BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATEO HERNANDEZ, Claimant, v. GOODE AUTO GROUP, Employer, and FEDERATED MUTUAL INSURANCE CO., Surety, Defendants.	**IC 2016-031629** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED APR 07 2021 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Twin Falls, Idaho, on May 22, 2019. Clyel Berry of Twin Falls represented Claimant, and Michael McPeek of Gardner Law Office represented Defendants[1] The parties produced oral and documentary evidence at and after the hearing, took one post-hearing deposition, and submitted briefs. The matter came under advisement on January 19, 2021.

[1] After the hearing but before briefing commenced Gardner Law Office ceased to exist, but Mr. McPeek remained as counsel of record for Defendants at his current firm of Bowen & Bailey, LLP.

ISSUES

The issues for resolution at this time are:

1. Whether the conditions for which Claimant seeks benefits are causally related to his industrial accident in question, and

2. Whether and to what extent Claimant is entitled to unpaid medical expenses associated with those conditions.

CONTENTIONS OF THE PARTIES

Claimant contends that on October 21, 2016, he injured his right knee in a compensable accident while working for Employer. Thereafter, it was determined through radiographic studies that Claimant's right knee suffered from end-stage osteoarthritis at the time of the work accident even though Claimant had experienced little to no issues with that knee since a prior right knee surgery in 1997.

After the work accident in question Claimant had debilitating and unrelenting pain and limited use of his right knee and eventually underwent a total right knee replacement surgery (total knee arthroplasty or TKA). Claimant's post-surgery rehabilitation was hampered by a pre-existing condition – lower extremity bilateral spasticity – related to a prior back injury. To successfully rehabilitate Claimant's right lower extremity after the TKA surgery, Claimant needed treatment to address this spasticity and such treatment is also compensable.

Defendants initially paid for Claimant's right knee treatment until they obtained an IME report on March 15, 2017, which disputed Claimant's need for further treatment associated with his October 2016 industrial accident. The Defendants refused to pay for the TKA and spasticity treatments. Claimant is entitled to medical benefits for all unpaid medical expenses associated with his right knee surgery and rehabilitation, including spasticity treatment.

Defendants assert Claimant's accident of October 21, 2016 at most produced a slight knee strain but in no way permanently affected his highly arthritic right knee. Claimant's TKA, while reasonable and necessary treatment, was not at all causally connected with the work accident in question. The accident did not permanently aggravate Claimant's right knee condition or accelerate his need for TKA surgery. Objective radiographic evidence showed no evidence of a traumatic injury to the structure of Claimant's right knee. All of Claimant's MRI findings were pre-existing. Defendants are not obligated to pay additional medical benefits beyond those previously paid to Claimant for treatment of his soft tissue knee sprain.

It is axiomatic that if Claimant's TKA surgery was not compensable, the treatment for his spasticity would likewise not be compensable. Even if the Commission finds the TKA surgery was causally related to Claimant's work accident, the treatment for his lower extremity spasticity due to incomplete paraplegia from a previous accident was solely due to such accident. There is no medical evidence in the record to establish the claim that the spasticity treatment was rendered to address Claimant's surgical rehabilitation. There is no physician's opinion evidence in the record which establishes the medical-causal link between the October 2016 industrial accident and Claimant's subsequent spasticity treatment. As such, Claimant has failed to carry his burden of proof on this issue.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's exhibits (CE) A through O admitted at hearing;
3. Defendants' exhibits (DE) 1, 2, 3, 4, 7, 9, 13, 27, 28, and 29 admitted at hearing;

4. Claimant's supplemental exhibits P and Q, and Defendants' supplemental exhibit 30, each of which were admitted by agreement of the parties and the Referee; and

5. The post-hearing deposition transcript of R. David Bauer, M.D, taken on July 11, 2019.

FINDINGS OF FACT

1. At the time of hearing Claimant was a 47-year-old single man living in Heyburn Idaho, employed by Trinity Trailers.

Relevant Past Medical History

2. In 1992, Claimant fractured his tibia approximately 4 inches above his right ankle. Treatment for this injury included surgery with instrumentation. Subsequently that hardware was removed. Claimant testified he had no residual effects from that injury.

3. In 1997, Claimant injured his right knee in what has been described as a lateral tibial plateau fracture and underwent surgery by a now-retired orthopedic surgeon from Twin Falls. Medical records from that incident are unavailable. Claimant testified he had no residual difficulties with his right knee after recovering from the 1997 surgery until the work accident in question. There were no medical records produced by the parties which would contradict Claimant's testimony on this point.

