

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

VERDENE PAGE,	)	
	)	
Claimant,	)	
	)	
v.	)	<b>IC 2002-007246</b>
	)	
MCCAIN FOODS, INC.,	)	
	)	
Employer,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
and	)	<b>AND ORDER</b>
	)	
TRANSCONTINENTAL INSURANCE CO.,	)	filed Sept. 8, 2009
	)	
Surety,	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

On January 31, 2008, the Idaho Supreme Court issued an opinion in the above-captioned case and remanded the case to the Commission for further proceedings. The Commissioners conducted a hearing in Twin Falls, Idaho on April 9, 2009. L. Clyel Berry of Twin Falls represented Claimant. Glenna M. Christensen of Boise represented Defendants.<sup>1</sup> The parties submitted oral and documentary evidence. Post-hearing depositions were taken, and the parties submitted post-hearing briefs. At the request of the parties, Commissioner Thomas P. Baskin recused himself. The matter came under advisement on July 6, 2009. It is now ready for decision.

**ISSUES**

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

1. Whether and to what extent Claimant is entitled to receive medical care benefits

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<sup>1</sup> As of July 30, 2009, Mark C. Peterson is the attorney of record for Defendants.

from and following November 26, 2001;

2. Whether and to what extent Claimant is entitled to receive temporary disability benefits from and following November 26, 2001; and

3. Whether and to what extent Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

Additional issues are reserved.<sup>2</sup>

### **CONTENTIONS OF THE PARTIES**

In *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), the Court found that there was not substantial and competent evidence to support the Commission's finding that Claimant achieved medical stability on November 26, 2001. This holding re-opens several issues, including the issues currently before the Commission.

Claimant contends that she did not achieve medical stability until four to six months following the surgery performed on her left knee in May 2008. The surgery, a total knee arthroplasty, is covered by workers' compensation, because Claimant's need for the surgery was caused, in part, by her industrial injury. She is entitled to additional medical care she received for her industrial injury since November 26, 2001, and is also entitled to a total knee arthroplasty on her right knee that has not yet been performed.

Because she was not medically stable until late 2008, Claimant is entitled to receive temporary total disability benefits covering the period from November 26, 2001 until the date of medical stability. She should be awarded attorney fees, because the Defendants' refusal to pay

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<sup>2</sup> These issues include the extent of Claimant's permanent partial impairment (PPI) and permanent disability. Though the Supreme Court upheld the Commission's prior finding of 1% PPI, the Commission determined that the issue of Claimant's PPI is once again open, in light of the Court's holding that the Commission erred in finding that Claimant achieved maximum medical improvement on November 26, 2001. A finding of permanent impairment cannot be made until Claimant has reached maximum medical improvement. Idaho Code § 72-422. Thus, before Claimant's PPI can be assessed, she must be found medically stable.

medical care and temporary disability benefits from and following November 26, 2001 was unreasonable.

Defendants respond that Claimant achieved medical stability on her industrial injury, a left medial meniscus tear, by April 25, 2003. Defendants deny that Claimant is entitled to medical care benefits for her total knee arthroplasty, because Claimant's need for the surgery was caused by "extensive, pre-existing degenerative changes," not the industrial injury. Also, because the arthroplasty is an "elective" procedure, it is not the kind of medical care that employers are obliged to provide under Idaho Code § 72-432(1). Claimant's arthroplasty fails to satisfy the conditions of compensable medical care set forth in *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

With regard to temporary disability benefits, Defendants argue that Claimant should receive them for a period ending no later than April 25, 2003. Claimant is not entitled to attorney fees; because of the long and complex history of this case, including two Commission decisions that favored Defendants, it was reasonable for Defendants to take a "wait and see" approach in order to determine what benefits would be assessed before paying them.

### **EVIDENCE CONSIDERED**

The record in this matter consists of all exhibits, testimony, and other evidence admitted into the record prior to April 9, 2009, as well as the following:

1. Claimant's Exhibits 17 through 22A;
2. Defendants' Exhibit J;
3. The testimony of Claimant at the April 9, 2009 hearing;
4. The post-hearing depositions of Paul C. Collins, M.D., and Joseph R. Petersen,

M.D.;

5. The Industrial Commission legal file pertaining to this claim; and
6. The opinions of the Supreme Court in *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005), *hereinafter Page I*, and *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), *hereinafter Page II*.

All objections posed during the depositions are overruled.

