BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE GALL, Claimant, v. NEAL WARREN, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-030217** **IC 2007-041368** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 3, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on February 27, 2009. Richard S. Owen of Nampa represented Claimant. Neil D. McFeeley of Boise represented Defendants. The parties submitted oral and documentary evidence, conducted two post-hearing depositions, and submitted post-hearing briefs. The matter came under advisement on June 3, 2009 and is now ready for decision.

ISSUES

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

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment on October 16, 2007;

2. Whether the left ankle condition for which Claimant seeks benefits was caused by the August 24, 2007 industrial accident;

3. Whether the left ankle condition for which Claimant seeks benefits is due in whole or in part to pre-existing or subsequent injuries or conditions;

4. Determination of Claimant's average weekly wage; and

5. 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).

Pursuant to agreement of the parties, all other issues are reserved pending resolution of these preliminary causation issues.

CONTENTIONS OF THE PARTIES

Claimant asserts that he injured his left ankle on August 24, 2007, while performing landscaping and sprinkler installation work for Employer. Claimant sought medical care and notified Employer two days after the accident. Claimant was diagnosed with an ankle sprain and received conservative care, including work restrictions, until he was released from care on September 19, 2007. The swelling of Claimant's ankle laterally just below the fibula was still present on September 19, and never completely resolved. With the exception of two days immediately following his injury, Claimant continued to work full time at his usual job with some accommodations. With care, Claimant was able to walk on level ground with little discomfort, but walking up or down hills or on uneven ground caused pain and increased swelling of the ankle.

On October 16, following a short emergency trip to Arizona, taken despite Employer's objection, Claimant resumed his duties for Employer. Later that same day, Claimant was

walking up a hill when he stopped short, and he felt something in his left knee. Claimant did not report the incident or seek medical care for his left knee until after Employer terminated him on November 20, 2007. Immediately after being fired, Claimant saw Dr. Terry for his left knee, and several visits later, his still-symptomatic left ankle. When Dr. Terry offered no treatment for Claimant's ankle, he sought out Dr. Burk, who diagnosed Claimant's ankle injury and provided on-going care and treatment, including two surgical procedures. Claimant contends that his August 2007 ankle injury never completely resolved, and resulted in the two surgical procedures. He is entitled to compensation for all of the medical care related to his ankle and time loss from November 20, 2007 until he is medically stable. Claimant asserts that he is entitled to compensation for the medical care he received for his knee, including the MRI and four doctor visits.

Defendants do not dispute that Claimant suffered an industrial accident on August 24, resulting in a left ankle sprain. However, Defendants assert that Claimant's ankle injury resolved within a month, and Claimant continued to work with no visible signs of discomfort up until the day Employer terminated him. Employer argues that Claimant's foot deformity and ligament tear pre-existed the industrial injury, and the tear of the peroneus brevis tendon, which necessitated the surgery, did not occur until sometime after November 2007.

Defendants dispute that Claimant sustained any knee injury as a result of an accident on October 16, 2007. Defendants assert that they received no notice of the October 2007 incident, and therefore had no knowledge of the alleged incident, or any knee injury allegedly resulting therefrom, and saw no evidence of an injury in the month that Claimant worked before Employer terminated him.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Louanne Gall, Burt Burkett, Carla Edwards, and Neal Warren, taken at hearing;

2. Joint Exhibits 1 through 13, admitted at hearing;

3. Defendants' Exhibits 1-9 and 12, admitted at hearing; and

4. Post-hearing depositions of Paul C. Collins, M.D., taken March 26, 2009, and P. Roman Burk, DPM, taken March 25, 2009.

All objections posed during the depositions of Drs. Collins and Burk 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 forty-nine years of age and lived in Nampa with his wife and daughter. He appeared at hearing in a wheelchair, having recently had a second surgery on his left ankle. Claimant was non-weight bearing. A large man to begin with, Claimant has become morbidly obese since his August 2007 industrial accident, such that he was unable to use crutches.

EMPLOYMENT

2. Claimant has had a number of jobs over his work-life, but the majority of his work experience was in landscape and irrigation, with occasional forays into restaurant work and stringing cable. Claimant graduated from high school in Arizona. In 1991, he moved to Eugene, Oregon, then to Idaho in 2004.

3. Claimant first began working for Employer in the spring of 2005, repairing

irrigation systems and performing some landscaping work. Claimant left Employer at the end of the season, and went to work stringing cable. In February 2006, Claimant returned to landscape work and worked briefly for Serenity Landscape before going to work for Senske Lawn and Tree. While working for Senske, Claimant did irrigation work in the summer. In the winter, he drove a snow plow and did shop work.

