



Inside Workers Comp NY

The insiders view of the New York State Workers Compensation Board
by a former Commissioner and Member of the Board

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The New York State Workers Compensation Board periodically publishes those decisions which it reaches after a review of the full board of commissioners at its monthly meetings. As these are maintained on the Board's website for only a short period of time, InsideWorkersCompNY is posting them to its website where these decisions will be available anytime in the future. Any comments or suggestions should be sent to: TheInsider@InsideWorkersCompNY.com.

Matter of J. Kings Food Service Professionals Inc.

Case # 40707678

Date of Accident: 7/11/07

District Office: Hauppauge

Employer: J Kings Food Service Professio

Carrier: State Insurance Fund

Carrier ID No.: W204002

Carrier Case No.: 62379508-142

Date of Filing of Decision: 4/13/10

Claimant's Attorney: Turley, Redmond, Rosasco

Panel: Robert E. Beloten

The Full Board, at its meeting held on March 16, 2010, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on June 16, 2009.

ISSUE

The issue presented for Full Board Review is whether total left knee replacement surgery should be authorized.

In a decision filed on December 4, 2008, the Workers' Compensation Law Judge (WCLJ), in pertinent part, found that the claimant's consequential fall and left knee injury sustained on April 15, 2008, did not cause the claimant to need a total left knee replacement, whereby the authorization for surgery was denied.

The Board Panel majority found that the total left knee replacement surgery should be authorized. The majority noted that, while the claimant had preexisting arthritis and the issue of surgery had previously been raised in medical reports, the issue had only been raised as a possibility for the future; no recommendation for surgery was actually made until the claimant aggravated his preexisting arthritis on April 15, 2008. In addition, the majority found that both Dr. Douglas Petraco and Dr. Philip D'Ambrosio opined that the April 15, 2008, incident exacerbated the claimant's condition and that the claimant was now in need of a total left knee replacement, whereby the surgery should be authorized.

The dissenting Board Panel member found that the claimant's need for a total left knee replacement was not causally related, as both the claimant and his physician were fully aware of

his need for surgery prior to April 15, 2008, and the claimant had compelling reasons for surgery prior to April 15, 2008.

In its application for Full Board Review, the carrier asserts that the claimant's accident on April 15, 2008, merely exacerbated the claimant's long standing, active left knee arthritic condition, and that the medical experts all agreed that the claimant would have needed a total left knee replacement regardless of the April 15, 2008, incident, whereby the surgery is not compensable. In support of its position, the carrier cites to Matter of Guarino v Natslock Inc. & Natlock, 278 AD2d 633 (2000) and Matter of King Kullen Grocery, 2009 NY Wrk Comp 40704074, and incorporates its rebuttal below, wherein it asserted that "the incident occurring on 4-15-08...is not compensable."

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

By form C-669 filed on September 4, 2007, the carrier accepted the claim for a back injury sustained on July 11, 2007, when the claimant slipped and fell while pulling a pallet. This claim was indexed by the Board as WCB Case # 40707678.

The claimant was diagnosed with lumbar radiculopathy and causally related right foot drop by his attending orthopedic surgeon, Dr. Mark Stephen, and the carrier's consultants, Dr. Barry Katzman and Dr. William Walsh. The claimant underwent back surgery (L3-L4 and L4-L5 hemilaminectomy) on December 10, 2007. Following the surgery, Dr. Stephen prescribed an ankle-foot orthosis to help in the rehabilitation of his right foot drop, and the claimant received physical therapy to help strengthen his right lower extremity. The claimant was cleared to return to work by Dr. Stephen on April 4, 2008.

On April 15, 2008, the claimant injured his left knee at work. The claimant's form C-3 indicates that he fell while making a delivery, and that he was treated by a different orthopedist, Dr. Petraco.

In his May 12, 2008, narrative, Dr. Petraco noted that the claimant had a long history of left knee arthritis; that total left knee replacement had previously been indicated; that the claimant's pain had increased since April 15, 2008, when his left knee buckled while pushing a hand truck; that X-rays showed advanced arthritis; that the claimant had a varus deformity and tenderness along the medial joint, with a positive patellofemoral grind; and that total left knee replacement was being recommended. Although the narrative made no mention of a fall, the form C-4 for May 12, 2008, does include a history of a fall.

By form C-669 filed May 23, 2008, the carrier accepted the claim for a left knee injury sustained on April 15, 2008. This claim was indexed by the Board as WCB Case # 00824292.

At the hearing held on June 19, 2008 in WCB Case # 40707678, the case was established for a July 11, 2007, back injury, awards were made, and WCB Case # 00824292 was directed to travel as an associated file.

