

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

RICARDO CORTES,

Claimant,

v.

SWIFT TRANSPORTATION COMPANY,  
INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Surety,  
Defendants.

**IC 2015-013491**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**FILED  
MAY 24, 2018**

**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 Boise on May 22, 2017. Claimant, Ricardo Cortes, was present in person and represented by Justin Aylsworth, of Boise. Defendant Employer, Swift Transportation Company, Inc. (Swift), and Defendant Surety, Ace American Insurance Company, were represented by Emma R. Wilson, of Boise. The parties presented oral and documentary evidence. Claimant testified at hearing through interpreter Susan Evans. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 7, 2018.

**ISSUES**

The issues to be decided by the Commission are:

1. Whether Claimant is entitled to additional medical benefits; specifically total knee replacement, due to his industrial accident.

2. Whether Claimant is entitled to temporary disability benefits due to his industrial accident.
3. Whether Claimant has reached maximum medical improvement and the date thereof.

All other issues are reserved.

### **CONTENTIONS OF THE PARTIES**

All parties acknowledge Claimant suffered an industrial accident at work on May 19, 2015, and injured his right knee. Defendants paid for surgical repair of Claimant's torn right knee meniscus. He now seeks additional medical benefits for a total right knee replacement and temporary disability benefits during recovery therefrom. Defendants dispute the causation and compensability of his requested total right knee replacement surgery.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The parties' Joint Exhibits 1 through 17, admitted at the hearing;
3. The testimony of Claimant taken at hearing;
4. The post-hearing deposition testimony of Ronald M. Kristensen, M.D., taken by Claimant on August 18, 2017; and
5. The post-hearing deposition testimony of Roman Schwartsman, M.D., taken by Defendants on September 1, 2017.

All pending objections are overruled and motions to strike are denied except that Defendants' objection to changes in Dr. Kristensen's deposition testimony beyond simply correcting typographical errors in the transcript, is hereby sustained.

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

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

## **FINDINGS OF FACT**

1. Claimant was born in 1955. He was 62 years old and lived in Caldwell at the time of the hearing. Swift is a commercial trucking enterprise.

2. **Background.** Claimant was born and raised in Mexico City. In approximately 1972, at the age of 18, he became a professional soccer player and played goalie for ten or twelve years in Mexico. He practiced two hours per day, six days per week and played 30-50 games annually.

3. In 1973, Claimant injured his right knee during soccer practice. His shoe caught in the grass and he fell to the side. He underwent surgery for a torn meniscus. Claimant recovered and returned to playing professional soccer approximately 30 days later.

4. In 1975, Claimant was playing professional soccer and suffered a left knee injury when his shoe again caught in the grass and he fell. He underwent surgery for a torn meniscus and also for ligament injuries. Claimant was unable to play for approximately six months and thereafter returned to playing professional soccer for seven more years.

5. In 1982, Claimant stopped playing professional soccer because while returning home from a soccer game he was attacked and stabbed leaving him with punctured intestines and a punctured lung. He was hospitalized for 15 days and required approximately one full year to recover.

6. In 1985, Claimant moved to the United States. He became a US citizen. He had no right knee symptoms. Claimant worked in California at a furniture factory where he lifted materials and operated production machinery. He later worked in a carpentry shop and loaded and unloaded trucks. Claimant thereafter worked for a transportation company and suffered an

industrial accident resulting in a hernia requiring surgical repair. He recovered and resumed working.

7. Claimant sustained no right knee injury during any of his work activities. A March 30, 1992 report by his medical provider indicated Claimant's job duties then included lifting and carrying up to 70 pounds and operating a forklift. He moved 25,000 pounds of cargo per day. Claimant eventually became a long haul truck driver for Swift in California.

8. In 2012, Claimant moved to Idaho to be closer to his oldest son. Claimant began working as a long haul truck driver for Swift in Idaho. He had no right knee symptoms or complaints. Claimant had private health insurance coverage which he used while at Swift. There is no indication in the record that he had right knee symptoms or sought medical attention for his right knee at any time between 1974 and 2015. To the contrary, his wellness exam on April 1, 2013 documented that he denied pain or swelling of his joints and had normal range of motion of his extremities. Exhibit 8, pp. 11-12. Similarly, his annual wellness exam on December 16, 2014, showed normal range of motion and no edema in his extremities. Exhibit 8, p. 78.