After having considered the above evidence and the briefs of the parties, the Commission adopts the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. The Court's findings of fact in *Page I* and *Page II* are adopted by the Commission and incorporated into this decision. The Commission's previous findings of fact that are not inconsistent with the Court's opinions are likewise incorporated into this decision. The findings made below pertain chiefly to the issues currently before the Commission or are included for purposes of clarity.

2. Claimant was born on May 11, 1944 and was 64 at the time of hearing. On August 17, 2001, Claimant tore her left medial meniscus in an industrial accident.

3. Joseph R. Petersen, M.D., an orthopedic surgeon, performed an arthroscopy on Claimant on October 25, 2001. He removed part of the torn meniscus to relieve Claimant's severe pain. Claimant was scheduled to see Dr. Petersen for follow-up treatment on November 26, 2001, but missed the appointment. Claimant believed she was supposed to follow up with Dr. Lawrence Hicks, her primary care physician, instead. Because Claimant missed her appointment, Dr. Petersen deemed her to be medically stable as of November 26, 2001. He withdrew that opinion when he discovered the reason for her absence.

4. Claimant treated with both Dr. Petersen and Dr. Hicks for several years following

her surgery; the arthroscopy failed to relieve her pain. Dr. Petersen attempted to treat her conservatively; he gave her injections and medication to control the pain.

5. On May 22, 2008, Dr. Petersen performed a total knee arthroplasty (TKA) on Claimant's left knee. The purpose of the TKA was to relieve Claimant's ongoing pain. Following the surgery, Claimant was in recovery for several months. According to Dr. Petersen, she achieved medical stability four to six months after the surgery.

6. At the time of Claimant's 2001 arthroscopy, she had degenerative changes present in her left knee. Prior to her industrial injury, however, Claimant's left knee had been asymptomatic.

7. Claimant's left knee pain has improved significantly since the TKA. However, Dr. Petersen believes she will need a TKA on her right knee in the near future. Dr. Petersen relates Claimant's right knee pain at least in part to her industrial injury; Claimant altered her gait to compensate for the pain in her left knee, thus putting more weight on her right knee. Dr. Petersen believes that, should Claimant need a right TKA in two to three years, her need for the surgery would relate in part to her change of gait following the industrial injury.

## **DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW**

### Medical Care

8. An employer shall provide to an injured employee such reasonable medical, surgical, or other attendance or treatment as may be reasonably required by the employee's physician. Idaho Code § 72-432(1). A primary duty of an employer to an injured worker is to "furnish reasonable medical, surgical, or other treatment necessary to rehabilitate [her] and as far as possible restore [her] health, usefulness, and earning capacity." *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 200, 377 P.2d 794, 798 (1963). 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).

An employer takes an employee as it finds her, and a pre-existing condition 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). When the need for a total knee replacement surgery is hastened by an industrial injury, the surgery is compensable, even if there is evidence to indicate that the claimant would eventually have needed the surgery in the absence of a compensable injury. *Swenson v. Hiddleston & Son, Inc.*, 2009 IIC 0225.

9. Defendants pose two challenges to Claimant's claim for additional medical care benefits. First, Defendants deny that Claimant's industrial injury caused her need for total knee replacement surgeries on either her left or right knee. Second, Defendants argue that because Claimant's left TKA was an "elective procedure," "palliative as opposed to curative," it is not a "required" procedure as contemplated by Idaho Code § 72-432(1), and does not meet the conditions of the legal test articulated by the Supreme Court in *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

10. **Causation.** Dr. Petersen, Claimant's treating physician, testified that, on a more probable than not basis, Claimant's need for her left TKA was accelerated by her industrial injury. Dr. Petersen believes that the removal of Claimant's torn meniscus in 2001 created a "cascade syndrome" that accelerated Claimant's degenerative changes. The meniscus acted as a "bumper cushion" in the joint; when it was removed, Claimant's knee lost its stability. Dr.

Petersen believes that Claimant's need for a left TKA was accelerated by five to ten years because of the industrial injury.

11. Paul Collins, M.D., specializes in orthopedics. At the request of Defendants, Dr. Collins reviewed Claimant's medical records, but he did not examine Claimant herself. Dr. Collins testified, on a more probable than not basis, that Claimant's need for her left TKA was caused by degenerative changes in her left knee. He does not believe that Claimant's 2001 arthroscopy had a substantial impact on her declining knee condition. Dr. Collins acknowledged that the meniscus provides a significant amount of control and cushioning in the knee joint, but he said that Claimant's TKA was "going to happen no matter what."

