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Hartgrave v. City of Twin Falls Appellant's Reply Brief Dckt. 44552

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

CHARLES LEROY HARTGRAVE,

Claimant-Appellant,

vs.

CITY OF TWIN FALLS,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants-Respondents

Supreme Court No. 44552

* * * * *

APPELLANT'S REPLY BRIEF

Appeal from the Idaho State Industrial Commission

Chairman Thomas E. Limbaugh, Presiding

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PRELIMINARY STATEMENT

The citations and arguments set-forth within the instant Reply Brief are intended by Appellant to be supplemental to those citations and that argument originally advanced within Appellant's Opening Brief, dated August 28, 2017, filed of record herein. Therefore, it is not the intent that the instant Reply Brief respond to each of the various issues, arguments or citations advanced by or within Respondents' Brief, to the extent that any such response would simply duplicate citations or argument previously made by Appellant.

SUPPLEMENTAL ARGUMENT WITH CITATIONS

I. Reply to Certain of Respondents' Understanding of Relevant Facts and/or Misrepresentation of Fact Within Respondents' Brief

It is not counsel's intent to "nit-pick" to the extent of addressing each factual representation of Respondents to which counsel disagrees. Most certainly, counsel recognizes that "poetic license" affords certain latitude in arguments and/or representations made upon behalf of a party. However, when a representation of fact is not supported of record or where a party's argument is premised upon a misrepresentation of fact, such should be noted. Appellant does so, as follows:

1. Page 4 of Respondents' Brief:

Respondents assert that,

Claimant's counsel entered into an attorney fee agreement with Blue Cross of Idaho to prosecute its subrogation claim arising out of the November 2013 right TKA. This claim was prosecuted on behalf of Blue Cross because claimant did not bill Surety for his right TKA.

At page 8 of Respondents' Brief, it asserts,

...claimant did not request that Surety pay for (his right TKA). ...Instead, claimant billed his right TKA through his personal health insurer, Blue Cross of Idaho. As a

result, claimant's counsel only pursued recovery of Blue Cross' subrogation interest in this case.

Again, at page 29 of Respondents' Brief, it asserts,

...this case and appeal was prosecuted solely for the benefit of claimant's subrogee, Blue Cross of Idaho,... . In other words, there would be no tangible benefit to the claimant from the prosecution of this medical benefits claim and subsequent appeal. The only person that stands to benefit from this appeal is claimant's counsel who... signed an attorney fee agreement with Blue Cross in which he would receive an attorney fee if he prevailed.

These representations by Respondents/Respondents' counsel are partially correct. As noted at pages 1-2 of Appellant's Opening Brief, Charles LeRoy Hartgrave, Claimant-Appellant herein (hereafter referenced as "LeRoy") had been employed by Defendant-Employer, City of Twin Falls, for 38 years, and had become friends with his co-workers and supervisors, such that he was a "reluctant" participant in the underlying adversarial Title 72 proceeding. It was by reason of this fact that LeRoy entered into the Modified Lump Sum Agreement (hereinafter referenced as MLSA) with Respondents, settling his underlying Title 72 claims against the advice of his attorney, who was of the opinion that the settlement did not fairly compensate LeRoy to the extent provided by Title 72.

Throughout the underlying proceedings, Respondents, Defendants therein, disputed and denied the compensability of LeRoy's right knee presentment, generally, and specifically the compensability of his right TKA, as being either directly or indirectly related to his two industrial left knee injuries, the compensability of which were conceded by Respondents. Respondents' Answer to Complaint, regarding both the February 3, 2009 and August 23, 2012 claims, specifically denied liability for any injury to LeRoy's right knee. *R.*, pp. 10 and 12. The State Insurance Fund,

Surety herein, did not process and pay for LeRoy's right TKA because it was not billed, but because Respondents, at all times herein, denied any responsibility for LeRoy's right knee presentment.

The underlying claim was prosecuted upon behalf of LeRoy. Blue Cross, which processed and paid certain of the billings related to LeRoy's right TKA pursuant to the terms and conditions of its contract of insurance, was subrogated therein to the extent of those payments.

As a practical matter, any settlement of the underlying claim between LeRoy and Respondents was precluded by Blue Cross' subrogation claim unless Blue Cross' interests were protected by and within the settlement or the settlement specifically excluded Blue Cross' interests. The MLSA entered into by and between LeRoy and Respondents excluded Blue Cross' subrogated interests. Following the MLSA, Blue Cross' interests were the subject of the Title 72 proceedings which culminated in the Commission's August 23, 2017, decision from which the instant Appeal was taken. However, the instant Appeal was not taken by reason of Blue Cross' interests, but was taken for the benefit of LeRoy.

The underlying, principal and primary objective of the instant Appeal is to protect and benefit LeRoy. Of record herein is the fact that certain of the consideration paid by Respondents to LeRoy pursuant to the MLSA was the total of LeRoy's out-of-pocket costs, in the form of his co-pay and/or deductibles, related to the right TKA. At the time of the MLSA, LeRoy had been released from medical care following right TKA and there was no hint or suggestion that he was at risk for other or prospective procedures involving or related to right knee presentment.