9. While working for Swift in Idaho, Claimant exercised regularly. He ran for 30 minutes and also biked 5-10 miles, two or three times per week. He experienced no right knee symptoms while working or exercising.

10. **Industrial accident and treatment.** On May 19, 2015, Claimant was driving truck for Swift. He arrived for a scheduled delivery to a Wal-Mart in Burley. Upon lifting the door of his trailer, several boxes fell from a pallet, striking the side of his right knee. The boxes weighed approximately 15-25 pounds each. He noted immediate right knee pain which did not resolve as the unloading continued. He notified the store manager who reported the incident.

Claimant also called the Swift yard in Utah and reported the accident. The following morning he presented to a hospital in Tremonton, Utah where Todd Miller, M.D., attended him and recorded:

The patient states that he was working near a pallet [of] boxes that tipped over and hit him in the anterior and lateral aspect of the right knee. States that his knee was hyperextended and forced medially during the incident. He was able to ambulate at the time and walked into the emergency department but is having significant pain and a limp. He states that he had a knee scope on that knee many years ago and is [sic] had normal function and no pain in the recent past.

Exhibit 6, p. 6. Right knee x-rays showed significant degenerative arthritis. He was given a knee brace. Another driver brought him back to Idaho where Claimant was referred to Dr. Martinez for treatment of his right knee.

11. In June 2015, Claimant underwent a right knee MRI that disclosed significant meniscal pathology and degenerative changes. Defendants authorized George Nicola, M.D., to provide additional treatment for Claimant's industrial injury. On July 29, 2015, Dr. Nicola performed arthroscopic right knee partial lateral meniscectomy. As Claimant recovered from surgery, Dr. Nicola recommended physical therapy. Claimant completed three months of physical therapy. During one physical therapy session in early October 2015, Claimant felt a painful "pop" in his right knee. In his December 22, 2015 notes Dr. Nicola recorded: "Patient states that he was at physical therapy doing a leg extension with weight when he felt a snap in the right leg. .... He feels that since this incident he has been getting worse. .... Patient had an injury that occurred at physical therapy 2 months ago which may have caused a lateral meniscal tear into the right knee." Exhibit 3, p. 25.

12. In January 2016, Claimant underwent another right knee MRI after which Dr. Nicola recommended total right knee arthroplasty.

13. Claimant was off work from May 2015 until February 2016. He then returned to work in spite of his continuing right knee symptoms.

14. **Condition at the time of hearing.** At the time of the hearing Claimant continued to work 60-70 hours per week for Swift. He started at 6:00 or 6:30 am and returned at night between 7:00 and 9:00 pm. He drove a truck with automatic transmission and was not required to load or unload his own truck. Dr. Nicola has cautioned Claimant to avoid heavy lifting, including putting chains on his truck. Claimant chained up his truck in February 2017 in Wieser and noted increased knee pain. When Claimant worked he noted right knee pain that caused him to take breaks. His right knee was sore upon finishing each shift even though he wore the prescribed knee brace while working. He continued working for Swift in spite of his increasing right knee symptoms in order to maintain health insurance coverage for his wife who has cancer.

15. At hearing Claimant testified that his right knee is painful and wakes him at night. His knee pain worsens with physical activity. Sitting for long periods also increases his knee pain. He can no longer exercise because it increases his knee pain.

16. **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.

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

17. 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).

18. **Medical care.** The first issue presented is whether Claimant's need for total right knee replacement is due to his industrial accident.

19. Idaho Code § 72-432 provides in pertinent part:

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.

Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). 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).

20. Claimant herein alleges that his 2015 accident at Swift caused his current need for total right knee replacement. Defendants acknowledge that Claimant's proposed total knee arthroplasty is reasonable treatment for his right knee condition. However, they assert it should be pursued on a nonindustrial basis and deny that Claimant's industrial accident caused his need for such surgery. Several physicians have opined on the issue, including Dr. Nicola, Dr. Schwartzman, and Dr. Kristensen.

21. Dr. Nicola. Dr. Nicola was recognized by Defendants as Claimant's treating physician and performed his July 2015 partial meniscectomy. When Claimant's knee symptoms persisted thereafter, Dr. Nicola recommended Claimant undergo total right knee arthroplasty on a nonindustrial basis due to his significant pre-existing osteoarthritis.

