

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CANDIDA HERNANDEZ,
Claimant,
v.
TACO SHOP, INC. dba,
FIESTA OLE RESTAURANT,
Employer,
and
IDAHO STATE INSURANCE FUND,
Surety,
Defendants.

IC 2013-021538

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

Filed December 9, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls on February 24, 2016. Michael McBride represented Claimant. Scott Hall represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on September 8, 2016. This matter is now ready for decision.

ISSUE

The sole issue to be decided at this time is:

1. Whether Claimant is entitled to additional medical care, specifically a second arthroscopic knee surgery.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her knee on August 9, 2013 when it struck Employer's tile floor in a fall. Knee surgery was performed November 14, 2013. One meniscus tear was expected and repaired. After surgery a full thickness tear of the posterior horn of the meniscus remained. The unrepaired tear remains symptomatic. A second surgery is reasonable.

Defendants contend the treating surgeon and an IME physician have opined that a

second surgery is unlikely to produce a satisfactory result. Moreover, a second surgery could exacerbate the arthritis in Claimant's knee. Claimant self-selected the surgeon upon whom she relies for a recommendation of a second knee surgery. The treating and IME physicians had more complete medical information upon which to formulate their opinions. Claimant is not a credible reporter of her function or pain.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and her daughter Keyla Gil;
2. Claimant's exhibits A through L, admitted at hearing;
3. Defendants' exhibits 1 through 18; and
4. Post-hearing depositions of Casey Huntsman, M.D., and Brian Tallerico, D.O.

Except as noted immediately below, all objections raised in post-hearing depositions are overruled.

In post-hearing briefs, Defendants objected to and moved to strike the testimony of Dr. Huntsman as untimely. The objections to that part of Dr. Huntsman's testimony which relied upon documents provided to him only on the day of his deposition are sustained as violative of J.R.P. Rule 10. Testimony which does not rely upon late-provided documents is afforded weight. Defendants' motion to strike is denied.

Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for review and adoption by the Commission.

FINDINGS OF FACT

(The issues in this matter having been bifurcated, not all medical records are addressed herein. Those addressed below are deemed most relevant to the issues at hand. No findings

herein are intended to be applicable to issues not presently at issue. Nevertheless, the Referee analyzed the entire record carefully.)

1. Claimant was injured in a compensable accident. She slipped and fell. She twisted and struck her left knee on the tile floor.

Medical care

2. Claimant first sought medical care on August 14, 2013. She reported the accident occurred five days prior. Initial diagnosis was a knee strain and/or knee sprain.

3. A September 3, 2013 knee X-ray was negative.

4. A September 23, 2013 MRI of the left knee showed the meniscus tear.

5. On October 7, 2013 Dr. Andary examined Claimant. He noted mild effusion, medial joint line tenderness with positive McMurray and Steinmann maneuvers, and mild loss of left knee range of motion. Upon review of the MRI he recommended surgery. He imposed temporary restrictions.

6. Surgery was performed November 14, 2013. Dr. Andary trimmed the tear and two chondral lesions. He noted the procedure resulted in “some loss of biomechanical integrity because of compromise to the root, I would say 30% to 40%.”

7. Claimant reported significant postoperative pain. Follow-up visits show a slow recovery with the aid of physical therapy. Left knee range of motion was “well maintained.” Physical therapy notes show Claimant complied with recommendations despite pain and soreness in her knee. Her ability to tolerate therapy without much pain varied from treatment to treatment.

8. On December 11, 2013 Dr. Andary noted swelling in the knee. He ordered a hiatus in therapy for a couple weeks. Dr. Andary discussed the possibility of a second surgery

with Claimant. He preferred to avoid a second surgery which he felt would cause more long-term problems.

9. On January 7, 2014 Dr. Andary allowed a return to modified work. His revised temporary restrictions likely precluded a return to work.

10. On January 29, 2014 Dr. Andary noted pain behavior out of proportion from his expectation. He deemed the radial tear of Claimant's medial meniscus "not repairable." He provided an injection. For the next few therapy visits Claimant reported improvement.

11. On February 28, 2014 Claimant reported her condition had worsened. Dr. Andary again modified his restrictions in an attempt to allow for part-time work. Her therapy records are consistent. They show worsening beginning about February 14.

12. A March 10, 2014 MRI showed a tear of the posterior horn of the medical meniscus near the root. The radiologist noted, "The appearance is very similar to that seen on 09/23/2013."

13. At follow-up visits to Dr. Andary, Claimant's reports and behavior indicated worsening pain. On March 21, 2014 Dr. Andary noted that the meniscal tear "is very difficult to repair. Any repair of this would likely fail." He recommended a second opinion.

14. On April 18, 2014 Dr. Tallerico reviewed records and examined Claimant at Surety's request. His primary finding was functional overlay and symptom magnification. He opined Claimant was at MMI. He rated PPI at 2%, lower extremity.

15. On April 28, 2014 Dr. Andary reviewed Dr. Tallerico's report and checked a box to indicate he agreed with Dr. Tallerico's findings.

16. On July 3, 2014 Claimant visited Dr. Huntsman. She reported the left knee history and added that her left hip and right knee started hurting as she adjusts her stance and

gait to avoid left knee pain. Upon examination, McMurray's test was markedly positive. In an August 26, 2014 follow-up note to Surety, Dr. Huntsman opined Claimant's left knee "needs more aggressive debridement to treat the mechanical problem that is most likely causing the pain." He affirmed his opinion that the condition was causally related to the accident.

17. On October 14, 2014 Dr. Tallerico opined his disagreement with Dr. Huntsman's recommendation for a second knee surgery.

