BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THERON HAMMON, Claimant, v. CENTURY AG, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2013-026008** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 29, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on May 13, 2015. Claimant, Theron Hammon, was present in person and represented by Dennis R. Petersen, of Idaho Falls. Defendant Employer, Century AG, Inc. (Century), and Defendant Surety, Idaho State Insurance Fund, were represented by Steven R. Fuller, of Preston. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 12, 2016. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order. While the Commission agrees with the majority of the Referee's proposed recommendation, the Commission concludes that the Referee inappropriately speculated as to the type of injury Claimant suffered, i.e., "likely meniscal tearing", without medical evidence. The Commission believes that the type and degree of Claimant's accident-produced injury must await further medical evaluation.

ISSUES

The issues to be decided are:[1]

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident or whether his condition was caused by a subsequent and/or pre-existing injury or condition;

3. Claimant's entitlement to medical care;

4. Claimant's entitlement to temporary disability benefits;

5. Claimant's entitlement to attorney fees; and

6. Whether the Commission should retain jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

Claimant alleges he suffered an industrial accident on August 7, 2013, while working for Century. He seeks medical and time loss benefits and an award of attorney fees. Defendants assert that Claimant's account of an accident is not credible, that his delayed reporting, delay in seeking medical treatment, and other conduct after the alleged accident indicates his account is not credible, and that he is entitled to no benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

[1] The issue of whether Claimant's claim is barred by the Idaho Supreme Court's decisions in Nycum v. Triangle Dairy and Nelson v. Ponsness Warren, was noticed for hearing but not addressed by any party at hearing or in briefing and is therefore considered abandoned.

2. The pre-hearing deposition testimony of Garland Kisner and Marilyn Jensen taken by Claimant on February 13, 2015;

3. Joint Exhibits A, A1- O, admitted at hearing;

4. The testimony of Claimant, Garland Kisner, and Marilyn Jensen taken at hearing;

5. The post-hearing deposition testimony of John Andary, M.D., taken by Claimant on June 15, 2015; and

6. The post-hearing deposition testimony of Stan Griffiths, M.D., taken by Defendants on October 19, 2015.

All pending objections are overruled.

FINDINGS OF FACT

1. Claimant was born in 1959. He was 56 years old and resided in Ririe, Idaho at the time of hearing.

2. Century is a farming and ranching enterprise. At all relevant times, Garland Kisner was the shop manager and Marilyn Jensen was the office manager at Century's business location in Ririe.

3. **Background.** Claimant worked at a family grocery store as a youth. He completed the 11th grade but did not graduate from high school and never obtained a GED or any further formal education.

4. After leaving high school, Claimant performed miscellaneous jobs. In 1979, he began working for Yukon Produce stacking potato sacks on pallets. In 1985, he commenced working for A&R Metal Works where he learned welding and metal fabrication. Over the next several years Claimant worked in welding, metal fabrication, and construction for several employers.

5. In 1995, Claimant sustained a lumbar disc injury and underwent surgery. He subsequently sustained a hand injury and a wrist burn. In January 2007, he suffered another low back injury. In each instance, he recovered from these injuries and resumed working.

6. On September 28, 2011, Century hired Claimant to drive trucks for the potato harvest. He quit on November 10, 2011. Century rehired Claimant on January 16, 2012, and he worked in the shop repairing tractors and welding. Claimant voluntarily left his employment with Century on October 2, 2012. On March 6, 2013, Century rehired Claimant to work in the shop performing welding, fabrication, and repair. By August 2013, Claimant was working full-time, four ten-hour days, Monday through Thursday, each week.

7. **Alleged industrial accident.** On Wednesday, August 7, 2013, Claimant was working for Century welding deflector shields into place inside an even flow tub. The tub had sloping sides and was approximately 20 feet long and 16 feet wide.[2] Claimant worked inside the tub welding deflectors onto a pipe most of the day. At hearing, Claimant described the alleged accident:

> Q. Did you suffer an accident there on August 7, 2013?
>
> A. I slipped on a cord. But just even being in there—it puts a strain on your whole body just even being in there for eight hours.
>
> Q. What happed to you slipping on a cord?
>
> A. I was crossing over the pipe that ran the length of the even flow tub to the other side. I reached up and grabbed ahold [sic] of the come-along that I had holding it in place. I went to step underneath the conveyor to get to the other side. My foot was on a cord. And when I took the pressure off my right foot, it rolled on the cord and my left foot went out from underneath me.

