

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

3. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care; and

b. Temporary partial and/or temporary total disability benefits (TPD/TTD).¹

All other issues, including impairment and disability, were reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained a medial meniscal tear in his right knee while using a shovel to backfill an excavation for a sewer line repair as part of his work for Employer.

Defendants contend that Claimant failed to meet his burden of proving that he suffered a compensable work-related accident because his testimony and the documentary evidence offered in support of his assertion are "contradictory, inconsistent, uncorroborated, and inherently unreliable." Defendants' Post-Hearing Response Brief, p. 1.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Kelly Demand, Tim Demand, Margaret Bevans, Kathy McDonald, Gary Blevins, Gina Taruscio, Chris Clark, and John Zimmer taken at hearing;
2. Claimant's Exhibits A through G, admitted at hearing;
3. Defendants' Exhibits 1 through 11, admitted at hearing; and
4. The post-hearing deposition of Timothy Moody, M.D.

¹ The parties advised the Referee that they did not anticipate putting on any evidence regarding the issue of TTDs or TPDs as the amount was easily ascertainable in the event that Claimant's injury was found to be compensable.

All objections made during the deposition of Dr. Moody are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 50 years of age, and resided in Pullman, Washington, with his girlfriend, Kathy McDonald.

2. On June 3, 2004, Claimant was an employee of Express Personnel Services (EPS), performing work for Express Sewer and Drain (Express Sewer), where he had been placed in March 2004. Express Sewer performed essentially two kinds of work—unclogging drains and repairing or replacing sewer lines. Claimant received on-the-job training in both facets of the business.

3. On Thursday, June 3, 2004, Express Sewer was replacing a residential sewer line in Lewiston, Idaho. Claimant reported for work at the company's shop in Clarkston, Washington, at 7:15 a.m. At the residence where the work was to be performed, Gary Blevins of Roach Construction was waiting with an excavator to expose the line where it connected with the house and the sewer main in the street.² Claimant assisted with site preparation, including confirming the location of the sewer line, and unloading and setting up tools and equipment. Chris Clark, a permanent employee of Express Sewer and an experienced sewer and drain technician, was also present on the site. John Zimmer, another technician and a permanent employee of Express Sewer, was present at the work site on several occasions throughout the day.

² Roach Construction, Express Personnel Services, and Express Sewer and Drain were all owned by Jay and Tedi Roach, but were operated as separate entities.

4. Gary Blevins used the excavator to expose the sewer line at both ends. The nature of the excavating equipment precludes fine work close to the exposed line, so it was a part of Claimant's job to use hand tools to remove the soil immediately adjacent to the pipe to allow full access to both ends of the sewer line. Typically, the excavated material is placed on a large piece of plastic to facilitate backfilling when the job is complete and to minimize disturbance to a property owner's landscaping. After the machine and hand excavation was complete, Claimant assisted Clark with the subsequent replacement and testing of the line. Once the new line had been inspected, Clark and Zimmer left, and Blevins used the excavator to backfill both trenches. It was not possible for the excavator to remove all the backfill from the plastic, so Claimant used a shovel to replace the remainder of the backfill, feathering it over the excavation. At about 3:00 p.m., Claimant was just finishing up this task, scooping up a shovel of dirt, and twisting and throwing it over the backfilled excavation, when he felt a "pop" in his right knee. He continued his task, and after a couple more shovels full, he felt his knee pop again, and experienced an immediate onset of pain.

5. Claimant finished replacing the topsoil, replaced the sod, and watered the excavated area to help compact it. While Claimant was finishing up and loading his tools and equipment, Blevins was loading the excavator on the equipment trailer. When Claimant's knee continued to hurt, he mentioned to Blevins that he had hurt his knee, but provided no further details.

6. Blevins left the work site with the Roach Construction excavator and returned to Genesee, Idaho, where Roach Construction was headquartered. Claimant returned to the Clarkston shop in the Express Sewer van. No one was at the shop when Claimant arrived. He signed out at 3:45 p.m. without encountering any of the other employees from Express Sewer.

7. Claimant drove home to Moscow. His right knee continued to be painful; it was hot and swelling. When he arrived home, Claimant immediately told McDonald that he had hurt his knee at work. McDonald urged Claimant to go to the emergency room, but Claimant opted to try rest, ice, and elevation and see if things improved.