During counsel's review of the Commission's June 23, 2017, decision with LeRoy, LeRoy noted that he had experienced difficulty with the right TKA and had re-presented to his orthopedic

surgeon, who advised that the right TKA had “failed,” such that it was probable that LeRoy would require a repeat procedure, which would be significantly more complicated and expensive than had been the original TKA. LeRoy stressed that in light of the Commission’s June 23, 2017, decision, he was greatly concerned that further required right knee procedures would result in his responsibility for co-pays and/or deductibles which he and his family could not afford, and specifically requested counsel to file the instant appeal. See Affidavit of Berry in Support of Claimant’s Motion for Re-Opening of Claim in Order to Correct Manifest Injustice, dated January 25, 2017, at paragraphs 6-11. *R.*, pp. 88-90. Such was most certainly within the knowledge of Respondents’ counsel, Mr. Augustine. The above representations made upon behalf of Respondents were materially false and obviously intended to bias this Court against the instant Appeal.

2. Page 6 of Respondents’ Brief: Thereat and repeated thereafter is the understanding of Respondents/Respondents’ counsel that Dr. McKee recommended and the surety approved a left TKA, which LeRoy underwent on March 13, 2013. Actually, Dr. McKee did initially recommend a left TKA for LeRoy but subsequently determined that an arthroscopic procedure offered potential for greater benefit, which the surety authorized and Dr. McKee performed on March 13, 2013. *Ex. C.3.*, pp. 95-112.

3. Page 7 of Respondents’ Brief: Respondents misrepresent that LeRoy testified that, “...after he stopped using the crutches following his March 2013 left TKA (should be left arthroscopy), his right knee was ‘extremely painful,’ he had ‘trouble bending it,’ and it would ‘lock up’ on him,” citing *Hartgrave Depo.*, p. 64, LL. 13-23. (Emphasis added.)

At page 27 of Respondents' Brief, Respondents' represent that, "[t]he timing of the onset of the claimant's symptoms in Dr. McKee's August 2013 release of the claimant to return to full duty establishes that his activities and daily living and work activities led to the documented onset of right knee pain in November 2013." (Emphasis added.)

Such representations were intended to project that LeRoy's knee symptomatology which resulted in his right TKA manifested "after he stopped using the crutches following his March 2013 left TKA," and did not occur until November, 2013. Such is irreconcilable with the record. With respect to LeRoy's onset/manifestation of right knee symptomatology, the "timing" was set by Mr. Augustine's inquiry to LeRoy, which was "[b]y the time you get off your crutches... ." *Hartgrave Depo.*, p. 64, L. 13. It is clear that by LeRoy's response to that inquiry, the onset/manifestation of right knee symptomatology was suffered while he remained on crutches following his March 23, 2013, left arthroscopic procedure. LeRoy's testimony was,

[a]fter the two surgeries on my left knee, it changed the way I walk and different things like that. I started having a lot of trouble with this right knee. Being on crutches for six weeks, totally on the right knee, it just caused all sorts of problems. ...this right knee never came back after I got back to work. It still gave me severe problems. ...it just wouldn't come back to what it used to be before the six weeks on the crutches. It wasn't - - it just wasn't working. (Emphasis added.)

Hartgrave Depo., p. 62, L. 20-p. 63, L. 11; and, p. 64, LL. 18-21.

Further, Mr. Augustine's representation that Dr. McKee's August 2013 release of LeRoy to return to work was at "full-duty" is shy of the mark. Rather, Dr. McKee's actual release of LeRoy to return to work was with permanent restrictions of "no squatting, kneeling and limit lifting to 50 pounds." *Ex. C.3.*, p. 145.

4. Page 10 of Respondents' Brief: Here, Respondents assert that at the time of LeRoy's first IME by Dr. Tallerico, in December, 2010, Dr. Tallerico then considered LeRoy a candidate for a right TKA. Such is simply not true. Rather, Dr. Tallerico, on cross examination, testified that the decision to proceed with a TKA or not is pain driven on the part of the patient. He would never recommend a TKA based only upon diagnostic films. Rather, if LeRoy would have presented to him as a patient with respect to his left knee and diagnostic studies had been performed on both knees, upon observing that the degenerative joint disease appeared worse on the right than the left, if LeRoy would have told Dr. Tallerico, as he did Dr. McKee, that he did not then have an issue with respect to the right knee, Dr. Tallerico would not have recommended a right TKA at that point in time. *Tallerico Depo.*, p. 41, L. 1-p. 43, L. 13.

5. Page 11 of Respondents' Brief: Respondents here represent that Dr. Tallerico, Respondents' IME physician, examined Leroy and, "...subsequently reviewed claimant's diagnostic studies and Dr. McKee's interpretation of the films. He testified that the films from November 2013 showed end-stage arthritis in the right knee..." It is true that Dr. Tallerico did conduct an IME upon LeRoy's left knee upon November 12, 2013. However, Dr. Tallerico did not then or thereafter review LeRoy's diagnostic studies, but only Dr. McKee's interpretation thereof. In fact, following LeRoy's initial left knee evaluation by Dr. Tallerico, on December 16, 2010, Dr. Tallerico did not personally review any of Leroy's diagnostic film or studies. *Tallerico Depo.*, p. 18, LL. 2-13; and, p. 25, L. 20-p. 26, L. 20.

