

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID J. BLAZIC)	
Claimant)	
)	
VS.)	
)	
CITY OF TOPEKA)	
Self-Insured Respondent)	Docket No. 196,589
)	
AND)	
)	
KANSAS WORKERS COMPENSATION)	
FUND)	

ORDER

STATEMENT OF THE CASE

The Kansas Workers Compensation Fund (Fund) requested review of the April 8, 2008, Post Award Order entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 3, 2008. Paul D. Post, of Topeka, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for the self-insured respondent. Darin M. Conklin, of Topeka, Kansas, appeared for the Fund.

The Administrative Law Judge (ALJ) found that respondent and the Fund stipulated to the necessity of hip replacement as part of the original settlement agreement and are now estopped from arguing that it is not work related. The ALJ further found that claimant's 1992 injury permanently aggravated claimant's hip condition and the necessity for the replacement is a direct result of claimant's work-related accident. Accordingly, medical treatment was ordered with Dr. Joseph Mumford, the costs of which are to be apportioned between respondent and the Fund as per the agreement between those parties.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 27, 2007, Post Award Hearing and the exhibits; the transcript of the deposition of David Blazic taken October 25, 2007; the transcript of the deposition of Joseph Mumford, M.D., taken January 31, 2008; and the transcript of the Settlement Hearing held March 19, 1996, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

The Fund asserts that claimant did not meet his burden of proving that his need for post-award medical care is related to his accident of January 24, 1992. The Fund contends that claimant suffered from moderately advanced osteoarthritis in his hip before his injury in January 1992 and that hip replacement surgery was being suggested within several weeks of that injury. Accordingly, the respondent argues that the evidence reveals that claimant's present need for hip replacement surgery is not the result of the 1992 accident. The Fund also argues that nowhere in the transcript of the settlement hearing held on March 19, 1996, was a statement or suggestion made that the Fund or respondent surrendered their respective rights to contest the correlation between claimant's need for future medical and the accident of January 24, 1992.

Respondent acknowledges that although future medical was left open upon application when claimant settled his claim on March 19, 1996, the fact that claimant may now require a hip replacement does not negate claimant's burden to prove that this treatment is causally related to his work injury. Respondent contends that the medical evidence in this case and common sense support a conclusion that the 1992 injury did not accelerate the need for a hip replacement that was not pursued until 16 years later.

Claimant argues that the evidence shows that his work-related accident aggravated his underlying osteoarthritis in his hip; that before the settlement hearing all the physicians who treated or examined claimant were of the opinion that he needed hip replacement surgery and the medical was left open specifically for that purpose; and that there has been no intervening accident or injury which has aggravated his hip injury. Accordingly, claimant requests that the Board affirm the ALJ's Post Award Order.

The issues for the Board's review are: Did the parties stipulate to the compensability of any future hip replacement surgery? If not, is claimant's need for post award medical care a direct and natural consequence of his work-related injury of January 24, 1992?

FINDINGS OF FACT

Claimant suffered a work-related injury to his right hip and low back on January 24, 1992. While being treated for his injury, he was seen by Dr. Sergio Delgado, Dr. Joseph Mumford, and Dr. Peter Bieri. All three physicians agreed claimant had preexisting osteoarthritis of his right hip, and all agreed that claimant would eventually need hip replacement surgery. Claimant settled his workers compensation claim on March 16, 1996. At the settlement hearing, respondent's attorney set out the terms of the settlement agreement, including that "[c]laimant retains the right to open medical upon application

with Dr. Mumford for the January 24, 1992 work related accident.”¹ Thereafter, the following was held:

THE COURT: Doug, is that your understanding of the settlement?

[Claimant’s attorney]: Yes, it is, with the additional stipulation that the medical records to date from all three doctors who have examined [claimant], Drs. Delgado, Berry [*sic*] and Mumford, have recommended future treatment and a future hip replacement.

THE COURT: Mr. Conklin, what would you like to add to the record?

[Fund attorney]: That’s a correct statement, Your Honor. The doctors have all indicated that he may need that treatment in the future.²

Respondent’s attorney was not asked to comment by the court about this additional “stipulation” or asked whether these statements altered his understanding of the settlement, and respondent’s attorney did not volunteer any comment.

Claimant is now 71 years old. He retired from respondent in September 1995. He has remained quite active during his retirement and pursues many hobbies, including restoring antique tractors, working with horses and buggies, growing and baling hay, camping, fishing and hunting. He worked as a mechanic for respondent, and he continues to work on his own vehicles. He states, however, that he has help with the physical labor. He also uses a stepping block to get out of wagons, stating: “That old hip will bite now and then. And it seems as I’m getting older it bites more to do certain things.”³

Claimant admits he worked another three years after his accident, working eight hour days. He also worked some overtime. He had been released from treatment with no restrictions and said he did not feel like he had problems doing his job.

Claimant walks with a limp. He testified that he has had the limp since the accident. He said he can only walk 10 to 18 feet without feeling pain, and said he has been taking about six Excedrin a day since 1992 for the pain. He denies any intervening accidents or injuries.

