BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID CURRIN, Claimant, v. CLEARWATER PAPER CORPORATION, Employer, and WORKERS COMPENSATION EXCHANGE, Surety, Defendants.	**IC 2010-031121** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed June 30, 2015**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston on December 3, 2014. Claimant was present and represented by Michel T. Kessinger of Lewiston. Bentley G. Stromberg, also of Lewiston, represented Employer/Surety. Oral and documentary evidence was presented and the parties took four post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on May 18, 2015.

ISSUES

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

1. Whether Claimant suffered an industrial accident causing injury; and, if so,
2. Claimant's entitlement to the following benefits:

(a) Medical;

(b) Total temporary disability (TTD);

(c) Permanent partial impairment (PPI); and

(d) Permanent partial disability (PPD);

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate; and

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

CONTENTIONS OF THE PARTIES

Claimant contends that the need for his right knee total arthroplasty (TKA) was a result of his industrial accident and he should be reimbursed the associated costs, including TTD benefits during his period of recovery. His industrial accident has rendered him totally and permanently disabled. Defendants acted unreasonably in denying medical and TTD benefits and Claimant is, therefore, entitled to an award of attorney fees.

Defendants assert that the need for Claimant's TKA was not from his industrial accident, but rather from a right knee ACL repair in 1995 and its associated degeneration. Defendants have paid all appropriate benefits up until the time of Claimant's TKA. Defendants relied on medical evidence in terminating Claimant's benefits; therefore, they have not acted unreasonably. Claimant is not totally and permanently disabled, as there are jobs available to him in his labor market, including returning to work for Employer.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant and Employer's safety manager David Church.

2. Claimant's Exhibits (CE) 1-13.

3. Defendants' Exhibits (DE) A-U.

4. The post hearing depositions of: John M. McNulty, M.D., taken by Claimant on December 23, 2014; Nancy J. Collins, Ph.D., and Rodde D. Cox, M.D., taken by Defendants on February 11, 2015; and Douglas N. Crum, CDMS, taken by Claimant on February 12, 2015.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 53 years of age and residing in Lewiston at the time of the hearing. He attended Lewiston Senior High and graduated in 1980. Claimant got Cs and Ds and had particular difficulty with math. Claimant can read and write and do basic math. He has had no formal education since high school.

2. Claimant was in the Air Force from 1980 to 1983. He received training in plumbing, but mainly performed routine maintenance work.

3. After Claimant's stint in the Air Force, he worked at a concrete plant in California as a general laborer for about a year-and-a-half before moving back to Idaho where he made furniture for a couple of years. Claimant then went to work for a plumbing company as an apprentice plumber for about a year. After that, Claimant worked as a "prep and finish person" for a boat trailer manufacturer for less than a year.

4. Claimant began his employment with Potlatch[1] on September 1, 1989. About four years after being "trained to do all sorts of things," Claimant won a bid to work in the napkin department as a unit leader until his injury in October 2010. Part of Claimant's job duties included making adjustments to the napkin paper machine that required him to climb up four or five ladder steps at least 100 times a week. Claimant's job also required him to stand almost constantly, as well as crawl on, under, and around the napkin machine to make adjustments and repairs frequently throughout his shift.

5. At the time of his industrial injury, Claimant was making approximately $20.65 an hour. He received medical, dental, and vision insurance, as well as paid vacation for six weeks per year. Claimant also received three "floater" days a year to be taken whenever he wanted.

6. On October 7, 2010, Claimant suffered an accident he described this way at hearing:

> I was running my machine. I was at the packing station, packing product into the - - the cardboard boxes to send up the line. And I looked over my shoulder, and there was a jam coming out of the wrapper. The packs were jammed up coming out of the wrapper.
>
> So I briskly walked around my computer station to go to the jam, and my knee just popped and I had severe pain.

H.T., p. 33.

7. In 1994, Claimant injured his right ACL in a fight with his brother that resulted in an ACL reconstruction. Claimant testified that he recovered from that surgery without any problems and that it, in no way, interfered with the ability to do his job.

8. Claimant immediately reported his accident to his supervisor. He continued to work, but his knee pain became unbearable.

[1] Potlatch was Clearwater Paper Corporation's predecessor in interest.