22. Dr. Kristensen. Ronald Kristensen, M.D., is a board certified orthopedic surgeon who has treated thousands of patients and performed thousands of total knee arthroplasties. He examined Claimant on April 25, 2016, at Claimant's request. Dr. Kristensen affirmed that

Claimant had significant right knee degenerative arthritic changes present for many years prior to his industrial accident. However, he reviewed pre-accident medical records and found no record indicating Claimant sought medical treatment for his right knee for 30 years prior to his industrial accident. Dr. Kristensen affirmed that Claimant denied right knee symptoms prior to his industrial accident. While noting that Claimant had preexisting right knee arthritis, Dr. Kristensen testified that “A few percent of patients with a history of arthrosis or arthritis are asymptomatic.” Kristensen Deposition, p. 14, ll. 16-17. He quantified this as five to ten percent of his patients. Kristensen Deposition, p. 21, ll. 15-17.

23. Dr. Kristensen testified of the relationship between Claimant’s industrial accident and his meniscus surgery:

Q. ... based on your review and evaluation, did Ricardo undergo an arthroscopic partial lateral meniscectomy surgery performed by Dr. George Nicola on July 29, 2015, as a direct result of the work-related meniscus injury he suffered on May 19, 2015?

A. Yes.

Kristensen Deposition, p. 14, l. 24 through p. 15, l. 5. Dr. Kristensen concluded that Claimant’s industrial accident accelerated and hastened his need for total right knee arthroplasty.

24. Defendants cite portions of Dr. Kristensen’s deposition testimony on cross-examination which they argue indicate he was unsure of the relationship between the industrial accident and Claimant’s need for right knee arthroplasty. However, review of the entirety of Dr. Kristensen’s testimony reconfirms his causation opinion:

Q. [by Ms. Wilson] Then what specific pathology do you relate to his industrial injury?

A. I don’t know exactly. You know, I think that the—sort of the whole continuum I think that got us here. He had an injury, and the MRI showed a lot going on. And what was caused by that and what was there, I can’t say.

But the injury plus the treatment, I think, leads to the pathology that he now has, which is symptomatic arthritis. Did that answer your question?

Q. When you talk about the aggravation of his arthritis, is that due to the injury alone or the surgery that he had in 2015?

A. It's hard to say something definitive about the injury. But the literature is very clear about the results of the lateral meniscectomy. So I can speak most confidently when I talk about the results of that lateral meniscectomy.

So the fact that he had an injury that was deemed a lateral meniscus injury that had a surgery, that's where I can speak the most that the combination of that injury with subsequent surgery leads to these results.

Kristensen Deposition, p. 21, l. 18 through p. 22, l. 16 (emphasis supplied).

25. Dr. Schwartzman. Roman Schwartzman, M.D., is a board certified orthopedic surgeon who examined Claimant on November 22, 2016, at Defendants' request. Dr. Schwartzman conducted his examination in English and opined Claimant's command of English was adequate for purposes of the examination. Dr. Schwartzman testified that the radiologist reading the June 2015 MRI indicated there was "edema in the posterolateral aspect of the knee. That's the area that Mr. Cortes claims to have been struck in suggesting a recent direct blow to the lateral and posterolateral aspect of the knee. .... confirming that in fact Mr. Cortes would have been struck in that area, and that's why the edema developed." Schwartzman Deposition, p. 11, ll. 2-6, 9-11.

26. Dr. Schwartzman noted that "the type of meniscectomy Mr. Cortes had [in 1973] invariably and consistently leads to advanced end-stage degenerative changes 20 to 25 years later. That's pretty much the time course that we're working with here." Schwartzman Deposition, p. 14, ll. 3-6. He concluded that Claimant has preexisting end stage arthritis and his 2015 industrial accident "did not in any way significantly aggravate, exacerbate or contribute to

the need for a total knee arthroplasty.” Schwartsman Deposition, p. 15, ll. 23-25 (emphasis supplied).

27. Dr. Schwartsman agreed with Dr. Nicola’s recommendation that Claimant undergo a total knee replacement on a nonindustrial basis. Dr. Schwartsman disagreed with Dr. Kristensen’s conclusion that Claimant’s injury and surgery led to the need for a total knee replacement because Claimant’s preexisting conditions “merited a knee replacement as his only viable treating option in this case.” Schwartsman Deposition, p. 17, ll. 110-11.