4. Claimant returned to work for Employer in February 2007. Employer was preparing to start the irrigation season, and there was repair work left over from the preceding fall, along with lining up new contracts and generally getting the business rolling at the start of the season. Throughout the summer, Claimant worked for Employer doing mostly irrigation installation, maintenance, repair, and some landscaping.

AUGUST 24, 2007 ACCIDENT

5. On Friday, August 24, Claimant was one of several workers on a commercial landscaping job. It was nearing the end of the workday, and Claimant was checking the sprinkler system to ensure that all of the newly installed plant material was receiving water. Claimant was stepping to the ground from a low (about twelve inches) retaining wall. ". . . I stepped down on my right foot, it was fine, but as I went to follow with my left, it kind of slipped and I rolled my ankle and I fell down." Tr., p. 30. At the time of the fall and immediately thereafter, Claimant experienced some pain in his left ankle and described it as feeling "spongy" when he walked. Defendants do not dispute that an accident occurred on August 24, 2007, resulting in some injury to Claimant's ankle. Claimant's testimony describing the accident and the mechanism of injury is uncontroverted.

6. After the fall, Claimant finished up and turned off the sprinklers, and drove his work truck back to the vehicle yard. When Claimant got out of the work vehicle, he noticed that

the pain in his ankle had increased. There was no one at the yard and Claimant knew there was no one at the office (a different location), so Claimant got in his car and drove home.

7. Upon arriving at his home, Claimant rested on his bed with his left leg elevated. At bedtime, he noticed swelling on the outside of the ankle below the fibia. Claimant described the swelling at bedtime as looking about the size of a tennis ball. When Claimant awoke on Saturday morning, the swelling had increased to approximately the size of a softball. Claimant spent the day icing his ankle while resting and elevating it as much as possible, but the swelling did not subside, and, in fact, became worse.

8. Claimant became worried when the swelling did not subside with ice, rest, and elevation, and on Sunday morning, August 26, Claimant called Employer and reported the accident and stated that he needed medical care.

9. Claimant presented at the urgent care clinic operated by Saltzer Medical Group located at Mercy Medical North that same day.[1] Claimant was tender to palpation over the anterior fibular (ATF) ligament, and the area was mildly inflamed. X-rays were negative for fracture. Claimant was fitted with a "cam boot," and advised to wear it at all times, to continue treating the ankle with rest, ice, compression, and elevation, and to return to the clinic for follow up in four days. In the meantime, he was restricted to non-weight-bearing activities—no standing, walking, climbing, or squatting.

10. Claimant did not work on Monday, August 27 or Tuesday, August 28. Claimant's ankle remained swollen on Wednesday, August 29, but he could walk on it, so he returned to work and worked the full day. Employer testified that he had received a copy of Claimant's

[1] In the record, the clinic is sometimes referred to as Mercy Medical North, but the clinic is not operated by Mercy Medical Center.

work restrictions, and that Claimant wanted to work—Employer did not *require* Claimant to work. Claimant testified that he could get around okay and felt some pressure to work because it was the busy time of year, and Employer was still annoyed with Claimant for taking time off to go to Arizona. Employer accommodated Claimant by assigning work that was lighter duty than his regular job, but Claimant was clearly working outside of his restrictions. Claimant could not wear the cam boot at work (it was too bulky and his toes were exposed). He testified that he wore a pair of lace-up work boots that provided ankle support. Employer testified that when Claimant returned to work on August 29, he was wearing tennis shoes "because his foot was swollen up." Tr., p. 163.

11. Claimant returned to the clinic and saw Ben Terry, D.O., on Thursday, August 30. He stated he could walk with the cam boot, but extending the ankle without the cam boot was painful. He rated his pain as seven on a scale of ten. Dr. Terry released Claimant to modified duty, defined as *limited* standing, walking, climbing, and squatting. Claimant continued to work full-time, and Employer continued to make accommodations, but Claimant was still working outside of his restrictions.

12. On September 5, 2007, Claimant returned to the clinic for further follow up. He described his condition as unchanged. On exam, Claimant exhibited point tenderness to palpation of the lateral ankle, and there was swelling in the area. Extension and flexion of the ankle and forefoot produced pain. Claimant remained on modified duty with limited standing, walking, climbing, and squatting. Dr. Terry also gave Claimant orders for physical therapy three times per week for two weeks, and directions to return at the end of the two-week period for further follow up. Claimant did not go to physical therapy because, he stated, his work schedule did not permit it. Employer continued to accommodate Claimant, and Claimant continued to

work outside of his restrictions.

13. Claimant returned to the clinic on September 19, and reported he was doing well, and estimated that he was 90% to 100% recovered. The chart note indicates that there was no overlying observable swelling, effusion, or erythema in the ankle, and Claimant demonstrated full range of motion without pain. Dr. Terry released Claimant to full-duty work without restrictions.

