

2. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432;

3. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits (TPD/TTD); and

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

Additional issues are reserved by agreement of the parties.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his left knee on July 20, 2005. The claim was accepted by Defendants and benefits were initiated. Claimant had surgery in the form of an anterior cruciate ligament (ACL) reconstruction and meniscal repair on September 8, 2005 for which Defendants paid. Claimant underwent a course of post-operative care and returned to work for an alternate employer in January 2006.

Claimant contends that he did not fully recover from the September 2005 surgery and that his condition was exacerbated while at physical therapy. He maintains that he needs another left knee meniscal repair and ACL reconstruction because his initial surgery failed. Claimant relies on the medical opinion of orthopedic surgeon James M. Johnston, M.D. Claimant seeks additional past TTD benefits from November 2005 through his return to work in January 2006 as well as future TTD benefits during his recovery from the proposed surgery. Claimant asserts that he is entitled to an award of attorney fees because Defendants' denial of the proposed ACL surgery is unreasonable.

Defendants acknowledge that Claimant's recurrent left knee meniscal tear is causally related to the industrial injury, but contend that Claimant's current ACL condition resulted from an intervening non-compensable cause. Claimant's description of re-injury during physical

therapy is not credible or supported by the contemporaneous medical records. Claimant demonstrated post-operative non-compliance with medical restrictions and recommendations which likely resulted in a new injury to his left ACL. Defendants rely on the medical opinion of orthopedic surgeon George A. Nicola, M.D., who performed the initial surgery. Claimant remains entitled to benefits associated with his recurrent meniscal tear but not his ACL condition. Claimant is not entitled to additional past TTD benefits because he refused an offer of employment in November 2005. Defendants assert that their denial of Claimant's current ACL condition is reasonable and supported by the evidence.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1 through 11 admitted at hearing;
 2. Testimony of Claimant and his wife Tiffney Miller taken at hearing;
 3. The post-hearing deposition of James M. Johnston, M.D., taken on March 18, 2008;
 4. Joint Exhibit 12 offered at the deposition of Dr. Johnston;
 5. The post-hearing deposition of George A. Nicola, M.D., taken on April 17, 2008;
- and
6. The Industrial Commission's legal file in this matter.

Defendants attached a Notice of Claim Status form dated December 6, 2005 to their post-hearing brief and identified the document as "Exhibit 1." Claimant neither objected to the inclusion of this document into evidence nor stipulated to its admissibility. The document was not previously part of the Industrial Commission's legal file and was not timely offered as an exhibit. The document and reference to the document in Defendants' post-hearing brief will not

be considered in this decision. After having considered all of the other 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

Background, Injury and Treatment

1. Claimant was 25 years old and resided in Nampa at the time of hearing. He experienced problems with his knees as a teenager and had arthroscopic surgery performed on both knees in the mid-1990s. Claimant was diagnosed with osteochondritis dissecans, bilaterally. An operative report from 1996 reflects that Claimant's left knee ACL and menisci were intact and normal in appearance. There is no record of medical treatment to either of Claimant's knees from early 2002 until the time of the industrial injury in 2005.

2. Employer is a temporary employment agency. On July 20, 2005, Claimant was assigned to the client company of Idaho Power and was working as a utility meter reader. He earned \$9.00 per hour. While performing his work duties, Claimant was chased by a dog and stepped into a hole that had been obscured from view by tall grass. He sustained a twisting injury to his left knee.

3. Claimant immediately reported his injury and was sent to Kevin Chicoine, M.D., by Employer. Claimant received conservative treatment at the direction of Dr. Chicoine from July 20, 2005 through August 15, 2005, without improvement. An MRI of the left knee was performed on August 11, 2005 which revealed a complete tear of the ACL and a complex tear of the medial meniscus. Dr. Chicoine referred Claimant to George A. Nicola, M.D., for surgical consultation.