4. In 1998, Claimant was involved in an accident which resulted in a T12 burst fracture requiring a T11 to L1 fusion surgery with grafting and instrumentation. This significant injury left Claimant with permanent residual effects including clonus and lower extremity

bilateral spasticity which led to a slower and altered gate and loss of strength in Claimant's lower extremities.[2]

Industrial Accident and Treatment

5. On Friday, October 21, 2016, Claimant was delivering a part to a customer's premises as part of his work duties with Employer when he stepped in a depression, twisting his right knee, causing Claimant to fall. While he felt immediate pain, he figured the injury was something he could walk off. However, over the course of the next few hours the pain did not remit, so Claimant notified Employer of the accident and was directed to use Sterling Urgent Care (Sterling) in Burley if medical treatment was needed. Claimant attempted to seek treatment there the following day, but the facility was closed for the weekend. When Claimant's pain and weakness did not improve, he sought care at Sterling the following Monday, where he was seen by Corbin Bunnage, PA-C.

6. On this initial visit, Claimant's subjective complaints included muscle spasm, pain, weakness, and popping sensation in his right knee. Claimant was unable to straighten the knee. Claimant indicated his knee had given out on him that previous Saturday, causing him to fall.

7. PA-C Bunnage noted Claimant's right knee showed obvious swelling, but no ecchymosis, erythema, or tenderness to palpation. All performed tests for joint ligament instability

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[2] Clonus refers to a condition of the central nervous system which can cause convulsive muscle spasms resulting from the alteration of the normal pattern of motor neuron discharge. *See Meriam Webster's Online Dictionary, https://www.meriam-webster.com/dictionary/clonus*. That same source defines spasticity as a "state or condition of muscular hypertonicity with increased tendon reflexes." *https://www.meriam-webster.com/dictionary/spasticity*. Dr. Bauer, in his deposition, described clonus as hyperexcitability of a reflex, and spasticity a permanent condition where muscles do not fully relax and therefor prevent the corresponding joint from fully extending. In Claimant's case, the spasticity caused Claimant to have difficulty in walking normally, as his knee joints would not fully extend, and he walked in a slight crouch. Bauer Depo, pp. 19-20.

(Lachman's, anterior drawer, posterior drawer, varus and valgus strain, and patella grind) were negative.

8. X-rays taken that day showed generalized osteopenia, severe joint space narrowing with prominent femoral tibial and patellofemoral spurring; no discrete fractures were identified. Prepatellar soft tissue swelling and large knee effusion was noted by the reading radiologist.

9. PA-C Bunnage released Claimant to work with no restrictions other than standing and walking as tolerated with position changes as needed.

10. Claimant returned to Sterling on October 28, complaining of increasing pain in his right knee. Claimant also noted he could feel and hear a crunching sensation/sound in the knee. Testing was positive for meniscus damage (Apley's and McMurray's). Claimant was prescribed Norco. An MRI was scheduled for his right knee and Claimant was referred to Gilbert Crane, a Burley area orthopedic surgeon.

11. The MRI showed extensive damage throughout the knee joint and supporting structures, including severe end-stage osteoarthritis, severe degenerative maceration of the medial and lateral meniscus, a complete tear of the ACL with cystic degeneration of the PCL, chronic partial tears of the iliotibial band, LCL, and biceps femoris, and a large joint effusion without a definable Baker's cyst. Multiple loose bodies were identified along the posterior aspect of the medial compartment and lateral compartments with large osteophytes in the patellofemoral compartment.

12. Dr. Crane first saw Claimant on November 22, 2016. He noted Claimant's tricompartmental advanced osteoarthritis and probable old tibial plateau fracture with severe end-stage arthritis. Dr. Crane felt Claimant's severe advanced osteoarthritis of his right knee was

significantly aggravated by his recent work injury. Claimant's condition was also complicated by his previous spinal cord injury which resulted in increased extensor tone.

13. Dr. Crane felt Claimant would need a total knee replacement due to his severe osteoarthritis, but his hope was to first return Claimant to his pre-work-injury status and normalize Claimant's gait prior to surgery. To that end, Dr. Crane recommended steroid injections, anti-inflammatory medications, and physical therapy.

14. Claimant underwent the recommended treatment and physical therapy with limited improvement. Ultimately, on September 13, 2017, Claimant underwent a total right knee replacement surgery performed by Dr. Crane.[3]

Expert Opinions – Causation for TKA surgery

Dr. Crane

15. At the time Dr. Crane suggested the TKA surgery for Claimant, he noted in his records:

> [Claimant] understands [his right knee condition] is a partially pre-existing condition but he feels strongly that the fall and a work injury significantly aggravated the condition to the point where he is needing to proceed with knee replacement surgery earlier than he would have otherwise. I feel the patient is very straightforward and honest in his presentation[.] I would agree that his need for knee replacement surgery is related to pre-existing arthritis but there has been a significant aggravation of the condition due to the work injury.

Dr. Crane apportioned 60% of the need for surgery to Claimant's pre-existing condition and 40% to his work accident. CE D, p. 29.

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[3] Surety denied responsibility for this surgery based upon opinions rendered by a physician who conducted an independent medical examination for the Surety. The opinions on causation for the TKA are addressed hereinafter. Likewise, the issue of whether Claimant's treatment for his spasticity which was undertaken after the TKA surgery was a compensable consequence of his work injury will be dealt with subsequently.

