BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN FUNKE, Claimant, v. ATKISON LOGGING COMPANY INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 1991-744516** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed July 20, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston on October 21, 2015. Christopher Caldwell represented Claimant. Kent Day represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on May 25, 2016. The Commission has reviewed the Findings of Fact and Conclusions of Law proposed by Referee Donohue but declines to adopt the same. As developed infra, the Commission concludes that different treatment is warranted for the issues relating to intervening cause and attorney fees.

ISSUES

The following issues are to be decided at this time:

1. Whether the conditions (broken right femur in 2009 and broken left femur in 2014) for which Claimant seeks benefits are compensably linked to Claimant's June 14, 1991 industrial accident or whether they constitute subsequent intervening events;

2. Whether and to what extent Claimant is entitled to benefits for:

    a) medical care, and
    b) attorney fees.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant suffered a compensable accident on June 14, 1991 which resulted in total permanent disability. It left him with a burst fracture of L1, a right below-knee amputation, paraplegia, a neurogenic bowel and bladder, and without sensation below the waist. He received benefits including an ATV for mobility. While deer hunting on November 18, 2009 he fractured his right femur while getting off his ATV. Surety denied the claim. While deer hunting on December 1, 2014 he similarly fractured his left femur. Surety denied this claim as well.

Claimant contends the fractures are the direct and natural consequences of osteoporosis which arose from Claimant's paralysis caused by the compensable industrial accident. Two treating physicians have so opined. Medical Bills amount to $95,732.93. Because no physician has opined that the fractures are not relatable to the original accident, Defendants' denials of compensation were unreasonable. Claimant should be awarded attorney fees.

Defendants contend that on both occasions Claimant was riding an ATV while deer hunting. Contemporaneously made medical records support a determination that both fractures were the result of falls from his ATV. These fractures arise from independent subsequent events which are noncompensable. Claimant's decisions to go deer hunting are the proximate causes of Claimant's fractures. Surety's decision to deny compensability was reasonably based upon existing law. Attorney fees are not awardable in this instance.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Claimant's oral testimony at hearing;
2. Claimant's exhibits 1 through 18, admitted at hearing (An exhibit 19 was proffered at hearing but not admitted without post-hearing deposition testimony of physician Vivian Moise, M.D. to provide foundation. Since Dr. Moise's deposition was not taken, exhibit 19 is not admitted.);

3. Defendants' exhibits 1 through 7; and

4. The following stipulation:

> If the Surety's claim representative was called as a witness in this matter today she would testify that the medical cost arising out of the ATV accidents/femur fractures on November 18, 2009 and December 1, 2014, were denied by the Surety/Employer based on the legal position that the ATV accidents constituted independent intervening causes breaking the chain of causation between the original work accident and the injuries Claimant received as a result of the ATV accidents.

FINDINGS OF FACT

(The issues in this matter having been bifurcated, not all medical records are addressed herein. Those addressed below are deemed most relevant to the issues at hand. No findings herein are intended to be applicable to issues not presently at issue.)

1. Claimant was injured in a compensable accident in 1991. He is totally and permanently disabled as a result. Permanent disability benefits have been and are being paid.

2. Claimant's injuries from 1991 include a below-knee amputation and paraplegia below the waist.

3. Because Claimant resides in a rural location with gravel roads, an ATV and not a motorized wheelchair was a reasonable option to provide mobility. He also uses forearm crutches, leg braces—one attached to his thigh and prosthetic leg—and other appliances to stand or walk short distances and for short periods of time.

4. Claimant has adjusted to his disability and has tried to maintain a lifestyle as active as his conditions allow. Still, as his conditions have progressed over the years, his activity has gradually diminished. His chronic pain, usually associated with prolonged sitting, has gradually increased. He described muscle atrophy and the change in appearance in his legs.

5. As his legs atrophy he has required medical care. As his chronic pain has increased he has required medical care. As infections and other complications to his conditions arise he has required medical care.