9. About a month after his accident, Claimant first sought medical attention for his right knee injury. On December 8, 2010, Claimant found his way to Marvin Kym, M.D., an orthopedic surgeon. Upon examination and review of a right knee MRI, Dr. Kym diagnosed an acute ACL tear and acute medial and lateral meniscus tears.

10. On January 27, 2011, Dr. Kym performed a right knee arthroscopy with ACL reconstruction and a partial medial meniscectomy.

11. Claimant did not recover as Dr. Kym had expected, even after extensive physical therapy. Claimant attempted a gradual return to work at Employer's in August 2011, but his knee was still symptomatic: "Well, it [my right knee] just continually ached. It was - - it was swelling up on me. It just - - it just hurt. It hurt to stand on it, hurt to climb ladders. It hurt - - it hurt to do anything." HT, p. 37.

12. Claimant returned to see Dr. Kym on April 17, 2013 for his increasing right knee pain. X-rays taken at that time demonstrated bone-to-bone changes in the patellofemoral joint posterior medial compartment, as well as spurs and retained hardware from his two prior ACL repairs. An MRI showed ". . . degenerative meniscal, but osteoarthritis with thinning of the femoral cartilage and probable failure of his ACL graft." CE 6, p. 87. Dr. Kym diagnosed degenerative joint disease of the right knee secondary to previous ACL reconstructions. He recommended a right TKA which was accomplished on April 24, 2013. Claimant testified that Dr. Kym told him that the cause for his TKA was a combination of his two accidents and resultant surgeries. Unfortunately, Claimant still did not get the results he had hoped for.[2] He attempted to return to work after his TKA in

[2] Claimant's subjective complaints regarding right knee pain are in conflict with a February 5, 2014 office note wherein Dr. Kym referred to ". . . in what appears to be a well-fixed, good functioning knee." CE 5, p. 109. Dr. Kym has not recommended any additional treatment for Claimant.

September 2013, but he only lasted a day-and-a-half due to right knee pain.[3] He has not or worked or looked for work since that time as he does not believe there is any job he can do given Dr. Kym's restrictions of limited standing, crawling, stooping, etc., and his knee pain.

13. Surety denied coverage for the TKA, which Claimant and/or his medical insurance paid for. He has not received any time loss benefits.

14. Claimant is currently receiving Social Security Disability Insurance (SSDI) benefits in the monthly amount of $1,927, plus a medical retirement pension in the monthly amount of $2,100 or roughly $48,000 total per year. This is about $500 more than he made in 2012, his last full year with Employer.

15. Claimant has no intention of going back to work, anywhere, and does not intend to look for work. He would lose his SSDI and medical retirement benefits if he returned to work, which further incentivizes his resolve to remain unemployed.

DISCUSSION AND FURTHER FINDINGS

Accident/injury

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

[3] Claimant testified that, for some unknown reason, Employer assigned him a different napkin machine upon his return to work that was ergonomically harder to operate than his pre-TKA machine. For example, the ladders were steeper and harder to access than on his original machine.

body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant 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). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

A pre-existing disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983).

16. Defendants do not contend that Claimant did not suffer an accident causing injury on October 7, 2010; rather, they dispute whether the treatment Claimant received (his TKA) was reasonably related thereto. The Referee finds that Claimant suffered an injury-causing accident, as alleged.

Medical care

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an industrial injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission

is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant 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, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and/or unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

The IMEs

Dr. Cox

17. Defendants retained Rodde D. Cox, M.D., who performed an IME of Claimant on October 28, 2011. Dr. Cox is a physician in physical medicine and rehabilitation. He is qualified to testify as an expert in this matter.

> So in physical medicine and rehabilitation, we sort of wear two hats. The physical medicine hat we wear is dealing with people with musculoskeletal type injuries, joint pain, neck pain, low-back pain. Typically, we approach that with a conservative standpoint. The rehabilitation part of the specialty is working with people with catastrophic injuries, like traumatic brain injuries, strokes, spinal cord injuries, working with a team of different providers to try and get them going again. We work with people, as I mentioned, with multiple complaints, brain injury, strokes, amputations, joint replacement, those kind of things.
>
> Q. (By Mr. Stromberg): Okay. So you work with people with knee injuries?
>
> A. Yes.
>
> Q. And you work with people who have knee replacements?