Transcript, p. 28, l. 19 through p. 29, l. 7.

[2] The completed tub had the capacity to hold three truckloads of potatoes.

8. Claimant testified he did not fall, but noted left knee pain. He did not report the incident to anyone that afternoon because his direct supervisor, Garland Kisner, was on vacation and no one else was at the shop. Claimant completed his shift and left for the day.

9. Claimant returned to work the following day, Thursday, August 8, 2013. He testified that Kisner returned from vacation on Thursday and:

> First thing in the morning we talked about some other issues. I took him to the back of the piece of machinery, said that I was hurting from the previous day and I didn't want to work on the inside of the tub. And I worked on the outside of the tub for the 8 hours and 50 minutes.

Claimant's Deposition, p. 34, ll. 1-6. Claimant did not specifically tell Kisner about his alleged slip on the cord the day before. Claimant also complained to Kisner about the disrespectful conduct of a coworker towards Claimant earlier in the week and threatened to quit the following Monday if his complaint was not addressed.

10. Claimant was off work Friday, Saturday, and Sunday. He returned to work on Monday, August 12, 2013, but quit shortly after arriving because Kisner had not resolved Claimant's complaint against his coworker to Claimant's satisfaction. Claimant collected his personal belongings and left the shop. Claimant has not worked for Century since that time. Claimant affirmed that he did not quit Century because of his leg issues.

11. After quitting his job at Century, Claimant "took it pretty easy" on his leg, thinking he had twisted or sprained his knee while working in the tub. Claimant's Deposition, p. 39, l. 3.

12. **Subsequent employment.** On September 24, 2013, Claimant began working for Wesley Mills Construction. Claimant climbed ladders that morning and helped put up trusses and soffit. By lunch time his left knee was "burning." Claimant believed his left knee symptoms were due to his alleged accident at Century. He completed his work for Wesley Mills that day.

The following day, September 25, 2013, Claimant returned to his construction job in the morning, but his work was halted by rain after a few hours.

13. **Reporting the alleged accident.** On September 25, 2013, after rain halted construction work, Claimant went to Century where he spoke to Kisner about filing a claim with Century for his August 7, 2013 knee injury. Claimant testified: "I talked to [Kisner]. And I said they probably need to fill out a report on my knee. I said I had problems the last day I worked. And he said, yes, I know you did." Claimant's Deposition, p. 41, ll. 7-10. Kisner directed Claimant to Century office manager Marilyn Jensen to complete an accident report. Claimant spoke with Jensen who completed the accident report. Claimant asked Jensen where he should go for medical treatment, but Jensen did not specify any medical provider.

14. The next day, September 26, 2013, Claimant returned to work for Wesley Mills Construction, cutting fascia. He testified that "by the end of the day I was hurting just like I was on August 8th at Century Ag, same pain, same hip." Claimant's Deposition, p. 43, ll. 1-3. Claimant then called Century manager Dave Chapple and asked whether he should go to the emergency room or urgent care for medical treatment. Chapple did not direct Claimant to any provider.

15. **Medical treatment.** On September 26, 2013, Claimant presented at the emergency room complaining of left knee pain. Examination revealed a small joint effusion with mild tenderness and swelling in the medial joint line and medial collateral ligament of the left knee. Claimant was instructed to continue activities as tolerated but avoid strenuous activity. He was given an ace knee wrap and referred to orthopedic surgeon Stan Griffiths, M.D.