14. At hearing, Claimant and his wife both testified that on September 19 he still had some variable swelling laterally below the fibula, about the size of an egg. The swelling would decrease with rest and increase with use, but never completely resolved. Claimant also testified that the doctor told him during the September 19 visit that it would take some additional time for all of the symptoms to resolve. Claimant testified that after September 19, he still had difficulty walking on uneven or hilly ground, and some jobs took him longer to do because he had to take it easy on his ankle.

OCTOBER 16, 2007

15. Claimant continued to work for Employer through the remainder of September and into October. One of the busiest times of year in the landscape business is "blow-out" season, when a compressor is used to blow all of the water out of irrigation pipes and the system shut down so that water does not freeze and damage the lines. There is a limited amount of time to complete this end-of-season work for all of the customers after the weather cools and before the ground freezes. In 2007, Employer had scheduled system closing to start on October 15. On October 12, Claimant received a call that his son had been in a motor vehicle accident in Arizona and was seriously injured. Claimant called Employer and told him that he had to go to Arizona to be with his son. Employer was not happy that Claimant would be gone, as the company was

starting its busiest season. Claimant was gone from October 12 through October 15. The morning following his return from Arizona, October 16, Claimant went to work early to talk to Employer and see if he still had a job. Employer was still a bit put out with Claimant, but put him to work.

16. Claimant testified that on the afternoon of October 16, he was walking up a hill when he saw a small depression or divot on the ground where he was about to place his left foot. Claimant stated that he pulled up short to avoid hurting his ankle, and felt a "bump" or "ding" in his left knee. Tr., p. 55. Claimant testified that he continued to work that day, despite increasing discomfort in his knee caused by getting in and out of the truck, using the clutch to shift gears, and the cold and wet conditions under which he was working. Claimant admits that he never told Employer about hurting his knee on October 16 or at any time thereafter until Employer terminated Claimant. Claimant testified that he did not tell Employer because it was the busy season, and because he was afraid Employer would be mad if he filed another workers' compensation claim.

17. Claimant continued working for Employer until November 20. Employer testified that, after the system closures were completed, Claimant's work became increasingly erratic and unreliable, and Employer became increasingly frustrated with Claimant's performance. On November 20, Claimant and Employer got into a dispute on the telephone about a job that Claimant had worked on, the amount of time it had taken, and how it was billed. In the midst of the conversation, Claimant either dropped the phone or hung up on Employer. Employer called back, and told Claimant to come back to the office to turn in his keys and phone, because he was fired. When Claimant returned to the office with his keys and phone, he and Employer were both a bit hot under the collar and Claimant stormed out. Claimant returned

at the end of the day to collect his paycheck. Claimant and Employer exchanged words during one or both of these encounters, and Claimant stated, "you're going pay for my knee," before "stomping out of the office." Tr., p. 175. Claimant has not worked since November 20, 2007.

MEDICAL CARE

Dr. Terry

18. Claimant presented at the Saltzer Medical Group urgent care clinic that same day, November 20, complaining of pain in his knee that he attributed to a work-related accident some three weeks earlier.[2] He rated his pain as nine on a scale of ten, stating that the pain was worse with walking up hills or stairs. The chart note reflects Claimant's history of left ankle injury, but states that Claimant "[d]enies hip or ankle pain." Ex. 1, p. 4. Physician's Assistant Michael White examined Claimant's knee and appreciated some increased tenderness on the medial joint line of the left lower extremity, but detected no swelling or crepitus. He suspected a medial meniscus tear and ordered x-rays and an MRI. The x-rays were taken at Mercy Medical North the same day, and were negative for fracture or knee joint effusion. The MRI was initially scheduled for the following day, November 21, but was rescheduled at Claimant's request for November 28.

19. Claimant had the MRI on November 28, and returned to the clinic for follow up on December 3. Results of the MRI were negative for medial meniscus tear. On exam, Dr. Terry observed no effusion or erythema, no pain on palpation, adequate range of motion with mild tenderness at the medial joint line and no crepitus. Diagnosis was strain of the left knee.[3]

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[2] Although the chart note mistakenly recorded the date of injury as November 16 or 17, it is clear from the entirety of the note that the incident occurred in October.

[3] The chart note erroneously refers to the diagnosis as "eye strain." This error occurs on occasion throughout the chart notes.

Claimant was fitted with a patellar stabilizer and prescribed physical therapy three times per week for two weeks.

20. Claimant had an initial physical therapy evaluation of his knee on December 5, but did not continue with the physical therapy program as outlined in the evaluation.

