

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

JOHN A. MOE,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendant.

**IC 2011-018653**

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

**Filed June 6, 2014**

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d’Alene on October 18, 2013. Claimant was present and represented by Richard G. Whitehead of Coeur d’ Alene. Bradley J. Stoddard, also of Coeur d’Alene, represented the State Insurance Fund, who settled with Claimant prior to the hearing. Thomas W. Callery of Lewiston represented State of Idaho, Special Indemnity Fund (“ISIF”). Oral and documentary evidence was presented. The record remained open for the taking of three post-hearing depositions. This matter came under advisement on March 25, 2014 and is now ready for decision.

**ISSUES**

By agreement of the parties, the issues to be decided are:

1. Whether Claimant suffered injuries from an accident arising out of and in the course of his employment, and if so
2. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise, and if so,

3. Whether ISIF bears any responsibility; and if so
4. Application of the *Carey* formula.

### **CONTENTIONS OF THE PARTIES**

Claimant acknowledges that he has pre-existing cervical, back, and bilateral knee problems; however, his last industrial accident permanently aggravated his back and right knee condition to the extent that a third lumbar surgery as well as a total right knee replacement (TKA) was required. As a result of those surgeries along with nonmedical factors he is totally and permanently disabled. Further, “[t]he Claimant contends the combination of the residuals of the low back injury in 1983, 2003, and the post injury knee replacement all have combined to render him physically unable to compete in the labor market which exists in Avery, Idaho.” Claimant’s Opening Brief, p. 5.

ISIF questions whether or not Claimant actually suffered an accident on the date claimed because Claimant failed to mention the same to his physician until the third visit after the alleged incident. Even if Claimant suffered an accident as alleged, he has failed to prove that the accident caused any new injury or trauma to either his right knee or his back. This case involves the natural progression of Claimant’s severe pre-existing lumbar and knee degeneration. Because there is no credible medical evidence establishing a new injury or the permanent aggravation of his pre-existing degenerative condition, there can be no “combination” as is required to trigger ISIF liability.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's daughter Candy Arnold, Claimant's wife Cynthia Moe, vocational consultant Daniel W. Brownell, and Claimant's co-worker Kenneth Alan Pomponio taken at the hearing.

2. Claimant's Exhibits (CE) A-EE admitted at the hearing.

3. ISIF's Exhibits 1-8 admitted at the hearing.

4. The post-hearing deposition of J. Craig Stevens, M.D., taken by ISIF on November 13, 2013.

5. The post-hearing deposition of Jeffrey J. Larson, M.D., taken by ISIF on November 13, 2013.

6. The post-hearing deposition of Bret A. Dirks, M.D., taken by Claimant on December 10, 2013.

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

### **FINDINGS OF FACT**

1. Claimant was one week shy of his 69<sup>th</sup> birthday at the time of the hearing. He resides with his wife in Avery, a small community about 50 miles up the St. Joe River from St. Maries. He graduated from St. Maries High School in 1963 where he was an average student.

#### **Background and medical history**

2. Claimant began logging as a child in the St. Maries area. His father owned a logging company and Claimant ran a skid Cat for him. After high school Claimant began sawing, which included both falling trees and bucking on a landing.

3. In the 1980s, Claimant slipped and fell across a windfall and injured his back resulting in his first back surgery in 1984 or 1985 performed by a Dr. Gerber. After that surgery, Claimant gave up sawing for lighter work such as driving a water truck and school bus, as well as light mechanic work. He wore a TENS unit for about ten years to control his back pain.

4. In 2000, Claimant went to work for the Shoshone County Highway District as an equipment operator. He would haul sand with a dump truck in the summers and plow snow with a grader in the winters. In 2003, Claimant fell off the side of a dump truck. He underwent a second back surgery, again at the hands of Dr. Dirks, that resulted in lifting restrictions of 50 pounds. Because of Shoshone County's requirements, Dr. Dirks upped the 50-pound restrictions to 90 pounds at Claimant's insistence.

5. Claimant developed a left foot drop following his first back surgery and made worse by his second:

Well, my first surgery is what caused the drop foot. They had to cut around my spinal column, and then I don't know what Dr. Gerber did in there, but anyway, it got the pain off my sciatic nerve, but I still go three toes on the left foot that are dead. There's no feeling at all. And my ankle only comes up half as far as it used to, so I never know, when I'm walking - - you know, if there's something there that I don't see, that toe will catch.