16. Claimant did not work for any employer after September 27, 2013.

17. On October 7, 2013, Claimant presented to Dr. Griffiths. He found medial joint line tenderness but no effusion. He temporarily restricted Claimant to lifting 40 pounds and instructed him to avoid ladders. Dr. Griffiths recommended an MRI of Claimant's left knee. However, Defendants refused to authorize an MRI. Claimant never returned to Dr. Griffiths.

18. On November 8, 2013, Claimant filed his Complaint herein. Defendants timely filed their Answer, contesting the occurrence of an accident and denying all benefits. After filing his Complaint, Claimant did not return to work, did not seek work, and did not seek further medical treatment for approximately one year.

19. On November 5, 2014, Claimant presented to John Andary, M.D., at Claimant's counsel's recommendation. At that time Claimant reported burning in his left knee, with tenderness and popping in the joint. Dr. Andary recommended a left knee MRI, which Defendants again refused to authorize.

20. **Condition at the time of hearing.** At the time of hearing, Claimant was not working and had not worked or sought work since September 2013. He continued to complain of left knee tenderness and popping.

DISCUSSION AND FURTHER FINDINGS

21. 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). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

22. **Occurrence of an accident.** The first issue is whether Claimant suffered an accident at work on August 7, 2013. Idaho Code § 72-102(18)(b) defines accident 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." In the present case, Defendants argue that Claimant's testimony of an accident, or more precisely stated an untoward event at work, is fabricated. Claimant, Kisner, Jensen, and several medical records have addressed the circumstances surrounding Claimant's alleged industrial accident and merit close examination.

23. Claimant. Claimant testified that in the afternoon of August 7, 2013, while at work for Century welding inside the even flow tub:

> A. And at that point I welded the left side back on. And I had my welding hood on, all my tools and cords draped over this pipe. I grabbed hold of the come-along with my right hand, brought my left foot up on the pipe to cross underneath the top conveyor and the pipe. And I had my welding hood on.
>
> And I stepped up, and I wear a work boot that has a pretty good heel on it. And I went to go up over the pipe. And as soon as I took the pressure off my right foot, I must have twisted my left foot a little bit to where it caught the cord on the grinder. And that's when my left foot slipped out and went down to the side of the evenflo tub. And my welding hood came down. I lifted my hood up, got back up on the pipe, crossed to the other side. Sat down on the pipe for a few minutes and welded the right side up. And at that point I wasn't going to go any further until I talked to my supervisor.

Claimant's Deposition, p. 30, ll. 5-22. Claimant was the only one in the shop at that time.

24. Kisner. Claimant's supervisor, Garland Kisner, testified:

> A. Theron came on a Thursday—I was off Wednesday—and he says my knees are hurting from being inside that tub.
>
> Q. Okay.
>
> A. And he said—at the end of the day I said, well, do we need to do something about it. He said, well, I'll work today and see what it's like. He never

complained no more that day and I never spoke to Theron again until Monday morning and he quit.

Kisner Deposition, p. 10, ll. 11-20.

25. When questioned at hearing, Kisner reaffirmed and slightly elaborated on his account:

> Q. There on August 8th, Theron told you that his knees were hurting. Did I get that correct?
>
> A. You did.
>
> Q. Did he tell you which knee was hurting?
>
> A. No.
>
> Q. And it's my understanding that he told you that he had—the knees were hurting from working in that even flow tub.
>
> A. Yes.
>
> Q. …. Did you ask him if he wanted to fill out an accident report?
>
> A. I did. I said: Do we make an accident report of this? He says: No, I'll work through the day. He never said nothing [sic] till the end of the day.
>
> Q. So, you offered to fill out an accident report there on August 8, 2013 based on his report of his knees hurting him?
> …..
>
> A. That is a yes.

Transcript, p. 97, l. 6 through p. 98, l. 2.

26. Jensen. Century office manager Marilyn Jensen testified that when Claimant came to the office on September 25, 2013, to initiate an accident report, he did not tell her about any accident at Century, rather: "I asked him what he was doing and he said he had got a job the day before for a contractor or a construction company. And I asked him what are you doing there, and he said going up and down the ladder for six hours, my knee hurt." Jensen Deposition,

p. 17, ll. 17-22. Jensen and Kisner testified that Claimant also stated he could not put this "back on his new employer since he had just started working for him." Kisner Deposition, p. 17, ll. 12-14. Claimant denied making such a statement.