16. Dr. Crane declined the opportunity to sit for a post-hearing deposition. Instead, the parties agreed to allow Claimant to seek further opinions from the doctor via written correspondence. In response to questions posed by Claimant's attorney, Dr. Crane authored opinion letters; one dated May 14, 2018, (CE D. 1), and the other undated but noted as being from April 13, 2020 in Claimant's Exhibit Q. 2. Therein the doctor opined that Claimant's industrial accident in question likely accelerated the timing of Claimant's TKA surgery from what would have been medically anticipated. Dr. Crane noted Claimant had "very minimal" symptoms prior to such accident, and the accident aggravated Claimant's pre-existing arthritis to the point it was not responsive to conservative treatment and required total knee replacement surgery sooner than would otherwise have been predicted.

Dr. Bauer

17. When Dr. Crane sought approval for the proposed TKA surgery, Surety arranged for Claimant to be seen by R. David Bauer, an orthopedic surgeon from Texas who performs IMEs for a company known as Objective Medical Assessments (OMAC).[4] Dr. Bauer saw Claimant on March 15, 2017. Thereafter he prepared a written report. He was also deposed post hearing.

18. In his report, Dr. Bauer set forth a succinct and accurate history of Claimant's pre- and post-accident conditions and treatments. A physical examination was performed, and limitations due to Claimant's pre-existing conditions were noted. Dr. Bauer opined that there was no evidence of any objective change or harm to the Claimant's right knee which occurred in the incident in question. Claimant had increased subjective complaints,

[4] While Claimant notes several inaccuracies in the assignment letter from Surety to Dr. Bauer, it does not appear the factual inaccuracies carried through to the doctor's report, as he had the chance to interview Claimant and get a history from him and to review medical records.

but no objective findings; the MRI did not show any acute injuries. The loose bodies and osteophytes were pre-existing. Claimant's knee locking was due to the loose bodies. Objectively, there was no evidence of structural changes to Claimant's right knee. While Claimant suffered from osteoarthritis, the work accident at most caused a temporary soft tissue strain. Dr. Bauer read the MRI report as showing "no effusion, erythema, induration, bony edema, or any evidence of acute trauma;" all the MRI findings were chronic in nature. CE K, pp. 280, 281. Dr. Bauer also opined that there was no ongoing condition which was causally related to Claimant's work accident at the time of the IME. Claimant's need for further treatment was due entirely to his pre-existing conditions. Claimant suffered no permanent impairment or permanent restrictions from his temporary soft tissue injury.

19. In 2019, Dr. Bauer was provided additional medical records and Dr. Crane's letter of May 14, 2018, and was asked to provide a supplemental written report, which he did on May 8, 2019. None of the medical records provided changed Dr. Bauer's opinions. Specifically, he disagreed with Dr. Crane's assertion that the work accident accelerated Claimant's need for the TKA. Dr. Bauer argued that "one cannot predict the progression of osteoarthritis, or when somebody becomes symptomatic." He reiterated his opinion that the need for the total knee replacement was "primarily due to the pre-existing condition" and all the MRI findings were chronic in nature. DE 28, p. 226.

20. On July 11, 2019, Dr. Bauer was deposed. Therein, he presented his position well, providing detailed testimony supporting his opinion that while the MRI showed ample evidence of significant detrimental changes in Claimant's right knee, there was no evidence of any acute permanent changes of a recent origin. Dr. Bauer's opinions were based on his understanding that in Idaho, under the definition of an injury for worker's compensation purposes, there must be

"any sort of permanent damage or change to the structure of [Claimant's] knee" and with that definition in mind he found no such changes he could attribute to the work accident in question. Bauer Depo, p. 11. He did acknowledge that Claimant may well have suffered a temporary low-grade soft tissue knee strain when he fell, but that accident did not cause permanent structural changes observable on the MRI. Dr. Bauer did not believe Claimant's accident accelerated his underlying pathology.

21. Dr. Bauer testified that he saw no edema in the anterior cruciate and collateral ligaments, although both showed damage. The doctor believed that had Claimant injured either of these ligaments in the work accident of October 21, edema would still have been present when the MRI was taken on November 12. Likewise, Claimant had no edema in the bones of his knee.

22. Dr. Bauer did see loose bodies (loose bits of cartridge in the knee cavity) on the MRI but argued those are very common in arthritic knees.

23. Reviewing the TKA surgical notes, Dr. Bauer noted Dr. Crane observed a divot or hole in Claimant's tibia, but Dr. Bauer felt this "did not seem" to be an acute finding due to the fact Dr. Crane did not describe it as "acute" in his notes. *Id.* at 26.

24. Dr. Bauer was critical of Dr. Crane's opinion expressed in his letter of May 14, 2018, because it appeared Dr. Crane relied solely on Claimant's subjective increase in pain complaints in determining the work accident permanently aggravated Claimant's pre-existing condition. Dr. Crane pointed to no objective evidence of injury in his letter.

25. Dr. Bauer testified that Claimant "required that total knee replacement at some point… in the very near future to when he had it, if not the time that he had it, even if he had not had the incident in question." *Id.* at 29.