A. Yes.

Q. And what type of work do you do with them?

A. So I see people with knee injuries, both sort of acutely and chronically. I'll see people who have acute knee injuries either on the job, or as a result of some sort of injury, and I'll diagnose and treat them. If appropriate, make referral to my surgical colleagues for surgical intervention if they need it.

And then I also see those folks in a rehabilitation situation, if they've had surgical intervention. Most cases I would see them if they'd had joint replacement, see them for rehabilitation and getting them moving again after a joint replacement.

Dr. Cox Depo., pp. 4-5.

18. Dr. Cox knew Claimant because they both attended the same junior and senior high schools. Upon examining Claimant and reviewing pertinent medical records, Dr. Cox diagnosed "…a right knee ACL tear and a medial meniscus tear, and that he had undergone reconstruction of that in the setting of a previous right knee ACL tear, and I also felt that he had right knee degenerative joint disease. *Id.*, p. 7. Dr. Cox related Claimant's right knee ACL and medial meniscus tears to the subject accident.

19. Dr. Cox did not relate Claimant's degenerative arthritis to his industrial accident:

Well, I would say that for a couple of reasons. Number one, he had imaging studies early on that showed the degenerative arthritis to be present. We don't anticipate that the degenerative arthritis would develop in that short a period of time.

He, at the time of his surgery with Dr. Kym, had what I would consider fairly extensive degenerative arthritis, in particular in the patellofemoral joint. I believe his surgery was something like three months after his injury. And we would not expect that degree of degenerative change to develop in that period of time.

Id., pp. 78.

20. Claimant again saw Dr. Cox on March 15, 2013. An MRI revealed that Claimant's ACL repair was intact with some osteoarthritis in his knee joint. The MRI

raised suspicion of a tear of the posterior horn of the medial meniscus. Dr. Cox related the tear to degenerative processes as there was no evidence of a subsequent injury.

21. Consistent with his October 2011 IME, Dr. Cox opined that the need for the January 2011 TKA was unrelated to Claimant's industrial accident/injury:

> In my opinion, I think that Mr. Currin had substantial degenerative arthritis in his knee prior to the October injury, and he'd had a significant ACL repair. And I don't feel that the major - - that the need for surgery was related to the ACL tear that he had in October.
>
> Q. (By Mr. Stromberg): In your opinion, if he had not had that preexisting degeneration, would he have had to have a total knee replacement?
>
> A. No.
>
> * * *
>
> Q. (By Mr. Kessinger): In your October 28th, 2011 report you wrote that Mr. Currin's ongoing knee complaints were likely related to his underlying degenerative arthritis. How did you arrive at that conclusion?
>
> A. Well, I arrived at that conclusion - - so he'd had the surgical repair of his ACL, and it looked like the repair was solid, and his exam suggested that the repair was solid. So I thought he'd had a very reasonable surgery and successful surgery, yet he was still having ongoing pain complaints.
>
> And based on those ongoing pain complaints, and the fact that we knew he had underlying degenerative arthritis, that's how I came to that conclusion.

Id., pp. 13, 17-18.

22. Dr. Cox testified that the restrictions imposed on Claimant by Drs. Kym and McNulty were more based on Claimant's subjective complaints than objective evidence. The only restriction Dr. Cox would impose would be to avoid jumping onto hard surfaces.

Dr. Kym

23. Claimant's treating surgeon responded to a letter from Claimant's counsel on August 12, 2013 stating that Claimant's industrial accident contributed 30% to the need for Claimant's TKA. In an office note of that same date, Dr. Kym indicated that 60% of the need for the TKA was due to Claimant's previous ACL repair; he did not indicate what the remaining 10% represented.

24. On September 26, 2013, Dr. Kym permanently restricted Claimant from prolonged standing on concrete floors, using steps or ladders, and no kneeling or squatting. Dr. Kym also agreed with the restrictions imposed by Dr. McNulty.