28. Weighing the medical opinions. Dr. Schwartsman expressly agreed that pain is the overriding reason why a patient will elect to undergo knee replacement surgery. Schwartsman Deposition, p. 50, ll. 1-3. Knee replacement surgery is not commonly recommended for an asymptomatic knee. Dr. Schwartsman acknowledged that total knee replacement is recommended when objective imaging confirms loss of cartilage through the weight bearing surfaces of the knee and the patient’s discomfort is no longer tolerable given the patient’s chosen level of activity. Schwartsman Deposition, pp. 48-49.

29. Claimant’s 2015 right knee MRI as read by Dr. Schwartsman documented slight right knee edema, thus confirming Claimant’s description of his industrial accident. Nevertheless, Dr. Schwartsman and Dr. Nicola focused on Claimant’s extensive pre-existing tricompartmental right knee arthritis and concluded his present need for total right knee arthroplasty is due to preexisting nonindustrial conditions. Dr. Schwartsman’s opinion rests upon his speculation that Claimant’s right knee was symptomatic before his accident. Dr. Schwartsman doubted Claimant’s assertion that his right knee was asymptomatic prior to the industrial accident: “He claims that he did not have any prior symptoms with the knee. Frankly

in light of the extensive advanced degenerative changes seen in the lateral compartment, this appears unlikely.” Exhibit 4, p. 4.

30. In rendering his opinion, Dr. Schwartzman had no opportunity to review Claimant’s pre-accident medical records. Dr. Kristensen reviewed Claimant’s pre and post-accident medical records. There is no evidence in the record that Claimant had right knee symptoms at any time for more than a decade before his 2015 industrial accident. Claimant testified at hearing that before his industrial accident, his right knee was asymptomatic and did not hamper his sleep or restrict his work or recreational—including exercising—activities. Furthermore, in speculating Claimant had pre-accident right knee symptoms, Dr. Schwartzman was unaware of Claimant’s exercise routine,<sup>1</sup> but later intimated it could have increased his pre-accident functionality:

Q. [by Mr. Aylsworth] You weren’t aware that he ran up to 30 minutes and biked five to ten miles two or three times a week prior to the injury?

A. He did not make me aware of that. He claims that based on—he simply makes that claim?

Q. He testified to that. There’s also indications [sic] in the Primary Health records about an exercise routine prior to the injury.

A. Unfortunately that falls under the guidelines of subjective rather than objective. The biking I would fully endorse and fully subscribe to. My father, who is 78 years old, bikes 25 miles a day with knees that look worse than Ricardo’s. He does not run, but he does bike 25 miles a day. That actually is what keeps him going and keeps him away from the knee replacement is the biking.

Schwartzman Deposition, pp. 37, ll. 5-20.

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<sup>1</sup> On February 20, 2013, Daryn Barnes, PA, recorded Claimant has lost 20 pounds over the previous six months although he was not “working out more than normal.” Exhibit 8, p. 5. In his recorded statement to Surety’s adjustor three days after the accident, Claimant reported he normally exercised at home two or three times a week, running approximately two miles, walking frequently, and lifting 20-pound weights. Exhibit 16, pp. 14-15. At hearing, Claimant testified his regular exercise routine while working for Swift before the accident including running for “approximately 30 minutes” and pedaling a bicycle for “sometimes five miles, ten miles .... Two to three times a

31. Dr. Schwartzman elaborated on the benefit of Claimant's pre-accident cycling routine:

Q. [by Mr. Aylsworth] ...[H]ave you ever had the firsthand opportunity to treat any individuals or patients like Ricardo with remote medical and surgical histories and preexisting degenerative conditions who had functional and asymptomatic knees?

A. One word answer to your question is yes. Let's qualify the word asymptomatic. Because they're not truly asymptomatic. But they manage their symptoms well to the point where they can function.

In other words, I'll draw on my father and his cohort of skiing buddies who are all in their 70s and 80s who all ski 100 to 150 days a year in Utah and manage their arthritis with a regimen of anti-inflammatories and cycling. That's how they get by. None of them want a knee replacement, and they're able to manage their symptoms sufficiently.

Again, without having known Ricardo prior to this, without being directly aware of his exercise routine—

Q. Or having his preinjury medical records.

A. Or having his preinjury medical records or being able to in any way validate what he did or did not do, I would say the cycling would be a major contributor to his being able to manage his symptoms.

We know this from multiple studies in the orthopedic literature that show that closed chain, constant passive motion type exercises like cycling—in other words where the full weight of the body is not placed on the limb or the limb is on a fixed platform like a pedal, those are very helpful in managing arthritic conditions, if any.

Schwartzman Deposition, p. 37, l. 23 through p. 39, l. 3.