26. On cross examination, Dr. Bauer acknowledged the fact that there were no medical records pre-dating the work accident in question wherein Claimant complained of right knee pain, catching, weakness, popping, swelling, or any other knee-related issue. Likewise, Claimant indicated to Dr. Bauer during the IME that he had not had any issues with his right knee prior to the work accident at any time since he recovered from his prior knee surgery. All those symptoms came to light within a few days after Claimant's work accident. However, Dr. Bauer later testified as to his belief that a phenomenon known as recall bias accounted for Claimant's lack of memory of any prior knee problems. Dr. Bauer explained that recall bias describes the situation where a patient's subjective recollection of their symptoms changes with time. Also, recollection of symptoms before versus after a discrete accident can change. People tend not to recall every ache and pain in their daily lives when not associated with a particular event, such as an accident, but tend to recall those pains more vividly when associated with a traumatic event.

27. Dr. Bauer posited that Claimant became aware of his arthritic knee pain when he strained his knee, but most likely had suffered ongoing intermittent right knee pain for years. Claimant "honed in" on his pain after the accident, whereas before the accident he simply went on with life when his knee bothered him. After the accident Claimant also had reason to seek medical treatment for his right knee, and an avenue to discuss his complaints. *See generally* Bauer Depo, at pp. 37-38, 48-49.

28. The concept of bias recall does not call a person's truthfulness into question, but rather is just a part of human nature. Indeed, Dr. Bauer found Claimant to be very honest and forthright in his presentation.

29. While Dr. Bauer acknowledged the medical record from Claimant's initial post-accident medical visit with PA-C Bunnage listed "obvious swelling" as an observation,

the provider did not document any effusion or "other swelling." Dr. Bauer noted an arthritic knee such as Claimant's can appear chronically swollen, and he questioned whether PA-C Bunnage had the expertise or specialized, sophisticated orthopedic knowledge to recognize the difference between chronic and acute swelling. Dr. Bauer discounted PA-C Bunnage's observation and instead relied solely on the MRI, because he felt there was a mismatch between the physical examination done by the PA-C and the subsequent objective findings on the MRI. Bauer Depo, pp. 35-36.

30. When Dr. Bauer was asked about whether he likewise saw a large effusion in Claimant's right knee, such as documented by Claimant's treating physician, the doctor noted an arthritic knee would have effusion, but the MRI showed no effusion "increased over what I would expect from arthritis." *Id.* at 38.

31. Dr. Bauer acknowledged that loose bodies (meniscus fragments) can be displaced in an accident and end up within the articulating surfaces of a joint, causing the person to become symptomatic, but he testified that there was no evidence that Claimant had any loose bodies within the articulating surfaces of his right knee. However, in his next answer, Dr. Bauer agreed that Claimant's knee locking was due to those loose bodies.

32. When asked to explain why Claimant became symptomatic immediately after his accident, Dr. Bauer pointed to Claimant's soft tissue strain, but noted that strain did not cause a change in Claimant's arthritis. Claimant's strain should have resolved within ninety days or less, but his symptoms continued because his "symptoms from the arthritis continue to increase over time." Dr. Bauer explained that arthritis can lie dormant, but then suddenly rise to the surface, causing pain. This pain can either wane or progress, and Claimant's arthritis would definitely become symptomatic "at some point in his life." Bauer Depo, p. 47.

33. Dr. Bauer acknowledged that the need for TKA surgery is the result of both objective findings and significant pain complaints, and surgery is not undertaken solely on MRI findings, but rather is pain driven.

Spasticity Treatment and Causation

34. According to Claimant's hearing testimony, after his TKA, ongoing issues with his spasticity made his rehabilitation from the knee surgery more difficult and less productive. As a result, Dr. Crane, after consultation with Claimant's physical therapist, referred Claimant to other providers to attempt to reduce Claimant's lower extremity spasticity for the purpose of facilitating his recovery from the TKA. Eventually, Claimant had an intrathecal Baclofen (anti-spasmodic drug) pump implanted. Claimant testified that but for the TKA he would not have had such treatment.

35. Defendants argue a search of medical records will not produce any substantive evidence that Claimant's spasticity treatment after surgery was due to a referral from Dr. Crane to facilitate rehabilitation from Claimant's knee surgery. Dr. Crane's records are silent on such a referral. At most there is one ambiguous reference in the therapist's notes concerning Claimant beginning treatment with a Dr. Jensen for his spasticity but the note does not clarify if such treatment was based on a referral from the therapist, or Dr. Crane, or Claimant himself. Without proof that Claimant's spasticity treatment was undertaken to facilitate recovery from a compensable event (the knee surgery and subsequent rehabilitation) Claimant's claim for such treatment must fail.