Q. (By Mr. Whitehead) So have you fallen from time to time since that surgery?

A. Yes I have, pretty hard.

Q. And then when you had your second surgery in 2003, did that change in terms of your balance at all or - - coming out of that surgery?

A. Well, I got more unstable and had to be careful getting in and out of the graders and the dump trucks and stuff, and consequently I had another accident.

Hearing Transcript, pp. 104-105.

6. The “another accident” to which Claimant referred above occurred in the mid-2000s and resulted in a cervical fusion. The residuals from that injury are occasional neck pain and the inability to turn his head as far one way as the other.

7. Claimant returned to work at Shoshone County post-cervical fusion. However, due to “political overtones,” Claimant elected to draw his PERSI benefits and Social Security Retirement benefits at age 62.

8. Claimant returned to driving a school bus and doing related maintenance work in 2008. Claimant’s daughter also drove a school bus out of Avery. When the school district eliminated one of the routes, Claimant quit in order to keep his daughter employed.

9. Claimant then went to work for Lawrence Derry Trucking, Inc., Employer herein in 2010. He had always been able to find employment in the Avery area based on his reputation rather than relying on submitting employment applications, interviewing, etc. Claimant worked the winter season until the end of February 2011. He returned in mid-April or May to help get the trucks ready for summer log-hauling. Claimant then drove intermittently due to the weather. On July 18, 2011, Claimant suffered another accident he described at hearing as follows:

Well, it happened just like he testified a little bit ago.<sup>1</sup> It - - I was just waiting to get a load, and I was watching the scales in the cab, and when he got it up to 80,000 pounds, I shut him off, and he put his bucket down there. I put the wrappers in it, and he put them over the load.

I started to go around the truck there and had got just almost to the corner of the truck, and there was a bunch of rocks and limbs and stuff in the road there. I tripped and fell and knocked the wind out of myself for a little bit. When I got up, Kenny opened the door, and he said, are you okay? And I said, well, I think so. And then I went around and wrapped my load up and come back, and he handed me a ticket, and I jumped in the truck and left.

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<sup>1</sup> The “he” to which Claimant refers is log loader Kenneth Pomponio, who had just testified that he had witnessed Claimant’s accident.

And then I came back one more time that day for another load, and I worked two or three days trying to walk it off, but it was getting worse and worse and worse.

HEARING OFFICER POWERS: What's "it"?

THE WITNESS: My back - -

HEARING OFFICER POWERS: Okay.

THE WITNESS: - - was hurting and, of course, then the pain down my right leg was really severe, and I knew there was something wrong in there. So I went and told Dr. Davenport that I had had an industrial accident, but he didn't write it up that way. And I said that's how I want it charged out for insurance, you know. And he said, well, that's what we'll do. And then, of course, it never got done. And then - -

Hearing Transcript, pp. 112-113.

10. Claimant saw his family physician, Terry Davenport, DO., at St. Maries Family Medicine following his accident. Dr. Davenport's pre-and-post accident chart notes will be discussed later in this proposed decision. After conservative treatment failed, Dr. Davenport referred Claimant to neurosurgeon Brett A. Dirks in Coeur d'Alene. On March 21, 2012, Dr. Dirks performed lumbar laminectomies at L3-S1 and fusion.

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

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192,

1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as having “more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

A pre-existing disease or infirmity of the employee does not disqualify a workers’ compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983).

The permanent aggravation of a pre-existing condition is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). The fact that Wynn’s spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen [or women] who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he [or she] finds him [or her]. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

The dispositive question to be answered in this case is whether Claimant’s industrial accident on July 18, 2011 caused a new injury or permanently aggravated Claimant’s documented pre-existing lumbar spine degeneration and pre-existing bilateral knee degeneration. ISIF contends that Claimant’s need for his right TKA and lumbar fusion

were the result of the natural progression of his pre-existing degeneration. In order to answer that question, the medical evidence must be examined.

BACK

Dr. Dirks

11. Dr. Dirks is a board certified neurosurgeon who has practiced in Coeur d'Alene for almost 20 years. He performed the second and third of Claimant's lumbar surgeries. Dr. Dirks testified that the condition he treated in 2003 concerned Claimant's left foot drop, whereas the problem he treated him for in 2011 was right lower extremity pain, or two separate injuries. When comparing a lumbar MRI of 2003 with one done in 2011, "[i]f you look at the 2003, the L3-4 shows no disk herniation or central canal stenosis at this level. But the L3-4, he clearly has a moderate-sized, broad-based disk protrusion. So that's clearly different." Dr. Dirks' Deposition, p. 8.