At the joint hearing held on July 31, 2008, the parties agreed that claimant's left knee injury on April 15, 2008, was consequential to his established July 11, 2007, injury. As a result, WCB Case # 40707678 was amended to include a consequential left knee injury, and WCB Case #0 0824292 was closed as a duplicate file. However, the carrier refused to authorize the left knee surgery being requested on the basis that the claimant had a longstanding left knee problem, and its consultant (Dr. D'Ambrosio) did not indicate that the left knee replacement was causally related. As a result, the WCLJ made additional awards and directed medical depositions on the issue of causally related total left knee replacement surgery.

Dr. Petraco was deposed on October 17, 2008, and testified as follows: He had first treated the claimant for left knee arthritis on July 14, 2005, at which time cortisone injections were administered. He next saw the claimant again on February 1, 2008, at which time no treatment was prescribed. Following the April 15, 2008, accident, he treated the claimant on April 17, 2008, at which time he opined that the claimant had an acute exacerbation of his advanced arthritis, which was causing pain and mild swelling. He advised the claimant that he had advanced arthritis and that he needed a knee replacement, but the claimant was not ready to have surgery. He saw the claimant on several occasions from May 12, 2008, through August 7, 2008. The claimant's range of motion decreased over time, and he had more tenderness. As of his last examination on August 7, 2008, he felt that the claimant needed a total left knee replacement. While the claimant would "probably" have needed the replacement without the April 15, 2008, accident, his increasing pain and symptoms following the accident caused the claimant to decide that he was now ready to have the surgery. While the April 15, 2008, accident clearly did not cause the arthritis, it was definitely a contributing factor towards the claimant's current need for surgery because it made the claimant's symptoms worse.

Upon cross-examination, Dr. Petraco acknowledged that one of his partners had treated the claimant for left knee arthritis as far back as 1998, at which time X-rays revealed severe arthritis and it was noted that the claimant may require a total knee replacement "at some point in the future." However, the claimant was not symptomatic at that time and surgery was not recommended. When he first examined the claimant in July of 2005, the claimant had pain, swelling, reduced range of motion, and joint line tenderness. The X-rays taken in 2005 revealed advanced arthritis in all three joint compartments, for which he recommended and performed a Cortisone injection. Arthritis symptoms do not usually get better over time. At the February 1, 2008, visit, the claimant inquired about having surgery and was examined by his physician's assistant, who noted swelling and various deformity (outward bowing of the knee). Notwithstanding the accident of April 15, 2008, the claimant would have eventually needed a knee replacement.

Dr. D'Ambrosio was deposed on October 24, 2008, and testified as follows: He examined the claimant on one occasion, June 29, 2008. The accident history provided was that the claimant was going down steps on April 15, 2008, when he missed some steps and injured his left knee. The claimant had a "long-standing and well documented history of osteoarthritis of the left knee." The claimant was told in August of 2007 that he would eventually need a total knee replacement in approximately five years (i.e., by 2012). It was his opinion that the April 15, 2008, injury "represented an exacerbation of a preexisting well-documented osteoarthritis of the left knee." He

believed that a total left knee replacement was indicated, and that the claimant would have needed the surgery with or without the accident. Upon cross-examination, the physician acknowledged that his report found causality between the claimant's present condition and the April 15, 2008, accident; that the claimant's pain and symptomology increased following the accident; that a person with osteoarthritis who is asymptomatic or minimally symptomatic may never require a total knee replacement; and that a trauma superimposed upon an arthritic knee could cause it to become symptomatic.

At the hearing held on December 1, 2008, the parties presented their summations, and the WCLJ found that the need for a total left knee replacement was not caused by the April 15, 2008, accident. The WCLJ noted that the claimant had longstanding problems with his left knee, and stated that "regardless of the events of the claimant's life," he was going to need the surgery at some point. The WCLJ also found that Dr. Petraco's opinion was ambiguous as to the cause of the need for the knee replacement; that the surgery is an elective procedure; that the claimant had inquired about the surgery in February of 2008; and that the claimant had compelling reasons to undergo the surgery prior to April 15, 2008. The WCLJ further noted that the history of this case was "ugly," and that it was "not beyond the realm of possibility that [the April 15, 2008, incident] was not at all work related." The WCLJ's finding was subsequently memorialized in the decision filed on December 4, 2008, and the claimant filed a timely application for administrative review.

LEGAL ANALYSIS

In *Guarino*, 278 AD2d 633 (2000), the claimant alleged that his work duties aggravated his preexisting congenital neck condition to the point that he became disabled. The Court initially noted that "[w]here, as here, an occupational disease claim is based on the aggravation of a preexisting condition, this Court has long recognized the distinction between the aggravation of a previously active disabling condition and the aggravation of a condition which was previously dormant and not disabling" (*id.* at 633). The Court then found that the Board's decision to deny the claim was supported by substantial evidence, as the employer's consultant had opined that claimant's work activity of using a telephone and computer did not contribute to his disabling condition, and that claimant's disability resulted from the normal progression of his underlying disease which had been symptomatic since 1990.