6. Pages 13-14 of Respondents' Brief: Perhaps most damning on the part of Respondents is Respondents' misrepresentation of Dr. Tallerico's testimony. Respondents

affirmatively represent that Dr. Tallerico “...acknowledged that if the claimant’s medical records documented the onset of right knee pain ‘soon after’ this left knee TKA (should be arthroscopic procedure), he could change his opinion on causation,” citing *Tallerico Depo.*, p. 22, LL. 15-24 (Emphasis added). Rather, Dr. Tallerico’s testimony was,

- Q. Assuming that there was documented in the medical record that while (LeRoy) was non-weight-bearing, lets say, during the four months prior to his knee replacement that he had a sudden increase in right knee pain, would that change your opinion?
- A. Yes.

Tallerico Depo., p. 22, LL. 15-20.

Again, it was not counsel’s intent to “nit-pick” Respondents’ Brief within the context of representations made therein which were either not supported of record or, more significantly, were in direct conflict therewith. Quite the opposite. However, the above references to Respondents’ Brief were believed by counsel to be significant and most certainly worthy of reference within Appellant’s Reply Brief.

II. Response to Certain of the Argument Advanced by Respondents

As noted by Respondents’ Brief, LeRoy’s right knee claim failed before the Commission only because he failed to complain to Dr. McKee of right knee symptomatology within the four to six week period following his second left knee industrial knee surgery. Such would have afforded the “documentation” for Dr. Tallerico to express that LeRoy’s manifestation of right knee symptomatology which resulted in right TKA was by reason of his left industrial knee injuries status-post surgeries.

Respondents assert at page 29 of Respondents' Brief that, "...the fact that there was no contemporaneous medical record which would have corroborated the temporality of (LeRoy's) knee complaints with the claimant's testimony... (is) fatal to the claimant's causation argument,... ." As the Commission noted within its June 23, 2017, decision,

...the argument is that Claimant's pre-existing right knee condition was aggravated by the industrial accident by this path: Claimant suffered a left knee injury which required surgery. During his convalescence, Claimant was required to use crutches and this use of crutches caused a gait alternation which aggravated his right knee condition. If this causal chain finds support in the medical record, Claimant's right knee injury would be compensable pursuant to the 'compensable consequences' doctrine. (Emphasis added.)

R., pp. 185-186. By the "medical record," the Commission references Dr. Tallerico's IME reports and/or the office dictation of LeRoy's orthopedic surgeon, Dr. McKee, documenting LeRoy making complaint of right knee symptomatology during or soon after his six week period on crutches following his second left knee industrial arthroscopic surgery.

Rhetorically speaking, upon consideration of the facts of record in this matter and applying the same to controlling Idaho statute and/or case precedent, why should the absence of documentation within the medical records of LeRoy expressing complaint of right knee symptomatology close in time to the onset of that symptomatology be fatal to his claim? Clearly, it should not. LeRoy testified that,

[a]fter the two surgeries on my left knee, it changed the way I walk and different things like that. I started having a lot of trouble with this right knee. Being on crutches for six weeks, totally on the right knee, it just caused all sorts of problems. ...(The right knee) was in extreme pain. I was having trouble bending it. It just was at the point where I couldn't get around anymore. ...I had to be careful going up steps on crutches and different things like that. ...My knee never, this right knee never came back after I got back to work. It still gave me severe problems. ...It was extremely painful. I was having trouble bending it. It just wouldn't come back to what it used to be before the six weeks on the crutches. It wasn't – it just wasn't

working. ...It would try to lock up on me. It wouldn't – you know, it was painful. I couldn't bend it. ... (The right knee) was swollen. I had walked on it for six weeks with the crutches. So it had just taken its toll.

Hartgrave Depo., p. 62, L. 20-p. 64, L. 23.

In considering LeRoy's testimony, the Commission referred to the same as "...Claimant's subjective opinion and testimony regarding what caused the pain and when that pain occurred." *R.*, p. 187, ¶ 42. The Commission has previously held that it "...does not expect a claimant to have medical knowledge without medical training. He or she is not legally bound to his impression of causation." *Cook V. Ashley Inn, LLC and Employers Compensation Insurance*, I.C. 2009-025203, filed January 30, 2013. Most certainly, LeRoy is not medically trained and without supporting medical opinion, his subjective opinion as to the cause of the manifestation of his right knee symptomatology could be suspect. However, his knowledge of and testimony describing when that pain manifested is unrebutted.

In *Niebuhr v. Apex Construction, Inc., and Liberty Northwest*, I.C. 2006-513568, filed September 28, 2011, which presented with similar facts, the Commission noted that that claimant's medical records did not document her complaints of neck symptomatology related to her industrial injury "...when she was visiting a medical professional for another unrelated problem." (Emphasis added.) In that case, the Commission determined that, "...the six-or-more months' delay in recorded neck symptoms does not prove the absence of causation," and accepted the testimony of that claimant's treating physician expressing favorable causation opinion over that of an IME panel. See ¶¶ 60-62; and, 66-67, at page 16-17. Again, rhetorically speaking, who else but LeRoy could testify as to when and following what his right knee symptomatology manifested.

In rejecting Dr. McKee's favorable causation opinion, the Commission determined that, "Dr. McKee's changed opinion appears to be founded almost entirely upon Claimant's subjective and late self-reporting." (Emphasis added.) Within the same paragraph, the Commission found that Dr. Tallerico "unequivocally opined" that LeRoy's need for right TKA was unrelated to his left knee industrial injuries. *R.*, p. 188, ¶ 44. These findings by the Commission are absent support by substantial and competent evidence of record and clearly establish that the Commission failed to make proper application of law to the evidence of record in reaching the same.

