FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1492

HOWARD NOLAND,

Appellant,

v.

CITY OF DEERFIELD BEACH and
JOHNS EASTERN COMPANY,

Appellees.

On appeal from an order of the Judge of Compensation Claims.
Michael J. Ring, Judge.

Date of Accident: February 4, 1997.

November 6, 2020

KELSEY, J.

Claimant argues that his former Employer has to provide an orthopedic physician to treat his left knee following 2018 surgical replacement that was performed under his private health insurance. The Judge of Compensation Claims denied this request as well as costs and fees, accepting the Employer/Carrier's defense that the accident was not the major contributing cause of the need for the requested treatment. Claimant argues that when the E/C agreed in the pretrial stipulation that "left knee" was the "specific body part . . . related to the accident," the E/C thereby accepted

preexisting conditions as compensable. Claimant's argument is an overly broad reading of the E/C's pretrial stipulation identifying the body part at issue, and an incorrect application of precedent addressing an MCC defense arising out of a preexisting condition. The E/C preserved and proved its MCC defense, and the JCC's decision to accept the defense was supported by competent, substantial evidence. We reject Claimant's arguments and affirm the final order.

Facts.

Claimant, a firefighter, injured his left knee at work in 1997. Although he filed a notice of injury, the evidence the JCC accepted at trial did not show that Claimant filed a Petition for Benefits at that time, nor that the E/C then authorized any treating physician for this injury or provided any treatment or benefits related to it. It appears Claimant treated outside the workers' compensation system through his private health insurance, with a non-authorized physician who performed two operations on the left knee after the injury. Claimant returned to work full time, ran 2.5 miles a day, and played competitive softball, with no further reports of treatment for the left knee after 2001. He later had authorized treating physicians for other compensable accidents not involving his left knee, and testified that to treat knee pain, he used pain medication prescribed by a physician authorized to treat a neck injury.

When Claimant neared retirement in 2018, his doctor recommended dual knee replacements because of osteoarthritis. Claimant selected a non-authorized surgeon to perform the replacements under his private health insurance with Aetna. Although he inquired of the surgeon's staff whether the left knee surgery could be processed under workers' compensation, he was told the surgeon would not accept workers' compensation. He then denied that workers' compensation would apply. He later testified that he wanted the best surgeon and would lie if necessary to get the best. His workers' compensation attorney sent the surgeon a letter, stating that "[T]here are no Workers' Compensation claims for the right or left procedures you are scheduled to perform. Workers' Compensation did not accept any responsibility for Claimant's right or left knee conditions." However, before telling

the knee surgeon's staff that there were no workers' compensation claims for either knee, Claimant and his lawyer had already signed and filed a Petition for Benefits seeking to require the E/C to provide ongoing treatment for the left knee, and seeking fees and costs.[1] The knee replacements were performed and covered under Claimant's private medical insurance.

In the parties' joint pretrial stipulation as to this PFB, Claimant asserted that "left knee" was the "specific body part[]/psychiatric condition[]" "related to the accident." The E/C agreed that "left knee" was the "specific body part[]/psychiatric condition[]" that was "accepted as related to the accident." The E/C authorized a physician to treat the left knee. In the same pretrial stipulation, the E/C asserted MCC and other defenses, and asserted as an affirmative defense that "[t]he treatment requested is no longer related to the work place condition."

The evidence at trial established that Claimant was bowlegged and had a history of knee problems long before the February 1997 accident, including right-knee surgery following a football injury in 1973. The left knee surgeries performed after his 1997 accident revealed extensive grade IV chondromalacia and osteoarthritis. The doctor who first recommended knee replacement surgery in 2018 opined that the cause was osteoarthritis. The surgeon who performed the dual knee replacements in 2018 opined that the surgery was necessary because Claimant was bowlegged and had pre-existing osteoarthritis. The E/C's Independent Medical Examiner testified

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[1] In a second Petition for Benefits still pending, Claimant seeks to recover the cost of the left knee surgery that had already been completed under his private insurance. The E/C did not assert a misrepresentation defense as to either of these PFBs. *See* § 440.09(4)(a), Fla. Stat. (2019) (providing that no employee may receive compensation or benefits if employee "has knowingly or intentionally engaged in any of the acts described in s. 440.105 or any criminal act for the purpose of securing workers' compensation benefits"); § 440.105(4)(b), Fla. Stat. (2019) (listing prohibited false, fraudulent, and misleading acts constituting fraud, misrepresentation, or a crime).

that the major contributing cause of the need for ongoing left-knee treatment was “chronic pre-existing degenerative osteoarthritis and his chronic varus deformity [bowleggedness] that is congenital and chronic and predates the industrial accident.” The E/C’s IME physician testified that in light of the lack of documented medical treatment to the left knee from 2001 to 2018, plus Claimant’s return to full duty and running 2.5 miles per day, the MCC of any need for ongoing treatment of the left knee was chronic pre-existing degenerative osteoarthritis, not the February 1997 work accident.