RECOMMENDATION - 4

4. Dr. Nicola performed an ACL reconstruction and medial meniscus repair during arthroscopic surgery on September 8, 2005. Dr. Nicola described Claimant's knee condition as "pristine" with the exception of the "obviously blown ACL." (Joint Exhibit 3, p.70). Dr. Nicola was pleased with Claimant's progress upon examination of September 14, 2005 and referred Claimant to physical therapy. Claimant was noted to be doing well at his follow-up appointment of October 18, 2005, but mentioned that he experienced knee pain by the end of the day.

5. Claimant attended 21 post-operative physical therapy sessions from September 14, 2005 through November 7, 2005. Physical therapy notes reflect gradual improvement in Claimant's condition with intermittent complaints of pain or soreness. There is no mention of an intervening injury occurring either during or outside of physical therapy. There is no indication that Claimant gave submaximal effort and/or that he was non-compliant with medical restrictions. However, Claimant was approved for 24 therapy sessions and did not attend or make arrangements to reschedule the last three sessions.

6. On December 12, 2005, Claimant reported popping in his knee to Dr. Nicola who documented increased laxity in the left knee. Dr. Nicola indicated that Claimant was "not very cooperative following his surgery," but did not elaborate on the comment or provide an example of the non-cooperative behavior. (Joint Exhibit 3, p.80).

7. On February 20, 2006, Dr. Nicola reported that Claimant's ACL reconstruction was "working great" but documented complaints of tenderness and that Claimant felt he may have injured his knee during physical therapy. (Joint Exhibit 3, p.82). Dr. Nicola suspected a re-tear of the meniscus and ordered an MRI.

8. A left knee MRI was performed on February 22, 2006 that revealed intact but thinned fibers of the ACL and a decrease in size of the posterior horn of the medial meniscus.

Dr. Nicola felt that the findings were indicative of a meniscal tear and that an arthroscopy with meniscal resection was likely warranted.

9. Claimant did not show up for his mid-March 2006 appointment with Dr. Nicola. He contacted Dr. Nicola's office by phone on March 21, 2006 to request a change of physician. On that same day, Dr. Nicola reported that Claimant had been non-compliant following the September 2005 surgery. Claimant was not wearing his brace at the appointment two weeks postoperatively. Dr. Nicola questioned whether Claimant was utilizing his crutches outside of the doctor's visits and whether a second surgery would yield positive results based on Claimant's past non-compliance.

10. On April 13, 2006, Claimant sought the opinion of James M. Johnston, M.D. Claimant learned of Dr. Johnston from his wife who previously received treatment from him. Dr. Johnston obtained a history from Claimant, evaluated Claimant and reviewed the February 2006 MRI. He concluded that Claimant's previous surgery failed and recommended a meniscal repair and ACL reconstruction.

11. On May 31, 2006, Dr. Nicola wrote a letter of clarification to Surety in which he opined that the cause of Claimant's meniscal re-tear was poor compliance following surgery. Further, Dr. Nicola questioned whether Claimant's ACL was in need of repair. He felt that chances were good that Claimant would demonstrate poor compliance following a second surgery based on his behavior after the first surgery. The letter does not describe the nature of Claimant's poor compliance or any details as to how the non-compliance caused the need for a second surgery.

Return to Work

12. Claimant's time of injury assignment ended and was no longer available to Claimant. The case was referred by Surety to the Industrial Commission Rehabilitation Division (ICRD) in early August 2005. Dr. Nicola released Claimant to modified duty work on November 1, 2005.

13. By mid-November 2005, Employer had job openings through multiple client companies. On November 17, 2005, Employer offered Claimant a job at Plexus doing electronic manufacturing at a rate of \$9.36 per hour. Claimant advised the ICRD consultant that he declined the assignment at Plexus because he felt that he needed to earn more than the offered rate of pay. At hearing, Claimant testified that he declined the assignment because it was for a night shift position and would conflict with his family obligations. He interviewed for an alternate assignment through Employer at Cable One that paid \$10.63 per hour. Claimant subsequently found employment on his own and did not return to work through Employer.

