

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

EDWARD TERRY,	)	
	)	
Claimant,	)	<b>IC 2006-524609</b>
	)	
v.	)	
	)	
FISH AND GAME DEPARTMENT,	)	
	)	
Employer,	)	<b>ORDER</b>
	)	
STATE INSURANCE FUND,	)	
	)	September 19, 2008
Surety,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant's total knee replacement of March 20, 2007 was causally related to the industrial injury of October 14, 2006 and constituted reasonable medical care as provided for in Idaho Code § 72-432.
2. Claimant's revision surgery of March 4, 2008 was causally related to the industrial injury of October 14, 2006.

3. Defendants are not entitled to suspend or reduce Claimant's benefits pursuant to Idaho Code § 72-435.

4. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

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

If the parties are unable to agree regarding the amount of attorney fees, Claimant's counsel shall, within 21 days of entry of the Commission's order, file with the Commission a memorandum requesting attorney fees incurred in counsel's representation of Claimant and an affidavit in support thereof. Defendants shall have 14 days within which to respond. Claimant's counsel shall reply no later than 7 days thereafter. The Commission shall then review the pleadings and issue an order determining reasonable attorney fees.

DATED this 19 day of September, 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
James F. Kile, Chairman

/s/ \_\_\_\_\_  
R. D. Maynard, Commissioner

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_19\_\_ day of \_September\_\_\_\_\_, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

JOHN F GREENFIELD  
THE HUNTLEY LAW FIRM PLLP  
P O BOX 854  
BOISE ID 83701-0854

JON M BAUMAN  
ELAM & BURKE PA  
P O BOX 1539  
BOISE ID 83701

jkc

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_



## **ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's total knee replacement of March 20, 2007 was causally related to the industrial accident of October 14, 2006 and constituted reasonable medical care as provided for by Idaho Code § 72-432;
2. Whether the need for the revision of Claimant's total right knee replacement performed on March 4, 2008 was causally related to the industrial accident of October 14, 2006, including whether or not Claimant's condition was due, in whole or in part, to a pre-existing cause and/or subsequent intervening cause;
3. Whether and to what extent Defendants are entitled to suspend or reduce Claimant's benefits pursuant to Idaho Code § 72-435; and
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

All other issues are expressly reserved by request of the parties.

## **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant sustained an industrial injury to his right knee on October 14, 2006 as the result of a trip and fall. It is further undisputed that Claimant had pre-existing right knee problems and was pre-disposed to progressive degenerative changes of his right knee. The primary dispute is whether the industrial injury aggravated Claimant's pre-existing right knee condition to the point that Claimant's need for a total knee replacement was accelerated by the injury. Both parties rely on expert medical opinions. Claimant relies on the opinions of Richard E. Moore, M.D., and Robert N. Walker, M.D. Defendants rely on the opinions of Michael S. Weiss, M.D., and Paul C. Collins, M.D.

Claimant contends that his underlying degenerative changes were aggravated by the compensable injury and accelerated his need to undergo a total knee replacement. The initial total knee replacement was not successful, through no fault of Claimant, and a revision surgery was required. Claimant asserts that Defendants' refusal to pay for the surgeries was unreasonable.

Defendants acknowledge that the industrial injury resulted in the need for an arthroscopic meniscal repair of the right knee, but contend that the need for a total knee replacement was related to degenerative changes and cartilage loss that pre-existed the October 2006 injury. Defendants maintain that they are liable only for the acute traumatic injury which does not extend to include Claimant's progressive degeneration of his right knee. Defendants further assert that Claimant overused his right knee following the initial knee replacement surgery and that Claimant's overuse caused or contributed to the need for the revision surgery. Defendants maintain that their denial of payment for both knee replacements was reasonable.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 13 admitted at hearing;
2. Defendants' Exhibits 1 through 23 admitted at hearing;
3. Testimony of Claimant, Claimant's brother-in-law William E. Bell, and Claimant's supervisor Riley Peak, taken at hearing;
4. The post-hearing deposition of Michael S. Weiss, M.D., taken May 15, 2008;
5. The post-hearing deposition of Paul C. Collins, M.D., taken May 16, 2008; and
6. The Industrial Commission's legal file.