Only Claimant’s IME physician related the need for ongoing treatment of the left knee after the 2018 surgery to the 1997 accident. This physician testified that the 1997 accident created a meniscal tear that irritated the left knee, ultimately causing the need for the left-knee replacement and still constituting the major contributing cause of the need for ongoing treatment of the left knee. However, he acknowledged there was no documented medical treatment of the left knee between 2001 and 2018.

Claimant attempted to establish through his own testimony that the E/C provided left knee treatments after the 1997 accident,[2] and that the 1997 accident was the cause of ongoing problems with the knee. No documentary evidence supported Claimant’s testimony as to the E/C’s provision of treatment. The JCC specifically found Claimant not credible because of multiple false and contradictory statements. The JCC also rejected Claimant’s 120-day-rule argument under section 440.20(4), Florida Statutes, because the evidence failed to prove that the E/C ever previously provided any benefits for the February 1997 date of accident. The JCC concluded that the E/C was still within the 120-day window allowing denial of treatment.[3] The JCC denied the

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[2] This argument was relevant to the E/C’s statute of limitations defense, which the JCC struck as untimely because it was not raised in the original pretrial stipulation. The E/C has not cross-appealed as to that ruling, but it does not change our analysis.

[3] Claimant abandoned the 120-day-rule argument on appeal.

claim, concluding that the evidence established pre-existing osteoarthritis, not the 1997 accident, as the major contributing cause of the need for further left-knee treatment.

Legal Issues.

We review questions of fact for competent, substantial evidence; and questions of law, de novo. *Teco Energy, Inc. v. Williams*, 234 So. 3d 816, 820 (Fla. 1st DCA 2017).

On appeal, Claimant admits that pre-existing osteoarthritis constituting more than half of the current need for treatment *could* be a valid MCC defense:

> Claimant recognizes that if a claimant had a preexisting arthritic condition that was not accepted as compensable, and that preexisting condition, on its own, progressed to the point where it was greater than 50% of the cause of Claimant's current need for treatment, then the E/C would establish a "break" in the causation chain.

See generally § 440.09(1), Fla. Stat. (2018) (defining MCC as "the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought").

At trial, Claimant relied upon his own testimony that the E/C had provided treatment for the left knee immediately after the accident, as establishing that the E/C had accepted the preexisting osteoarthritis as compensable, thus eliminating any MCC defense to the 2018 PFB. The JCC rejected that argument as not supported by the evidence, and Claimant has not challenged that conclusion on appeal.

Instead, Claimant now argues that the E/C accepted the left knee "condition" as compensable in the 2018 pretrial stipulation, and that "condition" included the preexisting osteoarthritis. Claimant's argument is an overly broad reading of the pretrial stipulation. The E/C accepted the left knee as the "specific body part . . . related to the accident." Claimant argues the E/C "did not limit what about the left knee they were accepting as

compensable," and therefore the acceptance of the left knee as the body part "related to the accident" constituted an acceptance of any pre-existing conditions. He relies on inapposite cases involving stipulations that did not preserve defenses.

We reject Claimant's argument and his reliance on distinguishable cases. The pretrial stipulation's mere identification of the relevant body part involved in the accident is not properly interpreted as waiver or abandonment of defenses that are otherwise timely asserted. The E/C's stipulation established that a compensable accident occurred, and that the injury sustained in that accident would be compensable; but it did not constitute an agreement to provide any requested treatment or other benefit. The E/C timely and repeatedly asserted the MCC defense in both the original and amended pretrial stipulations, and in the pretrial memorandum. This was a valid issue preserved for trial, and the JCC's ultimate holding in favor of the E/C was supported by competent, substantial evidence. *See Certistaff, Inc. v. Owen*, 181 So. 3d 1218, 1221 (Fla. 1st DCA 2015) ("The JCC's factual findings will be upheld if any view of the evidence and its permissible inferences supports them.").