12. Dr. Dirks acknowledged that Claimant had extensive pre-existing lumbar degeneration. However, he testified:

But knowing Mr. Moe, he did not complain of any pain in his back or down into his legs in a radicular fashion - - radicular meaning in a nerve root fashion - - being compressed prior to this injury on July 18<sup>th</sup>, 2011.

And so he did have the preexisting condition. I don't think anybody doubts that. But clearly, prior to this injury he was working. He was working well. He had no difficulties. I had not heard back from him in any capacity in that regard.

And clearly he developed the new disk protrusion, I believe, at L3-4, as well as the ongoing radicular complaints related to the 3-4, 4-5 and S1 levels.

Dr. Dirks' Deposition, pp. 10-11.

13. Dr. Dirks opined that someone with degenerative disk disease is more susceptible to injuries from falls.



14. Dr. Dirks was shown, for the first time at his deposition, a chart note from Claimant's family physician, Terry Davenport, dated July 20, 2011 (two days post-accident) that states:

Patient is a 66-year-old who presents today with history of arthritis in multiple joints, including knees and hips. He is complaining of low back pain of several weeks duration. He is having pain [sic] the right lumbar region radiating into the gluteal region and down the posterior aspect of the thigh into the knee. He is also having some swelling of the right knee. However, he is kneeling and does feel well from the injection given to him last month.

A hand-written note in the chart states in pertinent part: "C/O rt. hip & sciatic pain x 2 weeks. Rt. thigh swells. Knee swells also. Denies injury. Driving 70 hrs wk."

Exhibit 3 to Dr. Dirks' Deposition.

15. Dr. Dirks does not take Exhibit 3 to mean that an accident did not happen as he found Claimant to be a credible witness/patient. He also opined that the injury Claimant suffered on July 18, 2011 necessitated the surgery that he performed.

16. During cross-examination, the following colloquy took place:

Q. (By Mr. Callery): When you first met with Mr. Moe in November of 2011, you took - - obviously you took a history of him?

A. Yes, sir.

Q. And he told you he was doing extremely well prior to the July 18<sup>th</sup> fall?

A. Let's see what I wrote here. I don't have anything in that - - no. Am I reading something wrong here? Are you - -

Q. In the middle of it, it says, Prior to that, he was doing - -

A. Oh, he had no problems at all. Now he has severe pain down the right leg. That is correct. Sorry.

Q. I mean, the history that Mr. Moe has given you all along was that he was doing well, he fell, and then he immediately had right lower leg pain and radicular pain, correct?

A. That's how I'm reading it, yes.

Q. Now, until today, you have not had an opportunity to review the medical records from Dr. Davenport or from St. Maries Family Medicine, have you?

A. No, sir.

Q. And you routinely rely upon the history your patients give you, correct?

A. Yes, sir.

Q. Now, Exhibit 3, which you have in front of you, is a - - I'd represent to you is a chart note from Dr. Davenport and St. Maries Family Medicine.

Prior to today, had you ever reviewed Exhibit 3?

A. No, sir. They may even be in my records, but I don't - - I almost never, quite honestly review records from the primary care, not because they're not important, but like you said, I like to listen and see what the patient has to tell me.

Q. If - - you were not aware that - - until today that Mr. Moe reported to Dr. Davenport that he was complaining of low back pain of several weeks duration on July 20<sup>th</sup>, 2011?

A. No, I do not know that other than reviewing this chart note as it's reported there.

Q. And in addition, there appears to be some handwritten notes immediately above Dr. Davenport's chart note, which states, Hip - - Right hip and sciatic pain of two - - times two weeks.

That appears to be some nursing notes, doesn't it, Doctor?

A. Honestly, I hesitate to even say. Yeah, probably, but I don't know.

Q. You don't know. But again, there was a report of what - - the right hip and sciatic pain of two weeks prior to July 20<sup>th</sup>, correct?

A. It does say that, yes, sir.

Q. That's inconsistent with the report, with the initial report that Mr. Moe made to you in November of 2011?

A. Yeah, I guess it would be, because that was only two days later. That is inconsistent.

Q. Now, were you aware that Mr. Moe had only recently gone back to work because of the spring shutdown in July of 2011?

A. Did not know that.

Q. Also, in the handwritten note immediately above Dr. Davenport's, see where it says, "Denies injury" in the handwritten notes on July 20<sup>th</sup>?