Dr. McNulty

25. Claimant retained John M. McNulty, M.D., a board certified general orthopedic surgeon, to address causation issues. Dr. McNulty has active orthopedic practices in both St. Maries and Williston, North Dakota. His CV may be found as Exhibit 1 to his deposition transcript. He is qualified to testify as an expert in this matter

26. Dr. McNulty performed an IME of Claimant's right knee at his attorney's request on October 2, 2013. He conducted a physical examination of Claimant where he found swelling and:

> He was still having some problems. He had an antalgic gait. His gait was abnormal. He had quite a bit of atrophy. Mr. Currin was almost six months from his surgery on his total knee and had almost 2 centimeters of atrophy on that right leg and - - the right thigh and a centimeter in the calf. That's significant atrophy. He also had weakness in his leg.

Dr. McNulty Deposition, pp. 9-10.

27. When asked what the significance of the atrophy was, Dr. McNulty testified:

> Well, atrophy occurs from disuse. So, it's an objective physical exam finding. For instance, a patient can walk and try to fake their gait. Well,

> they can't fake atrophy. If the leg isn't working properly, the muscle is going to shrink; if the leg is working properly, the muscle circumference is going to be the same as the other side. For instance, if a patient is malingering, "Oh, my knee hurts, my knee hurts," and they're out doing other activities when they're not being observed, then the muscle would be the same.

Id., p. 10.

28. Based on Claimant's history and the lack of relevant medical records to the contrary, Dr. McNulty concluded that Claimant's right knee did not limit in performing a demanding job before his last injury.

29. After examining Claimant and taking his history as well as reviewing pertinent medical records, Dr. McNulty diagnosed Claimant with a prior ACL reconstruction and partial medial meniscectomy and a right total knee replacement with residual right thigh atrophy and weakness.

30. The only thing "unusual" about Claimant's TKA is that he failed to get better. Dr. McNulty was unable to provide an explanation for why that is the case. "About 15% of the people who get total knees have some form of dissatisfaction; not that 15% do as poorly as Mr. Currin, but it's certainly not that uncommon." *Id.*, p. 14. Dr. McNulty went on to testify that, while a bad outcome may not be uncommon, it is still unexpected.

31. Regarding causation, Dr. McNulty testified:

> Q. (By Mr. Kessinger): Do you have an opinion, based upon a reasonable degree of medical probability, about what caused Mr. Currin's need for a right total knee replacement?
>
> A. He had permanent aggravation of preexisting osteoarthritis as a direct result of his work-related injury on 10-7-2010.
>
> Q. And in your opinion, was that total knee replacement needed solely because of that 2010 knee injury?
>
> A. In my report, I apportioned 50% to preexisting, 50% to the injury. Mr. Currin was operating - - was functioning at a pretty high level prior to his injury, from what he was doing at work. So, the injury certainly precipitated the need for total knee replacement by a - - you know, a

significant amount of time. Putting an exact time frame on that is difficult. He had significant x-rays to when he - - right before his total knee and those were most likely precipitated by the injury and treatment that he had.

Q. What x-ray changes did he have?

A. The 12-8-2010 evaluation by Dr. Kym, the last page, it says, "X-rays," in that section, he says, ". . . but joint paces are maintained in the x-rays."

Then we move to the 4-17-2013 H & P by Dr. Kym. The diagnostic studies, the x-rays showed bone-on-bone changes in the patellofemoral joint and posterior medial compartment.

So, there's a dramatic change from presurgery close to the injury to pretotal knee.

Q. Can you explain to us from a medical standpoint how the knee goes from where it was on 12-8-2010, when Dr. Kym had the x-rays taken, and where the knee was on April 17th, 2013?

A. My best evaluation of that would be that he did have an injury to his medial compartment at the time of the original - - at the time of the 2010 injury, and that, in addition to the effects of surgery, can precipitate osteoarthritis. He had an ACL reconstruction. He had, also, a partial meniscectomy. So, the cumulative effects of the injury and the effects of removing part of his meniscus I think precipitated the exacerbation of his osteoarthritis.

Dr. McNulty Depo., pp. 15-17.