First, again addressing LeRoy's sworn deposition testimony, which the Commission dismissed and believed insufficient for Dr. McKee's deposition testimony supporting causation, such testimony is uncontradicted and thusly must be accepted as true, absent the same being inherently improbable or rendered improbable by facts and circumstances disclosed at hearing. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171, 175 (Idaho 1937); *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575, 581-82 (Idaho 1979); and, *Wood v. Hogle*, 131 Idaho 700, 963 P.2d 383, 386 (Idaho 1998). For the Commission to ignore/reject this testimony, the testimony must be inherently improbable or rendered improbable by facts and circumstances disclosed at hearing. It most certainly was not.

LeRoy's testimony as to his on-set/manifestation of right knee symptomatology following the second industrial left knee arthroscopic surgery was considered by his orthopedic surgeon, Dr. McKee, who stated within his August 28, 2015, report that "...I feel that (LeRoy's) industrial injuries caused an aggravation to his right knee pain. Had there not been worsening symptoms we would not have proceeded with total knee arthroplasty. Therefore, yes, I believe that his industrial injuries

moved up his need for total knee arthroplasty on the right.” *Ex. C.3.c.*, p. 200. In his deposition, Dr. McKee’s sworn testimony explains that, upon consideration of the “history” provided by LeRoy within his sworn testimony,

- A. Well, I believe that (LeRoy’s) need for a knee replacement occurred earlier because of aggravation from being on crutches.
- Q. Okay. With regard to the alteration of gait because of the left knee, would that affect the weight bearing load on the right knee?
- A. Yes.
- Q. In what regard?
- A. Its just going to put more pressure on that knee when ambulating, even after being off crutches.

McKee Depo., p. 12, L. 19-p. 13, L. 4. In terms of medical probabilities, Dr. McKee’s testimony was,

- Q. Doctor, with the exception of the altered gait and the sequela from the left knee injuries and the two surgeries, and, again, honing in upon the March 2013 surgery, can you think of any other potential cause for the exacerbation on Mr. Hartgrave’s right knee symptomatology having greater probability than that altered gait following the 2013 surgery to cause Mr. Hartgrave’s symptomatology?
- A. No.

McKee Depo., p. 14, L. 23-p. 15, L. 6.

The Commission concluded that Dr. McKee’s opinions set-forth within his August 28, 2015, report as well as his sworn testimony had “changed” from those expressed within Dr. McKee’s report of July 29, 2014, at *Ex. C.3.a.*, p. 192. That report by Dr. McKee was responsive to counsel’s July 1, 2014, inquiry, of record at *Ex. C.3.a.(1)*, pp. 193-197. Of note, that five page correspondence from counsel failed to attach LeRoy’s explanation/description of how and when his right knee symptomatology manifested. Within his July 29, 2014, report, Dr. McKee simply stated that, “Mr.

Hartgrave had severe arthritis in his right knee that was noted on his initial visit in 2009. He would have required a total knee arthroplasty regardless of his industrial injuries.”

It is of critical importance that Dr. McKee’s opinion as stated within the July 29, 2014, report be compared with, of and to his report of August 28, 2015, and sworn deposition testimony. Not having benefit of LeRoy’s sworn description of the “timing” of manifestation of his right knee symptomatology, Dr. McKee’s July 29, 2014, report simply states that LeRoy “...would have required a total knee arthroplasty regardless of his industrial injuries.” No one disputes that fact. What is significant about this opinion of Dr. McKee is that there is no indication of a time-line as to when LeRoy’s right TKA would have been medically anticipated to be required absent his two industrial left knee injuries. Of note, Dr. McKee is board-certified in orthopedics whose practice includes sports medicine, joint replacement and trauma, with 50% of that practice involving knees. *McKee Depo.*, p. 4, LL. 9-20. There is no indication that Dr. McKee does IME examinations. Dr. McKee testified that when LeRoy presented to him in November, 2013, status-post on-set of right knee symptomatology, the “when, where and why” pertaining to that on-set was not an issue from his perspective, and did not become an issue until counsel’s inquiry to the doctor following the right TKA. *McKee Depo.*, p. 15, LL. 7-20. Obviously, as Dr. McKee did not perceive the circumstances regarding the on-set/manifestation of LeRoy’s right knee symptomatology to be an issue, there would have been no discussion of the same between Dr. McKee and LeRoy absent LeRoy initiating the same.

Prior to the initial February 3, 2009, industrial left knee injury, LeRoy’s only interaction with and/or exposure to workers’ compensation was by reason of an August 6, 1996 facial soft tissue

injury, for which he presented to a medical provider and suffered no residuals; and, a January 9, 2003, injury to his nose, for which he again presented to a provider for treatment, and suffered no residuals. *Ex. O.I.a.*, pp. 560-561, referencing Claimant's Answer to Defendants' Interrogatory No. 24. LeRoy would most certainly not be anticipated to understand the nuances within the doctrine of "compensable consequences," and thusly that he should discuss the whens, hows and whys of his on-set of right knee symptomatology with either Dr. McKee or Dr. Tallerico. Again, *Cook* (supra) expressed that the Commission "...does not expect a Claimant to have medical knowledge without medical training. He or she is not legally bound to his impression of causation."