6. Claimant described in detail the complicated process required to mount or dismount his ATV. He uses his arms to raise or lower his body to successive heights. He has fashioned a board to create a shelf at about the height of the foot rest to assist mounting and dismounting. Once on the seat he uses his hands to move his leg to straddle or unstraddle his legs beside the seat. (Transcript, 50/16-52/20). He constantly wears his leg braces when out of bed, including while riding the ATV. Claimant testified that prior to the 2009 accident, he had gotten off his ATV in the manner described above at least 30 times, evidently without mishap. (Transcript, 54/9-17).

7. Using the ATV Claimant is able to hunt deer alone. His disability permit allows him to shoot from his ATV while on a road. Whenever possible he will drive his ATV as close to the downed deer as terrain allows, lower himself from the ATV, grab the winch cable, scoot on his hands and butt over to the game, scoot back, winch the deer to the ATV, throw the cable over an overhead tree branch, raise the carcass to gut it and position it on the ATV and get the meat home. On some occasions he radioed for help with the carcass. He has shot elk as well.

2009 right femur fracture

8. On the morning of November 18, 2009, Claimant awoke to find that new snow had fallen overnight. Knowing that these conditions would allow him to see fresh tracks, Claimant decided to go hunting on a 10 mile loop he frequently hunts from his ATV. The accident in question occurred after he had traveled seven miles. While crossing from one road to

another via a skid trail his vehicle high centered on a small stump. He was unable to free his vehicle by manipulating the controls and so, determined that he would have to winch the vehicle off the obstacle. He got off the vehicle in the manner described above. On this occasion, however, there was brush of some type located within two to three feet of the left side of his ATV. Ordinarily, when using this exit maneuver, his legs slide out in front of him as he lowers himself to the ground. On this occasion, his legs got "hung up" in the brush and his right leg slid underneath his left knee. (Transcript, 60/23-61/22). Claimant believes that when he twisted his right leg in this fashion, he fractured his right femur. (Transcript, 60/16-22). However, he was not yet finished with extricating himself from his predicament. Claimant testified that he put his winch on "free spool" and pulled the winch cable to a tree approximately 20 feet from his ATV. He did this by scooting along on the ground with his back to his objective, pulling his legs along behind him. After attaching the winch to the tree, he scooted back to his vehicle, activated the winch, but was unable to free the vehicle. He then moved to the back of his vehicle and pushed on the rear fender in a way that freed the vehicle from the obstacle. He then remounted the vehicle in his normal fashion, and while moving his right leg over the fuel tank noted, for the first time, that it was bending in an unusual place. On returning home, he verified the likely femoral shaft fracture after taking off his leg brace. He sought immediate medical care.

9. Claimant testified that prior to the 2009 accident, he thought nothing of getting onto and off of his ATV without assistance in the manner described above. However, he testified that he is no longer so dismissive of the dangers he now knows to be associated with this activity:

> Q. So, before this happened in 2009, you had gotten off that ARB how many times like that, do you think?

A. Oh, 30. I don't know. I do it all the time. I plow snow with it. So, my winch cable breaks, so I have to slide off of it and do the same thing. And then if something happens, a wire breaks or something happens, I get off that way. I don't think really nothing about it. I do now - - but I don't know.

(Transcript, 54/9-17).

. . .

Q. Were you treating - - you were treating with Dr. Moise during this period of time, as far as your regular physician up in Spokane?

A. Yeah.

Q. Did you make her aware any way of the fracture to your right leg in 2009?

A. Yeah. Yeah, I let her know. I told her about it.

Q. What did you tell her?

A. About the same thing we just talked about: I broke my leg. And she asked me how. And I says, well, I really don't know. I just got off my four-wheeler like I usually do. I said, nothing really happened. And it's because I was worried about it because when I fall I am scared of breaking stuff now, when I'm standing up. But nothing really happened out of the ordinary.

(Transcript, 63/4-20).

10. A November 18, 2009 Gritman Medical Center handwritten note stamp-signed by Debra McKinnon, D.O., states: Paraplegic – slipped during transfer earlier – slipped – didn't realize at first (when transferring again – felt) brace slipped pt fell from 4 wheeler to ground."