18. On October 17, 2014 Dr. Andary responded in writing to Surety. He noted symptom magnification as the primary reason for recommending against surgery. He did note, "Thus perhaps a second surgery is reasonable and a more aggressive meniscectomy would yield better results."

19. On March 12, 2015 Claimant was treated for diabetes. A1C was 10.6%.

20. In deposition, Dr. Huntsman opined that the posterior tear of the medial meniscus which he observed on the MRI was surgically treatable. Without a second surgery, Claimant was at MMI when he last saw her on July 3, 2014. He recommended a second surgery at that time and still does as of the date of deposition. He opined that surgically removing the tear would likely improve Claimant's condition. He did not observe too much arthritis on MRI. He did not observe symptom magnification when he examined Claimant. A second surgery will not entirely remove all cartilage; Claimant will not be left "bone on bone." After the proposed surgery Claimant can expect significant pain relief but some medial meniscus and joint line pain with deep flexion. Failure to provide the proposed surgery may cause her arthritis to be worse in the future.

21. In deposition, Dr. Tallerico opined Claimant's presentation constituted "one of the most bizarre" examinations he had performed. He described in detail his

examination. He opined Claimant was at MMI when examined. Claimant's "overwhelming symptom magnification" is a "red flag" which augurs against a second surgery. He opined he was "not impressed" with the pathology—a root tear—shown on the post-surgical MRI. Dr. Tallerico would expect symptomatology from a tear like that which he observed on the post-surgical MRI.

DISCUSSION AND FURTHER FINDINGS OF FACT

22. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, a claimant must prove not only that she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). 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). 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. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

23. At hearing, with a brace and a cane, Claimant limped and hopped instead of walking. Her speech patterns, gestures, and body language were somewhat exaggerated, particularly when communication difficulty arose. Even Defendants' attorney engaged

in brief pantomime when asking a few specific questions. Nevertheless, Claimant's presentation was not outside the normal range of claimant behavior seen at hearings over the years.

24. Physicians have reported overdramatic gestures and representations of pain by Claimant. While experience suggests these reports are often the result of a foreign-speaking claimant strenuously attempting to be understood, it does not seem to be so here.

25. Concerned about the extent to which a language barrier might explain physicians' observations of florid demeanor, the Referee inquired. Claimant expressed satisfaction with her interpreters vis-à-vis physicians. Claimant's daughter testified that Claimant is demonstrative at home as well. Claimant's presentations to physicians were not likely an attempt to overcome the language barrier.

26. Based upon evidence and observation, Claimant shows an expressive personality. She is a credible witness, prone to some exaggeration, within the normal range of testimony.

27. An irreconcilable difference of perspective remains about the nature and extent of Dr. Tallerico's examination. Dr. Tallerico testified to a professional and usual examination of Claimant's knee, hampered slightly by Claimant's pain reports. Claimant and her daughter testified first that Dr. Tallerico never touched Claimant, then that he merely touched her heel, raised her leg a bit, and "threw" it over her other leg. Claimants who testify that an evaluating physician selected by a surety performed a cursory or an inadequate examination are uncommon—but not rare—in Commission experience. Laypeople often do not understand or appreciate the significance of a physician's actions during an examination. Moreover, Dr. Tallerico is a familiar expert—both as a treater and as a forensic evaluator—to the Commission. The greater weight of evidence shows it likely Dr. Tallerico's description of his examination of Claimant is more accurate.

Medical Care

28. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris, supra*. One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also, Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* suggested its articulated factors were exclusive.)

29. Here, Claimant has not recovered. An objective meniscal tear remains in her left knee. In early post-surgical comments to Claimant, Dr. Andary discussed the possibility of a second knee surgery. As Claimant became more frustrated with her ongoing pain, Dr. Andary's notes begin to show increasing suggestions of symptom magnification. Ultimately, Dr. Andary's opinion identifies his perception of risks that a second surgery will not improve Claimant's symptoms, but declares a second surgery is reasonable. He is clear that he will not perform this surgery. Dr. Tallerico acknowledges an objective basis exists to perform surgery, but declares that a repair and shaving of the meniscal tear will so affect the root that Claimant will likely have more arthritis and other problems in the long-term future. Moreover, he declares that Claimant's psychological makeup will prevent a resolution of her symptoms. Dr. Tallerico does not go so far as to opine that a second surgery would be unreasonable.

30. Dr. Huntsman agrees that an objective basis exists for a second surgery. He is willing and confident in his experience and ability to repair the condition. He opines that such a second surgery is reasonable, even relatively commonly performed at his hands.

31. The weight of evidence shows a second surgery is reasonable. Upon Dr. Andary's unwillingness to perform it, Claimant reasonably sought out Dr. Huntsman. Dr. Huntsman is her treating physician and his care, past and future for a second knee surgery, is compensably related to the industrial accident.

CONCLUSIONS

1. Claimant is entitled to a second knee surgery; This procedure is reasonable and required by her treating physician Dr. Huntsman.

2. Reserved issues should be held until after Claimant recovers from this second knee surgery.

RECOMMENDATION

Based on 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 17th day of November, 2016.

INDUSTRIAL COMMISSION

ATTEST:

/s/
Assistant Commission Secretary

/s/
Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

MICHAEL R. MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS, ID 83404-6236

SCOTT R. HALL
P.O. BOX 51630
IDAHO FALLS, ID 83405-1630

/s/

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ORDER

Filed December 9, 2016

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 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 a second knee surgery; This procedure is reasonable and required by her treating physician Dr. Huntsman.
2. Reserved issues shall be held until after Claimant recovers from this second knee surgery.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 9th day of December, 2016.

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 9th day of December, 2016, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____