BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT P. CHRISTENSEN, Claimant, v. HECLA MINING COMPANY, Employer, and ROCKWOOD CASUALTY INSURANCE COMPANY, Surety, Defendants.	**IC 2010-012816** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed July 25, 2017

INTRODUCTION AND BACKGROUND

On December 5, 2014, Claimant filed his Complaint herein listing as issues retention of jurisdiction, medical care, temporary disability, impairment, disability in excess of impairment, and attorney fees. Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the matter to Referee Alan Taylor. Defendants answered denying liability for further benefits and on June 22, 2015, filed their Request for Calendaring seeking hearing on the issues of Claimant's entitlement to medical treatment, time loss, impairment, permanent partial disability, and apportionment of benefits. Claimant filed his Response and Objection to Defendants' Request for Calendaring, affirming Claimant filed his Complaint because of concern for the time limitations of Idaho Code § 72-706, asserting that none of the issues listed by Defendants were currently in dispute, and requesting hearing only on the issue of retention of jurisdiction to preserve Claimant's right to request medical care, temporary disability, permanent impairment, permanent disability, and retraining in the future. On August 5, 2015, Defendants requested hearing on the additional issue of their entitlement to reimbursement from Claimant or an offset

against any future benefits payable for overpayment of impairment benefits. On August 25, 2015, the Referee conducted a telephone conference and issued a Notice of Hearing for December 4, 2015, on the issues of retention of jurisdiction and Defendants' entitlement to reimbursement or an offset from Claimant for overpayment of impairment benefits. On September 14, 2015, Defendants filed their Motion for Reconsideration of Notice of Hearing and Pre-Hearing Telephone Conference and Alternative Motion for Declaratory Ruling requesting reconsideration of the Notice of Hearing and seeking hearing on the additional issues of impairment, disability, and apportionment. On November 4, 2015, the Referee vacated the scheduled hearing because Defendants' motion for reconsideration was still pending. On November 10, 2015, the Commission issued its Order Granting Reconsideration and instructing: "If the Referee determines that a colorable argument has been made that Claimant is currently stable and ratable, he is directed to calendar for hearing all the issues raised by the parties." Order Granting Reconsideration, p. 7. Inasmuch as Claimant had been found stable and ratable by an examining physician, the Referee proceeded to calendar hearing on all issues raised by the parties.

On October 6, 2016, the Referee conducted a hearing in Coeur d'Alene. Claimant, Robert Christensen, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Hecla Mining Company (Hecla), and Defendant Surety, Rockwood Casualty Insurance Company, were represented by Mark C. Peterson, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 7, 2017. The Commissioners have chosen to give different treatment to the issues of apportionment and

application of Idaho Code § 72-316 and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to additional medical care;

2. Claimant's entitlement to additional temporary disability benefits;

3. Claimant's entitlement to permanent partial impairment;

4. Claimant's entitlement to permanent disability in excess of impairment;

5. Apportionment pursuant to Idaho Code § 72-406;

6. Whether Defendants are entitled to reimbursement from Claimant or an offset against any of Claimant's future benefits for Defendants' overpayment of impairment benefits to Claimant; and

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

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained an industrial accident resulting in left knee injuries while working for Hecla Mining Company on January 19, 2010. Defendants provided medical and time loss benefits, and permanent partial impairment benefits of 25% of the lower extremity. Claimant presently makes no claim for additional benefits and only requests the Commission retain jurisdiction of the matter because Claimant has been advised that he will require future knee surgery in 12-20 years after which his knee will be less functional. Defendants assert that Claimant has not proven present entitlement to further benefits due to his industrial accident and that Defendants are entitled to finality. Defendants also assert they

overpaid Claimant permanent impairment benefits and seek reimbursement from Claimant or a credit for their overpayment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file, including all materials filed by the parties in connection with Defendants' motion to reconsider;
2. The testimony of Claimant taken at the hearing on October 6, 2016; and
3. Claimant's Exhibits A through X and Defendants' Exhibits 1 through 21, admitted at the hearing.

FINDINGS OF FACT

1. Claimant was 50 years old and resided in Wallace at the time of the hearing. He is right-handed. He graduated from high school in 1984 and has received no other formal education. Claimant's medical records indicate he sustained knee injuries in high school. Records from 1983 by John Giesen, M.D., indicate Claimant likely had a torn left knee meniscus at that time but after quadriceps strengthening, he resumed his usual sports activities.