11. Gritman physician Wayne Ruby, M.D., in part, recorded an intake note as follows: "In the process of trying to get on his 4 wheeler he slipped while standing and fell to the ground. As he began to get up he slipped again this time causing his right leg to twist under his other leg and he felt more less on the thigh of his right leg." (Here and elsewhere in this medical note the text suggests a less than perfect transcription of an orally dictated note.) Later in the note, it goes on as follows: "Lost balance and fell. The patient paraplegic This is not a job related problem. Injury can be coded as occurring in home environs." Dr. Ruby

diagnosed a closed, acute, displaced, spiral fracture of the right femur.

12. That same day Dr. Ruby dictated a more complete history and physical examination note. In it he stated:

> He was out hunting today when he got his four wheeler stuck. In order to get out of his predicament he slid off of his four wheeler on purpose so that he could use his winch. He then eventually got back on his four wheeler and went back to his house after winching his way off the obstruction. When he was back in his house he realized that his femur was fracture. Because of his paraplegia he does not feel any pain. He could feel movement in the leg that he knew was abnormal and the that he (sic) a fracture. He had no actual fall. (C Ex1, p. 43)

13. An X-ray showed, in addition to the fracture, osteopenia. Charles Jacobson, M.D., performed surgery. He observed osteopenic bone in surgery and altered the placement of screws to affix them better. Dr. Jacobson's history is more consistent with Dr. Ruby's more detailed history than with Dr. Ruby's intake note.

14. The initial physical therapy note after surgery contains a history which does not mention a slip or fall. It merely notes Clamant noticed a problem after returning from riding.

15. The discharge summary dictated by Sunday Henry, M.D. stated, "He did not have any trauma."

16. On July 12, 2010 Surety denied liability for the right femur fracture as hunting "is not recognized as an activity of daily living."

17. Vivian Moise, M.D., has been Claimant's primary physician for more than a decade. On July 19, 2010 she recorded as follows: "This pt had a minor fall resulting in a femur fracture, due to osteoporosis from his spinal cord injury. Worker's comp did not cover the fracture. I agreed to write to his insurance regarding the reasons for the fx being due to his paralysis. . ." In her letter of July 19, 2010, Dr. Moise offered the following opinion on the cause of Claimant's right femoral shaft fracture:

> He had a minor fall that would normally not have caused a fracture, however, the fracture occurred specifically because he is osteoporotic due to paralysis of the lower extremities. Research shows that with new onset paralysis from spinal cord injury, such as with this patient, that patients lose about 30% of their bone density within the first 6 to 9 months after the onset of paralysis. It is my opinion that this patient's fracture, no matter what the circumstances of the fracture as to whether it was at home or when he was out doing a recreational activity, occurred because he had the work injury with resulting leg paralysis and that the fracture would not have occurred had he not had the work injury and paralysis. Treatment that he had for the fracture should be covered by his worker's compensation insurance company for that reason, in my opinion.

Claimant's Exhibit 8 at 692.

2014 left femur fracture

18. On December 1, 2014 while deer hunting on a slick logging road Claimant skidded sideways. He brought the ATV to a stop. As he dismounted his hand slipped and his body slid down the side of the ATV to the ground—about a 10- or 12-inch drop times two as his butt bounced to the ground. Claimant testified that as he bounced to the ground, his legs did the "splits" in some fashion. (Transcript, 60/11-22). Because he could not find an anchor point to attach the winch cable to, Claimant radioed for help. When Claimant arrived home he noticed his left femur was broken. He sought medical care.

19. Histories taken by physicians are consistent in describing this event as a fall from the ATV. Steven Pennington, M.D. performed surgery.

20. On January 7, 2015 Surety denied liability for Claimant's left femur fracture as the result of "an independent intervening cause."

21. By letter to Claimant's counsel dated March 23, 2015, Dr. Pennington answered a number of causation questions posed by counsel:

> Number one: Does Mr. Funke's paraplegia make him more susceptible to fracture injuries of the type for which I provided treatment? The answer to this is yes. Because he is not walking much, the bones become soft, and when the bones are softer they have a tendency to break more easily.