All objections made during deposition testimony that were not previously sustained are overruled.<sup>1</sup>

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. Claimant was born in 1948 and was 59 at the time of hearing. He grew up in Boise and attended Boise State University on a wrestling scholarship. Claimant participated in physically rigorous sports, recreation, trades, and occupations throughout his life which were often knee-intensive. Such activities include football, wrestling, fire fighting, loading/unloading aircraft, carpentry, hydraulic mechanic work, trail running, cycling, and hunting.

2. Claimant went to work for Employer in 2002 as a utility craftsman. The job involved different types of journeyman-level construction including outside heavy construction, concrete work, and water redirecting projects. The frequency of heavy lifting depended on the project, but it was not unusual for Claimant to lift up to 100 pounds. At the time he began working for Employer, Claimant had never been diagnosed with or treated for problems with either knee. He experienced occasional soreness in both knees after downhill trail running and when he would chuckar hunt more than twice a week.

3. In November 2004, Claimant was working for Employer at the fish hatchery in Nampa. He was performing HVAC work underneath houses which required him to carry items while bent over on his knees in an area scattered with chunks of concrete. Claimant experienced sharp pain in his right knee after performing the work for three days. Claimant performed modified duty work while seeking treatment for his right knee. Claimant was diagnosed with a

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<sup>1</sup> The Referee was present for the majority of deposition testimony and contemporaneous rulings were made during the depositions.

right medial meniscus tear and underwent arthroscopic surgery on February 1, 2005, by Robert N. Walker, M.D. Post-operative diagnoses were right medial meniscal tear and chondral injuries of the right medial femoral condyle and medial tibial plateau. Dr. Walker noted that Claimant reported a five year history of knee problems. Based on a pre-surgery MRI and his observations during the February 2005 surgery, Dr. Walker identified arthritis and degenerative changes in Claimant's right knee which were not severe enough for Claimant to need either a tibial osteotomy or a knee replacement. Claimant returned to regular duty work soon after his February 2005 surgery and did not seek treatment for his right knee from May 2005 until after his October 2006 injury.

4. Claimant initially pursued workers' compensation benefits for his November 2004 injury, but the claim was denied by Surety since there had not been an identifiable accident. Claimant's February 2005 arthroscopic surgery was covered by Claimant's personal health insurance through Blue Cross and Claimant decided not to pursue his workers' compensation claim for the 2004 injury.

5. Claimant performed physically demanding work, without modification, from May 2005 through October 13, 2006.

6. In October 2006, Claimant was building a fish weir near Bear Lake in the Montpelier area so that smaller fish would be routed back to the stream as opposed to being irrigated onto pasture. The job required pruning of vegetation and setting forms for walls. Claimant's boots were caked with mud. He stepped on a limb that was on the ground and his boot slipped backwards, off of the limb. He was facing downhill and his momentum was pushing him forward. Claimant twisted his body to avoid being impaled by brush and hyperextended his right knee. Claimant's boss, Riley Peak, and his boss's boss, Keith Sampson,

were in the vicinity and came over to assist him after the injury. Claimant returned to the hotel in Montpelier with the rest of the crew and returned to Boise one or two days later.

7. Claimant sought treatment with Dr. Walker on October 17, 2006. Claimant was evaluated by Dr. Walker's physician's assistant, Roy Stearns. Mr. Stearns documented the industrial injury. Dr. Walker evaluated Claimant during November 2006 and recommended that Claimant undergo either a tibial osteotomy or a total knee replacement. Claimant's pain was increased since his previous evaluations in 2005. X-rays revealed varus leg alignment (bow-leggedness) which resulted in wear of the medial side of Claimant's knee and pre-disposed him to progressive wear. Claimant had cartilage wear in his right knee in 2005 that would likely have caused Claimant trouble at some point in time. Claimant was able to accommodate this condition until the injury of October 2006. Dr. Walker previously performed total knee replacements, but stopped performing them a few years ago.