27. Medical records. The September 26, 2013 emergency room records document Claimant's chief complaint of "INJURY TO LEFT KNEE" and further noted "This occurred (6 weeks ago). Occurred at work. Mechanism of injury (at work 6 weeks ago)." Exhibit E, p. 1. Matthew Griggs, M.D., and Rebekah Bird, P.A., attended Claimant at the emergency room. The physician's clinical report noted small joint effusion with mild tenderness and swelling in the medial joint line and medial collateral ligament of the left knee. The report assessed left knee sprain and also recorded:

> Chief Complaint-Injury to left knee. The injury happened 6 weeks ago. The patient sustained a twisting injury. Occurred at work. Patient is experiencing moderate pain. No other injury. (Pt. was at work, and is a welder fabricator and was working on a truck. Was walking in the truck and twisted knee. Had pain at the time and it has been improving over the last 6 weeks which he has been off work. Went back to work today for 6 hours and pain returned.). …. No prior injury to knee.

Exhibit E, p. 3 (emphasis supplied). Claimant indicated he reported working in a tub, not a truck. Left knee x-rays that day identified no fracture and no significant joint space loss; however, "a small joint effusion [was] present." Exhibit D, p. 1.

28. The October 7, 2013 notes of Dr. Griffiths regarding Claimant's report of his alleged accident are comprehensive and thorough. Dr. Griffiths recorded:

> The patient is complaining of left knee pain. …. He states that his problems began on about August 7, 2013. He was doing some welding and fabricating work involving [a] large piece of farm machinery; he was inside this large "tub" device and it had slanted sides, the floor of this large piece of farm machinery had a belt to move potatoes in and that had been removed to the rollers underneath that; so he was standing awkwardly in this large piece of machinery, doing welding and fabricating work, and he was standing and working awkwardly because there was no flat surface to stand on. He remembers stepping up onto a

> bit of a step in this machinery and catching his foot on a cord and feeling awkward; however, he denied any one single significant injury. The next morning when he got up he was aware of left knee pain. He was aware that the pain was more medial in nature and somewhat posterior in nature. His whole body was sore. Then he had the weekend off and he thought he was feeling better and went back to work the next Monday. He was still feeling quite sore and about that time, because of other issues, apparently he quit working for the company he was working for when he felt like he may have injured his left knee. …. On September 24, 2013, he worked six hours and the same knee became more sore again. The next day, he worked a few hours and still was aware of left knee pain. The pain was worse going up and down ladders in the course of that work experience over those few days.
>
> He went back to the same company that he was working for in August to report that his knee still bothered him and make sure that paperwork was filled out. He filled out some more paperwork regarding the possibility of his left knee being a work related problem. He went back to work as a contract laborer again on September 26, 2013. He worked eight hours and was aware of increasing pain; increasing pain in the right hip area, and left knee; again worse going up and down ladders and so on.
>
> The patient went to Eastern Idaho Regional Medical Center on September 27, 2013 because of knee pain. …. The patient is here today for evaluation of his knee pain. He states today that the knee has not been hurting for the last few days. He has had no pain at all. At one point, he stated he is not sure why he was here. …. When I asked him what he wanted us to do, he stated that the left knee did not bother him, but he could not go back to work because if he had to climb ladders, he was afraid that the left knee would bother him more and then he would be off work again.

Exhibit F, pp. 1-2 (emphasis supplied).

29. Credibility. Claimant's story has been substantially consistent throughout. Although Claimant did not tell Kisner the details of the incident slipping on a cord in the even flow tub, Kisner readily acknowledged that on August 8, 2013, Claimant reported his knees hurt from work in the tub the day before to the point that Kisner asked about completing an accident report. Thus, although Kisner was not present the day of the alleged accident, his testimony corroborates Claimant's testimony of post-accident events and is consistent with Claimant's account of his accident.