2. In 2001, Hecla hired Claimant as a miner. He passed Hecla's demanding pre-employment essential functions evaluation with no sign of physical limitation. He subsequently left Hecla and worked for a time for a pipe welding business. There, Claimant suffered a twisting left knee injury at work and underwent a left knee MRI on January 19, 2004 that showed a large displaced osteochondral fragment from the medial femoral condyle and severe degenerative change in the medial compartment with marked thinning and irregularity of the articular cartilage, degenerated meniscus, and medial meniscus tear. On January 28, 2004, Lloyd Witham, M.D., performed left knee meniscus surgery and noted a dime sized area

underneath the medial meniscus that was worn down to the bone. He released Claimant to work on February 12, 2004, and advised Claimant to avoid twisting and high impact activities and noted that the natural history of this disease was worsening symptoms. Claimant returned to his pipe welding work.

3. In 2006, Claimant returned to Hecla as a miner, again passing Hecla's demanding essential functions evaluation with no sign of physical limitation. On October 2, 2007, Claimant reported left knee pain to his family physician Anthony Branz, M.D., who provided a cortisone injection and encouraged weight loss to a target of 190 pounds. At the time Claimant weighed 240 pounds. Claimant returned to his usual work. On January 19, 2009, Claimant reported to Dr. Branz that his left knee gave out on him while walking down stairs at his home. Dr Branz diagnosed left knee strain. Claimant again returned to his usual work.

4. **Industrial accident and treatment.** On January 19, 2010, Claimant was mining for Hecla when he slipped on mud while walking down an earthen incline ramp in the Lucky Friday Mine and his left knee gave out under him. He noted immediate left knee pain and promptly reported his accident but continued working day after day. Claimant regularly iced his knee after his work shift and tried to work through the injury for several months. However, by May 2010 he was limping noticeably and his knee was steadily worsening. His supervisor directed him to seek medical care.

5. On May 21, 2010, Claimant sought medical care. On June 3, 2010, he underwent a left knee MRI that revealed severe erosive cartilaginous injury in the medial femoral condyle, subchondral fracture consistent with osteochondritis dessicans, chronic posterior horn medial meniscus injury, and subchondral cystic changes and edema. He was referred to Adam Olscamp, M.D. Dr. Olscamp observed Claimant was "bone-on-bone" in the medial compartment and

stated "his most acute recent injury likely is a meniscus tear which has progressed his wear in the medial aspect of his knee." Due to Claimant's youth and high activity level, Dr. Olscamp recommended a partial knee replacement.

6. In September 2010, Leland Rogge, M.D., performed an IME at Defendant's request and indicated Claimant would need a hemiarthroplasty or total knee replacement. Dr. Rogge did not have the correct medical history of Claimant's prior injuries, but did have records[1] for the subject injury, and he also took a history from Claimant. He diagnosed preexisting traumatic arthritis and a fracture with aggravation of his preexisting arthritis on a permanent basis. Dr. Rogge opined: "the major contributing cause of the current condition is the prior arthritis." Nevertheless, Dr. Rogge opined that the recommended surgery was made necessary by the industrial injury.

7. On January 3, 2011, Dr. Olscamp performed hemiarthroplasty surgery. Defendants accepted responsibility for the surgery. On May 12, 2011, Dr. Olscamp found Claimant medically stable and released him to return to work without restrictions. Claimant returned to work for Hecla as a miner.

8. On August 15 2011, Charles Larson, M.D., performed an IME at Defendants' request and rated Claimant's left knee impairment at 25% of the lower extremity with no apportionment for prior conditions. Again, it appears Dr. Larson did not have Claimant's medical records from before the industrial injury, but like Dr. Rogge, he reviewed the treatment records, and listed in his chart review Claimant's 2004 left knee surgery, right knee fracture, and bone cyst. Curiously, although Dr. Larson acknowledged Dr. Rogge's finding that Claimant's preexisting arthritis was a "major contributing cause" of Claimant's current condition, and

[1]The treating records included a summary of Claimant's prior left knee surgery, bone cyst, and right knee fracture.

although Dr. Larson himself proposed that Claimant suffered from "advanced" preexisting degenerative arthrosis of the left knee, Dr. Larson declined to apportion any part of Claimant's left knee impairment to a preexisting condition. Defendants paid Claimant permanent impairment benefits consistent with Dr. Larson's report.