8. In January 2007, Claimant sought treatment with orthopedic surgeon, Richard E. Moore, M.D., who specializes in hip and knee replacements. Dr. Moore compared Claimant's right knee MRI of January 2005 with a new MRI of January 2007 and noted that the deterioration of cartilage had worsened. Dr. Moore performed a right total knee replacement (arthroplasty) on March 20, 2007. He believes that Claimant would eventually have become a candidate for a total knee replacement without the October 2006 injury, but that the injury accelerated the need for Claimant's surgery.

9. Claimant's initial right total knee replacement surgery failed and Claimant required a revision surgery on March 4, 2008. Dr. Moore determined that the failed surgery resulted from incompatibility between Claimant's dense bone structure and the viscosity of the

cement used in the surgery. In order to avoid the same problem with the revision surgery, Dr. Moore increased the surface area for adhesion. Thus far, the revision surgery is a success.

10. Dr. Moore agrees that Claimant's active outdoor pastimes contributed to his knee problems. Claimant reported physical activities in the form of cycling, walking and going on a hunt in between the two surgeries. Dr. Moore does not believe that the need for Claimant's revision surgery was related to his exercise regimen or physical activities. Dr. Moore encourages his patients to remain active in order to reduce scarring and/or loss of range-of-motion, but discourages steep ascents or descents by bike or foot. Claimant was compliant with Dr. Moore's post-operative instructions and Claimant's actions did not cause the problem with the compatibility of the cement.

11. Paul C. Collins, M.D., is an orthopedic surgeon who evaluated Claimant in February 2007 at the request of Defendants. Dr. Collins performed total knee replacements in the past, but stopped performing them ten years ago. He noted Claimant's past history of knee problems and reviewed medical records available to him<sup>2</sup>. Dr. Collins agreed that the industrial injury of October 2006 aggravated Claimant's pre-existing right knee problems, but opined that the aggravation caused the need for Claimant to have an arthroscopic meniscus repair as opposed to a total knee replacement. Dr. Collins explained that Claimant's injury of October 2006 was superimposed onto progressive pre-existing degenerative arthritis and that Claimant's need for a total knee replacement pre-existed the industrial injury.

12. Dr. Collins was unable to determine whether Claimant's need for a total knee replacement was accelerated by the industrial injury. Dr. Collins contends that the decision of

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<sup>2</sup> Dr. Collins was unable to identify exactly which records he had at the time of his initial exam and report versus records he received and reviewed at a later date. Based on comments in the body of his report of February 26, 2007, it is clear that he did not have Claimant's January 2005 MRI or the operative report of February 2005 prior to rendering his initial opinions.

the timing of Claimant's total knee replacement was properly determined by Dr. Moore and Claimant, but that if the industrial injury accelerated Claimant's need for the surgery, the primary need to have a total knee replacement would still be a result of pre-existing degenerative conditions.

13. Dr. Collins reviewed x-rays performed after the March 2007 knee replacement surgery which confirmed that the surgery corrected Claimant's alignment problem. Statistically, overuse and obesity contribute to loosening and other complications associated with total knee replacement failure. However, Dr. Collins has no disagreement with Dr. Moore's explanation that the Claimant's initial surgery failed because of cement problems.

14. Michael S. Weiss, M.D., is an occupational medicine/rehabilitation specialist who serves as a staff medical consultant for Surety. He performed a review of medical records<sup>3</sup> in January 2007 as part of a review of the surgical recommendation for the first knee replacement. He considered causation of Claimant's condition as well as the appropriateness of the recommended surgery. Dr. Weiss concurred that a total knee replacement was appropriate treatment for Claimant's diagnosis of end-stage degenerative joint disease. Dr. Weiss determined that Claimant's acute injury of October 2006 caused a medial meniscus tear but that the degenerative joint disease developed over time and was not related to the injury.

15. In November 2007, Dr. Weiss reviewed the request for authorization for Claimant's revision surgery. He considered causation and determined that the need for the revision surgery was not causally related to the October 2006 injury. Dr. Weiss based his opinion on the fact that the initial total knee replacement was not required because of the

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<sup>3</sup> Dr. Weiss initially had access only to records scanned by Surety and available for review by computer. He was subsequently provided with additional documentation in the form of hard-copy medical records and x-ray films. Review of the subsequent documentation did not alter his initial opinion.

compensable injury and because there had not been an intervening work-related injury. Dr. Weiss felt that, based on review of Claimant's medical records and x-rays, Claimant had risk factors of bowleggedness and obesity and was pre-disposed to require a total knee replacement. It is possible that Claimant's initial knee replacement failed because of heavy impact activities or obesity. Dr. Weiss agrees that Claimant likely had increased bone density because of obesity and his physically active lifestyle.