> Number two: If Mr. Funke did not suffer paraplegia, would I expect that he still would have suffered the fracture injuries for which I provided treatment? The answer to that is no. I would not expect he would have suffered femur fractures. My understanding is that this is the second femur fracture, and these are both from osteoporosis as a result of disuse. If he did not have paraplegia, he would not have the osteoporosis and therefore would not have suffered these fractures.
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> I understand the insurance carrier's position that this is no an industrial accident. However, it is definitely a result of his paraplegia, which was caused from the industrial accident, and therefore I would definitely consider this femur fracture and his previous femur fracture to be related to his industrial accident. I hope that answers your questions and precludes the need for meeting in person.
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> Claimant's Exhibit 10 at 695.

22. On March 26, 2015 Claimant's attorney forwarded Dr. Pennington's opinions to Surety.

23. On April 17, 2015, upon reevaluation Surety maintained its denial.

24. By letter dated 6/30/15, Dr. Moise again addressed the cause of Claimant's bilateral femur fractures:

> Paralysis from spinal cord injury causes a 33% loss of bone density from calcium leaching out of the bones and this occurs within the 1st one to two years after injury. This is well proven with multiple published research studies. As a result of this calcium loss, all paraplegic patients have severe osteoporosis and can fracture their pelvis or leg bones with little or no injury. For example, I have had similar patients fracture their brittle leg bones with a minor fall from the wheelchair to the ground 2 feet below, that would only cause a mild bruise to anyone else. I have had patients who have had fractured leg bones just doing a simple daily leg stretching ("range of motion") exercise by a caregiver. I have had patients with leg fractures with no knowledge of when it occurred, and a bruise and swollen area appeared out of nowhere.
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> My Funke had a right thigh bone (femur) fracture several years ago, and a recent left femur fracture within the past few months. Both are considered pathologic fractures. This means the bone broke due to being diseased by severe osteoporosis, without any specific or significant injury. There is no question that both femur fractures would never had occurred were it not for his paralytic work injury and the resulting osteoporosis he has, and that both are 100% due to his work injury and paraplegia. In my opinion, treatment for both femur fractures should be considered part of the treatment of his paraplegia.

Claimant's Exhibit 13 at 703.

Additional Findings of Fact

25. For both broken femurs surgeries were required to implant rods. Extensive findings about details of the medical care are unnecessary. All medical treatment provided which was related to the broken femurs was reasonable and necessary. Medical bills submitted to treat these fractures amount to $95,732.93. Upon Surety's denial Medicare paid the bulk of these bills. The record does not establish whether Medicare will pursue reimbursement in the event Claimant prevails on his claim for the care in question.

26. Since 1991 Claimant has fallen about 30 to 35 times while ambulating with the assistance of crutches. (Transcript, 75/23-77/1.)

DISCUSSION AND FURTHER FINDINGS OF FACT

Causation

27. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, a claimant must prove not only that 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 causal 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). Magic words are

not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

28. Defendants contend that the twisting or slipping episodes suffered by Claimant while attempting to dismount his ATV during hunting forays on November 18, 2009 and December 1, 2014 contributed to Claimant's bilateral femoral shaft fractures and constitute superseding intervening causes which break the chain of causation and leave Defendants without responsibility for the medical care Claimant subsequently required. Obviously, the issue of whether these incidents constitute superseding intervening causes is not reached if, as suggested by Claimant, the incidents are irrelevant to the occurrence of Claimant's femoral shaft fractures. In other words, if the medical evidence establishes that the events as described by Claimant contributed nothing to his bilateral femoral shaft fractures then there is obviously no superseding cause to be inserted between the 1991 accident and Claimant's subsequent bilateral femoral shaft fractures. There are certain portions of the letters of Drs. Moise and Pennington which, at first blush, seem to support the notion that the events of November 18, 2009 and December 1, 2014 are altogether irrelevant to the cause or timing of Claimant's bilateral femoral shaft fractures. In this regard, Dr. Moise stated:

> There is no question that both femur fractures would never have occurred were it not for his paralytic work injury and the resulting osteoporosis he has, and that both are 100% due to his work injury and paraplegia.