30. Defendants note that Kisner and Jensen both testified that Claimant told them he could not put this injury back on his new employer. Defendants suggest such a statement implies Claimant's account is fabricated. Claimant denied making such a statement. It appears that Jensen was not initially aware Claimant and Kisner had discussed completing an accident report on August 8, 2013, thus Jensen considered Claimant's report of an accident suspect when he indicated he could not put this back on his employer in September 2013. Having observed Kisner and Jensen at hearing and compared their testimony to other evidence of record, the Referee found that both are credible witnesses. The Commission finds no reason to disturb the Referee's credibility findings.

31. Claimant's deposition and hearing testimony of hurting his knee while working in the tub is corroborated in part by Kisner's testimony, and is consistent with the September 26, 2013 emergency room medical records and Dr. Griffiths' October 7, 2013 medical records. The reported timing of the onset of Claimant's symptoms is consistent with the asserted occurrence of his accident. Having observed Claimant and carefully compared his testimony with other evidence in the record, the Referee found that Claimant tends to be an imprecise communicator but is generally a credible witness. The Commission finds no reason to disturb the Referee's credibility findings.

32. Defendants note that when asked by Dr. Griffiths what accident he had, Claimant denied having "any one single significant injury." However the law does not require an accident be dramatic before the injuries therefrom are compensable. "To constitute an 'accident' it is not necessary that the workman slip or fall or that the machinery fail. An 'accident' occurs in doing what the workman habitually does if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place." Wynn v. J.R.

Simplot Co., 105 Idaho 102, 105, 666 P.2d 629, 632 (1983), quoting Hammond v. Kootenai County, 91 Idaho 208, 209, 419 P.2d 209, 210 (1966). Even without falling, slipping on a cord is sufficient to constitute an untoward event or mishap if it causes injury.

33. Claimant has proven he suffered an accident—an untoward event—while working for Century on August 7, 2013, when he slipped on a cord while working in an even flow tub.

34. **Causation.** Having proven the occurrence of an untoward event at work, the companion inquiry is whether the accident caused Claimant injury, or more precisely stated, whether the untoward event Claimant suffered at Century on August 7, 2013, caused personal injury to his left knee. This subsumes the issue of whether the condition for which Claimant seeks benefits was caused by the industrial accident or whether his condition was caused by a subsequent and/or preexisting injury or condition.

35. An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(18)(a). 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). Magic words are not necessary to show a doctor's opinion was 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 (2001).

36. Claimant herein alleges that his August 7, 2013, industrial accident caused his left knee injury. There is no evidence Claimant had a left knee injury of any kind prior to

August 7, 2013. Two physicians have opined regarding the causation of Claimant's left knee symptoms. Their opinions are examined below.

37. Dr. Griffiths. Dr. Griffiths' deposition was taken by Defendants. Dr. Griffiths examined Claimant on October 7, 2013. He testified he never arrived at a diagnosis of the cause of Claimant's left knee condition. Griffiths Deposition, p. 11. Dr. Griffiths' testimony supports a conclusion that Claimant suffers a left knee meniscus tear. Dr. Griffiths testified:

> [A.] A mild sprain would be a ligament sprain. So, a mild sprain, a muscle strain, a tendonitis problem could cause pain and those issues would resolve over time. A meniscus tear often does not resolve over time because it doesn't have the ability to heal itself.
>
> Q. In your examination of Mr. Hammon on that day, was there anything that indicated to you to rule out tendonitis?
>
> A. He was sore over the inner aspect of the knee. There are three tendons that come along there that can be sore with over-use. If you had a meniscus tear, it would be sore in the same place. So, where he was sore could be consistent with tendonitis or an MCL sprain or a meniscus tear.

Griffiths Deposition, p. 28, ll. 7-21.

38. Dr. Griffiths noted that Claimant "may have twisted the knee and had a meniscal problem, which is only brought out by doing certain types of work." Exhibit F, p. 2.