21. Claimant returned to see Dr. Terry on December 19. On exam, Dr. Terry noted no effusion, erythema or significant swelling. Claimant brought up the issue of his earlier left ankle injury, observing that his knee hurt if he uses his left ankle wrong. The knee had full range of motion, flexion, and extension, and was "essentially painless." Joint ex. 1, p. 01. Dr. Terry did observe swelling at Claimant's left lateral ankle. Dr. Terry applied a support or brace to Claimant's left ankle, and provided no further treatment for the knee.

Dr. Burk

22. On January 4, 2008, Claimant presented at the offices of P. Roman Burk, DPM, at Foot and Ankle Medical Center. Claimant provided the history of his ankle condition since the August 2007 accident. On exam, Dr. Burk's findings included:

- Mild low-grade edema in the left ankle;
- A cavovarus defect of Claimant's left foot;
- Significant limitation of eversion in the subtalar joint;
- Limited range of motion at the ankle joint;
- Significant pain on end range of motion to dorsiflexion of the left ankle;
- Point tenderness over the calcaneofibular ligament and anterior talofibular ligament;
- Significant joint line pain over the anterior margin of the left ankle; and
- Pain with plantar flexion and dorsiflexion at the end range of motion.

Dr. Burk diagnosed cavovarus foot deformity and chronic ankle ligament instability. Dr. Burk ordered an MRI of the ankle. Additionally, he placed Claimant in a lace-up brace with lateral ankle stabilizer, and restricted him to partial weightbearing and decreased activity.

23. An MRI of the left ankle, done January 10, 2008, showed an osteochondral contusion, a tear of the calcaneofibular ligament, and an abnormal peroneus brevis tendon consistent with previous partial tear or tendinosis. On February 27, 2008, Dr. Burk and Claimant discussed surgical reconstruction of the left ankle, and Dr. Burk noted that he was waiting for Surety approval before scheduling lab work and other pre-operative procedures.

IME

24. In late February, Surety sent Claimant to Paul Collins, M.D., an orthopedic specialist, for an independent medical evaluation (IME) of Claimant's left knee and ankle. Dr. Collins reviewed the January 10 MRI, took a history, and examined Claimant. In his report, dated February 25, 2008, he concluded:

- Claimant's current diagnosis is chronic instability of the left ankle. Claimant may have sustained a knee sprain, but if so, it has resolved;
- On a more probable than not basis, and based on the MRI and Claimant's reported history, his current ankle condition is related to the inversion sprain of August 2007;
- Stabilization of the left anterior talofibular ligament, as recommended by Dr. Burk, would be an appropriate treatment; and
- Claimant would have some temporary restrictions both before and after the surgery, but should be able to return to his time-of-injury employment following reconstruction of the ankle.

25. Dr. Burk received a copy of Dr. Collins' report and agreed with his findings.

26. Employer also received a copy of Dr. Collins' report. In response, Employer submitted a lengthy letter taking exception to much of the history that Claimant had provided to Dr. Collins concerning both injuries and which, in part, informed Dr. Collins' findings. Some of the issues raised in the letter included:

- Inconsistencies in the mechanism of injury of the ankle;
- When Claimant returned to work following the ankle injury;
- Claimant's footwear following the ankle injury;
- That a ligament injury was not mentioned in the initial diagnosis;
- Everything pertaining to the alleged knee injury;
- That neither Employer nor co-workers saw Claimant limping; and
- That Claimant's torn ankle ligament could have happened at the time of the knee injury.

27. Surety forwarded Employer's letter to Dr. Collins and asked him to review the information contained in the letter and determine whether it changed his opinions. Dr. Collins responded to Surety, essentially stating that the two histories were "quite different," and depending upon which one was correct, it could change his causation opinion regarding the ankle injury. *See,* Joint ex. 6, p. 002.

28. A review of the record ultimately explains, contradicts, or discredits much of what Employer stated in his letter to Surety. Inconsistencies in the chart notes regarding the mechanism of injury are the result of inartful notation on the part of some providers. Looking at all of the chart notes, and comparing them with Claimant's version of events, it is evident that Claimant's injury occurred when he stepped off a rock that formed part of a retaining wall and

his left ankle rolled (not "twisted") to the outside. Ultimately, both Drs. Collins and Burk were aware of this mechanism of injury.

29. Dr. Collins misstates the facts when he writes in his IME report that Claimant had *not* returned to work until September 5. He had not been *released* to return to work, but in fact, Claimant had been working full time and in contravention of his restrictions, since August 29. Employer was aware of Claimant's restrictions, but it was not clear that Claimant was aware of his restrictions.