16. Dr. Weiss doesn't disagree with Dr. Moore's decision to perform the initial knee replacement surgery, but feels that it should not be covered by workers' compensation absent a determination of apportionment.

17. Body Mass Index (BMI) is a ratio of height to weight. A BMI of 30 or greater is defined as obese and a BMI of 40 or greater is defined as grossly obese. Medical records reflect slight variations in Claimant's height/weight measurements. Claimant's BMI ranges from 30-32, depending on which measurements are utilized. The medical experts were generally in agreement that obesity impacts knee problems, but the medical evidence in the present case fails to establish that Claimant's borderline obesity was a significant factor in his need for either of his knee surgeries.

18. Claimant was previously a heavy smoker but quit smoking in late 2005. The evidence fails to establish a causal link between Claimant's tobacco use and knee problems. Similarly, there is no evidence that alcohol use was a factor that impacted Claimant's knee problems or recovery.

19. Employer did not have light-duty work available. Claimant was terminated by Employer in August 2007, while recovering from his initial knee replacement surgery. Claimant

lost his health insurance and could not afford the premiums of the COBRA plan. Claimant did not have health insurance at the time of the revision surgery.

20. William E. Bell is married to Claimant's sister. He credibly testified that he went on a camping/hunting trip with Claimant in the fall of 2007, but that Claimant took it easy and avoided hiking on uneven terrain. Claimant spent the trip helping out around the campsite and driving a truck to pick up the rest of the group. At the time of the trip, Claimant walked with a limp.

21. Riley Peak was Claimant's supervisor with Employer. He confirmed that Claimant returned to his regular job duties relatively soon after the February 2005 surgery and that Claimant continued to work until his October 2006 injury. Mr. Peak did not notice Claimant having any type of problem performing the physical duties of his job up until the October 2006 injury.

## **DISCUSSION AND FURTHER FINDINGS**

### **Medical Care**

22. Idaho Code § 72-432(1) mandates that an employer provide reasonable medical care that is related to a compensable injury. The claimant bears the burden of proving that medical expenses were incurred as a result of an industrial injury and must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson V. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d1365 (1997). The fact that a Claimant suffered a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if

the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

23. The medical experts agree that Claimant's total knee replacement of March 20, 2007 constituted reasonable medical treatment. The medical experts further agree that Claimant would have needed a total knee replacement at some point in time, based on his pre-injury right knee condition. The medical experts disagree as to whether the industrial injury of October 14, 2006 is causally related to Claimant's need for the March 20, 2007 surgery.

24. The Industrial Commission has addressed this issue in at least three factually similar cases. See *Rupp*, 2006 IIC 0422, *Van Sickle*, 1987 IIC 0241, and *Smith*, 1989 IIC 0626. In all three cases, the Commission applied the axiom that if an industrial accident hastens the need for surgery, it is compensable. In *Rupp*, the claimant sustained an industrial injury in 1998, for which he received workers' compensation benefits including a total left knee arthroplasty. He settled his 1998 claim and sustained a subsequent industrial injury to his left knee in 2004, after which he required a revision surgery of his left knee arthroplasty. The Commission found that the claimant had a symptomatic but tolerable left knee condition prior to the 2004 injury and that the 2004 work accident accelerated claimant's present need to undergo surgery. The Commission rejected the theory of defendants, that the claimant had a present and actual need for his left knee arthroplasty revision prior to the 2004 injury.

25. In *Van Sickle*, the claimant injured her knees in an industrial accident in December 1983. She underwent arthroscopic knee surgery in March 1984, and a total knee

replacement in November 1985. The Commission found her claim compensable noting that while Van Sickle's pre-existing arthritis likely would have necessitated a total knee replacement at some future time, the industrial accident accelerated the progression of her arthritis and thus was the cause of her surgery at the time it was performed.

