional three months.

3. In 1990, Claimant fell at work and landed on her left knee. After conservative treatment failed, Claimant underwent "Arthroscopy with localized synovectomy, debridement, medial tibial plateau, lateral retinacular release and removal of staple, left proximal tibia." Exhibit 6, p. 11-0004.

4. On May 1, 2006, Claimant again injured her left knee. According to her hearing testimony:

> I was sitting at my desk in a rolling desk chair - - in a desk chair that had rollers on it and I was on top of a plastic mat. The chair was sitting on top of a plastic mat. I was working on files. I had two file drawers open on my left-hand side at my desk and files on the top part of the top drawer that I had already looked at. I pushed with my right foot - - pushed my chair back and at the same time I swiveled in my chair and as I swiveled in my chair I had pushed myself too hard and my left leg twisted[1] as I turned towards the file drawer trying to catch myself and I hit - - in the twisting motion I hit the joint of my - - the outer joint of my left knee on the edge of the open file drawer.

[1] Whether Claimant actually twisted her leg as she described is an issue that will be explored later in this decision.

Hearing Transcript, pp. 37-38.

5. Claimant testified that she felt an immediate, sharp pain. However, she did not seek medical attention until July 10, 2006, because she ". . . didn't think it was that big of a [*sic*] injury." *Id.*, p. 39. Claimant eventually came under the care of Ronald Kristensen, M.D., who performed a left knee arthroscopy on November 15, 2006. Dr. Kristensen released Claimant to return to work with limited prolonged standing on November 20, and by February 20, 2007, Dr. Kristensen opined that the "acute problem" had resolved.

6. Claimant's knee condition failed to improve post-arthroscopy. Therefore, on April 8, 2008, Dr. Kristensen performed a left TKA. It is for this procedure that Claimant seeks reimbursement.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

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).

Two orthopedic surgeons have weighed in on this somewhat complex issue of causation. Their respective opinions are summarized below.

Ronald Kristensen, M.D.

7. Dr. Kristensen is a board-certified orthopedic surgeon whose specialty is lower extremity injuries and conditions. He was Claimant's treating physician and performed the arthroscopy and TKA. He has opined that the need for Claimant's TKA was 50% attributable to Claimant's underlying arthritic condition and 50% to her industrial accident. He explained at his deposition his reasoning for this apportionment as follows:

> Q. (By Mr. Monroe): In your medical records you state - - you state in your medical records that you believe that the meniscal tear was 50 percent related to the industrial accident and 50 percent to preexisting conditions. Is that still your opinion?
>
> A. Yes.
>
> Q. And what is the basis for that opinion?
>
> A. Well, she had had previous problems with her knee including previous surgeries. And it is certainly possible that she could have had a meniscus tear that was asymptomatic and, clearly, an arthritic knee that was apparently asymptomatic. And then she had an on-the-job injury and it became symptomatic. And I always struggle as to what sort of apportionment you give, but it seems reasonable to me that if she was asymptomatic, she had an injury - - we have documentation of the tear - - that at that point I decided that it was at 50 percent apportionment to her on-the-job injury.
>
> Dr. Kristensen Deposition, pp. 8-9.

8. Regarding the relation between Claimant's industrial accident and the need for the TKA, Dr. Kristensen testified:

> Q. (By Mr. Monroe): One of the - - the main reason why we're here today is to find out if Ms. Duncan's need for the total knee replacement was somehow related to the industrial accident. Do you have - - what is your opinion as to whether or not Ms. Duncan's May 1st, 2006, industrial accident hastened her need for surgery?
>
> [Defendants' objection overruled].
>
> A. I struggle with that. You know, this is a problem that we, as docs, see, and I always struggle with that. She clearly had arthritic changes beforehand. She was going to have a total knee arthroplasty at some point in her lifetime, I believe. And so the role of the injury leading to the replacement is always somewhat arbitrary to assign a number. I do feel that it is reasonable on a more-probable-than-not basis to say that the injury hastened the need for the replacement. But as to the time frame, that's difficult to put a number on it.
>
> Q. Okay. And what is the basis for your opinion that the surgery - - or that the accident hastened the need for the surgery?
>
> A. Well, if she was asymptomatic prior to her injury, then she had an injury, and then it never improved after that injury and eventually required a replacement, then I - - I feel that it's related.
>
> Dr. Kristensen Deposition, pp. 10-11.

Joseph G. Daines, M.D.