30. In other respects, Employer's testimony at hearing contradicted his statements in the letter. In his letter, Employer stated that Claimant worked his normal job with no complaints from September 19, 2008, until his termination November 20, 2008. At hearing, Employer testified that, while Claimant continued in his regular job during that time period, Employer made a number of accommodations so that Claimant could continue working (sending Claimant on easier calls, providing a helper if digging was required, etc.). Employer also testified that Claimant complained about aches and pains all the time, as did most workers who were Claimant's age and whose jobs were labor-intensive. Employer was also aware that Claimant self-accommodated by working more slowly and avoiding certain types of jobs. Employer specifically complained that, after the ankle injury, Claimant was taking much too long to perform many jobs.

31. In his letter to Surety, Employer denied that Claimant wore any kind of protective boot on his left ankle, stating that Claimant always wore tennis shoes. Claimant told his doctors, and testified at hearing, that he wore a lace-up work boot that provided support and compression to his injured ankle. Given that this point did not become an issue until many months after Claimant's termination, the accuracy and reliability of testimony that Claimant wore tennis shoes

regularly after August 24 is questionable. In light of the consistency demonstrated by Claimant regarding the events of August 24 and his subsequent treatment, Claimant is the more credible witness on the topic of footwear.

32. Employer was also troubled by the fact that Dr. Terry had not felt it necessary to order an MRI of the ankle, nor had he even suggested a possible diagnosis of a torn ligament or tendon during the time he treated Claimant for his ankle injury. Defendants explored this issue during the deposition of Dr. Burk. The premise of their questioning was whether Dr. Terry overlooked evidence of a torn peroneus brevis tendon, or whether the tear occurred after Dr. Terry released Claimant from care. Dr. Burk refused to accept the premise that these were the only possible options, and refused to speculate about how other facts, not proven, might change his opinion. But the subtext in his testimony was that, in the absence of any evidence of another acute injury, Dr. Terry either missed the torn tendon, or missed the seriousness of the initial injury which, when left untreated, eventually resulted in the substantial tear in the tendon.

33. Finally, Employer raised a number of issues concerning the left knee claim, including the mechanism of injury, the failure to report, the number of hours Claimant worked after the alleged knee injury, and if and how the ankle injury and the knee injury were related. The letter also asserted that Claimant neither limped nor complained about his knee in the month between the alleged injury and his firing. Many of the issues Employer raised regarding the knee claim are well taken. However, trial testimony revealed that Claimant often complained of aches and pains without identifying a specific injury, and that Carla Edwards, who repeatedly stated that Claimant was not limping the day he was fired, was not in a position to observe Claimant's entrance or exit from the premises. Finally, Employer's assertions about the connection between the ankle injury and knee injury are merely his opinions, formed on the basis of Claimant's

unproven belief that somehow his knee injury affected his ankle injury. None of the medical professionals involved in Claimant's care suggested any causal relationship between the two injuries.

34. Ultimately, the contents of the letter do not provide a reliable basis on which to formulate or reconsider a causation opinion.

DR. BURK, REDUX

35. Dr. Burk continued to treat Claimant conservatively for several more months. By early June, both Dr. Burk and Claimant felt they had exhausted their non-surgical options, and began discussing surgical options despite the Surety's denial of the claim.

36. Dr. Burk was concerned about Claimant's size and weight as it might affect the outcome of the surgical repair. Additionally, Claimant had untreated hypertension, which Dr. Burk wanted under control before surgery. On August 6, 2008, Dr. Burk performed arthroscopic surgery on Claimant's left ankle. He found several cartilaginous defects and moderate synovitis, all of which were debrided and cleaned. Dr. Burk repaired a seven-centimeter (2.7559 inch) longitudinal tear in the peroneus brevis tendon, and he reconstructed and reattached the calcaneal-fibular ligament using a bone anchor. Claimant had an uneventful postoperative course.

37. Claimant showed marked improvement in his ankle following five months of physical therapy and rehabilitation, but was still experiencing chronic pain at the front of his ankle caused by an attenuated and weak ATF ligament. Together with Claimant's cavovarus rear-foot deformity, Dr. Burk was concerned about Claimant's long-term prognosis. He performed a second surgery on January 14, 2009, during which he repaired the ATF ligament

and corrected the rear foot deformity.[4] Claimant was still recovering from the last surgery at the time of the hearing. He was still non-weightbearing and appeared at the hearing in a wheelchair because his bulk made using crutches difficult.