These facts distinguish this case from the cases on which Claimant relies. In *Meehan v. Orange County Data and Appraisals*, 272 So. 3d 458 (Fla. 1st DCA 2019), we noted that "the parties entered into a broad stipulation in which the [E/C] accepted compensability of the work-related exposure and 'building related illness,'" which we noted also included "building related illness associated with indoor air quality problems." *Id.* at 459. We held that this stipulated agreement encompassed treatment for vocal cord dysfunction and asthma-type symptoms because of the broad wording utilized, which the E/C could have avoided by more carefully defining the compensable injury. *Id.* at 462. *See also Perez v. Se. Freight Lines, Inc.*, 159 So. 3d 412, 414 (Fla. 1st DCA 2015) (noting Employer/Servicing Agent stipulated to compensable injury, but "did not assert . . . any major contributing cause defense at all" and had not demonstrated a break in the "causal chain").

The two material differences between *Meehan* and this case are the nature of the stipulation, and the scope of its wording. Claimant incorrectly equates one line of the uniform pretrial

stipulation entered here, which only agreed that "left knee" was the body part involved in the industrial accident, with the broad negotiated stipulation involved in *Meehan*. There was no causation defense in *Meehan*. In *Meehan*, the parties entered into a negotiated, court-approved settlement in which they stipulated broadly to compensability of "building related illness associated with indoor air quality problems." *Meehan*, 272 So. 3d at 459. The *Meehan* "stipulation" was a litigated, court-approved, and broad settlement of compensability issues—not materially analogous to the two-word identification of "left knee" as the body part related to the "accident" on these parties' uniform pretrial stipulation form.

In contrast to the broad court-approved settlement agreement in *Meehan*, the E/C's agreement on the pretrial stipulation form that "left knee" was the "specific body part . . . related to the accident" did not waive the E/C's right to pursue its timely asserted defense to the causal connection between the 1997 industrial accident and the 2018 requests for knee replacement surgery and follow-up treatment. *See*, *e.g.*, *Engler v. Am. Friends of Hebrew Univ.*, 18 So. 3d 613, 614 (Fla. 1st DCA 2009) (restating general rule distinguishing between right to challenge causal connection between industrial *accident and injury*, on one hand, and between *injury and benefit*, on the other hand). The mere identification of the body part involved in an accident does not negate timely asserted defenses to provision of treatment or other benefits for a given injury. The E/C asserted a valid MCC defense in the appropriate part of the pretrial stipulation. This case is analogous to *Teco* in that respect, in which, as Claimant correctly observes in his reply brief, the JCC and this Court properly found the E/C had preserved its MCC defense. 234 So. 3d at 819. We see no material difference between the preservation of the MCC defense in *Teco* and here.

Claimant likewise misplaces his reliance on *Jackson v. Merit Elec.*, 37 So. 3d 381 (Fla. 1st DCA 2010). The parties there stipulated that the claimant's accident was compensable, *and* the E/C agreed to provide and did provide treatment for the claimant's back injury. *Id.* at 382. As we noted, this stipulation established that a compensable industrial accident occurred, but did not preclude the E/C from asserting that the accident was not the

cause of the specific treatment requested. *Id.* at 383. However, the only evidence the E/C adduced in attacking causation was the opinion of a doctor who, unaware of the stipulation, concluded the accident had nothing to do with the injury that the E/C had already agreed to treat, and there was no evidence of a break in the causal chain. *Id.* Because this doctor's conclusion was inconsistent with the E/C's broad stipulation to provide treatment for the injury, the causation defense failed. *Id.* In our analysis we carefully distinguished between "accident" and "injury." *Id.* Our observations in *Jackson* apply with equal force on the specific facts presented here.

As the JCC found, the E/C never provided or paid for any benefits under the February 1997 date of accident. No causal chain was established in the first place. Although the E/C stipulated that the left knee was the body part at issue in the "accident," the JCC determined that the E/C still had the right to deny treatment. The E/C timely asserted its MCC defense denying liability for further treatment, and had not made a broader stipulation as to the connection between the *accident* and the need for any given *treatment* or *benefit*, a materially different fact compared to *Jackson*.

Claimant's superficial comparison of the stipulation in this case to the stipulations in other cases is unavailing. The detailed context matters in determining the scope of any "stipulation." Here, the E/C expressly asserted its MCC defense on the very same uniform pretrial stipulation form in which it agreed the left knee was at issue: "[t]he treatment requested is no longer related to the work place condition." The defense was timely, consistently, and adequately preserved, and then proven at trial by competent, substantial evidence that the JCC was entitled to accept. The E/C proved the MCC defense and has no obligation to provide treatment or benefits. We therefore affirm the final order.

AFFIRMED.

ROWE and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Bill McCabe of William J. McCabe, P.A., Longwood; and Brian P. Vassallo, West Palm Beach, for Appellant.

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