36. Claimant notes Surety had already denied further responsibility for Claimant's medical care from his work accident by the time he sought treatment for his spasticity after surgery, so it is irrelevant whether such treatment was in the "chain of referral" – instead, Claimant was

entitled to seek needed medical treatment from any provider "at the expense of the employer" under Idaho Code §72-432(1). However, Claimant admits such treatment must be causally related to a compensable accident to be covered under the above statute. [5]

37. On September 28, 2017, Claimant presented at the office of David Jensen, DO, as a new patient. Dr. Jensen's notes reflect that Claimant was complaining of difficulty with spasticity after having a right total knee replacement on September 13. Dr. Jensen noted Claimant had not been taking medicine for his spasticity in the recent past but previously had been on Baclofen and also had tried Botox injections which had not helped him. Claimant was currently using Valium. Dr. Jensen noted Claimant's "spasticity is interfering with some of his rehabilitation of the right knee." CE I. p. 173. Dr. Jensen felt Claimant should be seen by Dr. Jonathan Myers, for a more comprehensive spasticity management regimen.

38. Claimant next saw Jessica Ziebarth, DO, on October 31, 2017. Her office notes indicate Claimant was complaining that his spasticity "has caused some issues in terms of TKA recover[y]. His spasticity is limiting the ROM in the right knee, especially with extension due to hamstring tightness." *Id.* at 178. Claimant was also interested in exploring the latest in AFO (ankle, foot orthotic braces or appliances) to perhaps supplement the high ankle boots he currently used for ankle support.

39. Finally, on November 8, 2017, Claimant saw Jonathan Myers, M.D., a physiatrist in Twin Falls, and partner of Dr. Ziebarth. His initial history notes make no mention of Claimant's recent TKA as being a factor in his visit. Instead, Dr. Myers noted Claimant's previous spinal cord injury and noted Claimant "struggles with spasticity." CE I, p. 184. Nothing in the notes

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[5] Both parties acknowledge that if Claimant fails to establish his TKA was causally related to his work accident, then the treatment for his spasticity would likewise not be compensable, regardless of any other issues.

of that visit would suggest or hint at a correlation between Claimant's spasticity complaints and his TKA rehabilitation. Although Dr. Myer's notes submitted by the parties do not show this, apparently, he referred Claimant to Michael McEntire, M.D., for an intrathecal Baclofen trial and pump implantation.

40. Dr. McEntire's initial visit notes of November 21, 2017, state in part "[Claimant] weaned off Baclofen because he did not like side effects, and recently started up again due to spasming. He still does not like side effects including mild confusion affecting work." DE 22, p. 183. Dr. McEntire's notes also detail Claimant's past spinal cord injury from his motorcycle accident and further discuss the fact that Claimant's "resultant low back and leg spasticity… limits ambulation." *Id.* at 185. Dr. McEntire worked Claimant up for an intrathecal Baclofen trial and subsequent pump implantation but never once discussed Claimant's TKA as being even a minor contributing factor in Claimant's treatment. Instead, all references were to Claimant's spinal cord injury and his recent increase in spasticity issues.

41. In late December 2017 Claimant underwent a trial for the intrathecal pump, which was successful. The pump implant took place in February 2018. Dr. McEntire's records throughout this period make no mention, even in passing, of Claimant's TKA.

DISCUSSION AND FURTHER FINDINGS

42. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. *Anderson v. Harper's Inc.,* 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). "The Commission may not decide causation without opinion evidence from

a medical expert." *Id.* No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *See, e.g. Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997). In determining causation, it is the role of the Commission to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony.

TKA Causation

43. From the record it is clear that Dr. Crane consistently believed Claimant's need for knee replacement surgery had as a contributing or accelerating component his industrial accident of October 21, 2016. However, detailed authority for such opinions is lacking, other than to note that Claimant's symptoms began or severely intensified immediately after such accident and would not respond to conservative treatment, coupled with the doctor's findings such as swelling and effusion. While Dr. Crane believed that undoubtedly at "some point in his life" Claimant would have needed the TKA surgery, that date was accelerated by permanent aggravation to Claimant's arthritic knee in the work accident in question. Dr. Crane also noted that over the course of his career he has had several patients who had asymptomatic severe osteoarthritis in their knees without swelling or pain until a specific accident "awakens" their condition, after which they may or may not return to baseline with conservative treatment. Dr. Crane felt that such situations are common, and Claimant's course of symptoms is not unique. CE Q, pp. 343, 344.

44. On the other hand, Dr. Bauer looked primarily to the objective evidence found in Claimant's right knee MRI to form his opinion. Therein he found no evidence of recent trauma. Without such evidence, Dr. Bauer opined that Claimant's work accident played no part in his need for knee replacement surgery.

45. Dr. Bauer's opinions were woven into a multi-stepped analysis that was logical and reasonable, the highlights of which included the following facts and observations:

- Claimant significantly injured his right knee decades previously;
- The prior injury led to increasing arthritis and deterioration of the structures of the knee joint;
- At some point Claimant's deteriorating knee would inevitably cause him pain and discomfort which could wax and wane for a period of time but would eventually get to the point where the pain would become unrelenting and require a knee replacement;
- The MRI taken after his work injury showed sufficient deterioration as to warrant the TKA surgery at that time;
- Nothing on the MRI suggested recent trauma to the joint or its supporting structures;
- Without some evidence of trauma it is not medically reasonable to attribute any need for surgery to the accident, which at most produced a mild and temporary soft tissue strain.