9. By November 2011, Claimant noted pain and catching in his left knee. He continued working. In July 2013 Claimant underwent another left knee MRI that revealed loose fragments in his left knee. On August 21, 2013, Dr. Olscamp performed left knee arthroscopy, removing the loose fragments and repairing a left lateral meniscus tear. The meniscus repair attempt was unsuccessful and on January 6, 2014, Dr. Olscamp performed a left knee lateral meniscectomy. This repair was successful and Dr. Olscamp soon released Claimant to work without restrictions. Claimant returned to work in the mine.

10. On March 19, 2014, Michael Ludwig, M.D., evaluated Claimant's permanent impairment at Surety's request and assigned a rating of 2% of the lower extremity for his partial lateral meniscotomy and 25% of the lower extremity overall; Dr. Ludwig explained that Dr. Larson's prior 25% lower extremity impairment rating was for total knee replacement because there is no partial knee replacement rating in the AMA Guides and should Claimant undergo a total knee arthroplasty in the future, his permanent impairment would not be expected to exceed 25% of the lower extremity. Dr. Ludwig did not have medical records for Claimant's pre-2010 knee condition but did have treatment records and Dr. Rogge's and Dr. Larson's IME reports, all of which included a brief summary of Claimant's prior injuries. Though aware, to some extent, of Claimant's prior left knee problems, Dr. Ludwig did not address the issue of whether Claimant's left knee impairment should be apportioned. However, nothing in Dr. Ludwig's March 19, 2014 report suggests that he was asked by Defendant's to address this issue. Indeed, it

appears that the principle reason for Dr. Ludwig's March 2014 exam of Claimant may have been to ascertain whether the left lateral meniscus surgeries, surgeries which took place after Dr. Larson's 2011 impairment evaluation, caused a change in Claimant's ratable impairment.

11. On July 28, 2015, Dr. Ludwig revisited the issue of Claimant's impairment after being provided with all of Claimant's medical records referencing his preexisting left knee condition. As well, Dr. Ludwig was asked, evidently for the first time, to discuss how, or whether, Claimant's left knee impairment should be apportioned between the subject accident and the documented preexisting condition. Dr. Ludwig reviewed records of Claimant's knee issues in the 1980s, his 2004 left knee surgery, and his 2007 and 2009 reports of his left knee "giving out" and pain, respectively. Relying upon these additional medical records, Dr. Ludwig reaffirmed a rating of 25% of the lower extremity, but apportioned 20% thereof to preexisting degenerative conditions.

12. On August 10, 2015, Dr. Ludwig issued another PPI addendum at the request of Defendants' attorney. He opined that any future total knee replacement would be caused entirely by the preexisting osteoarthritis in the left knee and not the industrial injury.

13. **Condition at the time of hearing.** At the time of hearing, Claimant's left knee continued to be intermittently painful. However, he continued to work as a hard rock miner for Hecla and maintain his reputation as one of the best producing miners in the Lucky Friday Mine.

14. **Credibility.** Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee finds that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

15. 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).

16. **Present entitlement to additional benefits.** Although raised by Defendants as hearing issues, Claimant makes no present claim for and has not proven present entitlement to additional medical benefits, temporary disability benefits, permanent partial impairment benefits, or permanent disability benefits.

17. **Idaho Code § 72-406 apportionment.** Claimant has been rated at 25% LEI for his left knee injury. This rating is not disputed by the parties, and has been paid by Defendants. However, Defendants now contend that they should be responsible for only a portion of this rating, specifically 5% LEI, and that the rest is referable to Claimant's documented preexisting knee condition. Per Idaho Code § 72-406, Defendants ask the Commission to apportion the 25% LE impairment between the subject accident and the preexisting condition.

18. Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Thus, where permanent disability is less than total, it is a "statutory dictate that an employer is only liable for the disability attributable to the industrial injury." Page v. McCain Foods, Inc.,

145 Idaho 302, 309 fn. 2, 179 P.3d 265, 272 fn. 2 (2008). When apportionment under Idaho Code § 72-406 is at issue, a "two-step approach is envisioned for making an apportionment." Brooks v. Gooding County EMS, 2013 IIC 0064.29 (September 12, 2013). First, the claimant's permanent disability from all causes combined must be determined; second, a determination must be made of the extent to which the injured worker's permanent disability is attributable to the industrial accident. *Id*.

19. As recently discussed in Dickinson v. Adams County, 2017 IIC 0007, Idaho law does not recognize the payment of "permanent impairment," characterized as such, even though it is a convention of Idaho worker's compensation practice to refer to the payment of a PPI rating. Rather, Idaho law only recognizes the payment of "permanent disability," of which impairment is a component part. In some cases, an injured worker's permanent disability may be no greater than his impairment rating. In others, the worker's permanent impairment will inadequately compensate him for disability, once the nonmedical factors enumerated at Idaho Code § 72-425 and Idaho Code § 72-430 are taken into consideration. Therefore, while "permanent disability" may exceed "permanent impairment," such permanent impairment must be viewed as a component of a disability award. Idaho Code § 72-406 is potentially confusing because it anticipates that disability from an industrial accident may be increased as a result of a preexisting physical impairment. In such cases, employers can only be held responsible for the additional disability referable to the industrial condition. If impairment and disability are treated as different entities, it is somewhat difficult to understand how a preexisting physical impairment can affect a subsequent work related disability. However, when it is recognized that impairment is simply a component of disability, this difficulty vanishes, and the rule of Page, supra, becomes easy to apply; first measure disability from all causes (inclusive of impairment), then ascertain

what part of that disability is referable to the subject accident. As applied to these facts, Claimant has current disability of 25% of the LE. The Commission must determine whether some of this disability is referable to disability which predated the accident.

20. Only two doctors have issued ratings and both agree Claimant's impairment from all causes is 25% of the lower extremity. Dr. Larson rated Claimant at 25% of the lower extremity with no apportionment, and Dr. Ludwig rated Claimant at 25% with 20% apportioned for "osteoarthritis of the knee."

21. Dr. Larson's rating is problematic: he knew Claimant had a prior left knee meniscectomy, knew that Claimant was bone-on-bone when he first saw Dr. Olscamp, knew that Dr. Rogge had opined arthritis was the major contributing cause for the surgery, and himself diagnosed Claimant with "preexisting advanced degenerative arthrosis." Nevertheless, Dr. Larson did not apportion any part of Claimant's impairment to a preexisting condition.

22. Dr. Ludwig is the only rating physician that had access to Claimant's pre-industrial injury medical records. When finally asked to consider the issue of apportionment, Dr. Ludwig apportioned 20% of his rating to preexisting arthritis. The new information in these additional medical records include the details of Claimant's prior knee surgery in 2004, his 2007 report of pain, and his 2009 report of his knee giving out. We find Dr. Ludwig's opinion to be well informed and internally consistent. We conclude that it is appropriate to apportion Claimant's impairment, 20% to the preexisting condition and 5% to the subject injury.

23. **Reimbursement or offset.** The next question before the Commission is whether Defendants are entitled to apply what we have identified as an overpayment of disability to their future obligations, if any. Claimant contends Defendants are not entitled to a credit or reimbursement because it would be unjust to allow it under a theory of quasi-estoppel and

because no statute authorizes the reimbursement or credit under these facts.

24. We first turn to Claimant's argument that there is no statutory authority for a credit or reimbursement under these facts. Defendants have acknowledged without comment Idaho Code § 72-316, but have not otherwise identified any statute supporting their request for reimbursement or offset. Idaho Code § 72-316 provides:

> **Voluntary payments of income benefits.--**Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of the weekly payments.

Idaho Code § 72-316.

25. No additional income benefits are owed at this time to which an overpayment of PPI might be applied. Since, as developed below, we conclude that the potential need for future work-related medical care with associated additional disability warrants retention of jurisdiction, the possibility exists that Claimant may receive an award of additional disability in the future. Since PPI is disability, there is no reason that Defendants could not seek to apply the overpayment to that obligation pursuant to IC § 72-316.