26. In *Smith*, the claimant had a history of prior knee problems and treatment, including ligament and meniscus surgery. In February and May 1984, Smith reinjured his knee when he slipped at work. In June 1984, Smith underwent a total knee replacement. Medical evidence established that his preexisting knee condition would have eventually required a total knee replacement at some future time. However, the Commission found Smith entitled to benefits for the total knee replacement surgery because the industrial accidents had exacerbated or aggravated his knee condition thus requiring the replacement surgery in June 1984.

27. In the present case, Claimant's pre-existing right knee problems were aggravated by his October 2006 industrial injury and the need for his total right knee replacement was accelerated by the injury. Dr. Walker had a look inside Claimant's right knee during the arthroscopic surgery of February 2005 and credibly testified that Claimant was not a candidate for a total knee replacement based on degenerative conditions present at that time. Claimant demonstrated a good recovery from his arthroscopic surgery and returned to his regular duty employment for more than a year without physical limitation or the need for ongoing medical treatment. The October 2006 injury aggravated Claimant's pre-existing right knee conditions beyond a torn meniscus and necessitated a total knee replacement at an earlier time than if the injury had not occurred. The medical opinions of Drs. Walker and Moore are more credible and persuasive than the opinions of Drs. Collins and Weiss and are adopted.

## **The Revision Surgery**

28. Dr. Moore credibly testified that the initial surgery failed because the cement did not hold up as intended. The need for Claimant's total knee replacement revision surgery resulted from a complication of the initial surgery and is compensable.

## **Injurious Practices**

29. Idaho Code § 72-435 states:

If an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced.

Defendants point out that Claimant was engaged in various activities following his initial knee replacement surgery that placed extraordinary demand on his new knee. Specifically, Claimant cycled 182 miles over a period of three days. Defendants rely on testimony from Dr. Weiss to assert that Claimant's premature failure of his initial knee replacement was attributable to a rare lack of adhesion, Claimant's obesity, extraordinary demand on the knee, or a combination of these factors.

30. Claimant's post-surgical activities were within his medical restrictions and there is no credible evidence that Claimant's initial knee replacement failed because of injurious practices. The fact that Claimant may have over-exerted himself during a non-weight bearing activity such as cycling does not constitute an unsanitary or unreasonable practice. In fact, non-weight bearing exercise was recommended to Claimant and his exercise regime likely minimized the negative impact of his borderline obesity.

31. The defense of injurious practices is without merit.

## **Attorney Fees**

32. Idaho Code § 72-804 states:

ATTORNEY'S FEES -- PUNITIVE COSTS IN CERTAIN CASES. If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Claimant asserts that Defendants engaged in unreasonable conduct, examples of which are enumerated in Claimant's post-hearing brief. He contends that Defendants engaged in "spectacular and numerous" unreasonable actions and inactions. These include failure to appropriately differentiate between "aggravation" of a pre-existing condition as a legal term of art and an employer/surety's right to apportionment based on pre-existing impairment; a frivolous assertion that Claimant's need for a revision surgery was due to an intervening superseding cause; reliance on expert opinions founded on incomplete medical information; and pursuit of discovery/hearing procedures in a manner that delayed Claimant's receipt of benefits at significant expense to Claimant.

33. Generally, in cases involving a battle of medical experts, a defendant's reliance upon a reasonable medical opinion will not subject them to liability for an award of attorney fees even if that medical opinion is rejected in favor of a more persuasive opinion offered by the claimant. In the present case, it is understandable that Defendants initially questioned a causal relationship between Claimant's October 2006 industrial injury and the March 2007 knee replacement surgery. It is undisputed that Claimant had pre-existing right knee problems and

Defendants obtained the opinion of Dr. Collins to address the extent of Claimant's injury and the need for medical treatment. Dr. Collins opined that Claimant's need for a total knee replacement pre-existed the industrial injury. The fact that Dr. Collins came to this conclusion prior to review of either Claimant's January 2005 diagnostic studies or February 2005 operative report gives rise to the appearance of bias, in spite of the fact that Dr. Collins testified that his later review of additional medical records bolstered his initial opinion that was based on physical examination and the history provided by Claimant.