46. Dr. Bauer's analysis has two weak points which he tried to explain away. The first dealt with the fact that Claimant's first medical records after his work accident listed "obvious swelling" as one of the objective observations made by the physician assistant who examined Claimant. Dr. Bauer testified that the PA-C was not trained to recognize the difference between chronic swelling associated with Claimant's advanced osteoarthritis and swelling associated with a recent trauma. Dr. Bauer then discounted such observation, and tacitly concluded the PA-C simply observed chronic swelling.

47. The flaw in this argument is the fact that it is not a forgone conclusion that PA-C Bunnage did not see acute swelling. He saw swelling; it might have been acute, or perhaps it was chronic. Dr. Bauer concluded it was chronic based on findings from an MRI taken three weeks later which did not demonstrate any findings which Dr. Bauer would label as acute. No one

asked PA-C Bunnage if he knew the difference between how chronic swelling presents *vis a vis* acute swelling. To assume he did not know is simply a theory, and theories are not evidence.

48. It is up to Defendants to show that the objective observation in the medical records is inaccurate, which they did not do. Furthermore, Claimant himself noted swelling which occurred only after his work accident. His observation was not challenged, and his personal observations are evidence. Finally, Dr. Crane, in his medical records from November 22, 2016, noted "[Claimant] will need a total knee replacement given the severe osteoarthritis which he has but I would hope to settle his knee back down to where it was prior to the work related injury... prior to considering knee replacement surgery." CE D, p. 27. Obviously, Dr. Crane was of the opinion that Claimant's knee condition was affected by the work accident such that medical care was needed to return it to its pre-accident condition, which indicated some level of injury to Claimant's knee. Dr. Crane was unsuccessful in his attempt to return the knee to its pre-accident baseline.

49. The next hurdle Dr. Bauer had to overcome was Claimant's testimony that he had no difficulties with his right knee prior to the accident, and thereafter had immediate, severe, persistent pain, weakness and catching/grinding in his right knee which impacted his ability to function. Dr. Bauer advanced the theory of "recall bias" in an attempt to show that Claimant really did have problems with his right knee prior to the work accident but just did not make a mental note of those issues because they were not severe enough to seek medical treatment and were not associated with a specific event to which he could tie the complaints. However, when he suffered a transient knee strain at work, Claimant began to focus on his knee complaints and correlated all knee pain he suffered thereafter with the work accident and not his pre-existing condition.

50. While undoubtedly there is some validity to the concept of recall bias as a general concept which can influence an individual's recall, just because this phenomenon exists does not prove it applies to Claimant in this case. Claimant testified that he did not have prior knee problems; if Defendants wished to rebut that testimony, they needed to do so with admissible evidence, not a general theory which may have no application in this particular case. For example, if Defendants produced testimony from Claimant's co-workers or acquaintances that they recalled Claimant complaining of knee issues prior to his work accident, or saw Claimant using a cane or crutch on occasions, or some other positive testimony calling Claimant's recall into question, then the concept of recall bias could be used to explain the inconsistencies.

51. In this case, there are no inconsistencies – Claimant unrebuttably and credibly testified he had no right knee issues prior to his accident. Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

52. Statements found in medical records, such as Claimant "had some problems with his knee for a long period of time" (CE D, p. 28), or "had done fairly well" (CE D, p. 26) with his knee prior to the work accident do not rise to the level of contradictory evidence when presented in the narration of a doctor's interpretation of Claimant's history unless the authority or corroboration for such statement is in the record.

53. There was evidence in this case of trauma to Claimant's right knee in the form of swelling and effusion. While Claimant may very well have needed a TKA at some point even without the work accident, there is no evidence he needed such surgery on October 20, 2016.

As Dr. Bauer noted, knee replacement surgery is warranted when objective evidence of end-stage osteoarthritis is coupled with subjective severe pain complaints. Claimant had no such complaints until he injured his knee at work in October 2016. Even if an element of recall bias was in play, the fact remains that Claimant was able to function with his right knee until he fell at work; thereafter he suffered immediate crippling pain and loss of function which failed to return to baseline with conservative treatment and eventually resulted in his TKA surgery.

54. Dr. Crane opined that the injury suffered by Claimant in his work accident accelerated the need for the surgery, and cited evidence of knee locking, significant pain, swelling in Claimant's knee, and a large effusion as seen on his MRI. By all accounts, Claimant suffered some injury (violence to the physical structure of the body) in his work accident. The injury in turn "lit up" or permanently aggravated Claimant's pre-existing end-stage osteoarthritis in his right knee which required medical treatment in the form of a TKA surgery to address Claimant's complaints and physical limitations. Simply because Claimant had an asymptomatic but severe pre-existing condition in his right knee does not deprive him of the right to medical care under the Idaho Worker's Compensation Act because "[a]n employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a workers' compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P3d. 788, 793 (2002). (Claimant's preexisting arthritis was not a bar to recovery when she injured her shoulder removing defective seeds from a conveyor belt in employer's processing plant.)