9. Defendants retained board-certified orthopedic surgeon Joseph Daines to perform two independent medical evaluations. Dr. Daines had previously treated Claimant for a shoulder problem. Dr. Daines has performed "thousands" of TKAs. Dr. Daines' first IME was performed on May 31, 2007, after her arthroscopic surgery. Dr. Daines does not believe that Claimant's relatively minor accident caused her torn meniscus or hastened the need for her TKA. He testified:

> Q. (By Mr. Ford): Okay. And these conditions that were found at surgery,[2] would any of those be consistent with a striking of the lateral side of the knee on a desk drawer?

[2] Counsel is referring to the November 15, 2006, arthroscopy.

A. Well, I cannot conceive of changes as diffuse as those described on an MRI scan or at the time of her arthroscopic surgery as being caused by an injury where she struck the lateral aspect of her leg at the knee. None of it.

Q. Okay. And why is that?

A. Because the way the accident happened, despite her being on a chair and rolling across a mat and then striking an open drawer, that's an impact injury. And I can't - - there was no twist involved with that, and I therefore can't attribute any of those findings directly to that trauma.

. . .

Q. As a general proposition, in your experience, can an injury to an arthritic knee hasten the need for [a] total need [*sic*] in certain cases?

A. Absolutely. I mean if you have somebody who's got arthritis and they have significant trauma to their knee - - and by "significant trauma" I mean a violent twisting accident, an accident that might cause ligaments to tear or fractures to occur in and around the knee - - even if they have arthritis there, that their need for a total knee may be hastened by the injury that they sustained, but not this injury.

Q. Why is there a difference between, say, this injury and that more significant one that you described?

A. Because a more significant injury in and of itself could lead to that. Again, with the tincture of time, you know, in a lot of instances would lead to the same conclusion. You know, this injury that she had is - - you know, would not do that.

I think that - - I think that it's important to look at the big picture in things. And it is a very common finding that people who have - - I have people that come in my office all the time after a relatively minor incident, will show up with advanced arthritis when they're evaluated. And a lot of them will say they never had a lick of trouble with their knee before the accident that they had. Obviously their accident did not impact their need for a total knee. And I think this is one of those cases.

Yes, she had some trauma to her knee, but it was trivial.[3] And it did not hasten the need for her to have a total knee. If she'd had a much more significant injury, I wouldn't take this strong a stance.

Dr. Daines Deposition, p. 52-53.

[3] Dr. Daines' description of Claimant's accident as minor finds support in the record in that she did not immediately report it, thought it was no big deal herself, and did not seek medical treatment for over two months post-accident.

10. For reasons detailed below, the Referee is more persuaded by the opinions expressed by Dr. Daines than those of Dr. Kristensen.

Twisting

11. Drs. Kristensen and Daines agree that a twisting-type knee injury is more likely to cause meniscal and ligament damage than an impact injury. Here, Claimant testified that she twisted her knee as she slid across the mat in her chair. However, her testimony in that regard is undermined by the record. Claimant herself prepared a First Report of Injury or Illness on July 6, 2006. Even though she testified that she tried to be accurate and specific in the report, she did not mention any twisting-type injury to her knee therein. In her February 11, 2008, deposition, Claimant testified that she did not know or did not remember if she twisted her knee. *See*, Claimant's deposition, pp.120-121. When she first sought medical treatment on July 10, 2006, Claimant failed to mention any twisting-type injury. When Claimant saw Dr. Kristensen's partner, Darby Webb, M.D., on August 31, 2006, she did not mention a twisting-type injury and Dr. Webb noted, "There was not a twisting-type motion and she had a direct blow."[4] Exhibit 27, p. 03-0010. It was not until October 17, 2006, that any mention of a twisting-type injury appears in the records when Claimant first saw Dr. Kristensen.[5] Claimant argues this delay in mentioning twisting at her visit with Dr. Kristensen was, unlike her deposition, "non-confrontational," thus giving her the chance to more fully explain her accident. However, the preparing of the Form 1 and the visits with the two physicians prior to Claimant seeing

[4] Claimant testified at hearing that she did tell Dr. Webb that she had a twisting-type injury; however, based on the record, especially Claimant's deposition testimony, Claimant's assertion in that regard is given no weight.

[5] Interestingly, Claimant also told Dr. Kristensen on her first visit that she was experiencing medial knee pain which is the opposite side of the knee from where she struck the file drawer.

Dr. Kristensen was ostensibly non-confrontational as well, and would have provided the opportunity to mention the twisting aspect of her accident.