39. Dr. Andary. Dr. Andary opined that with a meniscus tear there is generally immediate pain and there may also be swelling. He testified: "I would say normal [sic] there would be a small effusion with a meniscus tear. So there would be a small amount of swelling." Andary Deposition, p. 18, ll. 3-5. Dr. Andary opined that Claimant's accident on August 7, 2013, while working in the even flow tub caused him left knee injury—likely a meniscal tear. However, the full extent of Claimant's left knee injury could not be determined without an MRI.

40. Weighing the medical opinions. Defendants note that Dr. Griffiths found no left knee swelling when he examined Claimant on October 7, 2013. However, Dr. Griffiths examined Claimant two months after the accident and after he had been completely off construction work for two weeks. At that time, Claimant himself reported that his knee was only minimally painful. In contrast, when Dr. Griggs examined Claimant at the emergency room on September 26, 2013, he found a small left knee effusion and the radiologist who read Claimant's left knee x-rays that same day also documented a small joint effusion. This tends to corroborate Dr. Andary's diagnosis of a meniscus tear due to an injury on August 7, 2013. Dr. Andary confirmed that most individuals with meniscal tears have good range of motion—as Claimant displayed when examined by Dr. Griffiths and Dr. Andary. Andary Deposition, p. 30.

41. Dr. Andary's opinion that Claimant's August 7, 2013 accident caused him left knee injury is consistent with the evidence, including Claimant's credible testimony of his symptoms at and shortly after the time of his accident, and Claimant's unrestricted functioning before his accident and his decreased functioning after his accident and is persuasive.

42. Claimant has proven that his August 7, 2013, industrial accident caused a left knee injury, possibly a meniscus tear. However, the type and degree of injury must await further medical evaluation.

43. **Medical care.** The next issue is Claimant's entitlement to medical care. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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. Of course an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus Claimant's requests for medical benefits must be supported by medical evidence establishing causation.

44. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court overruled in part Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), regarding the determination of reasonable medical treatment, stating:

> This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72–432(1) is a question of fact to be supported by substantial and competent evidence.
> ….
>
> [T]he central holding of Sprague, which remains valid, is simply: "It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable." 116 Idaho at 722, 779 P.2d at 397.
>
> The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

Chavez, 158 Idaho at 797-798, 353 P.3d at 418-419.

45. In the present case, Claimant asserts that his August 7, 2013, industrial accident requires additional treatment, including left knee MRI. Both Drs. Griffiths and Andary persuasively testified that an MRI would be reasonable medical treatment for Claimant's left knee symptoms now persisting for more than a year and a half and that additional medical treatment may be warranted depending upon the results of the MRI.

46. Claimant has proven that due to his industrial accident, he is entitled to such further diagnostic care, including MRI, as may be necessary to diagnose the type of injury

sustained by Claimant as a consequence of the accident, and such further care as he may require for that accident-produced condition.

47. **Temporary disability benefits.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

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

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986). However, an injured worker otherwise entitled to temporary disability benefits may lose such benefits if he refuses suitable work, quits or is terminated from his employment for cause, rather than for any limitation from his industrial injury. Idaho Code § 72-403, Quinn v. Doug's Fireplace, 2014 IIC 0095 (Dec. 24, 2014), Griffin v. Extreme RV, 2008 IIC 0946 (Dec. 5, 2008), Smith v. Champion Building Products, 1994 IIC 1511 (Dec. 14, 1994).

48. In the present case, Claimant requests temporary disability benefits from August 13, 2013, through the time of the hearing. However, on August 11, 2013, Claimant voluntarily and unilaterally quit his employment at Century for a cause not related to his industrial accident. Claimant was upset when he was wrongly blamed for leaving a fuel tank from a truck where it obstructed the access of another employee. The other employee had blamed and disrespectfully addressed Claimant about the fuel tank and before even fully advising his supervisor of his accident, Claimant told his supervisor to "try to get [the matter] resolved by Monday or I'll be gone." Claimant's Deposition, p. 34, ll. 16-17. Claimant later testified that when he returned to Century on Monday, August 11, 2013, the following exchange ensued:

> I asked him [Garland Kisner] if anything had been tooken [sic] care of, an apology or anything. And he said no. So I started gathering up my personal tools, my hood, my leathers, my gloves. Head out the door. And Garland said so you're quitting again. And I said, yes, I am. I don't need this kind of employment. And I left.