8. On Friday morning, Claimant's knee was swollen, stiff and sore. Claimant called his doctor, Dr. Moody, to make an appointment to have the knee looked at. The earliest appointment Claimant could get was for Monday, June 7. Claimant continued to treat his knee with rest, ice and elevation on Friday. Friday evening Claimant and McDonald picked up McDonald's mother, Margaret Bevans, at the bus depot. It was the first time Bevans and Claimant met, and Bevans immediately commented on Claimant's limp. Claimant told Bevans he had hurt his knee at work the previous day. Claimant and McDonald took Bevans to the home of Tim and Kelly Demand, McDonald's daughter and son-in-law. Both Tim and Kelly observed Claimant's swollen knee or his difficulty walking.

9. On Saturday, Claimant's knee was worse. Claimant and McDonald went to the Demand residence for a brief family gathering before attending Kelly's graduation ceremony held at Washington State University. Before leaving home, McDonald wrapped Claimant's knee with a compression wrap. Claimant had difficulty walking up the steps at the facility where the graduation was to take place. Claimant was in a great deal of discomfort and he and McDonald left the ceremony early and returned home.

10. On Sunday, Claimant and McDonald drove Ms. Bevans to Worley, Idaho, to meet up with McDonald's brother, where Bevans was to visit before returning to her home in Everett, Washington. Claimant drove to Worley, and McDonald drove home because Claimant's knee was hurting him.

11. On Monday, June 7, Claimant went to his appointment with Dr. Moody. The chart note for that visit includes Claimant's report that he hurt his right knee at work on June 3. Dr. Moody examined the knee, noting swelling along the joint line, tenderness along the medial joint, and a positive McMurray's sign. Dr. Moody diagnosed a medial meniscus tear, and scheduled an MRI for June 10. The chart note also indicates that Dr. Moody would arrange for a referral to Edwin M. Tingstad, M.D., an orthopedist. He advised Claimant to take ibuprofen, keep the leg elevated, and use a compression wrap.

12. Following his appointment with Dr. Moody, Claimant and McDonald left in Claimant's pickup camper for a previously-scheduled fishing and camping trip along the Salmon River, where they planned to meet Tim and Kelly Demand. Claimant and McDonald arrived at the site first—a piece of private property with parking in the upland just a short distance from a large sandy beach. McDonald assisted Claimant down to the beach, leaving the heavier equipment and coolers at the camper until the Demands arrived and McDonald enlisted Tim to help carry equipment and set up camp.

13. Claimant remained mostly sedentary during the camping trip, fishing for sturgeon from the bank. He did hook one large fish, which he played for about fifteen minutes before he lost it.

14. Although Claimant and McDonald had originally planned to stay longer, they returned home on Wednesday so Claimant could attend his Thursday MRI appointment.

15. Claimant had his right knee imaged on Thursday, June 10. The images showed a medial meniscus tear with a medial femoral condylar bruise and osteochondral defect.

16. Claimant returned to work as scheduled on Friday, June 11. He told Clark that he had to take it easy because of his knee injury. Over that weekend, Claimant was required to dig

out a sewer line, despite Claimant's calls to Clark that he couldn't do it because of his knee.

17. Dr. Tingstad saw Claimant on Monday, June 14. He confirmed Dr. Moody's diagnosis and the MRI findings. Dr. Tingstad recommended surgical removal of the meniscus.

18. The same day, Claimant advised Employer about his work-related knee injury, and filled out a first report of injury or illness. Gina Taruscio filed a report on behalf of Employer on June 16, listing June 14 as the date that Employer was notified of the injury.

19. As of the date of hearing, Claimant had not had the needed surgery because Defendants denied his claim.

20. Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

21. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996).

An "accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An "injury" is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

INJURY

22. Certainly Claimant has proven that he incurred an injury to his right knee. The medical records of Drs. Moody and Tingstad are uncontroverted that Claimant had a medial

meniscus tear with associated medial femoral condylar bruise and osteochondral defect. The real dispute in this proceeding is whether Claimant injured his knee at work—specifically, as a result of shoveling backfill onto the top of the sewer trench at the Lewiston job site on June 3, 2004. This is really a two-part question: Was there an accident, and if so, did the accident cause the knee injury? The answer to the first of these questions is ascertainable from the hearing testimony.

