

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

CHARLES LEROY HARTGRAVE,

Claimant,

v.

CITY OF TWIN FALLS,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2009-005461**

**2012-022300**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND ORDER**

Filed August 30, 2016

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**INTRODUCTION**

Pursuant to Idaho Code §72-506, the Idaho Industrial Commission assigned the above referenced matter to Referee Michael E. Powers. Claimant is represented by L. Clyel Berry of Twin Falls. Defendants are represented by Paul J. Augustine of Boise. In lieu of a hearing, the parties stipulated to having this matter decided on the record. The parties took two depositions and submitted briefs. This matter came under advisement on May 17, 2016. The Commission has reviewed the proposed decision, and agrees with the result. However, the Commission concludes that a different treatment of the issue of causation is warranted, and therefore substitutes this decision for that proposed by the Referee.

**ISSUE**

**FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER- 1**

The sole issue to be decided is whether Claimant's right total knee arthroplasty (TKA) is compensable.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that the need for his right knee<sup>1</sup> TKA was hastened by a change in his gait following two industrial accidents and surgeries to his left knee. Because Claimant was in a non-weight bearing status and on crutches for his last left knee injury, he was forced to bear a greater load on his right knee that created unbearable pain that was previously mostly asymptomatic. Claimant's right knee TKA was required due to this increase in pain.

Defendants counter that the medical evidence does not support Claimant's position in that Claimant did not complain of any pain in his right knee until three months after his full-duty release from his March 13, 2013 left knee surgery. Further, as Claimant can identify no accident involving his right knee, *Nelson* prevents recovery. Moreover, Claimant was a candidate for a right TKA before either of the accidents involving his left knee injuries/surgeries. Finally, Claimant never informed Defendants of his TKA until he answered discovery in March of 2014 and never made a claim for income or disability payments, and a Lump Sum Settlement Agreement limits the issue to whether Blue Cross has a subrogation interest in the medical expenses it paid for Claimant's TKA.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Joint Exhibits (JE) A, B, C, G, I, O, P, and R (Claimant's May 20, 2015 deposition transcript).

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<sup>1</sup> It is undisputed that Claimant's right knee was severely arthritic at the time of his left knee injuries.

2. Deposition transcript of Brian D. Tallerico, D.O., taken by Defendants on March 17, 2016.

3. Deposition transcript of R. Tyler McKee, D.O., taken by Claimant on March 31, 2016.

All pending objections made during the course of taking the above-mentioned depositions are overruled, with the exception of Claimant's objection at pages 21-22 of Dr. McKee's deposition regarding the use in cross-examination of a medical record previously withdrawn by stipulation, which is sustained, and any testimony by Dr. McKee regarding that withdrawn exhibit is stricken.

### **FINDINGS OF FACT**

1. Claimant is 61 years of age and residing in the Magic Valley. He graduated from Murtaugh High School in 1973.

2. Claimant spent 38 years as an employee of the Twin Falls Street Department.

#### **Previous accidents/injuries**

3. In the first grade, Claimant broke his right leg.

4. While in high school, Claimant injured his right knee resulting in a meniscectomy. He healed without residuals.

5. Claimant testified that the only medical treatment he received between the above and 2009 was for right shoulder pain, heartburn, and asthma. Claimant testified that before 2009, his right knee: “. . . was in pretty good shape.” Claimant's Depo., p. 33. However, he would take an over-the-counter pain medication on occasion if he “overdid it.”

6. On **February 3, 2009**, Claimant stepped on a piece of uneven asphalt and injured his left knee. He eventually came under the care of R. Tyler McKee who performed arthroscopic surgery on Claimant's left knee on May 6, 2009. Shortly thereafter, Claimant was returned to light, then full-duty work, although Claimant continued to have pain issues with his left knee.

7. Claimant suffered another injury to his left knee on **August 23, 2012** when he slipped off of the bottom step of a water truck. Dr. McKee again treated Claimant and brought him to arthroscopic surgery on March 13, 2013. Claimant was non-weight bearing on the left and on crutches for approximately 6 weeks post-surgery. He was placed on sedentary duty until he was declared at MMI on August 9, 2013.

8. On November 8, 2013, Claimant again presented to Dr. McKee, this time complaining of bilateral knee pain. Dr. McKee performed a right TKA on November 25, 2013. The gravamen of this claim is whether the need for Claimant's right TKA is a compensable consequence of either one or both of Claimant's left knee injuries/surgeries.

### **The medical evidence**

Brian D. Tallerico, D.O.

9. Defendant State Insurance Fund retained Dr. Tallerico to perform IMEs on Claimant's left knee. Dr. Tallerico lives and practices in Star Valley, Wyoming, a town of about 1200 residents. He is an orthopedic surgeon who conducts IMEs for OMAC.<sup>2</sup> He is fellowship trained in knee replacement and reconstruction. He performs approximately 60-75 knee surgeries per year.