As noted within Appellant's Opening Brief, none of LeRoy's IME presentments to Dr. Tallerico were regarding his right knee. Dr. Tallerico was not a treating physician for LeRoy. Dr. Tallerico testified that, "I probably did at least a cursory exam of (LeRoy's) right knee... (which would) ...not (be) as thorough as the accepted body part for the claim... ." *Tallerico Depo.*, p. 12, LL. 19-23; and, p. 28, LL. 1-9. Thusly, both from the perspective of Dr. Tallerico and LeRoy, the right knee was not a subject for discussion and/or examination. Further, as noted by Dr. Tallerico, LeRoy "...is tough. He doesn't complain a lot." *Tallerico Depo.*, p. 71, LL. 3-5. Dr. McKee agreed that LeRoy was tough and stoic, such that it would therefore be reasonable to assume that LeRoy thought that after he was off crutches and his gait disturbance relative thereto had resolved, his right knee symptomatology would abate, and thusly there was no need to complain. *McKee Depo.*, p. 31, L. 17-p. 32, L. 15. Revisiting LeRoy's sworn deposition testimony confirms that such was exactly the scenario.

- A. After the two surgeries on my left knee, it changed the way I walk and... I started having a lot of trouble with this right knee. ...This right knee never

came back after I got back to work. It still gave me severe problems. ...It just wouldn't come back to what it used to be before the six weeks on the crutches. It wasn't – it just wasn't working. ...I hadn't had any plans of having anything done with the right knee. I told (Dr. McKee) I was having a lot of trouble with it, and he checked it out. ...(Dr. McKee) said it wouldn't get any better. (Emphasis added.)

Hartgrave Depo., p. 62, L. 20-p. 65, L. 23.

Recall, Dr. Tallerico, Respondents' hired IME physician, described LeRoy as "...obviously a very hardworking and straight-forward individual who has no secondary gain issues." (*Ex. G.1.*, p. 278); "Once again, it is obvious that Mr. Hartgrave is a hardworking individual with no secondary gain issues." (*Ex. G.5.*, p. 308); that LeRoy "...was obviously straight-forward, that he was honest, that he was hard-working and that he exhibited no signs whatsoever of symptom magnification." (*Tallerico Depo.*, p. 28, L. 22-p. 29, L. 3); that if LeRoy were to have told Dr. Tallerico something, Dr. Tallerico "...would have believed it." (*Tallerico Depo.*, p. 29, LL. 4-8); and, that Dr. Tallerico found LeRoy "...to be forthright, straight-forward, honest... (and) a stand-up guy." (*Tallerico Depo.*, p. 53, LL. 19-21). Again, rhetorically speaking, upon what basis does the Commission discredit LeRoy's sworn testimony as to the circumstances and "timing" of the on-set/manifestation of his right knee symptomatology?

Within Finding 45 of the Commission's June 23, 2017, decision, the Commission concluded that Dr. Tallerico "unequivocally" testified that LeRoy's need for right TKA was unrelated to his left knee industrial injuries. Simply and bluntly stated, he did not. Within paragraph 30 of its decision, the Commission characterized Dr. Tallerico's testimony as that he "...might change his mind (on causation) if there was documentation that Claimant began complaining of right knee pain shortly

after his second left knee surgery and while he was non-weight bearing.” *R.*, pp. 182-183. Dr.

Tallerico’s actual testimony was,

- Q. Assuming that there was documented in the medical record that while (LeRoy) was non-weight-bearing, let’s say, during the four months prior to his knee replacement that he had a sudden increase in right knee pain, would that change your (causation) opinion?
- A. Yes. If it was documented clearly that soon after having the second left knee surgery that he came in for evaluation of the right knee, though he was post-operative on the left. That would be important, obviously.”

Tallerico Depo., p. 22, LL. 15-20. The “documentation” to which Dr. Tallerico was referring was simply notation within either Dr. McKee’s records or Dr. Tallerico’s records that LeRoy had discussed his on-set/manifestation of right knee symptomatology. *Tallerico Depo.*, p. 66, LL. 5-13. Thusly, had Dr. McKee perceived there being an “issue” regarding LeRoy’s on-set/manifestation of right knee symptomatology; made inquiry to LeRoy; and, documented the same within his records, Dr. Tallerico’s causation opinion would have been favorable to LeRoy. After all, both Drs. McKee and Tallerico had, each, had patients within their respective practices who presented exactly as did LeRoy, “...who present with horrific osteoarthritic knees on film and yet have very little manifestation of complaint, of symptomatology,... (and) something happens where, after that occurrence, those previous, for the most part, asymptomatic patients develop manifestation.” *Tallerico Depo.*, p. 45, L. 18-p. 46, L. 3. Dr. McKee sees “...patients all the time that have no pain with severe arthritis, but something will set if off, whether it is an injury or a fall or Mr. Hartgrave’s situation.” (Emphasis added.) *McKee Depo.*, p. 14, LL. 1-4.

LeRoy’s treating orthopedic surgeon, Dr. McKee, expressed that upon consideration of the “history” provided by LeRoy’s testimony, his need for right TKA was advanced in time by reason

of his altered gait from being on crutches for the six week period of time following LeRoy's second industrial left knee surgery. *McKee Depo.*, p. 12, L. 3-p. 13, L. 10. Dr. McKee could think of no other potential cause for the exacerbation of LeRoy's right knee symptomatology having greater probability than the altered gait following the 2013 left knee industrial surgery. *McKee Depo.*, p. 14, L. 23-p. 15, L. 6. Had Dr. Tallerico considered LeRoy's deposition testimony, his causation opinion would certainly have also been favorable to LeRoy. As earlier noted, Dr. Tallerico found LeRoy to be honest and would have believed him.