CAUSATION

Dr. Burk

38. By letter dated February 16, 2009, and in his March 25, 2009 deposition, Dr. Burk opined that the need for Claimant's two ankle surgeries was more likely than not the result of the August 2007 accident. In reaching this conclusion, Dr. Burk cited a number of factors, including:

- Claimant's description of the mechanism of injury to his left ankle was consistent, and the impact on the ankle structures from an event of the type Claimant described was more than sufficient to cause the injury that Dr. Burk confirmed during surgery;
- Despite Employer's belief to the contrary, there was no evidence of a pre-existing condition or another acute injury to the ankle subsequent to the August 2007 accident and injury;
- Claimant's build and the cavovarus deformity of his left foot predispose him to this type of injury;[5]
- Inversion sprains of the ankle can include additional injuries that can be either acute or secondary to the original injury; a sprain is a tearing of ligaments; torn ligaments result in

[4] Dr. Burk admitted that he had not been aggressive enough in his first surgery, and should have addressed the ATF ligament at that time. Pain over the ATF ligament was one of Claimant's earliest observed symptoms, and Dr. Collins had also recommended repair in his IME report.

[5] A predisposition to a particular type of injury should not be confused with a pre-existing condition.

laxity of the joint complex and affect the function of the ankle and can often result in additional injury when put to continuous use;

- Surgical findings confirmed the diagnosis and were consistent with a year-old injury that was essentially untreated.

Dr. Burk concluded his letter by noting:

> [Claimant's] injuries to his ankle have been numerous and extensive. It is my professional experience that [Claimant's] injuries would have occurred during a mechanism of injury similar to what he described his work place injury to be. Some of the symptoms and problems would have also been the result of insufficient down time from which to heal appropriately.
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> In conclusion, [Claimant's] injury did occur while at work. Significant structural damage to the ankle was present and has needed treatment. Based upon [Claimant's] history, the accompanying documentation, my physical exam and diagnostic studies, it is my professional opinion that [Claimant's] original industrial accident is the causative factor for the injuries I have been treating.

Joint ex. 7, p. 003.

Dr. Collins

39. Dr. Collins' IME report concluding that Claimant's ankle injury was the result of his August 2007 work accident, and his subsequent letter expressing concern about Claimant's history and mechanism of injury, are discussed *infra*. Dr. Collins was deposed by Defendants on March 26, 2009. At bottom, Dr. Collins' deposition was a longer version of his April 2008 letter to Surety: If Claimant's history was correct, then the need for the ankle surgery relates back to the August 2007 injury; if Employer's history was correct, then a second event may have caused the injury that led to the surgery.

AVERAGE WEEKLY WAGE

40. In the first notice of injury or illness prepared by Defendants, they asserted that Claimant had an average weekly wage (AWW) of $560 at the time of the August 2007 injury.

Employer based this AWW on a pay rate of $14.00 per hour over a forty-hour week. In his briefing, Claimant asserted that the Commission should accept Defendants' admission of Claimant's $560.00 AWW. In response to a request from Surety, Employer provided wage information stating that, in the thirteen weeks preceding the August injury, Claimant earned $7,196.00 (Defendants' ex. 8). This works out to an AWW of $553.54. Finally, Defendants' ex. 7 shows that, between May 21, 2007 and August 20, 2007 (a period of thirteen weeks and one day [92 days]), Claimant's gross pay was $10,680.00. This works out to an AWW of $812.61 (10,680/92 x 7). The Referee finds that the payroll ledger offered into evidence by Defendants is the best record of Claimant's actual earnings in the thirteen weeks preceding his accident, and calculates Claimant's AWW to be $812.61.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

41. A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. The claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. His proof must establish a probable not merely a possible connection between cause and effect to support his contention that he suffered an accident. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985).

42. More specifically, 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.

Knee

43. The Referee finds that Claimant has failed to carry his burden of proving that he sustained an injury to his knee as the result of an accident on October 16, 2007. That is not to say that Claimant fabricated either the knee injury or how it occurred. But the known facts surrounding the claim—Claimant's failure to report the injury, the tension between Claimant and Employer on and around October 16, the dispute between Claimant and Employer that led to his firing on November 20, 2007, and a lack of objective medical evidence of an injury—make it difficult for Claimant to satisfy his burden of proving a knee injury as a result of an accident on October 16, 2007.

Ankle

44. For the reasons discussed below, the Referee finds that Claimant has met his burden of proving that he sustained an injury to his left ankle on August 24, 2007, which injury never completely resolved and, ultimately, led to the need for two surgical procedures.

45. First, there is no real dispute that Claimant sustained an inversion injury to his left ankle on August 24, 2007. Employer initially tried to place blame for the injury on Claimant—a matter of no legal consequence even if true. Then there was the letter that Employer sent that caused Dr. Collins to revisit his IME opinion. As discussed previously, the information contained in the letter was, in large part, unreliable, unsupported, or inconsequential. Certainly

the letter alone was not sufficient grounds for Dr. Collins to change his initial opinion. Despite these retrenchments, Defendants ultimately admitted that there was an accident and an injury.