10. Dr. Tallerico first saw Claimant on December 16, 2010 at which time he reviewed pertinent medical records, interviewed and examined Claimant, and prepared a report (JE G). Although Claimant's right knee was not the subject of Dr. Tallerico's IME,

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<sup>2</sup> According to Dr. Tallerico, he performs between 120 to 150 IMEs a year, of which about 10% are for Claimants.

Claimant did inform Dr. Tallerico that he has had ongoing symptoms, including swelling, with his right knee since his open meniscectomy in the early 1970s. Dr. Tallerico testified that patients undergoing an open meniscectomy have a 100% chance of developing bone spurs, flattening of the joint, and loss of joint space.

11. After reviewing diagnostic films of Claimant's left and right knees, Dr. Tallerico opined: "I felt that it (right knee) was actually in much worse shape than his left knee at the time, with significant lateral compartment collapse and loss of cartilage interval." Dr. Tallerico Dep., p. 11. He believed Claimant was a candidate for a right knee TKA at that time.

12. Claimant again saw Dr. Tallerico in August 2011, at which time he diagnosed Claimant with bilateral restricted range of motion, right worse than left, bilateral degenerative joint disease unrelated to his left knee industrial injury and not aggravated by it.

13. Claimant next saw Dr. Tallerico in November 2015, at which time Claimant made no specific right knee complaints and did not mention any need for a right knee TKA. Dr. Tallerico noted that Claimant had undergone a repeat left knee surgery by Dr. McKee in 2013 that (if Dr. Tallerico had done the surgery) would have required four weeks of "protected weight bearing" on the left, meaning that he would have been bearing that weight on the right in order to ambulate. If a patient was experiencing difficulties with that switch to the right, one would expect complaints of pain within several days. Dr. Tallerico reviewed Dr. McKee's records between March and November 2013 when Claimant was non-weight bearing and thereafter, and found no complaints made by Claimant concerning his right knee, nor did he mention to Dr. Tallerico that he

was about to get a right knee TKA. Dr. Tallerico, based on bilateral knee MRIs ordered by Dr. McKee in November 2013 that showed end-stage osteoarthritis in Claimant's right knee, testified that: "My opinion was that nothing related to the left knee claims or injuries would have hastened or accelerated the need for a total knee arthroplasty on the right." Dr. Tallerico Dep., p. 22. However, Dr. Tallerico might change his mind if there was documentation that Claimant began complaining of right knee pain shortly after his second left knee surgery and while he was non-weight bearing.

14. Dr. Tallerico generally agrees with Dr. McKee's opinion that Claimant would have required a right TKA regardless of the industrial injuries to his left knee. Dr. Tallerico disagrees with Dr. McKee that injuries to Claimant's left knee aggravated or accelerated his right knee pain and the need for his right TKA.

15. On cross-examination, Dr. Tallerico testified that Claimant was an honest person and that if he told him something, he would believe it. However, he admitted that he had not reviewed Claimant's deposition testimony or his Answers to Interrogatories regarding when Claimant may have complained of right knee issues. Dr. Tallerico reiterated that the purpose of his various visits with Claimant focused on his left knee problems; not his right knee, although he would examine his right knee to some extent on each of those visits. Dr. Tallerico testified that the decision regarding proceeding with a TKA is "pain driven."

16. Dr. Tallerico opined as follows regarding the affect of limping favoring one side over the other:

Q. (By Mr. Berry): Is it your testimony that a prolonged limp on one lower extremity would not affect the equilibrium or the flow of the motion with regards to the opposing knee?

A. When you limp, it affects, obviously, the mechanics of the involved extremity. However, I believe the question at hand is: Does it impact the contralateral or opposite extremity to any significant degree?

As I said, that gets thrown around a lot and discussed a lot, especially in the area of workers' compensation. However, I don't put a lot of stock in that.

I think, if we are talking about amputations, on one hand, that that increases forces across the joints above and proximal to. That's well documented in orthopedic and biomechanical studies.

As far as a limp on the left causing a worsening of arthritis in the knee or ankle or hip on the right? No.

Dr. Tallerico Dep., p. 46.

17. Dr. Tallerico opined that while a limp on the surgical side may have an affect on the non-surgical side, corresponding symptomatology should develop within the time frame of non-weight bearing on the surgical side. However, he does not believe that a disruption in the normal range of motion of the non-surgical knee would result in an acceleration of degenerative joint disease. Dr. Tallerico testified that it was coincidental that Claimant's right knee became symptomatic during the non-weight bearing phase of his second left knee surgery and, due to the natural progression of his underlying degenerative disk disease, he would have had to have a right knee TKA at some point in any event.