For reasons undisclosed of record but certainly well understood (Respondents' "strategy" in manipulating/controlling the data upon which Dr. Tallerico would base his causation opinion), Respondents failed to provide Dr. Tallerico with LeRoy's sworn deposition testimony describing the on-set/manifestation of right knee symptomatology. *Tallerico Depo.*, p. 28, LL. 12-21. Dr. Tallerico did say that if LeRoy testified that after the second industrial left knee surgery and while he was non-weight-bearing, that his right knee symptomatology flared up and never went back to baseline, that the manifestation would be within the time continuum supporting causal relation between the on-set of symptomatology and the industrial left knee surgery. *Tallerico Depo.*, p. 47, LL. 11-13; and, p. 48, LL. 2-12. However, when specifically asked to consider LeRoy's deposition testimony, Dr. Tallerico refused and responded, "why wasn't it (provided to me?) – again, I don't have that transcript. All I have are my four reports and the medical records, Dr. McKee's importantly, all of my opinions are formulated on that." (Emphasis added.) *Tallerico Depo.*, p. 53, L. 3-p. 54, L. 4.

Dr. Tallerico conceded that there was nothing within LeRoy's medical records which indicated that prior to his industrial left knee injuries, LeRoy complained of popping or cracking

(crepitus); was experiencing give-way, weakness or instability; was restricted in going up or down stairs, steps or ladders; experienced difficulty stooping, crawling, prolonged walking, walking over uneven surfaces or squatting; or, regarding any activity involving the right knee. *Tallerico Depo.*, p. 37, LL. 6-14; and, p. 38, L. 16-p. 39, L. 20. Dr. Tallerico testified that for LeRoy to proceed with right TKA, he was experiencing a “different level” of pain, being “tough.” *Tallerico Depo.*, p. 38, LL. 11-15. Dr. Tallerico concurred that, ultimately, the decision to proceed or not with TKA is pain driven on the part of the patient. *Tallerico Depo.*, p. 43, LL. 9-13. Not having had benefit of (and refusing to consider) LeRoy’s deposition testimony, Dr. Tallerico expressed that the “... cause having greater probability for the increase in manifestation of Mr. Hartgrave’s right knee during the six to eight weeks following the second left knee surgery than his two industrial accidents, inclusive of the left knee surgeries” was “coincidence.” *Tallerico Depo.*, p. 54, LL. 16-24.

In *Anderson v. Gamma Phi Beta Sorority and Continental Casualty Co.*, I.C. 2014-013005, filed June 7, 2016, the Commission was faced with an analogous claim, where that claimant’s treating orthopedic surgeon expressed a favorable causation opinion, based upon “...a temporal relationship between (the industrial event) and development of symptoms,” and the opposing opinion of defendants’ IME physician that that claimant’s on-set/manifestation of symptomatology at the point in time experienced was “coincidence.” In that claim, as here, defendants attacked the treating physician’s causation opinion as “...unfounded as he failed to cite supporting medical literature.” In dismissing the same, the Commission determined that the treating physician’s experience as a practicing orthopedic surgeon provided adequate support for his causation opinion, and accepted the same in finding that claimant’s presentment compensable. It is respectfully submitted that the

“coincidence” opinion of Dr. Tallerico constitutes pure and simple speculation; flies in the face of the clear record herein; and, should be similarly rejected. Conversely, Dr. McKee, LeRoy’s treating orthopedic surgeon, is the only physician expressing causation opinion upon receipt, review and consideration of all pertinent medical records and data, inclusive of the sworn testimony of LeRoy describing when, how and why his right knee symptomatology manifested and never returned to baseline, which, from a pain-driven perspective, required and resulted in right TKA.

Upon multiple occasions throughout Respondents’ Brief, Respondents emphasize the lack of “medical records” of either Dr. McKee or IME Physician Tallerico documenting that LeRoy complained of right knee manifestation between the March 13, 2013, second industrial left knee arthroscopy and LeRoy’s re-presentment to Dr. McKee upon November 8, 2013. While the arguments set-forth within Appellant’s Opening Brief as well as herein above are upon the assumption that LeRoy did not discuss his right knee manifestation with Drs. McKee or Tallerico during this time frame, it most certainly cannot be ruled-out that LeRoy did, in fact, do so, but that the physicians and/or their respective staff simply failed to record the same within the medical records.

It is well known that medical records are not infallible. Mistakes and omissions occur. Further, irrespective of one’s perception of duties and/or obligations, upon occasion individuals simply fail to do that which should be done, inclusive of making entries in medical records.

First, regarding Dr. McKee and his office’s records, it is Dr. McKee’s medical assistant, not himself, who obtained the “chief complaint, clinical comments, pain assessment, vitals, injury information, (and) etcetera, from Mr. Hartgrave.” *McKee Depo.*, p. 18, LL. 11-16. At the time of

his deposition, Dr. McKee candidly conceded that he did not recall “every interaction” with LeRoy. Rather, his deposition testimony was given “relying on (his) medical records and the documentation of (LeRoy’s) symptoms to determine whether or not he was complaining of a specific symptom at that time.” *McKee Depo.*, p. 19, LL. 9-18. Unless Dr. McKee’s medical assistant was astute and thorough enough to make inquiry regarding LeRoy’s right knee presentment at the time of LeRoy’s left knee presentments following the second industrial left knee surgery, Dr. McKee’s records would be absent of the same, and thusly the “documentation” required by Dr. Tallerico would not exist.