26. Next Claimant argues that the claimed right to credit must be denied pursuant to the doctrine of quasi-estoppel. Quasi-estoppel is an equitable doctrine which "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." Atwood v. Smith 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (quoting C&G, Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 144, 75 P.3d 104, 198 (2003)). The doctrine can be applied when:

> (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. C & G, Inc., supra at 145.

Both Claimant and Defendant cite extensively to Vawter v. UPS 155 Idaho 903, 318 P.3d 893 (2013) in support of their position. In Vawter, Claimant was injured while working for UPS in 1990 and subsequently in 2009. In settling the first claim, UPS took the position that Claimant had suffered 0% impairment based on the medical opinion generated by its IME physician and paid no impairment consistent therewith. Claimant was injured again in 2009. In 2011, UPS filed a complaint against ISIF that alleging Claimant had a preexisting 7% impairment from the 1990 injury based on a new medical opinion, in an effort to assign some of the Claimant's disability to the 1990 accident, disability for which ISIF would be responsible. The matter went to hearing, and the Commission held Claimant became totally and permanently disabled as a result of his injuries, that he did have a prior impairment of 7%, but that Defendants were estopped from arguing apportionment:

> "Now, of course, the occurrence of the subject accident of December 18, 2009 has made it advantageous to UPS and its current surety to argue that some portion of Claimant's impairment must pre-date the subject accident… It seems clear that UPS is now asserting a position inconsistent with one it acquiesced in and benefited from in 1991. Further, we believe that it would be unconscionable to allow UPS, after having accepted the benefit of the 0% PPI rating rendered by Dr. Knoebel, to now assert a contrary position to the disadvantage of the ISIF." Vawter v. UPS, 2012 IIC 0083.

The Supreme Court agreed: "Because of its position in 1991, UPS avoided paying benefits to Vawter. Now, UPS takes the opposite position to again avoid making payments." Vawter. at 912.

27. Here, Claimant argues that while Defendant's previous position was that Claimant was entitled to a 25% impairment rating, they now assert that Claimant is only entitled to 5% of

that rating and that they deserve a credit for the impairment paid beyond that 5%. We agree with Defendants that this case is unlike the facts at issue in Vawter. Assuredly, Defendants now take a position in this case different then they initially did, but only because they have discovered new facts in the course of this proceeding which support that change of position. This is not unconscionable. Indeed, we believe that Defendants acted appropriately in paying the full rating when and how they did. To encourage sureties to err on the side of paying benefits, Idaho Code § 72-316 allows Defendants the opportunity to attempt to recoup payments that were not actually due when made. Defendant's application for relief following the new evidence on apportionment is consistent with Idaho law, and is not unconscionable.

28. Nor do we give credence to the argument that Defendants gained an advantage to the detriment of Claimant by asserting rights under Idaho Code § 72-316 following the discovery of new evidence, in this case, the opinion of Dr. Larson. Claimant had the benefit of payments to which he was not ultimately entitled. It is not surprising he wishes it were otherwise, but Defendants application under Idaho Code § 72-316 is not the kind of conduct which implicates application of quasi-estoppel.

29. Finally, we do not accept that Claimant has been induced to change any of his positions as a result of Defendant's reliance on Idaho Code § 72-316 following the discovery of new evidence. Claimant has always contended that he is entitled to full payment of the 25% rating. Nothing has changed in this regard.

30. **Retention of jurisdiction.** The final issue, and the only issue raised by Claimant, is whether the Commission should retain jurisdiction beyond the statute of limitations. Claimant readily concedes he is presently owed no temporary disability, permanent impairment or permanent disability benefits and filed his Complaint only to preserve the opportunity to claim

such benefits after future left knee surgery. Defendants assert the Commission should not retain jurisdiction because Claimant's medical condition is stable and has been rated, his physical limitations are not expected to change, any future medical care would not be related to the industrial accident, and Defendants are entitled to finality.

31. Commission discretion. The Commission has discretion to retain jurisdiction under appropriate circumstances:

> Whether to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. When it is clear that there is a probability that medical factors will produce additional impairment in the future, it is appropriate for the Commission to retain jurisdiction. Horton v. Garrett Freightlines, Inc., 106 Idaho 895, 896, 684 P.2d 297, 298 (1984). Similarly, where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction.