32. The Referee is more persuaded by the opinions of Drs. McNulty and Kym than those expressed by Dr. Cox. Dr. Kym has operated on Claimant's right knee twice and has visited with him many times and is more familiar with his condition than any other physician involved in this case. He attributes the need for Claimant's TKA 30% to the subject accident and 60% to preexisting degeneration.[4]

33. Dr. Cox has seen Claimant twice. While qualified to give expert testimony, he is not a surgeon. He is the only doctor out of the three to give causation opinions in this

[4] Defendants argue that Dr. Kym's industrial apportionment of 30% is contrary to what he observed at surgery, i.e., bone-on-bone Grade IV chondromalacia. Defendants argue that ". . . there is no explanation for his opinion in the record and therefore there is no way to examine the medical basis and validity of that opinion." Defendant's brief, p. 11. One is left to wonder why Dr. Kym was not asked to clarify.

matter to not relate at least some of the cause of Claimant's need for his TKA to the subject accident. His testimony regarding how the 1994 ACL tear and subsequent surgery contributed to the need for Claimant's TKA yet the 2010 injury and repair did not is unpersuasive.

34. Dr. McNulty is a board certified orthopedic surgeon who has performed over 1500 knee surgeries including approximately 500 TKAs. He saw Claimant once for an IME in October 2013 after Claimant finished treating for his TKA. Dr. McNulty, in a straightforward and convincing manner, expressed his opinion that Claimant's October 2010 accident permanently aggravated his preexisting osteoarthritis and was 50% responsible for his TKA, and the Referee so finds.

PPI

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

35. Dr. Cox assigned a 5% PPI rating with 2% industrial and 3% preexisting. He explained his reasoning this way:

> So what I did is, typically when we try to apportion, we sort of go back to the guides and try and look at, well, what would their rating have been before the injury.
>
> So in looking back at the guides and trying to rate him where I thought he would have been before injury, that's how I came up with that three percent. I thought that from his previous ACL injury, that he would have been about at the three percent level.

Id., p. 10.

36. Dr. McNulty assigned a 10% whole person PPI rating using the AMA Guides, 6th Edition. While admitting that determining apportionment was "somewhat arbitrary," he apportioned 50% of the 10% PPI to Claimant's preexisting osteoarthritis and 50% to his industrial accident. His PPI rating included Claimant's TKA whereas Dr. Cox's did not.

37. Claimant did not address the PPI issue in his briefing. Defendants concede that if the Commission finds Claimant's TKA is causally related to his October 2010 industrial injury, then Dr. McNulty's rating should be accepted. Because a causal connection has been found, the Referee finds that Claimant is entitled to a whole person PPI award of 5%.

TTDs

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary

disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) the claimant's former employer has made a reasonable and legitimate offer of employment to the claimant which the claimant is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout the period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of the claimant's light duty work release. *Malueg*, *Id*.

38. Claimant seeks TTD benefits from the date of his TKA (April 24, 2013) through the date of his failed attempt to return to work (September 19, 2013). Based on the Referee's finding that Defendants are responsible for Claimant's TKA, it follows that they are responsible for the TTDs requested.

Total Permanent Disability

Claimant's physical restrictions

39. Dr. McNulty assigned the following restrictions in which Dr. Kym concurred: Claimant can walk a total of two hours per workday; he can stand a total of two hours per workday; he can stand and walk a total of two hours per workday; and he can stand and/or walk a maximum of 20 minutes continuously. See CE 9, p. 216. Dr. McNulty could find nothing radiographically or mechanically abnormal with Claimant's right knee.

He based his restrictions on his physical examination of Claimant as well as his atrophy which causes problems with walking and stairs. Dr. Cox has limited Claimant to no repetitive kneeling and no stair or ladder climbing.

The vocational experts

Douglas Crum

40. Claimant retained Douglas Crum to provide a vocational opinion. Mr. Crum's credentials are well-known to the Commission and he is qualified to render expert vocational opinions. Mr. Crum met with Claimant in Lewiston on October 11, 2013. He reviewed relevant medical and vocational records, prepared a report dated November 11, 2013 (CE 13), and was deposed.

41. Mr. Crum found that Claimant had access to 9.1% of his pre-injury labor market. Post-TKA, based on Dr. McNulty's restrictions, Mr. Crum found that "Based on the recommendations of Dr. McNulty, Mr. Currin will essentially be a sedentary worker, being required to be off his feet six hours out of every eight hour workday." CE 13, p. 246.

42. Mr. Crum concluded his report as follows:

> Under the permanent restrictions recommended by Dr. McNulty, combined with his age, education, skills, work history and the nature and composition of his labor market, in my opinion Mr. Currin has no reliable access to jobs in his labor market, and, as a result, it is my opinion that Mr. Currin has been rendered totally and permanently disabled as a result of the October 7, 2010 industrial injury.