12. Frederick L. Surbaugh, M.D., also specializes in orthopedics, with a subspecialty in orthopedic surgery. He reviewed Claimant's medical records at the request of Claimant. Dr. Surbaugh opined, on a more probable than not basis, that Claimant's need for a left TKA was accelerated by four to five years because of the industrial injury.

13. Dr. Hicks, Claimant's primary care physician, treated Claimant both before and after her industrial injury. Prior to the injury, Dr. Hicks never treated Claimant for left knee pain.

14. When expert medical opinions conflict, the Commission considers several factors in determining which opinion should be given greater weight. These include, but are not limited to, whether the opining physician examined the claimant, whether the opining physician conducted a thorough review of the claimant's medical records, and whether the opining physician treated the claimant over a meaningful period of time. The last factor can be particularly significant, because a long-term treating physician has the opportunity to become well-acquainted with both the claimant and the claimant's condition. *See Poss v. Meeker Machine Shop*, 109 Idaho 920, 925, 712 P.2d 621, 626 (1985).

15. In this case, neither Dr. Collins nor Dr. Surbaugh examined Claimant, while Dr. Petersen and Dr. Hicks have treated Claimant for several years. Dr. Hicks had the opportunity to observe Claimant both pre- and post-injury. Dr. Petersen has been treating Claimant's knee condition since the fall of 2001. He is thus familiar with Claimant's condition in a way that neither Dr. Collins nor Dr. Surbaugh can be.

16. The Commission finds that Dr. Petersen's causation opinion is the most credible. He has the most familiarity with Claimant and her condition, and his opinion is consistent with the testimony of both Dr. Hicks and Claimant herself that Claimant did not have left knee problems prior to her industrial injury.

17. Claimant's need for a left TKA was accelerated by the industrial injury.

18. **Required treatment.** Pain-killing treatments may be compensable, even if they do not necessarily cure the employee's condition. *Poss*, 109 Idaho at 924, 712 P.2d at 625. The appropriate inquiry is not whether the treatment is necessary, but whether it is reasonable. *Sprague*, 116 Idaho at 722, 779 at 397. The treatment is reasonable when three conditions are met: 1) the claimant made gradual improvement from the treatment received, 2) the treatment was required by the claimant's physician, and 3) the treatment received was within the physician's standard of practice, and the charges were fair, reasonable, and similar to charges in the same profession. *Id.* at 722-723, 397-398.

19. Defendants argue that because Claimant's pain management treatments, including her total knee replacement surgery, were elective treatments intended to relieve pain, the treatments were not "required" by her physician. Defendants apparently believe that medical treatment, to be compensable, must be necessary. This argument is contrary to the holding in *Sprague*. Defendants' definition of "required" is far too narrow. Even necessary, life-saving

procedures are elective; doctors cannot “require” their patients to do anything. Patients choose whether or not to undergo treatment after consulting with their physicians. In this case, Claimant underwent a variety of treatments, from injections to surgery, after consulting with Dr. Petersen.

20. For purposes of workers’ compensation law, medical treatment is “required” when a claimant has a need for it and a doctor recommends it. If a claimant is in pain, she has a need for treatment that will alleviate the pain. When an employer fails to provide that treatment, the employer fails to fulfill its statutory obligations as expounded in *Clevenger*: to rehabilitate the injured employee and restore her, as far as possible, to health and productivity.

21. Claimant suffered constant knee pain as a result of her industrial injury. Dr. Petersen testified that the pain was severe enough to prevent Claimant from working. Dr. Petersen treated Claimant with medication and injections, and ultimately performed total knee replacement surgery, to relieve Claimant of this pain. Both Dr. Petersen and Dr. Collins testified that Claimant had a need for the total knee replacement; they disagreed about what caused the need, but not that the need existed.<sup>3</sup>

22. *Sprague*. Defendants further argue that Claimant failed to fulfill the first prong of the *Sprague* test — that a claimant must gradually improve after receiving the contested treatment — because Claimant’s condition did not improve after her arthroscopy in 2001. Thus, according to Defendants, they are not obliged to pay for her ongoing medical care, because some of the care failed to relieve her pain.

23. *Sprague* and its progeny have not created a rule that medical care is compensable only when it is successful. In a case where the *Sprague* conditions are present, the medical care is compensable, but those are not the only conditions under which medical care is compensable.