32. Claimant's testimony that while working for Swift, he exercised regularly, running for 30 minutes each week and also biking 5 to 10 miles, two times per week is unrefuted and credible. Dr. Schwartzman's testimony and Claimant's regular pre-accident exercise routine provide the ready explanation of why in spite of radiographically documented significant

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week." Transcript, p. 28, ll. 13-21.

degenerative changes Claimant was highly functional and his right knee was asymptomatic prior to the accident.

33. Claimant's 2015 right knee MRIs confirmed advanced degenerative right knee arthritis in 2015; however, they do not necessarily refute his assertion that he had no right knee symptoms and was fully functioning prior to his industrial accident. Running for 30 minutes and also biking five to ten miles two or three times each week are not activities typically pursued by those with significantly symptomatic right knee arthritis. Dr. Kristensen testified that approximately five to ten percent of his patients with a similar degree of radiographically documented degenerative arthritis are asymptomatic.

34. In his final deposition statement, Dr. Schwartzman testified:

Q. [by Ms. Wilson] We've had an extensive discussion here today. Does it continue to be your opinion that Mr. Cortes' need for a total knee replacement is unrelated to his 2015 industrial injury?

A. My opinion is that Mr. Cortes had preexisting conditions which met the criteria for a total knee replacement and would have needed a knee replacement independent of whatever event transpired on May 19 of 2015. And that his need for a knee replacement is not significantly hastened by the specific mechanics of the injury which he describes for the event of May 19, 2015.

Schwartzman Deposition, p. 56, ll. 8-20 (emphasis supplied).

35. Dr. Schwartzman's final opinion was carefully articulated. In response to the question of whether he continued to opine that Claimant's need for total knee replacement is unrelated to his 2015 industrial injury, Dr. Schwartzman did not assert Claimant's need for total right knee arthroplasty is unrelated to his industrial accident; rather, he opined the accident did not significantly hasten Claimant's need for knee replacement. Dr. Schwartzman's response did not address whether the July 2015 meniscectomy hastened or contributed to Claimant's need for total right knee arthroscopy. Dr. Schwartzman had previously acknowledged that Claimant's

July 2015 meniscectomy surgery impacted his right knee: “If you’re arguing that the surgery was an insult to this patient’s knee, I would have a hard time disputing that. But whether the patient had a need for a total knee arthroplasty prior to his industrial event, he definitely did.” Schwartzman Deposition, p. 28, ll. 15-19.<sup>2</sup>

36. The Commission faced a similar situation in Zapata v. Lignetics of Idaho, Inc., 2010 WL 3947991 (Idaho Ind. Com. 2010), wherein a worker with pre-existing bilateral degenerative knee arthritis twisted each of his knees in separate industrial accidents and underwent a partial meniscectomy of each knee. Later, bilateral total knee arthroplasty was recommended. In finding the surety liable for bilateral knee arthroplasties, the Commission observed:

Dr. Dibenedetto testified that although Claimant suffered from degenerative osteoarthritis prior to his industrial accidents, he was functional and able to pursue work and other activities without limitation due to his knees and that subsequent to Claimant's industrial accidents, his knees have restricted his work and other activities. To Dr. Dibenedetto's knowledge the only intervening incident “that set this off would have been his industrial injury. ... [Claimant] clearly had a level of function before his injury that was never returned after his injury.” Dibenedetto Deposition, p. 13, ll. 3-4, 7-9. Dr. Dibenedetto explained the effect of trauma and surgery on any pre-existing osteoarthritis in a knee: “When someone has a degenerative condition of their knee, that's called osteoarthritis. .... When you add a trauma on top of a degenerative condition it adds significantly to the progression of osteoarthritis.” Dibenedetto Deposition, p. 14, ll. 8-10, 16-18.

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<sup>2</sup> Dr. Schwartzman testified regarding the insult of arthroscopy on the knee:

If you think about what happens in a surgical procedure ... we are making two incisions in the knee, we are disrupting the joint capsule by making those incisions and introducing rigid foreign bodies into the knee, specifically the arthroscope.

... [A]rthroscopy is invasive. We are violating a body cavity with a rigid foreign object.

There are complications that can happen as a result of even the most well-done and well-thought-out arthroscopy. There is an inflammatory response to that violation of the body cavity, and it can be a persistent inflammatory response.

Schwartzman Deposition, p. 46, ll. 3-19.