ACCIDENT

23. Determining whether Claimant injured his knee in a work accident is purely a question of credibility. Claimant testified that he hurt his knee while shoveling the last of the backfill off of the plastic tarp and onto the excavated area. Claimant's co-workers could not confirm Claimant's testimony, but neither did their testimony controvert Claimant's version of events. Defendants next endeavored to establish that Claimant had a pre-existing knee injury or hurt his knee someplace other than work—possibly while fishing for sturgeon on the Salmon River. Defendants' proof on these points consists primarily of conjecture, speculation, gossip, assumptions, and hearsay.

24. Defendants argue that Claimant didn't sustain his knee injury at work on June 3 because none of his coworkers can corroborate Claimant's story. While corroborating evidence might provide support for an assertion, its absence does not disprove the assertion. Work-related accidents are often unwitnessed and yet they are found to be compensable.

In this case, the only other person present at the time of the accident was Gary Blevins. Blevins testified in detail about how a sewer excavation was *usually* done, but had no particular recall about the particular job the day of Claimant's injury. He admitted that he didn't know what Claimant was doing every minute. Blevins did not recall being told of the injury by

Claimant, but could not deny that he had been told, stating: “. . . and I think if I had absolutely heard that and known it and understood it, I would have had something written down.” Tr., p. 200.

The testimony of Clark and Zimmer did nothing to further illumine the events of June 3. At the *most*, it indicates that neither man had anything more than a brief casual interaction with Claimant at the end of the day. In fact, their testimony strongly suggests that Claimant was correct when he stated that neither Clark nor Zimmer returned to the site at the end of the day, and he did not encounter them at the shop, because he was gone before they arrived.

Injury Did Not Occur At Work

25. Defendants assert that Claimant’s knee injury did not occur at work, strongly suggesting that he injured it while fishing for sturgeon along the Salmon River. Several of Claimant’s co-workers knew he was going on a fishing trip, but were not privy to the details, assuming incorrectly that the trip was over the weekend of June 4-6. None of the defense witnesses could testify as to Claimant’s activities on June 4, 5, or 6. Neither did their testimony call into question Claimant’s testimony, nor the testimony of McDonald and her family, as to his activities on those days. Dr. Moody’s medical records show that Claimant presented on Monday, June 7, with what appeared to be a torn meniscus. Claimant told Dr. Moody on that visit that the injury occurred at work on June 3. Claimant left for his fishing trip *after* seeing Dr. Moody, and *after* the MRI was scheduled, returning earlier than originally planned so he could attend his scheduled MRI appointment on June 10. Defendants’ contention that Claimant injured his knee during the camping and fishing trip is not supported by testimony and conclusively disproved by the records of Dr. Moody.

Prior Injury

26. Defendants presented no credible evidence, medical or otherwise, that Claimant had pre-existing knee problems or had ever had a previous knee injury. The only medical record that Defendants can point to that even mentions a knee injury is from 2001. Ex. 3, p. 9. It is a note regarding a call to the night service from an *unidentified* patient asking for medication because he “reinjured his knee.” The number that was written on the note was Claimant’s as confirmed by a call to that number, so the phone message was placed in his file. There is nothing in the medical records indicating that anyone ever followed up on the request or contacted Claimant regarding the request. The medical records that precede the note do not include any mention of a knee injury; Claimant was being treated for a low back injury at that time. There are no medical records subsequent to the note that mention a knee injury until Claimant’s visit on June 7, 2004. Both the phone number and the message were taken down at least twice, first by the service, and then by the doctor’s office staff. Questions about the provenance and pertinence of the note to Claimant’s case militate against giving it more than minimal credence.

Defendants also tried to establish through the testimony of Claimant’s co-workers that he had previous knee problems. Suggestions that Claimant had sustained knee injuries in a car accident could not be sourced, were denied by Claimant, and were not supported by medical records. Clark testified that he never heard Claimant complain about his knees, but it appeared that he had a problem being on his knees for more than a minute or two. Zimmer testified that Claimant complained about his knees, but couldn’t recall what he actually said. He observed that Claimant would have to get up and stretch after five minutes or so of work on his knees. Neither Clark nor Zimmer testified that Claimant had a prior knee injury or that he had problems

with his knees that interfered with his work.