R. Tyler McKee, D.O.

18. Dr. McKee is a board certified orthopedic surgeon who practices in Twin Falls. Approximately 50% of his clinical practice is comprised of knee injuries. He first saw Claimant on March 9, 2009 following his February 3, 2009 left knee injury. Bilateral knee films revealed that Claimant had severe osteoarthritis in his right knee but Claimant did not want treatment for his right knee at that time because it did not hurt. Dr. McKee performed left knee arthroscopic surgery on May 6, 2009 and, although

Claimant was still experiencing swelling and popping, and some limping on the left, he released him to return to work on November 16, 2009.

19. Claimant next saw Dr. McKee on October 2, 2012 following his August 23, 2012 left knee re-injury. Bilateral knee films continued to show right knee osteoarthritis but Claimant had no right knee symptoms at that time. On March 13, 2013, Dr. McKee operated on Claimant's left knee arthroscopically. Claimant was non-weight bearing with crutches on the left until April 23, 2013. Claimant continued to complain of left knee symptoms and continued to limp on the left. Dr. McKee released Claimant to return to work on August 9, 2013.

20. Claimant returned to Dr. McKee on November 8, 2013 complaining of bilateral knee pain. He informed Dr. McKee that his right knee was getting worse and he noted that Claimant was limping, favoring both lower extremities, something Dr. McKee had not seen before. Claimant had never complained of his right knee being symptomatic to Dr. McKee before November 8. Dr. McKee diagnosed right knee degenerative joint disease and performed a right knee TKA on November 25, 2013.

21. In a July 29, 2014 letter responsive to Claimant's counsel's inquiries, Dr. McKee indicated that Claimant would have had to have a right TKA at some point in time regardless of the two injuries and surgeries involving Claimant's left knee.

22. In another letter responsive to Claimant's counsel's further inquiries dated August 28, 2015, Dr. McKee responded to this specific question:

Whether, upon your perspective as Mr. Hartgrave's primary orthopedic surgeon since February 3, 2009, through current date, you believe it to be probable that Mr. Hartgrave's need for a right total knee arthroplasty was accelerated to a point in time earlier than otherwise anticipated had the industrial left knee injuries not have occurred,



specifically to encompass Mr. Hartgrave's change in gait status post the two left knee surgeries.

23. Dr. McKee's response:

I recall meeting Mr. Hartgrave in 2009 and commenting on his severe right-sided arthritis and that he told me at that point that he did not have pain and did not want to proceed with total knee arthroplasty at that time because of that reason. I do not recall addressing his right knee pain at all, until late 2013. At that point his knee was significantly more painful and he elected to proceed with right total knee arthroplasty. What I am trying to say is that I feel his industrial injuries caused an aggravation of his right knee pain. Had there not been worsening symptoms we would not have proceeded with total knee arthroplasty. Therefore, yes. I believe that his industrial injuries moved up his need for total knee arthroplasty on the right.

CE-3, p. 332hhh.

24. At his deposition, Dr. McKee confirmed the above opinion and added that Claimant's gait alteration due to his left knee surgery would also affect the weight bearing on his right knee. While Claimant's right knee was "bone on bone" from the time Dr. McKee first saw him, he was, nonetheless, mostly asymptomatic and did not want his right knee treated. It was the increase in his right knee pain from having to bear more weight on his right knee due to his left knee surgery and subsequent non-weight bearing status on the left that caused Claimant to change his mind about having a right TKA. Even with "bad" films, if a patient is not symptomatic, Dr. McKee would not recommend a TKA.

25. Under cross-examination, Dr. McKee stated that he was unaware that Claimant had testified that while he was on crutches for six weeks post his last left knee surgery his right knee was extremely painful. Dr. McKee conceded that there was no mention in his records of Claimant complaining of right knee pain of any degree while he was on crutches. Further, Dr. McKee testified that Claimant was not complaining of right

knee pain, at least according to his records, at the time Claimant was released to return to work following his last left knee surgery. Dr. McKee was unaware that Claimant was complaining of right knee difficulties upon his return to work in getting in and out of his truck and activities of daily living in general. He does not know if such activities aggravated Claimant's right knee pain. Dr. McKee would have expected Claimant to complain of right knee pain of such severity that it caused his need for a TKA during the six week period that he was on crutches rather than waiting some eight months to finally complain to him. However, over defense counsel's objection regarding speculation, Dr. McKee testified that Claimant may well have thought that after he stopped using crutches his right knee would get better so there was no need to complain during that time period.

