

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GERALD COLLINS,

Claimant,

v.

IDAHO TRACTOR, INC.,

Employer,

and

TOWER INSURANCE COMPANY
OF NEW YORK,

Surety,
Defendants.

IC 2011-015436

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

FILED AUG 16 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Boise on January 16, 2013. Claimant was present and represented by Richard S. Owen. Defendants were represented by R. Daniel Bowen. The parties presented oral and documentary evidence. Post-hearing depositions were taken, and briefs were later submitted. The matter came under advisement on May 2, 2013.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by an industrial accident;
2. Whether Claimant is medically stable and, if so, the date thereof;
3. Whether and to what extent Claimant is entitled to medical care, specifically including total knee replacement (TKR) surgery; and
4. Whether and to what extent Claimant is entitled to temporary disability benefits.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant ruptured his anterior cruciate ligament (ACL) on June 17, 2011 when he stepped down from equipment at work and twisted his right knee. His subsequent ACL repair surgery and rehabilitation are compensable. At the time of the hearing, Claimant was a candidate for either partial or TKR surgery.

Claimant contends that he is entitled to medical benefits for TKR surgery on his right knee. The industrial injury and surgery caused pain and other symptomatology previously absent. They caused his preexisting degenerative arthritis, previously asymptomatic, to become symptomatic. He relies upon the surgical recommendations of one of his treating physicians Dr. Shoemaker, on Dr. Curran, who provided a second opinion, and on Dr. Collins, an independent medical evaluator.

Defendants counter that Claimant's industrial accident did not aggravate preexisting bone-on-bone arthritis in his right knee. His arthritis was likely symptomatic before the accident. Claimant has fully recovered from his industrial ACL tear, which had no impact upon his preexisting arthritis. Defendants rely upon the medical opinions of Dr. Schwartzman, Claimant's treating orthopedic surgeon, to establish that Claimant's right knee symptoms related to his work accident were temporary in nature and have healed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through KK admitted at the hearing;
2. Defendants' Exhibits 1 and 2 admitted at the hearing;
3. The testimony of Claimant and Carol Carr taken at the hearing;
4. The post-hearing deposition testimony of orthopedic surgeon Paul Collins, M.D., taken January 23, 2013; and

5. The post-hearing deposition testimony of Roman Schwartsman, M.D., taken January 31, 2013.

All pending objections are overruled.

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

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 53 years of age and residing in Nampa.
2. When he was a freshman in high school, Claimant injured his right knee playing football. The injury required a medial meniscectomy in 1976, from which he recovered. Until his junior year, he remained active in sports, also including wrestling and track. He left high school early to join the Marine Corps, in which he underwent rigorous training including combat training and a lot of running. Claimant was also an avid outdoorsman who hunted and fished. He had worked as a farmer on his family dairy farm. He participated in these activities without right knee problems for many years.
3. Following an honorable discharge from the Marines, Claimant worked on his family farm, then for Dairymen's creamery. He was on his feet most of the time on concrete floors and experienced no right knee problems. After that, Claimant worked as a welder and mechanic at a Nevada gold mine, repairing heavy mining equipment for 18 years. He was on his feet climbing on and around the big machines and did not have any right knee problems. Claimant returned to Idaho and continued to work as a heavy equipment mechanic and welder.
4. After recovery from his meniscectomy in high school, Claimant regularly obtained medical treatment for various injuries. He did not complain of right knee problems to any medical care provider until his industrial injury in 2011. Of note, in 2003 Claimant suffered an industrial right ankle fracture. The corresponding chart note specifically identified

“no significant knee tenderness.” At hearing, Claimant denied experiencing knee pain in the years leading up to the 2011 industrial injury.

5. Claimant worked for Idaho Tractor beginning March 2010. On June 17, 2011, Claimant was coming down off of a John Deere skid steer when he twisted his right leg at the knee, causing a “pop” and igniting pain. Claimant reported the injury to his supervisor, Jeff Bowden. Claimant continued to work, thinking his symptoms would resolve on their own. After two weeks, Claimant’s knee was still painful.

6. On June 29, 2011, he sought treatment from Howard Shoemaker, M.D., an occupational medicine physician. Claimant underwent a right knee MRI on July 7, 2011, which revealed a ruptured ACL, severe degenerative change in the medial compartment and moderate thinning of the cartilage in the lateral and patella-femoral compartments.

7. Dr. Shoemaker diagnosed a torn ACL, imposed restrictions placing Claimant on light-duty work, and prescribed a brace. Neither Claimant nor Idaho Tractor heeded Dr. Shoemaker’s restrictions. Claimant continued to work his regular job.