Dr. Delgado treated claimant for injuries from his January 24, 1992, accident. He first saw claimant on February 11, 1992, 18 days after the accident, at which time he noted: “He has marked degenerative arthritic changes of the left [*sic*] hip with limitation of

¹ Settlement Hearing (Mar. 19, 1996) at 4.

² Settlement Hearing (Mar. 19, 1996) at 4-5.

³ P.A..H. Trans. (Dec. 27, 2007) at 19.

rotation. He probably has a strain to an already arthritic left [sic] hip. . . . He may need a total hip replacement on the left [sic] side at a later date.”⁴ Dr. Delgado further noted in his December 15, 1992, medical record that claimant probably should consider a total hip replacement.

Dr. Bieri performed an independent medical examination of claimant at the request of the ALJ on July 10, 1995. At that time he diagnosed claimant with soft tissue strain that aggravated preexisting degenerative joint disease involving the right hip. X-ray findings were consistent with severe degenerative arthritis of the right hip. At the time, claimant had returned to work without restrictions. Dr. Bieri’s report states that claimant had been told that his only possible future treatment would be surgical replacement of the right hip. Dr. Bieri opined that this appeared to be “reasonable, appropriate and consistent.”⁵

Dr. Mumford first saw claimant on January 29, 1993. On that date, he noted that x-rays taken the year before showed claimant had moderately advanced osteoarthritis of the right hip. On March 15, 1993, Dr. Mumford presented claimant with several options for coping with his right hip pain, (1) following his symptoms with no intervention, (2) consideration of steroid injections and (3) total hip arthroplasty. Dr. Mumford also noted that since claimant was “mobilizing reasonably well at work, I would like to hold off on a total hip arthroplasty.”⁶ By February 1994, claimant’s symptoms were progressing and had not responded to conservative treatment. Dr. Mumford opined that claimant was a candidate for total hip replacement.

Claimant returned to Dr. Mumford for treatment on August 29, 2007, complaining of right hip pain. Dr. Mumford found that claimant’s symptoms had progressed, and an x-ray showed he had end-stage osteoarthritic changes of the right hip. He again recommended total right hip replacement. Dr. Mumford stated that claimant’s examinations and x-rays have confirmed all along that he had advanced arthritis. He stated that Dr. Delgado’s records of February 11, 1992, indicated that claimant had degenerative changes of the hip. Dr. Mumford said that in 1993 claimant had moderately advanced osteoarthritis and now has end stage osteoarthritis in his right hip, which would reflect an advancement of the arthritic condition.

When asked whether claimant’s current need for a hip replacement was caused or accelerated by the January 24, 1992, accident, Dr. Mumford stated: “. . . I think he had

⁴ P.A.H. Trans., Cl. Ex. 1 at 17. The parties acknowledge that Dr. Delgado’s reference to claimant’s left hip should be read to mean the right hip.

⁵ *Id.* at 9.

⁶ *Id.* at 36.

preexisting underlying hip disease, that he would ultimately need hip replacement and the 1992 injury did not accelerate the need for that replacement.”⁷

PRINCIPLES OF LAW

In a request for post-award medical treatment, the claimant has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.⁸ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁹ Although the passage of time may increase the claimant’s difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

Generally, parties are bound to stipulations made by them or their attorneys unless withdrawn by the court. Accordingly, when the parties have agreed to the stipulated facts, a trial court can only render judgment warranted by those facts. [Citation omitted.] However, a court is not bound by erroneous stipulations or admissions regarding questions of law. [Citation omitted.]¹⁰

The Kansas Court of Appeals, in *Wentz Equip. Co.*,¹¹ stated:

When a stipulation of facts is agreed to by the parties, a trial court can render only “such judgment as those facts warranted.” *Baker v. City of Leoti*, 179 Kan. 122, 126, 292 P.2d 720 (1956). “Evidence of facts not within the issues agreed on is not admissible.” 83 C.J.S., Stipulations § 22. “Valid stipulations as to evidence are binding on the court, which is bound to enforce them; and *the court cannot go beyond the terms of the stipulation.*” 83 C.J.S., Stipulations § 23. Emphasis added. “[O]rdinarily, as we have said more than once, courts are bound by stipulations of the litigants.” *In re Estate of Maguire*, 204 Kan. 686, 691, 466 P.2d 358, *modified on other grounds* 206 Kan. 1, 476 P.2d 618 (1970). The only exceptions to this rule

⁷ Mumford Depo. at 4.

⁸ K.S.A. 2007 Supp. 44-501(a).

⁹ K.S.A. 2007 Supp. 44-510k(a).

¹⁰ *Swayne v. Cates Service Co.*, No. 93,408, unpublished Court of Appeal opinion filed September 16, 2005, slip op. at 6; see also *Mardis v. The Boeing Co.*, No. 75,386, unpublished Court of Appeals opinion filed January 3, 1997, slip. op. at 9.