CE 13, p. 247.

Nancy Collins, Ph.D.

43. Defendants retained Nancy Collins, Ph.D., to provide a vocational opinion. Dr. Collins' credentials are well known to the Commission and she is qualified to give expert vocational opinions. Dr. Collins interviewed Claimant via Skype, reviewed relevant

medical and vocational records, prepared a report dated October 30, 2014 (CE 12), and was deposed.

44. Dr. Collins observed that: "Considering the restrictions from Dr. Kym and Dr. McNulty, he would still have the capacity to do some light and sedentary jobs that are performed primarily from a seated position." CE 13, p. 266. In support of her opinion, Dr. Collins listed a number of job titles that she thought may be suitable for Claimant; however, she conceded that Claimant would have no access to many of the jobs she listed such as production work or inspection quality control positions. Claimant and/or Mr. Crum testified that Claimant could not perform any of the jobs listed by Dr. Collins either because they exceeded his physical restrictions or his qualifications.

45. Dr. Collins noted that Claimant may not be particularly motivated to return to work considering the amount of money he is making on SSDI and his pension. She indicated that Claimant has not looked for work because he does not believe he can work due to his inability to walk, stand, or sit for any length of time.

46. Due to Claimant's standing and walking restrictions, Dr. Collins opined:

> Based on my analysis and Dr. McNulty and Dr. Kym's restrictions, Mr. Currin has a 70% loss of access and a 50% loss of earning capacity. If Dr. McNulty and Dr. Kym's restrictions are considered, then and these restrictions are found to be related to his industrial accident, his disability inclusive of impairment is 60%. This assumes both vocational factors are given equal weight. This is a fairly high loss of access and the commission may put additional weight on this vocational factor.

CE 12, p. 268.

47. Dr. Collins would find no disability above impairment if the restrictions were found to be non-industrially related or if Dr. Cox's restrictions are adopted.

Odd lot

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established.

48. The Referee finds that Claimant is not totally and permanently disabled via the 100% method. His PPI rating is relatively small (5%) and his non-medical factors do not constitute the remaining 95%.

The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho*, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

a. By showing that he or she has attempted other types of employment without success;

b. By showing that his or her vocational counselors or employment agencies on h is or her behalf have searched for other work and other work is not available, or

c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

49. Claimant relies upon the third prong (futility) of the *Lethrud* test to establish odd lot status and the opinion of Mr. Crum that it would be futile for Claimant to search for suitable employment. Defendants contend that Claimant is not an odd lot worker but concede that if Claimant's TKA is found to be related to his industrial injury he has incurred 35% PPD inclusive of his PPI.

50. The Referee finds Claimant to be an odd lot worker. While Dr. Collins has identified certain job titles Claimant may be able to perform consistent with his restrictions, Claimant and Mr. Crum convincingly testified that, realistically, he is unqualified for most of them and physically incapable of performing them. Drs. Kym and McNulty's restrictions are based on both objective and subjective criteria and appear to be reasonable. Claimant's inability to walk, stand, climb ladders, sit, etc., are severely limiting and would likely require a sympathetic employer to accommodate him. While it is true that Claimant has no intention of returning to the work force, it is also true that he would not likely be competitive in obtaining employment in view of his medical and nonmedical factors.

51. Once a claimant establishes a *prima facie* case of odd lot status, the burden shift to Employer to show that there is:

> An actual job within a reasonable distance from [claimant's] home which he [or she] is able to perform or for which he [or she] can be trained. In addition, the [defendant] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he [or she] would in fact not be considered for the job due to his [or her] injuries, lack of education, lack of training or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407 565 P.2d. 1360, 1364 (1977).

52. David Church has been Employer's safety manager for the past five years. As such, Mr. Church is responsible for all workers' compensation claims including health management and return to work issues. He testified at hearing that Employer has an early return to work program that emphasizes bringing injured workers back to a position within their physical restrictions[5] with the understanding that in so doing, the injured employee will heal and go through therapy faster. Employer also modifies and/or creates jobs, and transfers, either temporarily or permanently, employees to different jobs as examples of accommodations Employer makes for injured workers. Mr. Church testified that as of the time of the hearing, Employer was accommodating a worker with a severe knee injury by placing him on a fork lift. There have been many fork lift openings for which Claimant could have bid and, with his seniority, could have secured. However, no job description for a forklift driving job (or any potential job) was ever sent to any physician for their

[5] Mr. Church testified that when Claimant returned to work after his TKA, he never mentioned any physician-imposed physical restrictions. However, Mr. Church eventually found out that Claimant was restricted to two hours each of walking and standing in a shift. He testified that Employer could have accommodated those restrictions had it known of them.

approval/disapproval; Claimant may or may not be able to drive a forklift. Also unknown is how long at a stretch could he drive.