With respect to Dr. Tallerico, within his deposition he repeatedly testified as to the obligation of a physician to document a patient’s complaints within the medical records. *Tallerico Depo.*, p. 69, L. 11-p. 70, L. 5. Interestingly enough, it appears that Dr. Tallerico imposes responsibilities and obligations upon other physicians that he, himself, fails to conform to. Reference is made to Dr. Tallerico’s report flowing from his repeat IME examination of LeRoy of April 17, 2014, at *Ex. G.6*, pp. 311-325. Therein, Dr. Tallerico notes that LeRoy presented with left knee symptoms regarding which “shots were minimally effective.” LeRoy had dull aching and near-constant pain on the medial aspect of his left knee, definitely worse doing some of his work activities. There was grinding and popping of the left knee. Exacerbating factors included prolonged standing and definitely repetitive climbing in and out of trucks. LeRoy also had a difficult time kneeling and squatting. In response to specific questions from the surety, Dr. Tallerico advised that LeRoy’s condition was “fixed and stable”; and, that LeRoy “...does not require any further medical treatment related to his industrial (left knee) injury.” See responses to questions 3 and 4, *Ex. G.6.*, p. 320.

At the time of his deposition, during cross-examination, Dr. Tallerico was asked whether, at the time of this IME examination, LeRoy would "...have been a TKA candidate with regard to the left knee.?" Dr. Tallerico's response was, "I don't think so. I mean, I would have, perhaps, mentioned it if he was that bad. ...and if (LeRoy) were my patient who came in and I did that knee scope on him, I would try a more conservative treatment for a little while." (Emphasis added.)

Tallerico Depo., p. 61, LL. 1-19. Dr. Tallerico's testimony continued as,

Q. From your records, as of the date of the 4/17/14 left IME, the MRI had documented a marked irregular cartilage loss and osteophyte formation. X-rays confirmed significant osteoarthritic changes.

He had aching and near constant pain. Worse at work activities. Grinding and popping without locking or give-away. Generally, upon such activities as prolonged standing, repetitive climbing in and out of vehicles, kneeling and squatting, mild crepitis, and an antalgic gait.

At that juncture, with regard to the left, he would not have presented as a left TKA candidate?

A. Is this my note?

Q. That is how I viewed it.

A. I am just trying to find it as you are talking. I am looking at 'Current Symptoms.' You are talking about 4/17/14; is that correct?

Q. Just one second here. I am looking at 4/17. Yes, sir, 'Current Symptoms.'

A. Yes.

Q. Left knee feels about the same as it did when I saw him in November. Shots, basically, without effect. Dull aching. Near constant pain. Definitely worse doing work activities. Grinding, popping, no locking or giving way.

Exacerbating factors: Prolonged standing. Definitely repetitive climbing in and out of trucks. Difficult time kneeling and squatting because of pain.

A. That's what he told me. Correct. I felt he was fixed and stable. He had exhausted treatment after that injury. Obviously, I didn't recommend a total knee replacement at that time. It wasn't a pointed question to that end, as far as, 'is he a candidate for total knee arthroplasty?' Sometimes that's put in the discussion or the cover letter.

This may go back to what I mentioned about his work activities and nearing retirement and all of that. I am not sure that we even mentioned that in the report. (But) I am sure we talked about it.

In other words, I don't think he was quite interested in having this left knee replaced at that time. You can't make somebody do it if they don't want to. (Emphasis added.)

Tallerico Depo., p. 61, L. 20-p. 63, L. 12. Thusly, although LeRoy presented at that juncture with far worse symptomatology than he had ever expressed to Dr. Tallerico regarding the right, Dr. Tallerico testified that he was not then a candidate for left TKA. Incredulously, irrespective of the good doctor's self-expressed obligations and responsibilities on the part of a physician to diligently record, and thusly document, discussions with the individual being examined, Dr. Tallerico states that he was "...sure (he and LeRoy) talked about it," meaning a left TKA, but there is absolutely no reference to that discussion or, in fact, current or potential future need for left TKA within the doctor's April 17, 2014, report. Ironically, were left TKA to become a subsequent issue and a "new" IME physician was reviewing Dr. Tallerico's records for "documentation" of discussion of the same, that documentation would not exist.

The point of the above discussion is that physicians' records, including those of Dr. Tallerico, oft-times do not set-forth each and every discussion between the patient and the doctor (or the doctor's staff) regarding symptomatology and/or potential medical procedures, especially where that symptomatology did not involve the injury or condition for which the patient was then presenting. How unfair to LeRoy would it be if, in fact, he had discussed his on-set/manifestation of right knee symptomatology with Dr. McKee's staff, who then failed to record and thusly document the same of record?

CONCLUSION

LeRoy's right knee claim should not and must not fail upon the basis that the medical records do not "document" that he made complaint to Drs. McKee or Tallerico of on-set/manifestation of right knee symptomatology prior to November 8, 2013. Rather, LeRoy's right knee claim can only fail if:

1. LeRoy's uncontroverted testimony regarding the on-set/manifestation of right knee symptomatology is determined to be "inherently improbable or rendered improbable by facts and circumstances disclosed at hearing." As previously discussed both within Appellant's Opening Brief and herein, it was neither. Rather, that testimony provided the history by and from which Dr. McKee found LeRoy's change of gait following the second industrial left knee surgery to be the most probable cause for the onset-manifestation of LeRoy's right knee symptomatology which resulted in right TKA. Further, that testimony, had the same been considered by Dr. Tallerico, would have resulted in Dr. Tallerico's favorable causation opinion.