She also stated that paraplegic patients who develop severe osteoporosis can fracture their pelvic or leg bones with "little or no injury". Dr. Pennington stated that if Claimant did not have paraplegia, he would not have osteoporosis and therefore would not have suffered the femoral shaft fractures. However, on careful review, it appears that in rendering their opinions, Drs.

Moise and Pennington are really only saying that but for Claimant's paraplegia and related osteoporosis, he would not have suffered bilateral femural fractures from the minor twisting/slipping incidents occurring in 2009 and 2014. Neither physician's opinions can fairly be read as supporting the assertion that Claimant would have suffered femoral shaft fractures on November 18, 2009 and December 1, 2014 even if he had decided to pass on hunting and stayed in bed both days. A fair reading of the opinions expressed by Drs. Pennington and Moise leads us to conclude that the trivial nature of the events of November 18, 2009 and December 1, 2014 would never be injurious to a normal person. However, these trivial stresses were significant to Claimant because his bones have been significantly weakened by osteoporosis, which is, in turn, directly related to his 1991 work accident. From Claimant's testimony, which we accept, and the opinions of Drs. Moise and Pennington, we conclude that both the November 18, 2009 and December 1, 2014 events did contribute, albeit to a small degree, to the femoral shaft fractures contemporaneously noted by Claimant. There is no support in the record for Claimant's assertion that the leg braces worn by Claimant at the time of both accidents would have made it impossible for the events of November 18, 2009 and December 1, 2014 to have contributed to Claimant's fractures.

29. Having determined that the events of November 18, 2009 and December 1, 2014 did contribute, in some fashion, to Claimant's femoral shaft fractures, we must next address the issue which we perceive to be at the heart of this matter, i.e. whether those events constitute superseding intervening causes which break the chain of causation, leaving Defendants without responsibility for Claimant's subsequent medical care. We believe that the issue is best stated this way: Based on the facts and circumstances of this case, can it be said that Claimant was negligent in undertaking the two solo hunting forays that contributed to his injuries, and is this

negligence sufficient to break the chain of causation between the 1991 accident and Claimant's current injuries? Stated differently, are the accidents of November 18, 2009 and December 1, 2014 merely to be regarded as natural and probable consequences of the original 1991 injury?

30. A distinction is recognized in Idaho law between the rules that apply to determine the compensability of a primary injury and those that apply to determine compensable consequences of that original injury. *Mulnix v. Medical Staffing Network, Inc.*, 2010 IIC 0368; *Hite v. Timberline Drilling, Inc.*, 2015 IIC 0039; 2 Lex K. Larson, Larson's Workers Compensation § 10.01 (Matthew Bender, Rev. Ed.) For example, employee fault is generally not a consideration in determining whether the primary work injury is one arising out of and in the course of employment. However, when the question becomes whether an injury occurring downstream of the primary injury should be compensable, the inquiry is whether the subsequent injury can be said to be a natural and probable consequence of the primary claim. In making this inquiry, consideration of the injured worker's negligence can come into play. This distinction is expressly recognized in the Idaho case of *Linder v. City of Payette*, 64 Idaho 656, 135 P.2d 440 (1943). In that case, claimant suffered a primary work related injury to his left arm. As a result, he was placed in a plaster cast extending from his shoulder to the fingers, holding the elbow rigid and the forearm at a right angle to the upper arm. While so encased, claimant and a companion made the decision to go fishing from a small boat on Sage Hen Reservoir. The boat capsized and claimant drowned. Claimant's survivors contended they were entitled to death benefits on the theory that the original accident, i.e. the original breaking of the arm, was the proximate cause of claimant's death because the cast that had been placed on the arm to treat his work injury hindered him in his ability to swim or otherwise save himself after being thrown into the water. As in the instant case claimant's death would not have occurred "but for" the original injury to

his arm and subsequent casting. Claimant made a choice to go boating in spite of his circumstances. On the question of whether or not the boating accident constituted an intervening cause breaking the chain of causation between the original work accident and decedent's death, the Court stated:

> We accept as correct appellant's proposition of law that the definition and determination of "proximate causes" in the field of torts is applicable herein. A recognized concomitant is that if there occurs, after the initial accident and injury, an intervening, independent, responsible, and culminating cause, the latter occurrence becomes the proximate cause.
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> 'The proximate cause of an event must be understood to be that which in a natural and continuous sequence, *unbroken by a new cause*, produces that event and without which that event would not have occurred.' [Emphasis added.] (*Pilmer v. Boise Traction Co., Ltd.,* 14 Ida. 327, at 341, 94 P. 432.)
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> The law regards the one as the proximate cause of the other, without regard to the lapse of time *where no other cause intervenes or comes between* the negligence [initial injury] charged and the injuries received to contribute to it. *There must be nothing to break the causal connection* between the alleged negligence [first accident and injury] and the injuries [death].' [Emphasis added.] (*Antler v. Cox*, 27 Ida. 517, at 527, 149 P. 731.)
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> It must be clearly kept in mind that the essential causal connection which must not be broken is, not that between the concededly compensable accident and the direct injury therefrom (*Brink v. H. Earl Clack Co*., 60 Ida. 730, 96 P.(2d) 500), but between the initial accident and injury and a subsequent and otherwise disconnected injury having no relationship whatever to decedent's employment.

If the claimant in *Linder* had originally broken his arm at work as the result of some negligent act on his part, claimant's negligence would not be a defense to the primary injury. However, *Linder* makes clear that as one looks downstream from the primary injury and is asked to consider how far the range of compensable consequences extends, claimant's negligence is a consideration in making this determination. *See Hite v. Timberline Drilling, Inc., supra*.

31. Whether, or how, a particular subsequent injury can be determined to be one which is a natural and probable consequence of the primary injury has generated a great deal of

discussion both in case law and in learned treatises. One approach that has been suggested for evaluating the cause of a subsequent injury is to distinguish between activities that can be said to be in the "quasi-course of employment" and those that cannot. 2 Lex K. Larson, Larson's Workers Compensation § 10.05 (Mathew Bender, Rev. Ed.) A quasi-course activity is one which, though taking place outside the time and space limits of the employment, is nevertheless related to the employment in the sense that it is reasonably related to the employment and would not have been undertaken but for the compensable injury. In *Mulnix*, claimant suffered a compensable injury to her shoulder. She reinjured her shoulder while performing physical therapy related to the original accident. Physical therapy directed by claimant's treating physician is a "quasi-course" activity, and the reinjury suffered as the result of that treatment was deemed to be a natural and probable consequence of the original accident. In *Linder*, the boating activities of claimant following his compensable injury were not in the "quasi-course" of his employment, but were altogether unrelated to claimant's employment.

32. Under the rule proposed by Professor Larson, an injury which occurs as the result of a quasi-course activity is a compensable consequence of the original injury unless the injury occurred as the result of the injured worker's intentional conduct. Where the activity in question is not a quasi-course activity, an injury which occurs as the result of claimant's negligence will break the chain of causation. To return to the aforementioned examples, in *Mulnix*, claimant's physical therapy was a quasi-course activity. An injury sustained by claimant as the result of engaging in that activity would be compensable as a direct and probable consequence of the original accident unless it was shown that she engaged in physical therapy activities with the intention of causing additional injury to her shoulder. In *Linder*, no such intention to suffer injury would be required since the activity was not a quasi-course activity. All that defendants

need to do to prevail is to demonstrate that claimant was negligent in deciding to participate in small water craft activities while encased in a cast.

33. We believe that this approach lends itself to analysis of the instant question of whether the hunting activities of 2009 and 2014 constitute intervening causes which break the chain of causation between the original accident and the subject injuries.