12. The Referee finds that Claimant did not suffer a twisting-type knee injury on May 1, 2006.

Symptomatic v. Asymptomatic

13. The crux of Dr. Kristensen's causation opinion is his belief that, per Claimant's history, her left knee was asymptomatic except for some limitation in her range of motion since her 1989 injury, prior to the subject accident. However, Dr. Kristensen was unaware that in 1992 Claimant complained of left knee pain to a chiropractor in Alaska. *See,* Exhibit 9, p. 20-0008. Dr. Kristensen was also unaware that Claimant complained of left knee pain to Peggy Rupp, M.D., a rheumatologist who treated Claimant between 2004 and 2008 on a referral from Dr. Daines for rheumatoid arthritis. Although not necessarily indicative of symptomatology, a left knee x-ray on April 19, 2004, taken by Dr. Rupp revealed osteoarthritis and other degenerative changes. *See,* Exhibit 21. Dr. Kristensen was similarly unaware that Claimant presented to St. Luke's ER on April 9, 2005, with a chief complaint of left knee pain. She also reported that she ". . . chronically has had a little bit of pain in her knee." Exhibit 24, p. 09-0001. Claimant's argument that she was having knee pain because she was not taking her medicine for rheumatoid arthritis at the time and her knee pain resolved once she resumed taking her medicine is not persuasive and does not mean she was not having pain as she reported.

14. The Referee finds, in spite of Claimant's assertions to the contrary, that she, at least to some extent, had left knee symptomatology prior to her May 1, 2006, industrial accident.

To the extent that Dr. Kristensen relies on Claimant's history that she was totally asymptomatic, his opinions regarding causation are given little weight.

15. Claimant underwent an MRI examination of her left knee on August 16, 2006. Regarding the menisci, the MRI report notes, "There is horizontal cleavage tear at the posterior third medial meniscus. The lateral meniscus shows degeneration and/or maceration or previous partial meniscectomy of the posterior third. There is blunting of the free margin of the anterior third." Exhibit 27, p. 03-0008. Dr. Kristensen testified that "maceration" is a degenerative process. He also testified that in the presence of arthritis, meniscal tears can occur without a twisting-type injury or a direct blow. Dr. Daines explained that there are degenerative meniscal tears and acute meniscal tears. Degenerative tears are complex and generally split the meniscus in a horizontal pattern, whereas acute tears split in a vertical fashion. Dr. Kristensen agrees that horizontal tears are "sometimes," but not always, chronic tears. Dr. Daines testified that the findings on MRI all denote chronic conditions. Dr. Daines also attributed all the findings at Claimant's November 15, 2006, arthroscopy to degenerative or chronic conditions, especially the horizontal tear of the meniscus.

16. The Referee finds that Claimant's relatively minor industrial accident did not hasten the need for her TKA. If, indeed, Claimant tore her meniscus in her accident, that condition had resolved prior to her TKA, leaving the most likely cause for that procedure the natural progression of her underlying osteoarthritis stemming from her 1989 injury.

17. Claimant cites to three Industrial Commission cases in support of her position. However, those cases are factually distinguishable from the instant case and do not warrant further discussion. Here, it is found that Claimant's need for the TKA was due totally to her underlying degenerative condition and not by her industrial accident, so there is no need to

discuss aggravation or acceleration. Also, unlike in the cases cited, here it is found that Claimant's accident was minor and her acute injury had resolved by the time of her TKA.

Attorney fees

18. Claimant contends she is entitled to an award of attorney fees because Defendants relied upon the opinion of Dr. Daines, who is known to them for "holding a bias against fundamental concepts in Idaho's workers' compensation system . . ." regarding the acceleration of a preexisting condition. *See,* Claimant's Reply Brief, p. 2. Claimant complains that Defendants did not explore with Dr. Daines the concept of "acceleration" until they were preparing for hearing, so they had no basis to deny her claim for the TKA and "[f]ailure to explore applicable legal theories with an expert witness is unreasonable and is ground for attorney fees." *Id.*

19. Defendants contend that they were entirely reasonable in relying on Dr. Daines' IME wherein he opined that Claimant's accident had nothing to do with the need for her TKA. No further clarification was necessary regarding "acceleration."

20. The Referee finds that Defendants did nothing unreasonable in relying on Dr. Daines' opinion and attorney fees are not warranted.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that her industrial accident caused or accelerated the need for her TKA.

2. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

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

DATED this __18th___ day of September, 2009.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___30th____ day of ____September_____, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DARIN G MONROE
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JAMES A FORD
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ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHERYL DUNCAN, Claimant, v. IDAHO DEPARTMENT OF ADMINISTRATION, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-515250** **ORDER** Filed Sept. 30, 2009

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 has failed to prove that her industrial accident caused or accelerated the need for her TKA.

2. Claimant is not entitled to an award of attorney fees.

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

DATED this __30th___ day of ___September_____, 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 __30th____ day of ___September____ 2009, a true and correct copy of the foregoing ORDER was served by regular United States Mail upon each of the following:

DARIN G MONROE
PO BOX 50313
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