#### **DISCUSSION AND FURTHER FINDINGS**

26. The parties agree that Claimant's right knee was not injured directly in an industrial accident. However, the permanent aggravation of a pre-existing condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

27. Here, the argument is that Claimant's pre-existing right knee condition was aggravated by the industrial accident by this path: Claimant suffered a left knee injury which required surgery. During his convalescence, Claimant was required to use crutches and this use of crutches caused a gait alteration which aggravated his right knee condition. If this causal chain finds support in the medical record, Claimant's right knee injury would be compensable pursuant to the "compensable consequences" doctrine. When a primary injury (the left knee) is shown to have arisen out of and in the course of

employment, every natural consequence that flows from that injury (the right knee) is itself compensable. Lex K. Larson, Larson Workers' Compensation § 10.01 (Matthew Bender, Rev. Ed.) The Industrial Commission has recognized the compensable consequences doctrine in prior cases. *See for example: Castaneda v. Idaho Home Health, Inc.*, 1999 IIC 0538 (July 1999); *Martinez v. Minidoka Memorial Hospital*, 1999 IIC 0262 (February 1999); and, *Offer v. Clearwater Forest Industries*, 2000 IIC 0956 (October 2000).

28. Claimant relies on the deposition of Dr. McKee to support his position. According to Dr. McKee, the need for Claimant's right knee TKA occurred earlier than it would have due to aggravation to the knee from being on crutches. Dr. McKee Dep., p. 12. Dr. McKee opined that the altered gait from Claimant's left knee injuries/surgeries would affect the weight-bearing load on the right knee which in turn could aggravate an already damaged joint. Dr. McKee Dep., p. 13.

29. However, while Dr. McKee felt that Claimant's pre-existing right knee condition was probably aggravated by Claimant's left knee industrial injuries, he acknowledged that he had no knowledge of Claimant's right knee pain until several months after it allegedly became symptomatic, he never actually discussed with Claimant how or why the right knee became symptomatic, and that if Claimant had made any mention of right knee pain, he would have documented it given his pre-existing right knee condition. Dr. McKee Dep., pp. 15-20.

30. According to Claimant's medical records, Claimant had left knee surgery on March 13, 2013. He was then ordered to be non-weight bearing on his left knee with the use of crutches for 6 weeks, through April 23, 2013. Claimant was still complaining of

left knee pain through August 2013 but made no mention of any right knee pain during that time. The first time Claimant mentioned right knee pain was November 8, 2013. Dr. McKee Dep., p. 20. Dr. McKee acknowledged that he would have expected any pain resulting from the non-weight bearing status of his left knee to occur within the 6 week period that he was on crutches. Dr. McKee Dep., pp. 26-27.

31. Dr. Tallerico agreed that the timing of Claimant's pain complaints are suspect and that he would have expected any aggravation of the right knee due to the crutches to have occurred while Claimant was on crutches. Dr. Tallerico Dep., p. 16. Although Claimant now asserts that he was in pain during that time and just did not mention it, there is absolutely nothing in the medical records to support his claim. Further, Dr. Tallerico, who specializes in knees, testified that there is absolutely nothing in orthopedic literature that shows a relationship between end-state arthritis being aggravated, or being caused undue or excessive pressure, by an injury to the contralateral side. Dr. Tallerico Dep., p. 21. Nor is he aware of any medical literature to support the theory that loss of normal motion can accelerate degenerative joint disease. Dr. Tallerico Dep., p. 50. According to Dr. Tallerico, it was clearly the expected progression of the pre-existing disease, not the industrial accident to the other knee, that led to Claimant's need for a right knee TKA. The timing was merely coincidental. Dr. Tallerico Dep., p. 55.

32. The medical evidence does not support the conclusion that it is more probable than not that Claimant's need for a right knee TKA was caused due to his left knee industrial injuries. Dr. Tallerico unequivocally opined that it was not. Dr. McKee opined that it might have been because he had no other explanation. He testified in his deposition that Claimant's need for a right knee TKA "could" have been due to his

altered gait due to being on crutches and that it was “possible” that Claimant’s pain could have begun while he was on crutches even though Claimant made absolutely no mention of right knee pain until several months later. Dr. McKee Depo., pp. 13, 32. Dr. McKee’s opinion appears to be founded almost entirely upon a temporal relationship between when Claimant now alleges his right knee became symptomatic and his surgery. However, a temporal relationship alone constitutes insufficient grounds upon which to base a medical opinion.

33. Given the deposition testimony of both Drs. McKee and Tallerico, and the lack of medical evidence to support Claimant’s claim, the Commission finds that the testimony of Dr. Tallerico is more persuasive and agrees that Claimant has failed to prove his right TKA is compensable.

#### **CONCLUSION OF LAW**

1. Claimant has failed to prove his right knee TKA is compensable.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 30<sup>th</sup> day of August, 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 30<sup>th</sup> day of August, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

L CLYEL BERRY  
PO BOX 302  
TWIN FALLS ID 83303

PAUL J AUGUSTINE  
PO BOX 1521  
BOISE ID 83701

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