55. In briefing, Claimant points out several Industrial Commission decisions similar to the current case, where MRI evidence of an acute injury is lacking but the totality of the evidence supports a claim for compensability. In fact, the Commission has never relied solely upon an MRI

finding to deny compensability; the Commission is required to examine all the evidence, including a "before-and-after" analysis of Claimant's complaints and limitations when coupled with a medical opinion sufficient to create a *prima facie* showing of compensability.

56. When the totality of the evidence is considered, Dr. Crane's opinions carry the greater weight for the reasons set out above.

57. Claimant has proven by a preponderance of the evidence that his need for a total knee replacement surgery at the time it was performed was causally related to his industrial accident of October 21, 2016.

Spasticity Treatment Causation

58. As noted previously, Claimant bears the burden of providing 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). This medical testimony is a threshold burden which cannot be overlooked by the Commission. Claimant's testimony on the issue of causation is not sufficient.

59. Claimant's TKA surgery took place on September 13, 2017. Thereafter he presented to Dr. Jensen on September 28, complaining of difficulty with spasticity after his TKA, noting the spasticity interfered with his rehabilitation. In late October, Claimant was seen by Dr. Ziebarth for ongoing spasticity which caused issues with his TKA rehabilitation. That was the last time there was mention of Claimant's spasticity impacting his rehabilitation.

60. By the time Claimant saw Dr. Myers in November, and Dr. McEntire thereafter, there was no mention of the TKA surgery as being connected with Claimant's ongoing complaints. By that time, Claimant was back working but felt the oral medication he had been taking

(Baclofen) had unwanted side effects. Rather, Dr. McEntire cited increasing spasticity as the reason for Claimant's need for an intrathecal pump trial.

61. While one could argue Claimant's initial visits with Drs. Jensen and Ziebarth were related to his rehabilitation efforts, certainly by November, when Claimant saw Drs. Myers and McIntyre, the focus was on Claimant's increasing spasticity related to his motorcycle accident. The record clearly indicates the implantation of the intrathecal pump was related solely to increasing spasticity stemming from Claimant's prior motorcycle accident.

62. Even though "magic words" are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related," *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001), there must be plain, unequivocal testimony that links the treatment to the accident in question. In the present case, any reasonable reading of the relevant records would lead the reader to understand the pump implantation was due to increasing spasticity stemming from Claimant's 1988 motorcycle accident and resulting injuries.

63. The closer issue is whether Claimant's visits with Drs. Jensen and Ziebarth meet the requirement of causality. While those records do record Claimant's complaint that his ongoing spasticity was interfering with his TKA rehabilitation, "a physician does not render a medical opinion by merely recording the assertion of a patient." *Meikle v. Alpine Flagging, LLC*, 2001 WL 470656 (Idaho Ind. Com. Apr. 27, 2001).

64. While Claimant's spasticity may have interfered with his rehabilitation, there is nothing in those doctors' records which could be read to indicate their proposed treatment was required simply to facilitate post-surgical rehabilitation. Claimant's ongoing spasticity required treatment; medical notes indicate Claimant had stopped taking Baclofen due to the fact

he felt it had not been helpful, but recently had tried Botox and Valium, and was interested in AFO devises for his condition. Dr. Jensen felt Claimant needed a comprehensive spasticity management regimen for this long-standing condition.

65. While Claimant testified his spasticity worsened after his TKA surgery, no physician has opined that Claimant's increasing spasticity was due to his industrial accident or TKA surgery. Likewise, no physician has opined that Claimant's industrial accident or TKA surgery permanently aggravated or accelerated Claimant's pre-existing spasticity. Instead, Dr. Bauer summed up the state of the record when he noted that Claimant "had difficulty with spasticity for years. He had been unsatisfied with multiple treatments that he had had in the past. Although the spasticity complicated his recovery from the total knee replacement, the treatments that he received [were] solely due to the prior incident and not due to the total knee replacement." DE 28, p. 226.[6]

66. The record as a whole supports the notion that Claimant's need for spasticity treatment was due to this permanent condition resulting from his previous motorcycle accident, and not a temporary treatment to aid Claimant's immediate need for rehabilitation after his TKA surgery.

67. Moreover, the medical evidence of record fails to support the proposition that by the time Claimant underwent his intrathecal baclofen trial on December 28, 2017 his pre-existing

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[6] Claimant argues that Dr. Bauer supplied a medical-causality link when he testified during his deposition that *if* Dr. Crane, the therapist, and the physicians who treated Claimant's spasticity post surgery felt such treatment was required in order to facilitate rehabilitation efforts he would support those opinions. The flaw in this argument is that there is nothing in the record supporting Claimant's premise that these providers opined as set out in the hypothetical question posed to Dr. Bauer.

spasticity and clonus were hindering his recovery from his total knee replacement. By this date, there is scant medical evidence to support the proposition that treatment of Claimant's pre-existing neurological condition was necessary in order to facilitate rehabilitation following his total knee replacement. Instead, the medical evidence suggests that Claimant's knee rehabilitation following surgery was largely completed by the time of the baclofen pump trial.

