STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
PORT SAINT LUCIE DISTRICT

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JUDGE: Robert D. McAliley
OJCC#: 11-006830RDM
VENUE: Martin County
D/A: 1/26/2011

ORDER ON THE MERITS

Claimant is a deputy sheriff with 23 years of service to the employer. He had a series of industrial accidents injuring his left knee. I find the occurrence of January 26, 2011, although it constitutes an "accident" as defined by the Workers' Compensation Law, does not result in any additional appreciable physical injury but instead was merely a temporary exacerbation of claimant's preexisting knee condition.

Because of this conclusion I am compelled to deny the claim for further treatment as further explained below.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. Notice of hearing is proper.

PROCEDURAL HISTORY

Following the initial trial, an interim order was entered September 23, 2011, making some factual determinations and appointing Jeffrey S. Penner, M.D., as an expert medical advisor (EMA). Dr. Penner's report has been received and is admitted into evidence. § 440.25(4)(d), *Fla. Stat.* (2011). Neither party presents the testimony of Dr. Penner. For context only, my letter of October 5, 2011, to Dr. Penner is also marked into evidence. The order of September 23, 2011, is incorporated by reference although some portions will be repeated for clarity.

STIPULATIONS

The appropriate date of accident is January 26, 2011, and "venue" is proper in Martin County, Florida. There was an employer/employee relationship and workers' compensation insurance coverage applies. The employer was timely notified of the accident. All issues pertaining to attorney's fees and costs that survive this order may be reserved for subsequent hearing.

CLAIMS AND DEFENSES

Claimant seeks a total arthroplasty of his left knee as recommended by John Hruska, M.D., together with attorney's fees and costs.

E/C asserts the industrial accident is not the major contributing cause for the need for knee replacement surgery nor is the surgical relief sought causally related or medically necessary due to the January 2011 episode. E/C further contends no injury by accident occurred on January 26, 2011. General denial of all remaining claims.

PETITIONS

To the extent indicated, this order disposes of the sole, pending Petition for Benefits (PFB) filed March 23, 2011.

MEDICAL HISTORY

This 50 year old claimant is a family man with an excellent record as a deputy sheriff. Prior illnesses and injuries other than those resulting from work are inconsequential.

Claimant initially injured his left knee on August 19, 1999, due to trauma stemming from a foot chase. John Hruska, M.D., an orthopedic surgeon, was authorized for treatment. Claimant's left knee was again injured in December 2002 while attempting an arrest. He was still under active care for the August 1999 accident when this occurred.

Although the facts are muddled, claimant apparently injured his left knee in June 2003 as a result of a slip and fall. He did not receive immediate medical care.

In February 2005, claimant's left knee buckled. A claim connected to this episode was controverted with E/C asserting any necessary medical care was due to a preexisting condition. But claimant did begin further care with Dr. Hruska beginning March 2005 under the June 2003 date of accident.

Dr. Hruska provided continuing conservative care for this latest event through February 2009. Claimant last receives authorized medical care for industrial accidents predating January 2011 on February 23, 2009, when he reports intermittent symptoms involving grinding, clicking, popping and pain in his left knee accompanied by swelling.

On January 16, 2011, claimant was patrolling a beach in Martin County on foot. Although marginally so, I find claimant's injury while walking under the peculiar circumstances involved constitutes an "accident" pursuant to section 440.02(1). He sustained some "injury" as defined in section 440.02(19) and E/C initially provides medical care for this event.

It should be noted the present claim is for prospective benefits only pursuant to the January 2011 occurrence and is *not*

a claim for treatment pursuant to claimant's prior industrial accidents outlined above.

As I see it, the pivotal question is whether the onset of pain merely reflects a temporary exacerbation of claimant's left knee disease or is a fresh, ongoing injury combining with claimant's preexisting injury so as to require further medical care. E/C's responsibility, of course, is to furnish benefits for "an accidental compensable injury… arising out of work performed in the course and scope of employment." § 440.09(1), *Fla. Stat.* (2011).