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<sup>3</sup> Though Dr. Collins testified that the surgery was “optional,” he also stated that Claimant would have needed a TKA “no matter what,” due to her degenerative arthritis.

Unfortunately, medical treatment does not always work. That does not mean the claimant must bear the costs of failed treatment.

24. The Commission finds that Dr. Petersen's treatment of Claimant, including the left TKA, was reasonable and required under Idaho Code § 72-432(1).

25. **Right TKA.** Claimant has not yet received a TKA on her right knee, and it has not yet been determined that she needs one. The issue of whether a right TKA would be reasonable medical care is therefore not ripe for decision.

#### Temporary Disability

26. An injured worker is entitled to temporary disability benefits during the period of recovery. Idaho Code § 72-408. The burden is on the claimant to present expert medical opinion evidence on the extent and duration of her disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Co.*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant establishes that she is in the period of recovery, she is entitled to temporary total disability benefits unless and until evidence is presented that she has been medically released for light-duty work and that 1) her former employer has made a reasonable and legitimate offer of employment that she is capable of performing under the terms of her release, and which employment is likely to continue throughout the period of recovery, or 2) there is employment available in the general labor market which Claimant has a reasonable opportunity of securing and which employment is consistent with the terms of her light-duty release. *Malueg*, 111 Idaho at 791, 727 P.2d at 1219. Once a claimant is medically stable, she is no longer in the period of recovery, and temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

27. Dr. Petersen opined that, following Claimant's accident, and prior to her left TKA, she has never been stable to the point that she could "get out and physically earn a living." Dr. Petersen said she might be able to perform some sedentary work, but she could not return to her time-of-injury position, or perform any work that required lifting, turning, twisting, or carrying. Dr. Hicks also testified that Claimant, following her industrial accident, has not been capable of working.

28. According to Dr. Petersen, Claimant finally achieved medical stability between four and six months following her left TKA in May 2008.

29. Defendants argue that Claimant achieved medical stability between November 2001 and April 2003, when she reached maximum medical improvement following her October 2001 arthroscopy. Defendants support this argument by pointing out that, earlier in this case, Claimant presented evidence on permanent impairment, which cannot be assessed until a claimant is medically stable. Defendants also argue that Dr. Petersen's understanding of medical stability or maximum medical improvement is fundamentally flawed, and that his opinion on medical stability is therefore unreliable.

30. A claimant reaches maximum medical improvement, or medical stability, on the date from which "no further material improvement would reasonably be expected from medical treatment or the passage of time" or "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated." *See Magee v. J.D. Lumber*, 135 Idaho 328, 332, 17 P.3d 272, 276 (2000). Defendants argue that, because Claimant elicited testimony about permanent impairment in April 2003, Claimant acknowledged that she had reached medical stability on her industrial injury by that point in time.

31. The permanent impairment rating that Claimant elicited was limited to the

impairment resulting from the torn meniscus and the resulting arthroscopy. The impairment rating did not address the impact the torn meniscus and the arthroscopy had on Claimant's overall condition. Claimant's condition declined substantially after April 2003, and the medical evidence in this case establishes that her condition declined, in part, due to her industrial injury. Her condition did not stabilize until at least four months after her May 2008 TKA. Before that time, she was capable of material improvement.

32. Claimant has established, through expert medical opinion, that she was in the period of recovery from August 17, 2001 to September 21, 2008, four months after her left TKA. Defendants have cited no evidence in the record indicating that they made an offer of employment to Claimant consistent with a light-duty work release, or that there was work available to Claimant consistent with such a release. Claimant is therefore entitled to temporary total disability benefits for the entire period of her disability.

33. Claimant has already been paid temporary disability benefits for the period from August 17, 2001 to November 25, 2001. She is entitled to additional temporary total disability benefits for the period from November 26, 2001 through September 21, 2008.

#### Attorney Fees

34. If the employer or surety contested a claim for workers' compensation without reasonable grounds, the claimant is entitled to reasonable attorney fees. Idaho Code § 72-804. Employers and sureties are expected to accurately apply existing law to the evidence in a case in order to make a reasonable evaluation of whether benefits should be paid. *Terry v. Fish and Game Dept.*, 2008 IIC 0692. Longstanding precedent establishes that if an industrial accident hastens the need for surgery, the surgery is compensable, even if the need for surgery is due in part to a pre-existing condition. *Id.*

35. Claimant requests attorney fees on the grounds that Defendants' denial of benefits, specifically medical care benefits relating to the May 2008 TKA, was unreasonable. Claimant asserts that Defendants were aware of Dr. Petersen's opinion that she needed a TKA and that her need for the TKA was accelerated because of the industrial injury. Defendants chose to deny Claimant's claim for medical care without having any medical evidence to support their position, until March 18, 2009, the date of Dr. Collins's report. By the time Dr. Collins issued his report, the hearing in this case had already been scheduled. Thus, Defendants chose to deny Claimant's claim and proceed to hearing without any evidence, credible or otherwise, to support their denial.