¹¹ *Wentz Equip. Co. v. Missouri Pacific R.R. Co.*, 9 Kan. App. 2d 141, 142, 673 P.2d 1193 (1983), *rev. denied* 235 Kan. 1042 (1984).

that come to our minds are (1) stipulations as to controlling law, 204 Kan. at 691, and (2) stipulations as to jurisdiction.

In *C.M. Showroom, Inc.*,¹² the Kansas Court of Appeals stated:

When a stipulation of facts is agreed to by the parties, a trial court can render only such judgment as those facts warrant. Factual findings made by the trial court contrary to the parties' stipulations cannot be upheld on appeal.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹³ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁴ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁵

ANALYSIS

The March 19, 1996, settlement was a lump sum compromise settlement that left open claimant's right to seek future medical treatment "upon application."¹⁶ The parties did not stipulate to the need for hip replacement surgery, and there was no agreement that if and when claimant should decide to undergo hip replacement surgery that it would be compensable as causally related to the work injury in this case. Respondent and Fund are not estopped from denying liability for the hip replacement surgery.

The ALJ reasoned that there was such a stipulation and that the doctrine of judicial estoppel precluded the respondent and Fund from arguing that claimant's current need for hip replacement surgery is not work related. However, the ALJ also addressed the merits of their defense when he said: "Further the court finds the accidental injury of 1992 permanently aggravated claimant's hip condition and therefore the necessity for the replacement resulted from claimant's work related accident."¹⁷ The Board will, therefore, review this causation finding.

¹² *C.M. Showroom, Inc. v. Boes*, 23 Kan. App. 2d 647, Syl. ¶ 1, 933 P.2d 793 (1997).

¹³ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁵ *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

¹⁶ Settlement Hearing (Mar. 19, 1996) at 4.

¹⁷ ALJ Post Award Order (Dec. 27, 2007) at 2.

For its determination of whether claimant has proven a direct causal connection exists between his present need for hip replacement surgery and his work-related accident of January 24, 1992, the Board looks primarily to the expert medical opinion testimony on causation.

The only medical exhibit presented to the Special Administrative Law Judge at the March 19, 1996, Settlement Hearing was a July 1, 1994, letter by Dr. Mumford. It read:

Mr. Blazic was initially seen by me on 1-29-93 for assessment of hip pain. Symptoms were brought on by a work-related-injury and subsequent evaluation, both radiographically and clinically, has documented advanced osteoarthritis of the hip.

At present, I think his condition is static and well stabilized and unlikely to change over time unless he elects for operative intervention (total hip arthroplasty). An impairment rating based on his arthritis and back pain can be calculated.

Based on the AMA Guidelines to the Evaluation of Permanent Impairment, Fourth Edition, Table 62, a 20% whole person (50% lower extremity) impairment has been calculated with regard to his hip. Based on Table 72 a 5% impairment has been calculated regarding his back. Using the Combined Values Chart, page 322 the sum of the hip and back impairment is calculated at 24%.¹⁸

Dr. Mumford was not recommending claimant undergo hip replacement at that time. From the medical exhibits introduced at the Post Award Hearing, it is apparent that Dr. Delgado likewise opined before the March 19, 1996, settlement that claimant “may need a total hip replacement . . . at a later date”¹⁹ and that claimant should “consider” a total hip replacement.²⁰ Claimant decided not to proceed with that surgery. Dr. Bieri also noted that surgical replacement of the right hip was a “possible future treatment.”²¹

The only expert medical opinion that takes into account the events after the 1996 settlement is that of Dr. Mumford. He saw claimant on August 29, 2007, and was deposed on January 31, 2008. Dr. Mumford did not relate claimant’s present need for hip replacement surgery to claimant’s work-related accident. Instead, he noted that claimant had advanced degenerative changes in his hip before that accident and opined that claimant’s present need for hip replacement surgery was a natural consequence of that preexisting condition. The 1992 injury did not accelerate the need for his hip replacement.

¹⁸ Letter from Dr. Joseph Mumford (July 1, 1994) attached to Settlement Hearing (Mar. 19, 1996).

¹⁹ P.A.H. Trans. (Dec.27, 2007), Cl. Ex. 1 at 17.

²⁰ *Id.* at 13.

²¹ *Id.* at 9.

Claimant has failed to prove that the January 24, 1992, accident accelerated his need for hip replacement surgery and that his present need for hip replacement surgery is a direct and natural consequence of his January 24, 1992, accident and injury at work with respondent.

CONCLUSION

(1) The parties did not stipulate to the compensability of any specific future medical treatment or, specifically, to future hip replacement surgery.

(2) Claimant failed to prove that his present need for hip replacement surgery is the direct and natural consequence of his January 24, 1992, accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Order of Administrative Law Judge Brad E. Avery dated April 8, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Paul D. Post, Attorney for Claimant
- Larry G. Karns, Attorney for Self-Insured Respondent
- Darin M. Conklin, Attorney for Kansas Workers Compensation Fund
- Brad E. Avery, Administrative Law Judge