CAUSATION

27. A claimant not only bears the burden of proving that an accident happened, but also that there is a medical causal relationship between the accident and the injury.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

28. Claimant has provided medical evidence from both Drs. Moody and Tingstad that his right medial meniscal tear and related injuries were the result of his work accident on June 3. Defendants have provided no medical evidence to the contrary. Rather, they argue that since the doctors' opinions are based on Claimant's version of events, the opinions are not credible. For the reasons discussed below, the Referee is not persuaded by such arguments.

29. Neither Dr. Moody nor Dr. Tingstad made a diagnosis solely in reliance upon Claimant's explanation of events. Rather, they considered Claimant's explanation of how the accident happened, examined his knee, reviewed imaging, observed objective symptoms, and used their professional experience in making their diagnoses. In this case, the imaging, the observable symptoms, and the physicians' professional experience were entirely consistent with

Claimant's explanation of the mechanism of injury. Claimant's explanation of how the accident occurred was consistent throughout, and his self-reported medical history is supported by the medical records offered into evidence.

Defendants cite to *Grim v. Flying J Corp.*, 1995 IIC 0139 and *Samuel 2003 v. Employer*, 2003 IIC 0673 for the propositions that medical opinions based solely on a claimant's recitation of facts is not sufficient to meet the medical burden of proof. *Grim* and *Samuel 2003* are distinguishable from the instant proceeding because in both cases the claimants provided versions of events that both varied in the retelling and were inconsistent with objective medical evidence. In *Samuel 2003*, the Referee found that the claimant was credible, but unreliable. It was the claimant's unreliability, together with a lack of other supporting evidence, which led the Referee to conclude that the claimant had not carried his burden of proving medical causation. In *Grim*, the Referee found the claimant's testimony implausible and unbelievable. Further, the claimant had lied in her deposition, and the record established that she had withheld relevant information from the physicians who rendered causation opinions. Further, none of the doctors were deposed, so the hearing officer was left with only the written medical records, which provided no insight into the reasoning behind or basis for the medical opinions that were offered. In fact, it was this lack of underlying analysis that the Referee in *Grim* was referring to when she cited *Caudle v. Boulder Mountain Village*, 91 IWCD 52, p. 4198 at p. 4201: "A physician does not render an opinion as to what caused an injury merely by recording without comment the history related by the Claimant."

In this case, neither physician's opinion was the result of "merely recording" Claimant's history. Dr. Moody was deposed, and fully explicated the basis of his opinion. Despite

Defendants' assertions to the contrary, there is no reason to question Claimant's credibility—his version of events was consistent, supported by both documentary and testimonial evidence.

EQUIPOISE

30. Apparently concerned that their arguments regarding the time and place of the accident and medical causation might not carry the day, Defendants' made one last attempt to prevail by arguing in the post-hearing briefing that the case was in equipoise, and thus, Claimant's cause must fail. Defendants support this argument by a broadside on Claimant's credibility, making much of the most minor of omissions, memory lapses, perceived inconsistencies, and timely reporting. Considering the record as a whole, the Referee was left with the firm conviction that Claimant was honest, his memory of past events was realistic and reliable, and he was a credible witness. Claimant's testimony was consistent, and was substantially corroborated by other evidence. Testimony elicited from Claimant's co-workers, who lacked personal knowledge of relevant events, could not discredit Claimant's testimony.

Defendants presented no medical evidence contrary to Dr. Moody's medical causation opinion. Defendants presented no competent or persuasive evidence that contradicts, or even calls into question, Claimant's version of events. The evidence is in equipoise when the scales are evenly balanced and neither party can tip the scales ever-so-slightly in either direction. In the case at bar, the scales are not evenly balanced—they weigh heavily in favor of the Claimant.

31. For the foregoing reasons, the Referee finds that Claimant had an accident at work on June 3, which caused a right medial meniscus tear with associated injuries.

CONCLUSIONS OF LAW

1. Claimant sustained an injury from an accident arising out of and in the course of his employment;

2. Claimant's condition is due entirely to the June 3, 2004 industrial accident.
3. Claimant is entitled to medical care pursuant to Idaho Code § 72-432; and
4. Claimant is entitled to TTDs or TPDs pursuant to Idaho Code § 72-408.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 30 day of October, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of November, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

CHARLES L GRAHAM
PO BOX 9344
MOSCOW ID 83843-9344

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

djb

/s/ _____

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 9 day of November, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
James F. Kile, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of November, 2006 a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

CHARLES L GRAHAM
PO BOX 9344
MOSCOW ID 83843-9344

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

djb

/s/ _____