46. The real dispute in this proceeding centers on the condition of Claimant's ankle from September 19, 2007 until January 10, 2008, when the MRI showed significant injury to the ankle joint and surrounding tendons and ligaments. Claimant asserts that his ankle injury was still symptomatic on September 19, when Dr. Terry released him to return to work without restrictions, and remained symptomatic to varying degrees until Dr. Burk performed the first surgical repair in August 2008. Defendants assert that Claimant's initial ankle injury was completely resolved by September 19, 2007, and any ankle complaints thereafter were due to a new, non-industrial injury.

47. Defendants' position finds little support in the record. There was a two-month period, from September 19 to November 20, 2007, for which there is no medical documentation of Claimant's ankle problem. During this time, Claimant had no reason to seek additional medical care, because he was told that, when released from care, it could take up to two months for his ankle injury to completely resolve. The next time Claimant had reason to seek medical care was on November 20, 2007, when he returned to P.A. White at Saltzer Medical Clinic with the complaint about his knee. The chart note from that visit is at the heart of the causation dispute that must now be resolved. The notes touch lightly on Claimant's recent history of an ankle injury, and then describe in some detail the origin of the knee complaint. At the conclusion of the patient history section of the note, Mr. White wrote: "denies history of trauma to left knee. Denies hip or ankle pain." Ex. 1, p. 4. At hearing, counsel for both parties questioned Claimant at length regarding the part of the note in which Claimant was alleged to have denied having any ankle pain. Claimant repeatedly responded that when he presented at the

clinic on November 20, 2007, he advised P.A. White about the prior ankle injury, including that the ankle still hurt and was still swollen, but that now his knee was hurting as well. Claimant categorically denied having told P.A. White that he had no ankle pain. Claimant further testified that even though he raised concerns about the on-going ankle problem to P.A. White, Mr. White did not examine Claimant's ankle, but remained focused on the potential for a meniscus tear in the knee. The Referee found Claimant to be a credible witness and reliable historian. Neither party deposed P.A. White, so we have no explanation of the chart note. In particular, the Referee finds it odd that P.A. White observed that Claimant denied knee trauma when the reason he was at the clinic was the result of a *knee injury*, which he described in some detail. By Claimant's third visit to the clinic on December 19, 2008, the MRI had ruled out a meniscus tear or other acute injury and Claimant's attention focused once again on his injured ankle. Dr. Terry's chart note for that date confirms that Claimant had swelling of the left lateral ankle. The record is entirely devoid of any probative evidence that Claimant sustained any new ankle injury between September 19 and December 19, 2007.

48. There is substantial evidence that Claimant continued to function as normally as possible despite the ankle injury and the attendant pain and swelling, which may well have exacerbated the initial injury. Claimant's ankle complaints, as documented in the records of Dr. Terry, Dr. Burk, and Dr. Collins, are consistent as to the description of the accident, location of the pain and swelling, and what activities made it worse and what treatment made it better. Most importantly, Dr. Burk's findings during surgery were consistent with an inversion injury of the type experienced by Claimant that had essentially remained untreated for a period of time.

49. Both specialists involved in Claimant's care agree as to the causal relationship between the need for surgical intervention and the August 2007 accident, so this proceeding does

not involve a "battle of experts" that requires the Referee to make findings about who is the most credible. Yet, the Referee feels compelled to note that Dr. Burk was a particularly credible and persuasive witness. While Defendants remarked on Dr. Burk's relative inexperience, the Referee was impressed with his thorough and straightforward explication of ankle anatomy and mechanics. His explanation of how ankle injuries occur and the effect the injuries have on the internal structures of the ankle were clear and rational. On Claimant's first visit, Dr. Burk was able to diagnose Claimant's injury, and that diagnosis was borne out by the operative findings. Dr. Burk does not yet have years of clinical experience, but he more than makes up for it with the recency of his knowledge and his specialized focus on foot and ankle care.

MEDICAL CARE

50. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

51. Having found that the treatment Claimant received for his ankle after his initial release from care on September 19, 2007, was causally related to his industrial injury, he is entitled to compensation for all unpaid medical care that is related to his ankle. Defendants' ex. 1, p. 1 is a breakdown of benefits paid to Claimant by Surety. It appears that Surety paid for the

care that Claimant received for his ankle through September 19, 2007. Thereafter, Surety paid for the January 4, 2008 visit to Dr. Burk, the January 10, 2008 MRI, and the January 15, 2008 visit to Dr. Burk. Of course, Surety also paid for the services of Dr. Collins. All remaining costs associated with Claimant's care, including the two ankle surgeries, the services of Dr. Burk, hospital charges, medications, physical therapy services, and the cost of assistive or therapeutic devices (wheelchair, splints, braces, crutches, etc.), are compensable.