14. Claimant began working at De Best Plumbing as a plumbing apprentice in early January 2006 at a rate of \$9.50 per hour. By mid-April 2006, Claimant changed jobs and went to work for Magic Plumbing making \$12.00 per hour. Claimant also worked for a brief period of time for a third plumbing company, Buss Mechanical. ICRD services were suspended in May 2006 because Claimant had successfully returned to work.

15. At the time of hearing, Claimant was performing meter repair work for Intermountain Gas and earning \$15.50 per hour.

Additional Testimony at Hearing

16. Claimant learned after-the-fact that Dr. Nicola considered him to be non-compliant with treatment. He did not discuss the issue with Dr. Nicola or anyone else at Dr.

Nicola's office. Claimant explained that he took his knee brace off prior to one medical evaluation because he assumed that the doctor would want the brace removed in order to perform an examination. He otherwise utilized his brace and crutches as instructed. He has been able to perform his post-injury employment without significant kneeling or crawling.

17. Claimant waited more than three hours after his scheduled appointment time to be evaluated by Dr. Nicola on one occasion. Claimant waited an hour and a half without being seen on another occasion and left after being told it would be another 40 minutes. Claimant's wife, Tiffney Miller, drove him to his appointments and was unable to wait any longer on the day they left without Claimant being evaluated. Claimant's testimony in this regard is supported by the documentary evidence.

18. Claimant requested that he be sent for a second opinion about his knee condition by inquiring about the possibility with Dr. Nicola's office and by calling his claims handler with Surety. Claimant was advised that he could obtain another opinion at his own expense. Claimant was under the impression that Surety was closing his case.

19. Ms. Miller confirms that Claimant was compliant with his post-surgical medical restrictions and that Claimant utilized his crutches at home.

20. Claimant recalls an incident at physical therapy when he experienced sharp pain and heard a popping sound while performing a strengthening exercise. He described the incident to the therapist, Carrie, who commented that it was likely a problem with his ACL. Claimant testified that he became increasingly dissatisfied with the results of therapy. Claimant can not think of any incident, other the one at physical therapy, that would constitute a new injury.

Clarification from the Medical Experts

Dr. Nicola

21. During his post-hearing deposition, Dr. Nicola explained that he does not disagree with either the meniscal repair or ACL reconstruction proposed by Dr. Johnston. However, the need for the ACL reconstruction was caused by Claimant's post-operative activities and gross non-compliance with treatment recommendations. The type of surgery he performed on Claimant in September 2005 has a low failure rate.

22. Dr. Nicola doubts the accuracy of Claimant's description of re-injury during physical therapy. He is familiar with the physical therapist in question and she has a good reputation. She would have alerted him if there had been a problem.

23. Dr. Nicola bases his opinion regarding Claimant's non-compliance on observation by his office staff of Claimant attending an appointment without his knee brace and Claimant's demonstrated low skill level in ambulating with crutches while in the office which was indicative of infrequent use of the crutches. Further, Dr. Nicola relies on his experience with human nature and past patients who have taught him that if a patient is slightly non-compliant while at the doctor's office that the degree of non-compliance is higher when the patient is in other environments.

24. Dr. Nicola's testimony does not contradict Claimant's representations that the non-compliance issue was never brought to Claimant's attention by anyone in Dr. Nicola's office.

Dr. Johnston

25. Dr. Johnston is a sports fellowship trained orthopedic surgeon and ACL reconstruction specialist. He has performed approximately 2,000 ACL reconstruction surgeries.

26. Claimant's February 2006 MRI revealed that the initial ACL reconstruction was done properly and there was good placement of Claimant's ACL. However, some ACL reconstructions fail for unknown reasons which is the case with Claimant.