34. It is clear that Claimant's hunting activities of 2009 and 2014 were not quasi-course activities, that is, Claimant's hunting activities, undertaken two decades following the original work injury, cannot be considered activities which are necessary or reasonably related consequences of Claimant's employment. We are, of course, aware that the ATV used by Claimant at the time of both accidents was purchased for Claimant by Surety, owing to the fact that a motorized wheel chair would not work well for Claimant in his hometown, where most of the roads are gravel and sidewalks are relatively scarce. (Transcript, 9/7-14). However, the fact that Surety made this purchase for Claimant under the provisions of Idaho Code § 72-432 does not make Surety an insurer for <u>any</u> subsequent accident suffered by Claimant while using the ATV. Therefore, we conclude that the activity in which Claimant was engaged at the time of the subject accidents was not a quasi-course activity related to his employment or to post-accident medical treatment.

35. We also accept that the medical evidence establishes that the original 1991 accident, along with the resulting paraplegia and osteoporosis, is the cause in fact of Claimant's subsequent femoral fractures; but for the 1991 injury and resulting osteoporosis, Claimant would not have suffered the injuries that he did in 2009 and 2014 from being exposed to rather trivial forces which probably would not have caused injury to a normal person.

36. Having established that the 1991 injury is the cause in fact of the femoral shaft fractures suffered by Claimant while he was engaged in activities which were not in the quasi-course of employment, we must evaluate whether Claimant's decision to engage in these hunting activities was in any wise negligent in view of his peculiar circumstances and medical condition. Having posed this question, we consider it admirable that with such severe and debilitating permanent injuries, Claimant has persevered to maintain his independence and live as normally as possible. However, our sentiment in this regard must be divorced from the examination we are required to make on the question of whether it is fair to burden Surety with Claimant's perhaps questionable judgment to embark with some frequency on 10-mile solo hunting forays into the north Idaho winter. Simply, was it negligent for Claimant to do this in a way that breaks the chain of causation between the subject accident and his non-quasi-course activity?

37. Claimant has testified that the first 10 to 15 years following the subject accident, he was more physically capable than he was at the time of the 2009 and 2014 incidents. Since approximately 2005, he has had more difficulty performing physical tasks and has generally suffered more from pain/discomfort. Nevertheless, he has continued to try and get out and about. Claimant testified at length about the procedure he has devised to get himself onto and off of his ATV. At home, he ordinarily approaches the ATV on his crutches, turns around, sits on the ATV seat, and then lifts one leg over the gas tank to assume the operator's position. In other situations where he finds himself without the use of his crutches, he has devised another method to get onto and off of the vehicle. (Transcript, 48/22-52/20). Generally, to mount or dismount the ATV without the assistance of a wheelchair or crutches, Claimant used upper body strength to raise or lower himself in a two-step process. He testified that he was comfortable with this

approach and had used it at least 30 times prior to the November 18, 2009 accident. Things might have gone normally on November 18, 2009 but for the unevenness of the terrain he was lowering himself onto and the presence of a shrub or a piece of brush which impeded the movement of his legs as he tried to slide himself to the ground. It is supposed by Claimant that this was the event which broke his right femur. Was Claimant negligent in allowing himself, a paraplegic, to get into this fix on the early morning hours of November 18 by himself? We believe this is a close question and one which reasonable people could decide differently.

38. However, we note that Claimant has testified that prior to November 18, 2009, he had no reason to be concerned that his solo hunting activities put him at heightened risk for large bone fractures. He had performed the aforementioned mounting and dismounting maneuvers on numerous occasions prior to November 18, 2009, evidently without ill effect. For this reason, we cannot say that Claimant knew or should have known that he was at risk for serious injury from relatively trivial falls or twisting events. We cannot conclude that Claimant's ambitions towards hunting by himself in the mountains of northern Idaho amounts to negligence. We conclude that the events of November 18, 2009 do not constitute a superseding/intervening event which breaks the chain of causation between the original accident and Claimant's right femoral shaft fracture. Claimant is entitled to recover all medical expenses incurred in connection with his right femur fracture subsequent to November 18, 2009.