MEDICAL OPINIONS

All of the opinions presented are somewhat fuzzy as explained in the interim order.

JOHN HRUSKA, M.D.

This is the authorized treating physician. I determine that Dr. Hruska believes claimant had a chronic, ongoing degenerative arthritis in his left knee and the January 2011 episode produced heightened symptoms. The January 2011 event, therefore, constitutes an aggravation of claimant's preexisting condition.

PETER WERNICKI, M.D.

This is E/C's independent medical examiner. His testimony is somewhat obscured because -- as most people outside the workers' compensation system probably would – he conflates

“accident” with “injury.” I determine Dr. Wernicki believes claimant’s present left knee disease is the sequel to claimant’s condition as it existed prior to January 2011 and nothing occurred on January 2011 which continues to impact the knee injury.

JEFFREY PENNER, M.D.

Dr. Penner is known to me as a board certified orthopedic surgeon. He was appointed to serve as an EMA.

I read Dr. Penner’s report as meaning claimant sustained no additional injury to his left knee as a result of the January 2011 event.

Although not asked to do so because there was no conflict on point, Dr. Penner does not recommend claimant undergo a total arthroplasty to his left knee. As a gratuitous observation, no matter what healthcare system claimant is treated under, given his age and good general health, I urge claimant to consider Dr. Penner’s opinion closely.

ANALYSIS

Unfortunately, Dr. Penner, in his report, describes himself as performing a compulsory medical evaluation instead of serving as an expert medical advisor. The letter is addressed to the carrier as opposed to directing his report to me.

Without more, including exploring with Dr. Penner the possibility that he misunderstood his posture in the case, I

find this inconsequential and accept his report as that of the EMA. Thus, Dr. Penner's opinion that claimant did not sustain an additional injury, beyond an immediate exacerbation of his symptoms, is controlling. *See,* § 440.13(9)(c), *Fla. Stat.* (2011).

However, even if Dr. Penner's opinion is given no special weight, I find claimant fails to meet his burden of proof that he sustained an additional injury, beyond a temporary exacerbation, of his underlying knee condition as a result of the occurrence of January 26, 2011. *See*, e.g., *City of B & L Services, Inc. v. Coach USA,* 791 So. 2d 1138 (Fla. 1st DCA 2001) (holding claimant must show "…there is a causal connection between the claimant's injury and his employment with (the subsequent) employer….''). Hence, the claim must be denied.

MOOT LEGAL ISSUE

In the interim order, I rejected E/C's argument pertaining to the applicability of *Pearson v. Paradise Ford,* 951 So. 2d 12 (Fla. 1st DCA 2007). Oversimplified, *Pearson* holds that where a claimant's injury stems from a string of compensable industrial accidents, the major contributing cause rule does not apply so as to preclude the most recent accident from being compensable.

E/C continues to argue because the statute of limitations has run on prior injuries, those injuries are no longer "compensable."

This argument is perhaps fortified by the decision in *Newick v. Webster Training Ctr.,* Case No. 1D11-2091 (Fla. 1st DCA January 30, 2011) (not final) (Thomas, J., concurring in the result only). In *Newick* the court holds apportionment is proper where claimant's prior injuries were due to unreported prior accidents. The court emphasizes the prior accidents have to be "compensable." *Id* at 6.

In this case, it appears at first blush (without so holding) the statute of limitations precludes recovery on the prior injuries.

I find it unnecessary to address this issue given the findings above.

CONCLUSION

Based on the foregoing findings, it is

ORDERED AND ADJUDGED as follows:

a. The claim for the employer, through its carrier, to provide surgery in the form of a total arthroplasty to claimant's left knee is DENIED.

b. In accordance with the stipulation of the parties, all claims pertaining to attorney's fees and costs which survive the foregoing determination are reserved for subsequent hearing.

DONE AND ORDERED in chambers, in Port Saint Lucie, Saint Lucie County, Florida, this 9th day of February, 2012.

Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been emailed to the attorneys on this 9th day of February, 2012.

Assistant to the Judge