A. I see that.

Q. That would be - - that would be inconsistent with what you were told as well?

A. Yes.

Dr. Dirks' Deposition, pp. 16-19.

**Dr. Stevens**

17. Craig Sevens, M.D., is a board certified physiatrist practicing in the Sandpoint area since 1998. He is involved in what he calls work injury management. He spends about 50% of his time conducting IMEs, primarily for the defense. He also conducts nerve testing and sees patients.

18. Dr. Stevens saw Claimant for an IME at Employer/Surety's request on September 28, 2011.<sup>2</sup> He examined Claimant and reviewed medical records pre- and post-accident in Claimant's presence to give him an opportunity to correct any erroneous entries. Dr. Stevens had conducted a previous IME concerning Claimant's neck. The present IME concerns Claimant's back and knees.

19. Dr. Stevens reviewed the July 22, 2011 lumbar MRI films as well as the radiologist's report. He testified, "It was interpreted to reveal advanced multilevel lumbar degenerative disc change as well as neural foraminal stenosis and central canal stenosis." Dr. Stevens' Deposition, p. 14. After reviewing Dr. Dirks' interpretation of the MRI, Dr. Stevens again reviewed the same and did not see any evidence of a herniated disc (nor did the interpreting radiologist). Further, Dr. Stevens testified that he disagreed with Dr. Dirks that pre-accident Claimant's pain was on the left side and post-accident it was on the right because Claimant had been complaining of bilateral leg pain going back to the 1980s.

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<sup>2</sup> Dr. Stevens, at the time of his deposition on November 13, 2013, had no independent recollection of Claimant and relied entirely on his IME report, x-rays, an EMG, and correspondence for his testimony.

20. Dr. Stevens opined as follows regarding the injuries flowing from Claimant's July 18, 2010 accident:

Q. (By Mr. Callery): Now, based upon your - - well, in your IME did you find any condition in the low back that you attributed to the July 18 - - or what ever date we assigned to it - - 2011 accident?

A. Turning to my Impression and Discussion, I began by noting that he exhibited degenerative lumbar osteoarthritis, facet hypertrophic degenerative arthropathy, and worsening lumbar spinal stenosis with a prior history of two lumbar surgical procedures.

I related his current condition at the time of that IME to be that of progressively worsening lumbar spinal osteoarthritis, degenerative facet arthropathy, degenerative disc disease and that he was developing lumbar spinal stenosis.

I related his condition as a continuation of his preinjury status. In Response No. 2 I noted that the features noted on his lumbar MRI would have taken years to evolve.

Q. Did you see any indication that he suffered an acute injury to his lumbar spine as a result of the July 18 accident?

A. No.

Dr. Stevens' Deposition, pp. 20-21.

21. Surety sent Dr. Davenport a copy of Dr. Stevens' IME report and he concurred with his findings.

### **Dr. Larson**

22. Jeffrey Larson, M.D., is a board certified neurosurgeon who has practiced in Coeur d'Alene since 2003. He performed an IME on Claimant on June 20, 2012 at Employer/Surety's request. Dr. Larson specializes in spine surgeries and performs approximately 400 spine surgeries a year. He performs about two IMEs per month and does not consider them to be a significant part of his practice monetarily.

23. Dr. Larson examined Claimant, took his history, and reviewed pre- and-post accident medical records. The focus of his IME was to determine the cause and effect of

Claimant's July 18, 2011 accident on his lumbar spine. Claimant informed Dr. Larson that, "He said he was wrapping a load of logs when he tripped and fell on his face. He hit his chin and was stunned. He said he started hurting in his right knee." Dr. Larson's Deposition, p. 8.

24. Dr. Larson personally viewed the two lumbar MRI films as well as read the radiologist's reports. Dr. Larson, as well as the radiologist, agree that the July 22, 2011 lumbar MRI revealed no acute injury or disc herniation; only arthritis. Further, Dr. Dirks' operative report of March 21, 2012 indicates that the surgery he performed was not for a herniated disc but was for spondylosis.

25. Regarding Dr. Dirks' opinion that because Claimant's accident produced symptoms on the right whereas before his accident he was treated for left-sided symptoms, therefore, the accident must have resulted in a new injury, Dr. Larson testified:

The medical records and specifically a note from Dr. Davenport on July 20<sup>th</sup>, indicates that Mr. Moe was having right sciatica preceding the incident.