8. Dr. Shoemaker referred Claimant to orthopedic surgeon Andrew Curran, D.O. Instead, Claimant saw orthopedic surgeon Roman Schwartsman, M.D. Claimant testified that Surety insisted that he see Dr. Schwartsman. Surety adjustor Carole Carr testified that Claimant saw Dr. Schwartsman because he did not wish to see Dr. Curran.

9. Dr. Schwartsman evaluated Claimant’s knee on July 14, 2011. He ordered a different brace, prescribed medication and recommended physical therapy. Claimant underwent reconstructive ACL surgery on August 31, 2011. Claimant was disappointed in his post-surgical results. Claimant’s pain is worse than it was pre-surgically.

10. Claimant was off work, in recovery and rehabilitation, for six months.

Dr. Schwartzman released him to work, with restrictions, in September 2011. However, Idaho Tractor would only allow him to return to work at such time that all restrictions were lifted.

11. On February 28, 2012, Dr. Schwartzman released Claimant without restrictions, even though Claimant's right knee pain and instability were still significant. The knee would sometimes give out while he was walking and he would fall. He had trouble with stairs and walking on uneven surfaces. Dr. Schwartzman advised Claimant that the residual symptoms were all due to preexisting arthritis. Claimant asked Dr. Schwartzman how his symptoms could be due to arthritis, when he had no arthritis symptoms prior to his industrial injury.

12. Idaho Tractor had no work for Claimant, so he went to work for Dasco on March 2, 2012 as a heavy equipment mechanic, welder and service technician, installing gas lines into new homes. His right knee was painful on kneeling, squatting, bending and lifting more than ten pounds or so, so he asked for help with tasks such as running the jackhammer, shoveling and digging and lifting heavy objects. He had particular difficulty getting down on the floor and crawling underneath things. He could not do it. He could perform standing work.

13. In April 2012, Claimant sought relief from his continuing symptoms from Dr. Curran, who recommended a TKR. Claimant's insurance with Dasco would not cover the procedure.

14. Dr. Curran authored a letter on April 11, 2012, in which he opined that Claimant's 1976 meniscectomy led to his right knee arthritis and, in turn, that the industrial ACL tear accelerated his need for TKR:

...I feel that Mr. Collins needs a total knee arthroplasty. I feel that his industrial accident led to the ACL tear. His reconstruction exacerbated preexisting arthritis, making it symptomatic. I do believe that given the fact that he had no pain prior to surgery and now has had worsening symptoms, the ACL reconstruction has

accelerated the need for surgical intervention regarding his preexisting arthritis. I do believe that his right knee meniscectomy done in high school led to the arthritis in his right knee.

Dr. Shoemaker later concurred in the TKR recommendation.

15. In September 2012, Dasco laid off Claimant for lack of work. Claimant believes his right knee difficulties played a role in that decision. Claimant has been unable to find a job since. He uses a cane to ambulate and usually has it with him when he visits potential employers to see if work is available.

16. At the time of the hearing, Claimant had trouble with activities including but not limited to climbing stairs, walking especially on uneven surfaces, kneeling, squatting, and sleeping without disturbance due to right knee discomfort. He also testified about sensory discomfort from his knee to his ankle.

Independent Medical Evaluation

17. At Claimant's request, orthopedic surgeon Paul Collins, M.D., performed an independent medical evaluation (IME) on September 13, 2012. Dr. Collins opined that Claimant's right knee condition was the result of aggravation of his previously asymptomatic degenerative arthritis by his industrial ACL tear. He opined that but for the 2011 accident Claimant's arthritis likely would have remained asymptomatic.

18. Dr. Collins posited that Claimant's soft tissues had essentially adapted over time to his worsening arthritis, allowing him to function symptom-free. However, when Claimant twisted his right knee in his industrial accident and tore his ACL, he disrupted that adaptive system, igniting arthritis pain and other symptoms. Dr. Collins described how the ACL stabilizes the knee and how laxity in the ACL would aggravate arthritis.

19. Dr. Collins opined that Claimant has not recovered from his industrial accident, and recommended TKR surgery for his right knee condition resulting from "a combination

of chronic, underlying condition and what I would consider an acute issue.” Per Claimant’s July 2011 MRI, Dr. Collins opined he had full or near-full thickness cartilage loss in his right medial compartment indicating significant degenerative arthritis warranting TKR; however, Claimant was not a TKR candidate at that time because he was asymptomatic. Following Claimant’s industrial accident, his arthritis became symptomatic and, consequently, he became a surgical candidate. “The purpose for a total knee is to correct symptomatology, not appearance...the symptoms are what really drive the need.”

