

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEWIS G. PETERSON,)
)
 Claimant,)
)
 v.)
)
 THE SWEEP, LLC,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
)
 _____)

IC 2008-029192

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

Filed: April 2, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d’Alene, Idaho, on September 4, 2009. Claimant, Lewis G. Peterson, was present in person and represented by Thomas B. Amberson of Coeur d’Alene. Defendant Employer, The Sweep, L.L.C. (The Sweep), and Defendant Surety, the Idaho State Insurance Fund, were represented by Bradley J. Stoddard of Coeur d’Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 4, 2009.

ISSUES

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

1. Whether Claimant suffered an injury to his right knee from an accident arising out of and in the course of employment on or about September 5, 2008.

2. Claimant's entitlement to medical care for his right knee.
3. Claimant's entitlement to permanent partial impairment benefits for his right knee.

CONTENTIONS OF THE PARTIES

Defendants acknowledge that Claimant sustained an industrial accident on September 5, 2008, when he twisted his right ankle. Claimant alleges that the industrial accident also caused injury to his right knee, for which he requests medical treatment and permanent partial impairment benefits. In the alternative, Claimant alleges that he suffered a right knee injury while participating in physical therapy for his right ankle injury

Defendants contend that Claimant's September 5, 2008 industrial accident did not cause his present right knee symptoms. Defendants further maintain that Claimant's right knee injury is not the result of physical therapy exercises, but of a degenerative condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken June 18, 2009, and admitted at hearing as Claimant's Exhibit 14;
3. The testimony of Claimant and Bruce Waddell, taken at the September 4, 2009 hearing;
4. Claimant's Exhibits 1 through 22 and Defendants' Exhibits A through I, admitted at the hearing;¹
5. The post-hearing deposition of Jonathan King, M.D., taken September 10, 2009; and
6. The post-hearing deposition of Dirk Anthony Baird, D.P.T., taken October 1, 2009.

¹ Claimant offered Exhibits 23 and 24 at hearing. Defendants objected for lack of foundation. Claimant proposed to lay foundation for admission during the anticipated post-hearing deposition of Stephen Sears, M.D. The deposition of Dr. Sears was never taken. Claimant's Exhibits 23 and 24 are denied admission for lack of foundation.

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. Claimant was born in 1943. He resided in Hayden and was 65 years old at the time of the hearing. He graduated from high school in 1963 and served in the Marine Corps from 1963 until 1967, when he was honorably discharged. Thereafter Claimant worked in construction, underground mining, and heavy equipment operation. In 2005, Claimant moved to northern Idaho.

2. Over the years Claimant has sustained various injuries for which he received medical treatment and, after recovering, continued working.

3. Claimant developed arthritis in his left knee. In 1976, he underwent left knee meniscectomy. In 1995, Claimant reported bilateral knee pain to physicians at the VA.

4. In September 2007, Claimant started working for The Sweep two or three days per week, earning \$9.00 per hour. He cleaned parking lots. He commenced work about 9:00 p.m. and used a blower to blow leaves and debris out of the corners and away from the curbs of parking lots. He then swept the lot with a truck to remove the debris. Claimant worked seven to nine hours per night.

5. In December 2007, x-rays showed a little arthritis in Claimant's right knee. On September 3, 2008, Claimant presented to Eric P. Benson, M.D., to establish care with a local physician. Claimant reported bilateral knee pain and Dr. Benson found Claimant had osteoarthritis in both knees. Exhibit E.

6. On September 5, 2008, at about 2:00 a.m., Claimant was at work blowing off the sidewalk around a parking lot. He stepped off the curb onto the asphalt lot. His right foot landed in an indentation in the asphalt and his foot slipped under him. Claimant noticed immediate right ankle pain. He noticed no right knee pain. Claimant was earning \$11.50 per hour at the time of his accident. Claimant notified his employer at about 9:00 a.m. that same morning that his right ankle

was hurting and that he was going to the hospital for medical treatment. Claimant's supervisor encouraged him to complete a notice of injury. Claimant reported no knee pain to his supervisor.

7. On September 5, 2008, Claimant was treated by Steve Malek, M.D., at Kootenai Medical Center where Claimant reported pain on the inside of his right ankle. Dr. Malek recorded that Claimant had no knee pain and gave him a splint for his right ankle. Claimant missed no scheduled work.

8. On September 8, 2008, Claimant reported to Michael Ludwig, M.D. Claimant's right ankle was about the same. Dr. Ludwig recorded that Claimant denied any associated knee injury or swelling and prescribed physical therapy. Shortly thereafter Claimant began physical therapy at Hayden Lake Physical Therapy with Dirk Baird, D.P.T. Claimant did band work on his ankle, wobble board exercises, and squats against the wall. Mr. Baird supervised most of Claimant's therapy treatments. Claimant's right ankle improved.