And immediately preceding the incident there were two documents in the chart. One is handwritten and one is dictated. One says right sciatica for the past two weeks.

Then if you go to the medical records preceding that even further, there's right-sided knee things going on. He's had numerous visits that year and in the ensuing year with Dr. Davenport regarding his knees.

And then there is a dictated note from Dr Davenport saying the patient has had right lower extremity symptoms for the past five weeks.

I asked Mr. Moe about this. I said, "Mr. Moe, your - - you explained your methods of injury to me. You say you tripped and landed on your right knee and you hit your chin. How did you stir up your back doing that?"

Because the first comment about the back comes later in the evaluation after the injury. They come - - the notes center around the injury.

And he said, "I don't know. I'm just depending on my medical doctors who told me that's what happened." He was referring to Dr. Dirks who recommending [sic] the surgery for it.

I asked him, "Can you distinguish - - as we sit here, can you distinguish the difference in the pain you have? Because you've had chronic back pain in most all of your things and records. You've had prior surgeries twice on your lower back. Can you distinguish a difference in your back pain prior to the incident and after?"

And I have to look at my IME. I'm trying to remember trying to talk through this with him.

"He acknowledges prior low back pain and bilateral knee problems long before the injury, and he had a difficult time today differentiating between which symptoms pre-existed the injury of July 18, 2011."

"He says that his right knee swelled significantly after the injury. He says that his back started hurting within an hour of the accident, however, again, he does not seem to be able to distinguish that back pain from the pre-existing back pain relating to extensive arthritis and two prior low back surgeries."

"When describing these surgeries, he reports chronic left lower extremity weakness related to one of those surgeries."

That surgery was for a disc herniation at L4/5 where he had an extruded disc fragment. He did have a disc herniation, and he had a surgery (the 2003 procedure).

From what I can tell, he's - - after that he had - - he had chronic left L5 radiculopathy which would be in relation to the disc herniation.

Dr. Larson's Deposition, pp. 17-19.

26. The Referee does not doubt that Claimant fell on July 18, 2011, as he and Mr. Pomponio described, and so finds. However, the Referee is unable to find, based on the totality of the medical evidence, that Claimant sustained either a new injury to his lower back or a permanent aggravation of his well-documented pre-existing degeneration. The opinions expressed by Drs. Stevens and Larson are persuasive. They were both aware that Claimant mentioned to Dr. Davenport that he was having back problems chronically since his 2003 back surgery. They were both aware that Claimant's proclamation that he was doing very well up to the time of his July accident is not supported by the medical evidence. Also troublesome is Claimant's failure to even mention his accident (he said he was not injured) to Dr. Davenport until September 14, 2011, even though he had another

opportunity to do so when he saw Dr. Davenport on August 30, 2011. As pointed out by ISIF's counsel, one explanation could be that Claimant himself did not consider his accident a significant event in light of his pre-existing chronic back pain. Claimant's testimony that he indeed told Dr. Davenport in the July and August visits that he had an accident and that a workers' compensation claim should be set up is not credible. While Claimant infers that physicians sometime make mistakes in their chart notes, there is no evidence that such is the case here.

27. Drs. Larson, Stevens, and Davenport, along with the radiologist all read Claimant's post-accident lumbar MRI as showing no evidence of trauma. While Dr. Dirks is no doubt eminently qualified to interpret an MRI film as he chooses, nonetheless, in this case the opinions regarding the pre-and-post accident MRIs expressed by Drs. Larson and Stevens are more persuasive.<sup>3</sup> Furthermore, the fact that the post-accident MRI did not show any traumatic injury is borne out by Dr. Dirks' operative report indicating that he was operating on a chronic condition (spondylosis) rather than for any herniated disc. It is significant that Claimant led Dr. Dirks to believe that he was doing extremely well up to the time of his accident. When confronted with information to the contrary, Dr. Dirks readily admitted that such information was inconsistent with what Claimant had told him.

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<sup>3</sup> Dr. Dirks testified that the following entry in the radiologist's report indicates nerve compression: "Oh, AP diameter of the canal is approximately seven millimeters with moderate foraminal narrowing . . ." Without further explanation, this is insufficient to overcome the testimony of Drs. Stevens and Larson and the radiologist's report that no trauma or herniations were noted.