53. Upon Claimant's return to work following his TKA, he was assigned to a different napkin machine than he had before his injury; Mr. Church does not know why. Claimant expressed his frustration with the switch to Mr. Church and looked upon it as a demotion. Even so, Claimant never asked to be moved back to his original machine or in some other way be accommodated.

54. Claimant admitted under cross examination that he did not ask Employer to modify/alternate his job, reduce his hours, participate in work-hardening as he had done with good results after his ACL tear, or switch back to his original napkin machine. Conversely, Employer did not approach Claimant about any accommodations. Certainly, in hindsight, it would have been better for Claimant to have timely made Employer aware of his restrictions. However, Employer's outreach to Claimant to try to get him back to work could also have been better. At this late date, it would be largely speculation as to whether Claimant can drive a forklift or perform any of the other jobs Employer claims to have available with accommodations. While Employer gets kudos for their return to work policy, it did not work very well in Claimant's case.

55. The Referee finds that Defendants have failed to rebut Claimant's *prima facie* case. The only actual job identified by Defendants is the above mentioned forklift driving position. There is no evidence that Claimant can actually drive a forklift, let alone drive one for a full 8 or 10 hour shift. Further, there is no evidence that there are <u>any actual</u> jobs regularly and continuously available in his labor market that he has a reasonable chance of securing.

56. The Referee finds that Defendants have failed to rebut Claimant's *prima facie* showing of odd lot status.

Apportionment

57. In light of the finding that Claimant is an odd lot worker, the issue of apportionment under Idaho Code § 72-406 is moot.

Attorney fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

58. While Dr. Cox's opinions did not carry the day regarding causation, nonetheless, Defendants reliance thereon was not unreasonable. There is no basis for an award of attorney fees in this case.

CONCLUSIONS OF LAW

1. Claimant suffered an industrial accident causing injury to his right knee ACL and meniscus on October 7, 2010.

2. Defendants are liable for the care and treatment associated with the above accident, including Claimant's right knee TKA, pursuant to *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

3. Claimant is entitled to TTD benefits from April 24, 2013 to September 19, 2013.

4. Claimant is entitled to whole person PPI benefits of 5%.

5. Claimant is totally and permanently disabled pursuant to the odd lot doctrine.

6. The issue of apportionment pursuant to Idaho Code § 72-406 is moot.

7. Claimant is not entitled to an award of attorney fees.

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 __12th__ day of June, 2015.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __30th___ day of _June_, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

BENTLEY G STROMBERG
PO BOX 1510
LEWISTON ID 83501-1510

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID CURRIN, Claimant, v. CLEARWATER PAPER CORPORATION, Employer, and WORKERS COMPENSATION EXCHANGE, Surety, Defendants.	**IC 2010-031121** **ORDER** **Filed June 30, 2015**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 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 suffered an industrial accident causing injury to his right knee ACL and meniscus on October 7, 2010.

2. Defendants are liable for the care and treatment associated with the above accident, including Claimant's right knee TKA, pursuant to *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

3. Claimant is entitled to TTD benefits from April 24, 2013 to September 19, 2013.

4. Claimant is entitled to whole person PPI benefits of 5%.

5. Claimant is totally and permanently disabled pursuant to the odd lot doctrine.

6. The issue of apportionment pursuant to Idaho Code § 72-406 is moot.

7. Claimant is not entitled to an award of attorney fees.

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

DATED this __30th___ day of ___June___, 2015.

INDUSTRIAL COMMISSION

___/s/_____
R. D. Maynard, Chairman

___Participated but did not sign._____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __30th____ day of __June___ 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

BENTLEY G STROMBERG
PO BOX 1510
LEWISTON ID 83501-1510

ge ___/s/_____