2. That either Dr. Tallerico or Dr. McKee expressed opinion that LeRoy's on-set/manifestation of right knee symptomatology could not be related to his altered gait following his second industrial left knee surgery. Neither doctor expressed such opinion.

As above-discussed, both Drs. McKee and Tallerico testified that, in their respective individual practices, they have had patients who present with significant degenerative joint disease on film but which is relatively asymptomatic to their patient. Both doctors testified that following an event or occurrence, that previously mostly asymptomatic condition is excited or caused to manifest, such that the patient then experiences significant symptomatology from that previously relatively asymptomatic condition.

Citing multiple prior decisions, in *Swenson v. Hiddleston & Son, Inc., and State Insurance Fund*, I.C. 2004-518859, (filed May 6, 2009), at p. 11, ¶ 33, the Commission noted that

[i]t is not uncommon for a seemingly mild industrial injury to aggravate a progressive pre-existing degenerative condition. The Industrial Commission has held on numerous occasions that when the need for a total knee replacement surgery is hastened by an industrial injury, such surgery is compensable even if there is evidence to indicate that the claimant would eventually have needed the surgery in the absence of the compensable injury.

The Court is invited to review and compare the Commission's decision in *Swenson* with the Commission's decision in the instant matter. It is respectfully submitted that upon similar but significantly weaker facts of record, Mr. Swenson prevailed whereas, in the instant matter, LeRoy did not.

To enable to Court to understand the factual presentment before the Commission in *Swenson* and the analysis and decision of the Commission in that matter and to compare the same with the undisputed facts of record together with the Commission's analysis and decision before this Court upon instant appeal, attached as exhibit hereto is a true and correct copy of the *Swenson* decision. Upon repeated reading of the Commission's decision in *Swenson*, it is submitted that the only reason that that claimant prevailed and LeRoy did not is that, in *Swenson*, the Commission accepted that claimant's testimony at face value whereas in the instant matter, without basis of record or benefit of the Commission's rationale in doing so, the Commission ignored the mandate expressed by this Court in *Pierstorff* (supra), *Dinneen* (supra) and *Wood* (supra), and rejected LeRoy's undisputed testimony. Such constitutes clear error.

In *Stevens-McAtee v. Potlatch Corporation*, 145 Idaho 325, 179 P.3d 288 (2008), this Court recognized that whether an injury arose out of the course of employment is a question of fact to be

determined by the Commission. However, in noting that the Court must liberally construe the provisions of the workers' compensation law in favor of the employee in order to serve the humane purposes for which the law was promulgated, the Court overturned the Commission's decision finding that claimant's injury was unrelated to his employment, upon the grounds that that finding was not supported by substantial and competent evidence. In doing so, it appears that the Court did, in fact, review the evidence of record in that matter and concluded that, "[t]he record overwhelmingly indicates that McAtee herniated his disk during his work shift... ." It is submitted that justice together with the principles upon and for which Title 72 was promulgated demands the same review and result by the Court in the instant matter.

Dr. Tallerico testified that for LeRoy to make the decision to proceed with right TKA, he was experiencing a "different level" of pain. Dr. Tallerico testified that surgery upon one knee could affect the opposing knee by reason of related gait disturbance, difference in balance, and disruption of the weight load on the opposing knee. *Tallerico Depo.*, p. 46, L. 24-p. 47, L. 10. Dr. Tallerico conceded that LeRoy's right knee manifestation fell within the anticipated period of time following the March 13, 2013, second industrial left knee surgery to be related. In fact, had LeRoy's deposition testimony been recorded within either the medical records of Dr. McKee's office or Dr. Tallerico's IME reports, Dr. Tallerico's causation opinion would, in fact, have been favorable to LeRoy. *Tallerico Depo.*, p. 22, LL. 15-20.

As noted within Respondents' Brief, at page 23, within the last full paragraph thereof, it was by reason of the absence of "documentation" within Dr. McKee's records that LeRoy had complained of right knee symptomatology

...while he was on crutches or prior to his full work release to return to work in August, 2013, five months after his left TKA... (that) the Commission found that the medical evidence 'does not support the conclusion that it is more probable than not that claimant's need for a right TKA was caused by his left knee industrial injuries.'

Most certainly, the Commission's June 23, 2017, decision herein, that LeRoy's right TKA was not compensable as either an indirect result and/or consequence of his primary industrial left knee injuries constitutes error; is unsupported by substantial and competent evidence of record; failed to set forth specific findings supporting the same, necessary and required for meaningful appellate review; and, failed to make proper application of law to evidence of record. As such, said decision should and must be overturned/reversed upon appeal. It is further submitted that Appellant herein is entitled to attorney's fees, as previously argued.

RESPECTFULLY submitted this 12 day of October, 2017.

STEPHAN, KVANVIG, STONE & TRAINOR

By


L. Clyel Berry

Attorney for Claimant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a resident attorney of the State of Idaho and that on the 12 day of October, 2017, I served two bound copies of the foregoing document by depositing true copies thereof in the United States mail, postage prepaid, addressed to the following:

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