Hanson v. UPS, 2016 WL 6884638, at 25 (Idaho Ind. Com. 2016). Retention of jurisdiction may also be appropriate where there is a probable need for future temporary disability benefits. Elmore v. Floyd Smith, Jr. Trucking, 86 IWCD 100, p. 1278.

32. In Horton v. Garrett Freightlines, Inc., 106 Idaho 895, 684 P.2d 297 (1984), Horton suffered an industrial hip fracture in 1974 and after medical treatment returned to work. Horton's doctor recommended: "that his case remain open because arthritis of varying degrees is often associated with a hip fracture such as he had. This may not develop for some time. And there is no way at this time of predicting whether or not he will develop arthritis." Horton, 106 Idaho at 895, 684 P.2d at 297 (emphasis supplied). The surety requested case closure and the Commission approved closure subject to determination of permanent disability, if any. No evidence of arthritis was found until 1981 when Horton's doctor then advised Horton would likely require total hip replacement in three to five years—10 to 12 years post-accident. The surety denied liability for anything other than medical benefits. The Court determined the

Commission had retained jurisdiction of permanent disability benefits in 1974 and declared:

> Idaho's workmen's compensation statutes are designed to provide "sure and certain relief for injured workmen and their families ..." I.C. § 72-201. This Court has consistently held that legislative policy requires our statutes be construed "liberally in favor of the claimant." [Citations omitted.] In keeping with that legislative intent, it is a prudent practice for the Industrial Commission to retain jurisdiction in cases where, as here, it is clear that there is a probability that medical factors will produce additional physical impairment in the future.

Horton, 106 Idaho at 896, 684 P.2d at 298.

33. Inasmuch as Horton approved retention of jurisdiction of disability benefits absent evidence that disability benefits had accrued or were certain to accrue, it is within the Commission's discretion to retain jurisdiction of income benefits in the present case if temporary disability, though not yet accrued, may likely accrue, and if permanent disability may likely accrue due to Claimant's industrial accident.

34. Causation. Claimant asserts that his future need for total knee replacement surgery will be due to his industrial accident. Defendants dispute causation and assert there is presently insufficient evidence to show a clear probability that medical factors will produce additional impairment in the future due to Claimant's knee condition. Three physicians have opined regarding the causation of Claimant's asserted future need for total knee replacement. The opinion of each is examined below.

35. *Dr. Rogge*. Dr. Rogge performed an IME at Defendants' request and concluded that Claimant would need a total knee replacement due to his degenerative or traumatic arthritis of the left knee that pre-existed the work injury and was permanently aggravated by it. Claimant's Exhibit E, pp. 28-29. However, as Defendants have noted, Dr. Rogge has not expressed an opinion on whether Claimant's future need for knee replacement is related to the subject accident.

36. *Dr. Ludwig*. Dr. Ludwig was retained by Defendants and opined that Claimant's future need for total knee replacement surgery will not be due to his industrial accident:

> With regard to future medical care and possible need for total knee arthroplasty, it is my opinion that any possible future need for a total knee arthroplasty would be due to the severe degenerative OA present, and would not be indicated based upon the injury sustained on 1/19/10 on a more likely than not basis.

Defendants' Exhibit 4, p. 61. Dr. Ludwig's conclusory opinion offers no persuasive explanation of how he could foresee that "any possible future need for a total knee arthroplasty" would be due to degenerative osteoarthritis but not due to the industrial accident and/or the effect of Claimant's working for more than four months at Hecla with his injured knee before seeking treatment.

37. *Dr. Olscamp*. Dr. Olscamp is Claimant's treating surgeon and performed Claimant's partial knee replacement surgery. He discussed Claimant's future need for total knee replacement surgery at the behest of both Defendants' and Claimant's counsel. In his letter of July 7, 2016, Dr. Olscamp noted Claimant's January 19, 2010 left knee injury for which he underwent Unicondylar medial knee prosthetic replacement for a medial meniscal tear and bone-on-bone medial arthritic change in the knee. Dr. Olscamp wrote:

> In our conversation about future treatment for Mr. Christiensen [sic], I stated that I do believe it quite likely that he will at some point (I provided my best estimate at 12-20 years) require revision of his current Unicondylar prosthesis to a total knee replacement. This is based on my knowledge of prosthetic wear rates in active younger patients. I am unable to comment whether this future revision surgery would be apportioned to his "prior to industrial injury" or to anticipated failure of his Unicondylar prosthesis which was accepted by L&I as treatment for his 1-19-2010 on the job injury.
>
> Finally I would like to clarify my position on Unicondylar versus Total knee replacement function levels. It is generally accepted that Unicondylar prosthesis function at a somewhat higher level than Total knee replacements. In particular the Unicondylar replacement generally has better flexion, ability to squat, ability to kneel, etc. Both prostheses allow for walking, climbing, etc., and both are functional for "low demand" occupations. This implies that occupations with

> high impacts, vibration, lifting requirements, etc. aren't ideal for post joint replacement patients. I also should add that revision joint replacements often don't function at as high a level as primary replacements—often having more stiffness, less motion and overall have somewhat less "durability" with a shorter overall joint life expectancy. In view of that, when Mr. Christensen gets to the point of revision surgery, he likely will have a lower overall level of function afterward.

Claimant's Exhibit S, pp. 429-430. Dr. Olscamp's frank acknowledgement that at this time he is unable to comment on whether Claimant's need for revision surgery 12 to 20 years from now will be due to prosthetic failure is refreshingly candid. However, Defendants assert it effectively forecloses Claimant's request for retention of jurisdiction.

38. In Geisendaffer v. Dan Weibold Ford, Inc., 2011 WL 765425 (Idaho Ind. Com. 2011), the Commission considered Geisendaffer's impairment, permanent disability, and "Whether the Commission should retain jurisdiction beyond the statute of limitations." Geisendaffer suffered two industrial accidents resulting in meniscus tears requiring surgery in each knee. At surgery he was found to have previously asymptomatic degenerative arthritis. The Commission found Geisendaffer sustained 1% permanent impairment in each knee related to his industrial meniscal injuries and 37% permanent disability inclusive of impairment—all referable to his industrial accidents. The Commission then declared:

> Claimant has requested that the Industrial Commission retain jurisdiction over this matter to consider whether Claimant is entitled to additional indemnity benefits in the future following the anticipated need for bilateral total knee arthroplasties. …. A casual perusal of the AMA Guides to the Evaluation of Permanent Impairment compels recognition that even successful total knee arthroplasties may result in additional impairment and disability owed to Claimant. …. Dr. Gussner has concluded that the subject accidents did aggravate Claimant's underlying degenerative arthritis. Dr. Gussner has also concluded that Claimant will likely require bilateral total knee arthroplasties, and that the need for such procedures has been accelerated as a result of the subject accidents. Of course, whether Claimant is entitled to this treatment as a result of the subject accidents is unknown, since no physician has recommended that Claimant is a current candidate for knee replacement surgery. Moreover, if, and when, Claimant does become a candidate for total knee replacement surgery, it may be as a result of the

> subject accidents, or, some type of intervening event that may supersede the impact of the subject accidents. Claimant's entitlement to total knee replacement surgery under the subject claims, must await future determination. However, because the facts before the Commission do admit a scenario that would leave Claimant entitled to future indemnity benefits following total knee replacement surgery, we believe it appropriate to retain jurisdiction of this matter since Claimant's impairment may indeed be progressive, thus entitling him to additional impairment and disability benefits. See Brooks v. Duncan, 96 Idaho 579, 532 P.2d 921 (1975); Horton v. Garrett Freight Lines, Inc., 106 Idaho 895, 684 P.2d 297 (1984). In the event that a future hearing results in a finding that Claimant is entitled to knee replacement surgery related to the subject accidents, it would be unfair to deny Claimant the opportunity to pursue a claim for additional indemnity benefits referable to such a procedure or procedures.

Geisendaffer, 2011 WL 765425, at 16 (emphasis supplied). The Commission therefore chose to "retain jurisdiction to consider a claim for additional impairment and disability, which may be progressive." Geisendaffer, 2011 WL 765425, at 17.