Michael Weiss, M.D., reviewed Claimant's medical records at Defendants' request and, in his letter of January 2, 2007, noted that Claimant "is very likely to require a total knee in the future, since this was already considered prior to this injury based on his tricompartmental osteoarthritis. I would certainly anticipate that his arthroscopic surgery and meniscectomy would have accelerated that to some degree." Exhibit 13, p. 395.

It is undisputed that Claimant suffered degenerative osteoarthritis in both of his knees prior to his industrial accidents. However, it is well settled that "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

Zapata, 2010 WL 3947991, at 6–7. See also Van Sickle, 1987 IIC 0241, and Smith, 1989 IIC 0626 (wherein the Commission applied the axiom that if an industrial accident hastens the need for surgery, the surgery is compensable).

37. In the present case, it is clear that Claimant had extensive pre-existing degenerative arthritis in both his right and left knee. Although his industrial accident may not be the sole or the most significant factor in producing his current need for total right knee arthroplasty, it accelerated that need. Dr. Kristensen's conclusion is well supported by the record and persuasive: "given that [Claimant] was asymptomatic prior to his industrial injury and has never been restored to his pre-injury status, the need for his total knee arthroplasty is directly related to his industrial injury." Exhibit 5, p. 3. Claimant has proven that his current need for right total knee arthroplasty is related to his 2015 industrial accident.

38. Claimant has proven he is entitled to right total knee arthroplasty due to his industrial accident.

39. **Temporary disability.** 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).

40. In the present case, Claimant has proven that his proposed total right knee arthroplasty is causally related to his 2015 industrial accident and thus has proven his entitlement to benefits for temporary disability during his recovery.

41. **Maximum Medical Improvement.** The final issue is whether Claimant has reached maximum medical improvement and if so, the date thereof. Inasmuch as Claimant has proven his entitlement to total right knee arthroplasty, he has not yet reached maximum medical improvement.

## **CONCLUSIONS OF LAW**

1. Claimant has proven he is entitled to right total knee arthroplasty due to his industrial accident.
2. Claimant has proven he is entitled to temporary disability benefits during his recovery from his proposed right total knee arthroplasty.
3. Claimant has not yet reached maximum medical improvement.

## **RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this \_\_4th\_\_ day of May, 2018.

INDUSTRIAL COMMISSION

\_ /s/ \_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

\_ /s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of May, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JUSTIN P AYLSWORTH  
PO BOX 6190  
BOISE ID 83707-6190

EMMA R WILSON  
1703 W HILL RD  
BOISE ID 83702

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

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**IC 2015-013491**

**ORDER AND CONCURRING  
OPINION**

**FILED  
MAY 24, 2018**

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Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven he is entitled to right total knee arthroplasty due to his industrial accident.
2. Claimant has proven he is entitled to temporary disability benefits during his recovery from his proposed right total knee arthroplasty.
3. Claimant has not yet reached maximum medical improvement.

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

DATED this \_\_\_24th\_ day of \_May\_\_\_\_\_, 2018.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/ Thomas E. Limbaugh, Chairman

\_\_\_\_\_  
/s/ Aaron White, Commissioner

ATTEST:

\_\_\_\_\_  
/s/ Assistant Commission Secretary

**Concurring Opinion of Commissioner Thomas P. Baskin**

While I concur with the result in this case, I am not in complete agreement with the Referee's analysis. The Referee concluded that the accident caused an injury to Claimant's knee, which, in turn, the required surgery, which further destabilized the knee. Therefore, both events contributed to the need for the total knee arthroplasty. Having reviewed the record, and in particular the testimony of Drs. Kristensen and Schwartzman, I do not believe that the evidence is sufficient to establish that the accident caused injury to Claimant's lateral meniscus, such as to require the surgery performed by Dr. Nicola on July 29, 2015. However, because it was reasonable to pursue surgery to treat/diagnose Claimant's suspected work-related condition, and because this care was authorized by Surety, Defendants are nevertheless responsible for the

natural and probable consequences of that treatment, including the likely acceleration of Claimant's pre-existing degenerative condition.

DATED this \_\_24th\_\_ day of \_May\_\_\_\_\_, 2018.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas P. Baskin, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_24th\_\_ day of \_May\_\_\_\_\_, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

JUSTIN P AYLSWORTH  
PO BOX 6190  
BOISE ID 83707-6190

EMMA R WILSON  
1703 W HILL RD  
BOISE ID 83702

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