27. It is possible that a patient's patent post-surgical non-compliance could cause an ACL reconstruction to fail. However, failure to wear a knee brace as prescribed following an ACL reconstruction would be categorized as mild non-compliance and would not cause the reconstruction to fail. In fact, Dr. Johnston does not usually ask his ACL reconstruction patients to wear a brace post-surgery and does not think that the use of a brace makes a difference in recovery from that procedure.

28. It would be possible but unusual for a patient to have a re-injury during physical therapy that would cause an ACL reconstruction to fail. There is a certain failure rate for surgery that is inexplicable and not related to a specific cause or re-injury.

29. Claimant's need for a meniscal repair is straightforward. Claimant's need for an ACL reconstruction is based on positive findings on examination as well as the MRI findings of February 2006 which shows the thinning ACL fibers.

30. Dr. Johnston believes that Claimant's current left knee condition is related to the industrial injury of July 2005 and not to the knee problems that Claimant experienced as a teenager. Surgical reports from the 1990s describe intact ACL and menisci in the left knee. Dr. Nicola's operative report from September 2005 notes the absence of chronic conditions.

DISCUSSION AND FURTHER FINDINGS

Causation and Medical Care

31. 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).

32. Dr. Nicola is a qualified expert with astute observations about human nature. However, the evidence falls short of establishing that Claimant's need for a repeat ACL reconstruction is the result of Claimant's non-compliance with medical recommendations. The opinions of Dr. Nicola regarding the extent of Claimant's non-compliance are speculative and not substantiated by the other evidence.

33. Dr. Johnston is also a qualified expert. His conclusions make sense and are consistent with the other medical evidence. The testimony of Dr. Johnston establishes that Claimant's initial surgery failed through no fault of his own. The opinions of Dr. Johnston regarding Claimant's need for future treatment and causation for Claimant's current condition are adopted over those of Dr. Nicola.

34. It is possible that Claimant suffered a re-injury of his left knee during physical therapy which caused the need for additional surgery, but the totality of the evidence fails to establish that such scenario is more likely than not. The opinions of Dr. Johnston are not tied to Claimant's explanation of an injury occurring during physical therapy.

35. Claimant has met his burden of proof to establish that his need for a left knee meniscal repair and ACL reconstruction are causally related to his industrial injury.

36. It is noted that Claimant has not formally requested a change of physician from Dr. Nicola to Dr. Johnston through the procedures outlined in Rule 20 of the Judicial Rules of Practice and Procedure. Rather, Claimant made a verbal request to Surety for a second opinion evaluation by Dr. Johnston that was declined. Claimant then proceeded with the filing of a Complaint and Request for Hearing to resolve the threshold issue of causation. It is clear from the evidence at hearing that Claimant seeks to continue with treatment for his left knee at the direction of Dr. Johnston and clear from Dr. Johnston's post-hearing deposition testimony that he is willing to serve as Claimant's treating physician. At this point in time, it would be redundant to require Claimant to proceed through a separate change of doctor process.

37. Pursuant to J.R.P. Rule 20(I), the procedures outlined for change of physician in sections A through H of J.R.P. Rule 20 are not to be deemed exclusive and a change of physician may be addressed through a hearing on the merits of the case. Claimant has established reasonable grounds to change treating physicians from Dr. Nicola to Dr. Johnston. Dr. Johnston specializes in ACL reconstructions. Further, it is likely that the rapport between Claimant and Dr. Nicola is less than ideal for a productive doctor/patient relationship based on conflicting opinions regarding Claimant's past compliance with Dr. Nicola's treatment recommendations.