36. Defendants respond that, given the long and contentious history of this case, they are entitled to take a "wait and see" approach — that is, wait and see what benefits, if any, the Commission awards to Claimant following the issuance of *Page II*. Defendants assert that, because the Commission has twice found in their favor, their position is reasonable, and that Claimant's attorney fees claim is "hopelessly rooted in hind sight" [sic].

37. The Commission finds Defendants' argument troubling. The "wait and see" approach that they have embraced is contrary to the policy of Idaho's workers' compensation statute, the purpose of which is to provide "sure and certain relief" to injured workers. Idaho Code § 72-201. Quite simply, Defendants do not have the right to "wait and see." They have an affirmative, statutory duty to provide relief to injured workers. In cases where there is a genuine factual or legal dispute over whether a claimant is entitled to the benefits she is claiming, employers and sureties certainly have the right to present evidence and legal argumentation demonstrating why they are not obligated to pay. But such evidence can only be found during a thorough, good-faith investigation into the claim. Such an investigation takes active effort. It is

the opposite of “wait and see.”

38. Defendants’ argument also seems to disdain the fact that while the Commission has twice ruled in their favor, the Supreme Court has twice overturned the Commission’s decisions. Defendants are not entitled to rely on decisions that have been overturned. Especially troubling to the Commission is Defendants’ assertion, in their brief, that “[w]hether Claimant suffered a compensable accident is questionable at best.” This issue has already been decided by the Supreme Court. However much the Defendants may disagree, they no longer have the right to contest it. They must base their current and future decisions in this case, not on what they wish the law to be, but on what the law actually is.

39. Following the issuance of *Page II*, Defendants were aware that Claimant was claiming additional medical care benefits and temporary total disability benefits. Defendants had a duty to evaluate Claimant’s claim in light of the holdings in both *Page I* and *Page II*, as well as existing case law. Existing Commission case law has established, in circumstances factually similar to Claimant’s, that a total knee replacement surgery is compensable. *See e.g. Rupp v. Trusscraft, Inc.*, 2006 IIC 0422; *Van Sickie v. School District #131*, 1987 IIC 0241; and *Smith v. Silver Creek Irrigation*, 1989 IIC 0626. Defendants denied Claimant’s claim for a total knee replacement without any expert medical opinion to rely on. They did not ask Dr. Collins for his opinion until after this case was set for hearing, and did not receive his opinion until three weeks prior to the hearing. This was a clear derogation of the workers’ compensation statute. Under Idaho Code § 72-804, attorney fees are appropriate where the denial or delay in payments is unreasonable. Here, the record establishes that Defendants, for more than one year following the issuance of *Page II*, had no basis for their denial. This is per se unreasonable.

40. Claimant is entitled to attorney fees.

## ORDER

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

1. Claimant is entitled to medical care benefits for the treatment she received from and following November 26, 2001, including her total knee arthroplasty in May 2008.
2. The issue of whether Claimant is entitled to medical care benefits for a total knee arthroplasty on her right knee is not yet ripe for decision.
3. Claimant is entitled to temporary total disability benefits from November 26, 2001 through September 21, 2008.
4. Claimant is entitled to attorney fees.
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 twenty-one (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 fourteen (14) days within which to respond. Claimant's counsel shall reply no later than seven (7) days thereafter. The parties are instructed to address the factors set forth in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The Commission, upon receipt of the foregoing pleadings, shall then review the pleadings and issue an order determining reasonable attorney fees.

DATED this 8th day of September, 2009.

INDUSTRIAL COMMISSION

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

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

Com. Baskin recuses himself from participating  
Thomas P. Baskin, Commissioner

ATTEST:

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

### CERTIFICATE OF SERVICE

I hereby certify that on the 8th\_\_ day of September, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

L CLYEL BERRY  
PO BOX 302  
TWIN FALLS ID 83303-0302

MARK C PETERSON  
PO BOX 829  
BOISE ID 83701

eb/cjh

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