68. Between his September 13, 2017 surgery and his last visit with Dr. Crane on December 14, 2017, Dr. Crane's records, as well as those of Burley Physical Therapy, reflect progressive improvement in Claimant's knee function, notwithstanding the absence of a baclofen pump. *See* CE D and H. For example, the physical therapy note dated November 6, 2017 reflects the fact that Claimant was making "steady" progress, and was "able to achieve full extension manually w/less difficulty or discomfort." CE H, p. 170.

69. Dr. Crane's last note of December 14, 2017, generated shortly before the baclofen trial, reflects that Claimant presented with the following history:

> [Claimant] is a 45 year(s) male who presents today for his knee. He is doing very well. There is minimal to no pain. Patient goes to the gym at least 3x a wk and swims in the pool. He is thrilled with the outcome of the surgery.

On physical exam, Dr. Crane noted Claimant was healing well with good extension and good flexion, stable ligaments and reasonably good strength. Dr. Crane concluded that going forward from December 14, 2017, Claimant need only return at the one year mark for follow up x rays, as he was making "excellent progress," "doing very well," and was "pleased with the outcome of his surgery."

CE D, pp. 46, 47.

70. Claimant's progress post-surgery, particularly in his right knee flexion and extension, challenges the assertion that Claimant's subsequent baclofen pump surgery was

necessitated in order to facilitate his rehabilitation following the September 13, 2017 total knee replacement. By the time of the December 28, 2017 intrathecal baclofen trial, the post-surgery treatment notes from Burley Physical Therapy and Dr. Crane reveal Claimant's rehabilitation from surgery had been largely completed. The medical evidence does not demonstrate that at the time Claimant received treatment for his pre-existing clonus and spasticity, such treatment was needed to promote rehabilitation of Claimant's right knee following surgery. While Claimant's perception of his post-surgical course is slightly different, his recollections are not supported by the medical evidence referenced above. The more persuasive evidence shows that the baclofen pump was not necessary to advance Claimant's post-surgical rehabilitation following his TKA.

71. Claimant has failed to prove by a preponderance of the evidence that his treatment for ongoing spasticity after his TKA surgery was causally connected to his industrial accident of October 21, 2016, or was a compensable consequence of such accident and its subsequent surgical treatment.

Unpaid Medical Expenses

72. While not substantively briefed by the parties, determination of causation leads naturally to determination of the compensability of the unpaid medical expenses in this case.

73. Surety denied Claimant further medical treatment after March 15, 2017. Because Claimant has proven his right to medical treatment associated with his right knee, including the TKA surgery and post-surgical therapy and treatment related thereto, it follows that he is entitled to all reasonable unpaid expenses for such treatments. Similarly, since Claimant has failed to establish his entitlement to treatment for his ongoing spasticity, including placement and maintenance of his intrathecal pump, if follows that Defendants are not liable to Claimant for medical expenses associated with such ongoing treatment.

74. Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable medical expenses (at the invoiced rate per *Neel*) not previously paid by Surety associated with the treatment of his right knee incurred as a result of his industrial accident of October 21, 2016.

75. Claimant has failed to prove by a preponderance of the evidence that he is entitled to reasonable medical expenses associated with ongoing treatment for his chronic lower extremity spasticity.

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence that his need for a total knee replacement surgery at the time it was performed was causally related to his industrial accident of October 21, 2016.

2. Claimant has failed to prove by a preponderance of the evidence that his treatment for ongoing spasticity after his TKA surgery was causally connected to his industrial accident of October 21, 2016, or was a compensable consequence of such accident and its subsequent surgical treatment.

3. Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable medical expenses, at the invoiced rate, not previously paid by Surety associated with the treatment of his right knee incurred as a result of his industrial accident of October 21, 2016.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to reasonable medical expenses associated with ongoing treatment for his chronic lower extremity spasticity.

RECOMMENDATION

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

DATED this 26th day of February, 2021.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATEO HERNANDEZ, Claimant, v. GOODE AUTO GROUP, Employer, and FEDERATED MUTUAL INSURANCE CO., Surety, Defendants.	**IC 2016-031629** **ORDER** FILED APR 07 2021 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. Claimant has proven by a preponderance of the evidence that his need for a total knee replacement surgery at the time it was performed was causally related to his industrial accident of October 21, 2016.

2. Claimant has failed to prove by a preponderance of the evidence that his treatment for ongoing spasticity after his TKA surgery was causally connected to his industrial accident of October 21, 2016, or was a compensable consequence of such accident and its subsequent surgical treatment.

3. Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable medical expenses, at the invoiced rate, not previously paid by Surety associated with the treatment of his right knee incurred as a result of his industrial accident of October 21, 2016.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to reasonable medical expenses associated with ongoing treatment for his chronic lower extremity spasticity.

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

DATED this the 6th day of April, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2021, a true and correct copy of the foregoing **ORDER** was served by email transmission and by regular United States Mail upon each of the following:

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