39. However, application of the same analysis to the December 1, 2014 accident yields a different outcome. Giving Claimant the benefit of the doubt, from at least November 18, 2009 forward, he was on notice that trivial falls and bumps could result in large bone fractures. Claimant acknowledged that prior to the November 18, 2009 accident, he never gave any thought to mounting and dismounting the ATV. However, he has worried about it since then.

(Transcript, 54/12-17;63/13-20). And yet, it appears that Claimant persisted in his habits, eventually finding himself, on December 1, 2014, in a situation very similar to that in which he found himself on November 18, 2009. By December 1, 2014, Claimant knew or should have known that it was perilous for him to go on solo journeys that might require him to mount and dismount his ATV on uneven ground and without the assistance of another person. We conclude that the choices Claimant made in this regard were rash and are sufficient to break the chain of causation between the 1991 accident and the left femur injury. Claimant's hunting trip put him at heightened risk for injury where he might be required to mount or dismount his ATV by himself, and in less that optimum conditions. We conclude that Surety is not responsible for the payment of medical bills incurred in connection with the left femoral shaft fracture.

Medical Benefits

40. In keeping with the foregoing, Claimant is entitled to medical care for the consequences of the 2009 accident, but not for the 2014 accident. For the 2009 fracture, Claimant is entitled to recover 100% of the invoiced amount of medical bills incurred in connection with that injury. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

ATTORNEYS' FEES

41. Pursuant to Idaho Code § 72-804, Surety may be held responsible for the payment of attorney's fees where it unreasonably neglects or refuses to pay benefits claimed by an injured worker. Here, the parties stipulated at hearing that if Surety's adjuster were called to testify, she would say that Surety denied responsibility for the November 18, 2009 right femur fracture because of Surety's opinion that the ATV accident constituted an independent intervening cause breaking the chain of causation between the original work accident and the right femur fracture.

We have come down on Claimant's side on the question of the compensability of the November 18, 2009 accident. However, we also note that reasonable minds might differ on whether Claimant acted reasonably in engaging in these activities in 2009. Therefore, we cannot say that Surety's position was unreasonable, and decline to entertain an award of attorneys' fees for the position it staked out for itself vis–à–vis the 2009 accident. Obviously, having validated Surety's position vis–à–vis the 2014 accident, we also conclude that Surety acted reasonably in connection with its denial of responsibility following that incident.

CONCLUSIONS OF LAW AND ORDER

1. But for the 1991 accident, Claimant would not have suffered injuries on November 19, 2009 and December 1, 2014. The 1991 accident is the cause in fact of both femur fractures.

2. Claimant's hunting activities in 2009 and 2014 were purely volitional, unrelated to his employment and unrelated to treatment for his 1991 injury. These activities were not quasi-course activities.

3. Prior to November 18, 2009, Claimant was unaware that trivial twisting events could result in serious injuries to the bones of a paraplegic with long-standing osteoporosis. Therefore, it was not unreasonable for Claimant to engage in solo hunting activities in Idaho's back country even though he knew he could reasonably be expected to have to dismount and mount his ATV without assistance, and in less than perfect conditions. Surety is responsible for the payment of all past and future medical expenses associated with the 2009 right femur fracture at 100% of the invoiced amount of such bills per *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

4. With respect to the December 1, 2014 incident, Claimant knew or should have known that he was at considerable risk for bodily injury in the event he was required to mount or dismount his ATV by himself in uncertain conditions. Claimant's negligence in this regard breaks the chain of causation. Surety is not responsible for any medical expenses incurred by Claimant in the past or required by him in the future, for care of the 2014 left femur fracture.

5. Claimant is not entitled to an award of attorney's fees.

6. Defendants are ordered to pay to Claimant a sum equal to 100% of the amount of the medical bills incurred in connection with the 2009 right femur fracture.

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

DATED this 20th day of July, 2016.

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 20th day of July, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL
P.O. BOX 607
LEWISTON, ID 83501

KENT W. DAY
P.O. BOX 6358
BOISE, ID 83707

___/s/_____