Temporary Disability Benefits

38. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939

(1980). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for work, or light duty work and the employer makes light duty work available to him. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

39. The period of additional past TTD benefits sought by Claimant is from early November 2005 through January 10, 2006 when he returned to work for De Best Plumbing. The ICRD notes reflect that Claimant declined Employer's offer of employment to return to work within his restrictions on November 17, 2005. The ICRD consultant documented both the Employer's version of the offer and rejection of the offer as well as Claimant's explanation of the situation. The records indicate that Claimant declined the job offered on November 17, 2005 because he needed a higher wage than the \$9.36 per hour offered. Claimant was, in fact, able to secure a series of higher paying jobs but not until early January 2006.

40. Employer is not liable for TTD benefits from November 17, 2005 through January 10, 2005 because Claimant declined an appropriate light-duty position. Claimant's testimony at hearing that the reason he declined the offered position was because it was for a night-shift job is not corroborated by the other evidence and is contradicted by the ICRD notes.

41. The record does not include evidence regarding the duration of availability of light-duty employment offered by Employer. Accordingly, Claimant's refusal of the light duty assignment on November 17, 2005 bars recovery of TTD benefits through January 10, 2006 when Claimant found other employment, but does not impact Claimant's right to future TTD benefits if Claimant otherwise meets the requirements of Idaho Code § 72-408.

42. Claimant is eligible for future TTD benefits and will likely be entitled to TTD benefits during his period of recovery from additional surgery. The precise period of time and/or exact dollar amount of future TTD benefits owed to Claimant can not currently be calculated and will depend on multiple factors including the course of his medical care, pace at which he recovers, availability of light-duty employment and the date of maximum medical improvement.

Attorney Fees

43. 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.

44. Defendants initiated medical and income benefits on this case in a timely manner. They refused to authorize a second ACL reconstruction based on the opinion of Dr. Nicola who maintains that Claimant's need for the procedure is not causally related to the industrial injury. The reliance of Defendants on the opinion of Dr. Nicola was reasonable and does not warrant an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant's recurrent left knee meniscal tear and his need for a left knee ACL reconstruction revision are causally related to his industrial injury of July 20, 2005.

2. Claimant continues to be entitled to reasonable and necessary medical care pursuant to Idaho Code § 72-432 at the direction of Dr. Johnston, including the recommended meniscal repair and ACL reconstruction surgery.

3. Claimant is entitled to past TTD benefits from July 21, 2005 through November 17, 2005 but is not entitled to TTD benefits from November 18, 2005 through January 10, 2006. Claimant remains eligible for future TTD/TPD benefits in accordance with Idaho Code § 72-408 as described in this decision. Defendants are entitled to a credit for benefits already paid.

4. Claimant is not 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 5 day of March 2009.

INDUSTRIAL COMMISSION

/s/ _____
Susan Veltman, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIM S. MILLER,)	
)	
Claimant,)	IC 2005-007930
)	
v.)	
)	
ADECCO, INC.,)	
)	
Employer,)	ORDER
)	
AMERICAN HOME ASSURANCE)	
COMPANY,)	3/12/09
)	
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 recurrent left knee meniscal tear and his need for a left knee ACL reconstruction revision are causally related to his industrial injury of July 20, 2005.
2. Claimant continues to be entitled to reasonable and necessary medical care pursuant to Idaho Code § 72-432 at the direction of Dr. Johnston, including the recommended meniscal repair and ACL reconstruction surgery.

3. Claimant is entitled to past TTD benefits from July 21, 2005 through November 17, 2005 but is not entitled to TTD benefits from November 18, 2005 through January 10, 2006. Claimant remains eligible for future TTD/TPD benefits in accordance with Idaho Code § 72-408 as described in this decision. Defendants are entitled to a credit for benefits already paid.

4. Claimant is not 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.

DATED this __12__ day of __March_____, 2009.

INDUSTRIAL COMMISSION

/s/
R. D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
James F. Kile, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___12 ___ day of _March_____, 2009, 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:

RICK TUHA
IDAHO LAW GROUP LLP
1006 W SANETTA ST
NAMPA ID 83651

ERIC S BAILEY
P O BOX 1007
BOISE ID 83701

jkc

_____/s/_____