Claimant's Deposition, p. 35, ll. 18-24. When specifically asked: "did you quit because of the problems you were having with your leg or anything like that?" Claimant answered: "No." Claimant's Deposition, p. 37, ll. 11-13. At hearing, Claimant reaffirmed that he voluntary quit his job at Century:

> Q. I think Counsel went through this with you about why you quit on Monday, the 11th of August, but I just wanted to make sure it's clear. The reason you quit had nothing to do with your knees or hips or anything that happened on August 7th.
>
> A. No.
>
> Q. It had to do with a disagreement that you had with another foreman or supervisor?
>
> A. Yes.

Transcript, p. 69, ll. 15-24.

49. The record establishes that on August 8, 2013, when Claimant reported to his supervisor, Garland Kisner, that his knee hurt and he did not want to work inside the tub, Kisner immediately accommodated Claimant's desire and gave him a different work assignment which Claimant performed the entire day without further complaint. Claimant returned to work on Monday morning August 11, 2013, and promptly quit because of a disagreement with a coworker and not for any reason related to his industrial accident.

50. Claimant's loss of earnings from Century after August 11, 2013, was due to the termination of his employment by his own volitional conduct, rather than for any limitation from his industrial injury.

51. Claimant has not proven his entitlement to temporary disability benefits from August 13, 2013, through the time of hearing.

52. **Attorney fees.** The next issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests

with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

53. In the present case, Claimant asserts entitlement to attorney fees for Defendants' denial of the occurrence of an accident, medical treatment, and temporary disability benefits. Claimant's delay in agreeing to complete a report of injury even when offered by his direct supervisor, Claimant's delay in seeking follow-up medical treatment, and Claimant's initially vague account of his unwitnessed accident all combine to make Defendants' denial of the occurrence of an industrial accident reasonable. Furthermore, Claimant has not proven his entitlement to temporary disability benefits. Defendant's denial of benefits was not unreasonable.

54. Claimant has not proven Defendants' liability for attorney fees.

55. **Retention of jurisdiction.** The final issue is whether the Commission should retain jurisdiction beyond the statute of limitations. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized, it is appropriate for the Commission to retain jurisdiction. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may also be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. Elmore v. Floyd Smith, Jr. Trucking, 86 IWCD 100, p. 1278. However, jurisdiction need not be retained regarding medical benefits as medical benefits pursuant to Idaho Code § 72-432 are not subject to a five-year statute of limitations.

56. In the instant case, Claimant timely filed his Complaint and requested hearing. Claimant has proven he suffered an industrial accident and is entitled to reasonable medical treatment for his left knee injury. The Complaint enumerates additional issues regarding

permanent impairment, permanent disability, and retention of jurisdiction beyond the statute of limitations that are not presently ripe for determination. The Commission will retain jurisdiction to determine all issues set forth in the Complaint that are not determined herein, including whether the Commission should retain jurisdiction beyond the statute of limitations.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven he suffered an untoward event while working for Century on August 7, 2013, when he slipped on a cord while working in an even flow tub. Claimant has proven that his August 7, 2013, industrial accident caused a left knee injury.

2. Claimant has proven that due to his industrial accident, he is entitled to reasonable past and future medical treatment for his left knee injury, including but not limited to left knee MRI.

3. Claimant has not proven his entitlement to temporary disability benefits from August 13, 2013, through the time of hearing.

4. Claimant has not proven Defendants' liability for attorney fees.

5. The Commission will retain jurisdiction to determine all issues set forth in the Complaint that are not determined herein, including whether the Commission should retain jurisdiction beyond the statute of limitations.

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

DATED this 29th day of April, 2016.

INDUSTRIAL COMMISSION

___/s/_____
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 29th day of April, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263

___/s/_____