RIGHT KNEE

**Dr. McNulty**

28. Claimant contends that his July 18, 2011 accident necessitated the need for his right knee TKA. He relies on the opinions of John McNulty, M.D., the orthopedic surgeon who performed the TKA on November 13, 2012. Dr. McNulty conducted an IME and prepared a report of his findings on February 21, 2013. *See* ISIF's Exhibit 6. Dr. McNulty noted that a post-accident right knee MRI performed on November 4, 2011 showed a "large degenerative tear lateral meniscus, advanced lateral compartment chondromalacia with subchondral marrow edema, large horizontally oriented tear involving the posterior horn medial meniscus, and large right knee joint effusion." ISIF Exhibit 6, p. 149.

29. Dr. McNulty also noted, "It is my understanding from the records available to me and interviewing Mr. Moe, that he did not receive any recent treatment for his lumbar spine or right knee at the time of his 7/18/2011 work related injury." *Id.* It is clear that Dr. McNulty was unaware that about five weeks before his accident, Claimant and Dr. Davenport discussed an orthopedic referral for a total knee replacement. It is clear that Dr. McNulty did not see Dr. Davenport's March 24, 2011 office note wherein Claimant was complaining of right knee pain and was given a diagnosis of degenerative joint disease right worse than left and received a steroid injection. It is also clear the he did not see Dr. Davenport's July 20, 2011 office note wherein Claimant was complaining of right knee swelling.

30. Dr. McNulty opined as follows regarding causation:

He did have pre-existing advanced lateral compartment chondromalacia of his knee as well as a large knee joint effusion. Mr. Moe



was functioning as a log truck driver with no recent treatment to his right knee. The MRI findings of a large posterior horn medial meniscus tear are consistent with the injury of falling and are the direct result of his 7/18/2011 injury.

*Id.*, p. 152.

**Dr. Stevens**

31. In discussing the November 4, 2011 right knee MRI, Dr. Stevens testified that the radiologist's report ". . .does not argue for or against an acute injury. Certainly, most of these features would have taken years to evolve, but you can't rule out an acute injury based on this MRI." Dr. Stevens Deposition, p. 28. Along those lines, he disagreed with Dr. McNulty: "I see. He noted a large horizontally-oriented tear above the posterior horn of the medial meniscus that was not degenerative. I don't see how he can ascertain whether it was not degenerative or degenerative. It could be degenerative; it could be traumatic." *Id.*, p. 29.

32. Dr. Stevens was aware that Claimant had received treatment for his right knee immediately prior to his accident and that such a history is important:

I'm not - - it's certainly possible that his injury caused the features seen on the MRI. But on a more probable than not basis given the history, not based on what I've seen on the MRI, but given the history, I would come to the determination that what we see in the MRI is caused - - well, was preexisting. It was present prior to this injury.

*Id.*, p. 30.

33. While recognizing that Dr. Stevens is not a surgeon as is Dr. McNulty, his opinion regarding causation is nonetheless more persuasive. Unlike Dr. McNulty, Dr. Stevens was aware of Claimant's long standing bilateral knee problems and the recent pre-accident treatment he obtained. Unlike Dr. McNulty, Dr. Stevens' opinions were subject to cross-examination.

34. The Referee finds that the need for Claimant's right knee TKA was not caused by his industrial accident but, rather, by his extensive pre-existing degenerative joint disease.

### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove his accident of July 18, 2011 caused an injury to his low back.
2. Claimant has failed to prove his accident of July 18, 2011 caused an injury to his right knee.
3. All other issues are moot.
4. The Complaint against ISIF should be dismissed.

### **RECOMMENDATION**

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

DATED this 2<sup>nd</sup> day of June, 2014.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of June, 2014, 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:

RICHARD WHITEHEAD  
PO BOX 1319  
COEUR D'ALENE ID 83816-1319

THOMAS W CALLERY  
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LEWISTON ID 83501

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*Gena Espinosa*

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

JOHN A. MOE,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendant.

**IC 2011-018653**

**ORDER**

**Filed June 6, 2014**

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Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 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 failed to prove his accident of July 18, 2011 caused an injury to his low back.
2. Claimant has failed to prove his accident of July 18, 2011 caused an injury to his right knee.
3. All other issues are moot.
4. The Complaint against ISIF is dismissed.

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

DATED this \_\_6<sup>th</sup>\_\_ day of \_\_June\_\_, 2014.

INDUSTRIAL COMMISSION

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

\_\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

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

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_6<sup>th</sup>\_\_ day of \_\_June\_\_ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD  
PO BOX 1319  
COEUR D'ALENE ID 83816-1319

THOMAS W CALLERY  
PO BOX 854  
LEWISTON ID 83501

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