9. On September 29, 2008, an assistant helped Claimant finish his physical therapy exercises, which included single-leg toe raises with his right leg. Claimant testified that his right leg was hurting from his foot clear up his leg and he told the assistant that his right leg did not feel "too good." Claimant did not report any right knee pain during physical therapy because the right knee pain came on the following morning. At approximately 3:30 a.m. the very next morning, Claimant was awakened by stabbing pain in his right knee. Claimant recognized it as the same kind of pain he had experienced in his left knee many years before.

10. On October 3, 2008, Claimant told Mr. Baird about the pain in his right knee and declined to perform further physical therapy exercises. Mr. Baird encouraged Claimant to return to Dr. Ludwig for evaluation. On October 6, 2008, Claimant presented to Dr. Ludwig with complaints of right knee pain. Dr. Ludwig prescribed medications and ordered an MRI of Claimant's right knee. The MRI disclosed medial and lateral meniscus tears in Claimant's right knee. Dr. Ludwig referred Claimant to Jonathan S. King, M.D., for further evaluation.

11. On January 8, 2009, Claimant presented to Dr. King who advised Claimant of his right knee meniscus tears and discussed surgical treatment. In March or April 2009, Claimant underwent a medical examination by Stephen Sears, M.D., at Defendants' request. Dr. Sears concluded that Claimant needed right knee meniscectomy, but that degeneration, not the industrial accident, caused his right knee condition.

12. At the time of the hearing, Claimant had not received any surgical treatment and continued to experience right knee pain when walking, standing, or sitting for prolonged periods.

13. Having observed Claimant at hearing and compared his testimony with the medical records and testimony of other witnesses, the Referee concludes that Claimant is a credible witness.

DISCUSSION

14. The provisions of the 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, the Commission is not required to construe facts 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).

15. **Medical causation.** Claimant's testimony regarding the occurrence of an industrial accident causing a right ankle strain while working on September 5, 2008, is credible and is not contested by Defendants. However, the crux of the instant case is whether Claimant's current right knee condition, for which he seeks benefits, was caused by the September 5, 2008, industrial accident.

16. A claimant must prove not only that he or she suffered an injury, 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). “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 was 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, 412-13, 18 P.3d 211, 217 (2001).

17. In the present case, Claimant has a history of pre-existing right knee pain. The medical records establish that Claimant reported right knee pain to Dr. Benson just a few days prior to his industrial accident. Dr. Benson diagnosed osteoarthritis in both of Claimant’s knees just prior to his industrial accident. Dr. King initially opined that Claimant’s industrial injury had caused his right knee pain. However, upon learning that Claimant reported suffering right knee pain prior to his accident and denied right knee pain at the time of his industrial accident, Dr. King testified that Claimant’s right knee meniscus tears are not the result of Claimant’s accident at work, but rather were caused by degeneration. Dr. King noted that meniscus tears are typically accompanied by significant immediate knee pain and that Claimant did not report such at any time on September 5, 2008, at the time of his industrial accident, or on September 29, 2008, at the time of his final physical therapy visit.

18. Dr. Sears opined that Claimant’s right knee meniscus tears were the result of degeneration rather than his work accident.

19. Physical therapist Dirk Baird noted that Claimant did not report any falls or complications during physical therapy. However, Claimant explained that he did not regard his single-leg right toe raises as a complication, but still believes this exercise caused his right knee

injury. Mr. Baird opined that Claimant's right knee meniscus injury was not caused by any physical therapy exercises.

20. The opinions of Dr. King, Dr. Sears, and therapist Dirk Baird are consistent and persuasive. There is no expert medical evidence that Claimant's right knee meniscal tears were caused by his industrial accident or by his physical therapy in 2008.

21. Claimant has not proven that his September 5, 2008 accident, or any physical therapy related to that accident, caused his right knee injury.

22. **Medical care and permanent partial impairment.** Having failed to prove that his right knee condition is related to his industrial accident, Claimant is not entitled to medical care and/or permanent partial impairment benefits for his right knee condition.

CONCLUSIONS OF LAW

1. Claimant has not proven that his right knee injury is due to his industrial accident.
2. Claimant has not proven his entitlement to medical care and/or permanent partial impairment for his right knee condition.

RECOMMENDATION

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

DATED this 29th day of March, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2010, 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:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83816-1319

BRADLEY J STODDARD
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sc

_____/s/_____

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 Claimant,)
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 STATE INSURANCE FUND,)
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 Surety,)
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 Defendants.)
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IC 2008-029192

ORDER

Filed: April 2, 2010

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 has not proven that his right knee injury is due to his industrial accident.
2. Claimant has not proven his entitlement to medical care and/or permanent partial impairment for his right knee condition.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 2nd day of April, 2010.

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 2nd day of April, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83816-1319

BRADLEY J STODDARD
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sc

/s/