52. To the extent that Claimant or any private insurer paid for medical services related to Claimant's left ankle during the period that the claim was denied is entitled to reimbursement pursuant to *Neel v. Western Construction, Inc.*, ____Idaho _____, ____P3d _____ (2009), ACO IIC 1207, 1211:

> Any medical bills incurred during the time from when the accident occurred to the time when the claim was deemed compensable fall outside the workers' compensation regulatory scheme and may not be reviewed for reasonableness and must be paid in full by the surety.

TTD/TPD BENEFITS

53. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Compan*y, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Defendants paid Claimant TTD benefits from January 4, 2008 through June 15, 2008, a period of twenty-three weeks and three days. This works out to a weekly benefit of $375.20.[6] As

[6] It is not clear how Surety calculated Claimant's TTD benefits during this period. Working backward from the total TTDs paid, Surety used a compensation rate of $375.20. If Surety had used the AWW that it claimed for Claimant on the first notice of injury ($520.00), then the compensation rate should have been $348.40 per week (67% of $520.00). If Surety had used the figure supplied by Employer in its letter of February 11, 2008, then the AWW would have been

discussed elsewhere in these Findings, the Claimant's AWW was actually $812.61. Because this wage was quite high, the compensation rate is tied to the average state wage (ASW) and, in this case, is $525.60 (90% of the ASW for the year the injury occurred). Using the correct compensation rate for the period for which Surety paid TTD benefits, Claimant should have received $12,314.57. Surety owes Claimant back TTD benefits of $3,523.66. For the period from June 16, 2008 through December 31, 2008, Claimant is entitled to TTDs totaling $14,942.06. Effective January 1, 2009, Claimant's compensation rate increases to $572.40, but he only gets paid at that rate for two days ($163.54). Starting January 3, 2009, the compensation rate drops to $426.12 (after 52 weeks of TTD benefits, compensation rate drops to 67% of the current year's ASW). TTD or TPD benefits owed from January 3 through the date of hearing, February 27, are $3,348.08. Surety is obligated to continue payment of TTD benefits at the weekly rate of $426.12, until Claimant is medically stable or until January 1, 2010, when the rate is adjusted based on the 2010 ASW.[7]

CONCLUSIONS OF LAW

1. Claimant failed to carry his burden of proving that he suffered a left knee injury from an accident arising out of and in the course of employment on October 16, 2007.

2. Claimant's left ankle injury and subsequent need for surgical intervention, was more likely than not caused by the August 24, 2007 industrial accident.

3. Defendants failed to prove that it was more likely than not that Claimant's left ankle condition was due in whole or in part to pre-existing or subsequent injuries or conditions.

$553.54 (7,196/13 = 553.54) and the compensation rate would have been $370.87 per week (553.54 x .67).

[7] At the time of the hearing at the end of February 2009, Claimant was six weeks, post surgery, and was still in a cast and non-weight bearing on the ankle.

4. Claimant's average weekly wage for purposes of calculating benefits is $812.61.

5. Claimant is entitled to medical benefits for his left ankle injury, as mandated by Idaho Code § 72-432, and as more particularly set out in Paragraphs 46 and 47, *supra.*

6. Claimant is entitled to TTD benefits through the date of hearing in the amount of $21,977.34; thereafter, Claimant is entitled to income benefits at 67% of the ASW as adjusted annually each January 1 until he has been deemed medically stable.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 9 day of October, 2009.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE GALL, Claimant, v. NEAL WARREN, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-030217** **IC 2007-041368** **ORDER** Filed: November 3, 2009

Pursuant to Idaho Code § 72-717, Referee Rinda Just 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 failed to carry his burden of proving that he suffered a left knee injury from an accident arising out of and in the course of employment on October 16, 2007.

2. Claimant’s left ankle injury, and subsequent need for surgical intervention, was more likely than not caused by the August 24, 2007 industrial accident.

3. Defendants failed to prove that it was more likely than not that Claimant's left ankle condition was due in whole or in part to pre-existing or subsequent injuries or conditions.

4. Claimant's average weekly wage for purposes of calculating benefits is $812.61.

5. Claimant is entitled to medical benefits for his left ankle injury, as mandated by Idaho Code § 72-432, and as more particularly set out in Paragraphs 46 and 47, *supra.*

6. Claimant is entitled to TTD benefits through the date of hearing in the amount of $21,977.34; thereafter, Claimant is entitled to income benefits at 67% of the ASW as adjusted annually each January 1 until he has been deemed medically stable.

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

DATED this 3 day of November, 2009.

INDUSTRIAL COMMISSION

_____
R.D. Maynard, Chairman

/s/_____
Thomas E. Limbaugh, Commissioner

/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of November, 2009, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653-0278

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

djb /s/_____