20. After reviewing Dr. Schwartzman’s records, Dr. Collins agreed that Claimant had bone-on-bone arthritis at the time of his industrial injury. But, he disagreed with Dr. Schwartzman’s causation opinion.

21. Dr. Collins also believes that Claimant’s ACL repair, itself, accelerated his medial compartment arthritis. “...[W]e’re seeing younger and younger kids having knee injuries with anterior cruciate repairs, and they’re coming to total knee replacements earlier and earlier....It’s really sad, but we cannot put the anterior cruciate back to what it was. We come close. It’s frustrating.” Dr. Schwartzman agrees that ACL instability will accelerate medial compartment arthritis, but he disagrees that ACL repair surgery has this effect. He found no prospective, randomized, double-blind studies to support this proposition.

22. Dr. Collins also disagreed with Dr. Schwartzman’s recommendation for a partial knee replacement. Because all compartments of Claimant’s knee are arthritic, Dr. Collins opined that only a TKR is likely to alleviate all of his symptoms. Dr. Schwartzman, on the other hand, believed in Summer 2011 that a partial knee replacement was the better choice in order to preserve as much of the knee as possible for as long as possible. That is why he recommended ACL repair following Claimant’s industrial injury; an intact ACL is required for

a partial knee replacement. He opined that Claimant's relatively young age is a factor in recommending a partial knee replacement.

23. Ultimately, however, Dr. Schwartzman could not say whether Claimant would benefit more from a partial or a TKR at this point because he has no current exam or imaging findings.

DISCUSSION AND FURTHER FINDINGS

24. 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). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Claimant's Credibility

25. Defendants attempt to persuade the Commission that Claimant was deceptive in his testimony about how he came under the care of Dr. Schwartzman. The differences of recollection and perspective between Ms. Carr and Claimant do not establish that either was being deceptive.

26. The issue grew to memorable proportions for Surety because Dr. Shoemaker contacted the Commission complaining that Surety was attempting to direct his medical decisions regarding Claimant's care by asking him to change his referral from Dr. Curran to Dr. Schwartzman. In any event, the record fails to establish that Claimant was intentionally deceptive in these proceedings.

27. At times, Claimant admitted he had difficulty recalling relevant dates. Where contemporaneously made, otherwise credible, documents establish the dates of events, they will

be given more weight than Claimant's testimony. Claimant is a credible witness.

Causation

28. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967). The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.* An employee may be compensated for the aggravation or acceleration of a preexisting condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(18)(b).

29. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

30. Three physicians have opined on the issue of whether Claimant's persistent right knee pain at the time of the hearing is, in whole or in part, a result of his industrial accident. Dr. Schwartzman opined that there is no connection between Claimant's industrial injury and his current symptomatology. Drs. Curran and Collins, however, opined that Claimant did

not have pain and instability prior to his industrial injury and, therefore, he would not now be a surgical candidate, but for his industrial ACL tear.

31. It is undisputed that Claimant had bone-on-bone arthritis in his right knee at the time of his industrial injury. Claimant testified he was asymptomatic beforehand. Assuming that Claimant was previously asymptomatic, Dr. Schwartzman agreed that the industrial accident likely caused Claimant's current right knee symptoms. However, Dr. Schwartzman was adamant that he does not believe Claimant's testimony in this regard, even though Claimant's medical records, nor any other source, belie any prior evidence of right knee complaints. Without requiring double-blind studies, Dr. Schwartzman based his opinion about Claimant having been asymptomatic upon his own anecdotal experience as a physician.

32. Like Dr. Schwartzman, Dr. Collins expected that Claimant's right knee would have been symptomatic prior to his industrial injury. However, after thoroughly reviewing Claimant's medical records and calling upon on his own experience, Dr. Collins believes Claimant. Dr. Collins has seen asymptomatic people with severe arthritis.

33. Defendants assert that Dr. Schwartzman's opinion is better-founded than Dr. Collins's opinion because he saw Claimant's knee condition intraoperatively and reviewed Claimant's MRI films and not just the radiologist's report. However, these points are moot because Dr. Collins agrees that Claimant had preexisting bone-on-bone arthritis in his right knee. Defendants also make the point that Dr. Schwartzman, throughout his treatment, separated out Claimant's ACL condition from his arthritis symptoms. This documentation is after the fact, and offers no insight as to how the arthritis became symptomatic in the first place. Dr. Schwartzman was, indeed, in a better position to opine on many aspects of Claimant's case. However, none of these aspects are in dispute.