As is evident from the facts of the present case, the carrier's reliance upon *Guarino* is entirely misplaced. This case involves a consequential traumatic injury, not an occupational disease. In addition, although the carrier's arguments are couched in terms of the need for causally related surgery, the carrier is actually objecting to the underlying establishment of the left knee injury. However, the case was established for a consequential left knee injury at the July 31, 2008, hearing by agreement of the parties; no objection was made by the carrier and no application for review was filed by the carrier with respect to the decision issued on August 20, 2008. If the carrier had believed the claimant to have an active left knee condition and/or that the April 15, 2008, incident did not cause any injury or aggravation, the carrier should have objected when the case was amended to include a consequential left knee injury. However, the carrier did not object and the left knee is an established site of injury in this case.

In addition, the facts in *King Kullen Grocery*, 2009 NY Wrk Comp 40704074, are readily

distinguishable from the facts in the present case. In that case, the claimant had a prior right knee ACL/PCL reconstruction and had been diagnosed with arthritis. The day immediately prior to her work accident, the claimant sought treatment with her orthopedist because she had twisted her knee and had trouble getting to work. The doctor took X-rays, diagnosed severe arthritis, informed the claimant that she required a total knee replacement, and referred her to a joint replacement specialist. The claimant then injured herself at work the next day, and the case was established for an aggravation (of the unrelated twisting injury from the day before). However, the claimant's request for total knee replacement surgery was denied by the Board, as her physician had already referred her for surgery and testified that the work accident only resulted in effusion, with no other changes to the claimant's condition. Thus, the work related accident had no impact on the need for surgery; the claimant required the surgery the day prior to the accident and the claimant required the surgery the day after the accident. When, as in *King Kullen Grocery*, the need for surgery is wholly unrelated to a claimant's compensable injury, the carrier will not be liable for the cost of the surgery (*Matter of Howard v New York Times*, 302 AD2d 698 [2003]). However, when a claimant's compensable injury causes, contributes to, or hastens the need for surgery, the carrier will be liable for the cost of the surgery (*Matter of Cold Spring Hills*, 2009 NY Wrk Comp 20603593).

In the present case, the claimant had not seen his physician immediately prior to his accident and had not been referred for surgery. Although the claimant did consult with Dr. Petraco on February 11, 2008 (i.e., two months prior to the April 15, 2008 incident), regarding possible surgery to the left knee, the records from this visit indicate that the claimant's left knee was "doing quite well"; that the claimant had only mild swelling and crepitus, with no effusion, no tenderness, good stability, good strength, and good range of motion; and that no treatment was being recommended at that time. There is also no indication that the claimant was given any work restrictions regarding the left knee for when he recovered from his back surgery and returned to work. In addition, there is no indication that the claimant sought any additional treatment for his knee between February 11, 2008, and April 15, 2008. As a result, although the claimant was noted to be "minimally symptomatic" on February 11, 2008, there is no evidence that his left knee was disabling, that he actually required any treatment on February 11, 2008, or that surgery was being recommended on February 11, 2008.

However, the same cannot be said of the claimant's left knee following the incident of April 15, 2008. The medical evidence from both parties clearly indicates that the claimant's fall exacerbated and increased his symptoms, and the reports from the claimant's physician indicate that he was never cleared to return to work at his delivery job, which was now deemed to be too physical in nature. The claimant experienced increasing pain, swelling, decreasing range of motion, and joint line tenderness, and the medical experts on both sides agreed that surgery was now warranted. While it is undisputed that the claimant's physicians had previously advised him that he would eventually need a total knee replacement at some time in the future, these opinions set a time frame of around 2012. However, following the claimant's fall and serious exacerbation of his symptoms without relief, the claimant's physician found that the surgery was required presently. This acceleration in the need for surgery is akin to the situation where a work related condition accelerates a claimant's demise, despite the existence preexisting conditions that would otherwise eventually have proved fatal, and the Board has repeatedly authorized surgery in such

circumstances (see Matter of Hometown Insurance Agency, 2009 NY Wrk Comp 40709178; Matter of Drake Bakeries, 2009 NY Wrk Comp 29406713). As a result, the preponderance of the evidence supports a finding that the claimant's need for total left knee replacement surgery is causally related, and such surgery is hereby authorized.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on December 4, 2008, is MODIFIED to find that the claimant's need for total left knee replacement surgery is causally related, and to authorize such surgery. The balance of the decision is AFFIRMED. No further action is planned by the Board at this time.