39. In the instant case, inasmuch as Claimant does not presently request any additional medical benefits, he need not presently prove his entitlement to future medical benefits, rather he must prove a reasonable likelihood of future entitlement to such benefits sufficient to warrant the Commission exercising its discretion to retain jurisdiction of benefits which are likely to accrue. It is sufficient that Dr. Olscamp confirms that Claimant's Unicondylar prosthesis has a limited life expectancy of 12-20 years based on Dr. Olscamp's knowledge of prosthetic wear rates in active younger patients and that, not if but "when Mr. Christensen gets to the point of revision surgery, he likely will have a lower overall level of function afterward." Claimant's Exhibit S, p. 430 (emphasis supplied). Moreover, under the facts now established, it is apparent that Idaho Code § 72-432(2) bears on the instant case.

40. Statutory replacement obligation. Idaho Code § 72-432 provides in pertinent part:

> **Medical services, appliances and supplies—Reports.--**
>
> (1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other

> attendance or treatment, nurse and hospital services, 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.
>
> (2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

Idaho Code § 72-432 (emphasis supplied).

41. After compensability of the initial prosthesis is determined, Idaho Code § 72-432(2), implicitly recognizing that a prosthesis may not be as durable as the natural limb or joint, places upon the employer and its surety responsibility to repair or replace the prosthesis when needed unless the need for repair is due to the injured worker's lack of proper care or to a subsequent intervening industrial accident.

42. In the present case, Defendants are responsible pursuant to Idaho Code § 72-432(2) for "necessary replacements or repairs" of Claimant's Unicondylar prosthesis when it reaches the end of its life expectancy of 12-20 years, "unless the need therefor is due to lack of proper care" by Claimant or the prosthesis is damaged or destroyed in a subsequent industrial accident. When the Unicondylar prosthesis requires replacement, if competent medical evidence establishes that the unavoidable trauma from the removal of the worn out Unicondylar prosthesis is sufficient to require replacement with a total knee prosthesis rather than another Unicondylar prosthesis, then Defendants may be liable for this replacement pursuant to Idaho Code § 72-432(2).

43. Presently, there is no evidence that Claimant has or will fail to observe proper care of his knee prosthesis or that he will suffer another industrial accident, thus there is no

evidence from which to conclude that Defendant's statutory obligation to replace Claimant's Unicondylar prosthesis will be foreclosed by future events. It would be premature to determine this causation question at present; however, given Dr. Olscamp's opinion, it is a near certainty that Claimant's current Unicondylar prosthesis will require replacement within 12-20 years.

44. Given Idaho Code § 72-432(2) requiring Defendant to provide replacement of Claimant's Unicondylar prosthesis necessitated by his industrial accident, and Dr. Olscamp's persuasive opinion that Claimant's Unicondylar prosthesis has a limited life expectancy, these facts together provide sufficient justification for the Commission to exercise its discretion and retain jurisdiction to consider future temporary disability benefits. Dr. Olscamp's opinion of the lesser function of revision joint replacements also justifies the Commission in exercising its discretion to retain jurisdiction of the case to consider future permanent impairment and disability benefits.

45. In the instant case, as in Geisendaffer, whether Claimant is entitled to total knee replacement surgery as a result of his industrial accident is presently unknown, since no physician has recommended that he is a current candidate for knee replacement surgery; however, the facts proven and the mandate of Idaho Code § 72-432(2) "do admit a scenario that would leave Claimant entitled to future indemnity benefits following total knee replacement surgery" and "in the event a future hearing results in a finding that Claimant is entitled to knee replacement surgery related to the subject accident, it would be unfair to deny Claimant the opportunity to pursue a claim for additional benefits referable to such a procedure." Geisendaffer, 2011 WL 765425, at 16.

46. The Commission should retain jurisdiction of this case to consider future claims for temporary disability, permanent impairment, and permanent disability.

CONCLUSIONS OF LAW AND ORDER

1. Claimant makes no present claim for, and has not proven present entitlement to, benefits in addition to those paid to date.

2. Claimant has current disability based on impairment of 25% of the whole person.

3. That disability is apportioned 20% to the documented preexisting left knee condition and 5% to the subject accident.

4. Defendants have paid the full 25% rating, and are entitled to apply the 20% overpayment to any future income benefits payable to Claimant as anticipated by Idaho Code § 72-316.

5. The Commission should retain jurisdiction of this case to consider future claims for additional temporary disability, permanent impairment, and permanent disability.

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

DATED this 25th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

Participated but did not sign
_____
R.D. Maynard, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2017, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

MARK C PETERSON
PO BOX 829
BOISE ID 83701

____/s/_____