34. On the disputed point – whether Claimant could have been, and was, asymptomatic prior to his industrial injury – Dr. Collins is in a better position to provide an opinion. He knows firsthand that it is possible for a person to function with severe knee arthritis without symptoms. Dr. Collins’ experience alone completely undercuts Dr. Schwartzman’s position because the only reason Dr. Schwartzman believes Claimant must be lying is that he believes it is impossible for someone with bone-on-bone arthritis to be asymptomatic. Dr. Collins persuades the Referee that it is not. Claimant’s testimony is credible, and Dr. Collins’ opinion is more persuasive than Dr. Schwartzman’s. The weight of evidence supports a finding that Claimant was asymptomatic prior to his June 2011 industrial injury. Dr. Collins persuasively described the mechanism by which Claimant's ACL tear likely disrupted Claimant's pre-injury adaptation to his degenerative arthritis, igniting his previously quiescent knee. Consequently, Claimant’s industrial accident permanently aggravated his preexisting end-stage medial compartment arthritis such that he is entitled to medical benefits to treat his continuing symptoms.

Maximum Medical Improvement (MMI) and Medical Care

35. It is undisputed that Claimant has not recovered from the onset and exacerbation of his arthritis symptoms since the date of his industrial accident. The evidence shows Claimant has not yet reached MMI following his industrial accident of June 17, 2011.

36. 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).

37. There is no dispute that Claimant is a knee replacement candidate. The only dispute – and this is a minor one – is whether Claimant should undergo a partial or a TKR. Drs. Shoemaker, Curran and Collins all recommend a TKR. Dr. Schwartsman concurs to the extent that Claimant’s right knee arthritis extends to his lateral and/or patello-femoral compartments. Drs. Curran and Collins both examined Claimant more recently than did Dr. Schwartsman and they had the benefit of at least one more current set of X-rays from which to draw opinions. TKR surgery, along with reasonable follow-up treatment, constitutes reasonable medical treatment for Claimant’s persisting right knee symptoms.

Temporary Disability Benefits

38. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover these income benefits. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

39. Defendants argue, per *Maleug v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), that Claimant is not entitled to temporary disability benefits following his lay-off from Dasco on September 4, 2012 because there was work generally available to Claimant in the community consistent with his restrictions. Although there is evidence in the record from which restrictions as of September 4, 2012 might be determined, there is insufficient evidence from which it could be determined that work was available. Along those lines, Claimant testified persuasively and without rebuttal that he applied for a number of jobs, unsuccessfully, following his lay-off. Further, Idaho Tractor has not been shown to have offered Claimant any work after his ACL surgery on August 31, 2011. Defendants have failed to establish a *Maleug* defense.

40. Claimant is entitled to temporary disability benefits beginning June 17, 2011, with

appropriate offsets to Defendants for periods in which Claimant was employed, until such time that Claimant is no longer in a period of recovery.

CONCLUSIONS OF LAW

1. Claimant sustained a permanent aggravation of his preexisting right knee medial compartment arthritis as a result of his injury at work on June 17, 2011;
2. Claimant is entitled to reasonable and necessary medical care, including but not limited to total knee replacement surgery and appropriate follow-up and rehabilitative care; and
3. Claimant is entitled to temporary disability benefits, with appropriate offsets to Defendants for periods in which he was employed.

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 5TH day of August, 2013.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of AUGUST, 2013, 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:

RICHARD S. OWEN
P.O. BOX 278
NAMPA, ID 83653

R. DANIEL BOWEN
P.O. BOX 1007
BOISE, ID 83701

dkb

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GERALD COLLINS,

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v.

IDAHO TRACTOR, INC.,

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IC 2011-015436

ORDER

FILED AUG 16 2013

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 sustained a permanent aggravation of his preexisting right knee medial compartment arthritis as a result of his injury at work on June 17, 2011.
2. Claimant is entitled to reasonable and necessary medical care, including but not limited to total knee replacement surgery and appropriate follow-up and rehabilitative care.
3. Claimant is entitled to temporary disability benefits, with appropriate offsets to Defendants for periods in which he was employed.

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

DATED this 16TH day of AUGUST, 2013.

INDUSTRIAL COMMISSION

/S/ _____
Thomas P. Baskin, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of AUGUST, 2013, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

RICHARD S. OWEN
P.O. BOX 278
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/S/ _____