34. Defendants appropriately shared Dr. Collins' report with Drs. Walker and Moore to seek their concurrence or disagreement. On April 11, 2007, Dr. Moore<sup>4</sup> responded to Defendants' April 9, 2007 request for an opinion with a check mark next to "Yes, I agree with the findings," along with the hand-written comment of "Mr. Terry would ultimately have required TKA, but the timing was accelerated due to his industrial accident." (Claimant's Exhibit 3, page 34). Defendants relied on the "yes" part of the answer and disregarded the "but the timing was accelerated" part. It is at this point that Defendants' failure to reverse their denial and/or seek further clarification became unreasonable.

35. The legal concept of establishing causation of an industrial injury by demonstrating an aggravation to a pre-existing condition through acceleration of the need for treatment to the pre-existing condition is not novel. In fact, the *Rupp* case cited in previous paragraph 24 addresses this same contention and involved the same surety and legal counsel as in the present case. Defendants opted not to cite or distinguish *Rupp* in their post-hearing brief.

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<sup>4</sup> It appears that Defendants' letter of April 9, 2007 was sent to Dr. Walker as opposed to Dr. Moore. It is difficult to read the signature of the physician who signed the response, but it looks more like "Walker" than "Moore." However, Dr. Moore reviewed the document during his testimony and confirmed that the handwritten response was made by him and reflects his opinion.

36. All medical experts agreed that Claimant was an appropriate candidate for his initial total knee replacement and that the revision surgery was medically appropriate. All medical experts agreed that Claimant's pre-existing right knee condition was aggravated to at least some extent by the October 2006 industrial injury. Defendants failed to present evidence to persuasively contradict Dr. Moore's opinion that the need for Claimant's total knee replacement was accelerated by the industrial injury and failed to make a specific inquiry to their medical experts that would address the acceleration issue. Rather, Defendants relied on the more general opinion that the need for a total knee replacement developed over a period of time rather than as a result of October 2006 industrial injury. Dr. Collins failed to appreciate the legal significance of "acceleration" and indicated that, even if the industrial injury accelerated Claimant's need for surgery, the primary need would still relate back to the degenerative changes. Similarly, Dr. Weiss' opinion regarding payment for the knee replacement surgery reflects an inaccurate legal assumption that workers' compensation medical benefits are subject to apportionment. Neither Dr. Collins nor Dr. Weiss were able to confirm during cross-examination whether the industrial injury accelerated Claimant's need to have knee replacement surgery. It is not required or expected of medical experts to understand the legal nuances and legal terms of art associated with workers' compensation claims. However, employer/sureties are expected to accurately apply existing law to the opinions of their experts in order to make a reasonable evaluation of whether benefits should be paid.

37. Claimant correctly contends that his pre-existing right knee degenerative changes are properly considered for purposes of apportioning permanent impairment and/or permanent disability, but that there is no legal basis upon which medical benefits may be apportioned or denied because Claimant was pre-disposed to right knee problems.

38. Claimant has established that he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804, based on the above findings. Other complained of actions by Defendants were considered, but are not the basis of this award for attorney fees.

### CONCLUSIONS OF LAW

1. Claimant's total knee replacement of March 20, 2007 was causally related to the industrial injury of October 14, 2006 and constituted reasonable medical care as provided for in Idaho Code § 72-432.

2. Claimant's revision surgery of March 4, 2008 was causally related to the industrial injury of October 14, 2006.

3. Defendants are not entitled to suspend or reduce Claimant's benefits pursuant to Idaho Code § 72-435.

4. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

### 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 \_\_\_12\_ day of \_September\_\_\_\_\_ 2008.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Susan Veltman, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19 day of September a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

JOHN F GREENFIELD  
THE HUNTLEY LAW FIRM PLLP  
P O BOX 854  
BOISE ID 83701-0854

JON M BAUMAN  
ELAM & BURKE PA  
P O BOX 1539  
BOISE ID 83701

jc

\_\_\_\_\_/s/\_\_\_\_\_