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

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| JAMES J. BROWN,<br><br>Claimant,<br><br>v.<br><br>MEADOW GOLD DAIRIES,<br><br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br><br>Surety,<br>Defendants. | ) | **IC 2008-030709**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed: July 29, 2011 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on October 21, 2010. Darin G. Monroe of Boise represented Claimant. W. Scott Wigle of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on February 18, 2011 and is now ready for decision.

## ISSUES

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

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;

3. Whether Claimant's condition is due in whole or in part to a pre-existing injury/condition;

4. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;
b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
c. Permanent partial impairment (PPI); and
d. Attorney fees.

The issue of disability in excess of impairment, if any, is reserved for future proceedings, should it continue to be a matter in dispute.

Defendants placed notice at issue in their Answer to Claimant's Complaint. However, Defendants failed to include the issue in their response to Claimant's request for calendaring filed December 4, 2009. The parties stipulated to vacate the original hearing date and the Referee reset the matter to October 5, 2010 for hearing on the same issues. On October 4, 2010, the Referee reset the hearing to October 21, 2010, on the same issues, due to the illness of Claimant's counsel. Counsel for Defendants graciously acquiesced to the delay in light of the circumstances. The Commission filed its Order Vacating and Resetting on October 4, 2010.

When Defendants received the October 4 Order, they realized for the first time that the issue of notice was not included as an issue for hearing. On October 6, 2010, fifteen days prior to the scheduled hearing, Defendants filed their Motion to Add Issue to Hearing Notice. Defendants did not ask for an expedited ruling on their Motion. Claimant filed his Objection to Defendants' Motion to Add Issue to Hearing Notice on October 20, 2010, one day before the scheduled hearing, and in compliance with the fourteen-day time for response.

The Referee took up Defendants' Motion and Claimant's Objection at the outset of the hearing. Claimant based his objection on Idaho Code § 72-713, which requires that the Commission give *at least* ten days written notice of time and place of the hearing and of the issues to be heard. Defendants argued that had Claimant not waited until the fourteenth day to respond to Defendants' Motion, the Commission would have been able to provide the required ten-day notice. Defendants also noted that Claimant was aware of the issue as Defendants identified the issue in their Answer to the Complaint, and that evidence regarding the notice issue was included in the proposed exhibits.

The Referee asked Claimant whether his preparation for hearing, or the evidence he intended to offer, would have differed in any way if the notice issue had been included in the Notice of Hearing. Claimant's counsel responded that their evidence was the same in either case. The Referee also gave the Claimant the option to vacate the hearing and reset it at a future date that would allow the Commission to provide the notice required by Idaho Code § 72-713. Claimant declined.

While recognizing the importance of the statutory notice requirement, the Referee concluded that, on the facts before her, strict adherence to the statutory language would elevate form over substance, delaying the proceeding without offering a commensurate benefit to the Claimant. For the reasons set out herein, and discussed at length at the outset of the hearing, the Referee granted Defendants' Motion to Add Issue to Hearing Notice.

## CONTENTIONS OF THE PARTIES

Claimant asserts that on Friday, June 6, 2008, he injured his left knee while maneuvering a loaded hand truck down the ramp of his delivery vehicle. He told his supervisor about the incident the following week, but neither Claimant nor Employer prepared and filed a first report

of injury. As a result of the injury, Claimant sought medical care and underwent arthroscopic surgery in July 2008. Claimant submitted the medical claim to his private insurance, which accepted the claim and paid Claimant's medical expenses. The July 2008 surgery triggered a series of rapid degenerative changes in Claimant's left knee which resulted in a total left knee arthroplasty in February 2010, also paid for by Claimant's private insurance. Claimant contends he is entitled to reimbursement for: costs associated with the July 2008 and February 2010 surgeries; TTD and TPD benefits for the periods that he was off work or on light duty following the two surgeries; and an impairment rating of 25% of the lower extremity (10% of the whole person), all as a result of his June 2008 injury.

Defendants assert that Claimant has failed to establish by a preponderance of the evidence that he suffered an industrial accident on June 6, 2008. Even if Claimant did suffer an industrial accident on June 6, 2008, he failed to inform Employer of the accident and injury within the sixty days provided by statute. Claimant's failure to comply with the notice requirements of the workers' compensation statutes was prejudicial to Employer, because it did not have an opportunity to either investigate the claim or to direct Claimant's medical care. Because Defendants are not liable on the underlying claim, Claimant's request for income benefits and attorney fees is moot.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Steve Phillips, taken at hearing; and

2. Claimant's Exhibits 1 and 2; pages 1 through 45 of Exhibit 3; and Exhibits 4 and 5.

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

### *BACKGROUND*

1. Claimant was 63 years of age at the time of hearing. He resided in Boise with his wife of 43 years.

2. Claimant served three years in the U.S. Air Force, receiving his discharge in the late 1960s. After his discharge, Claimant worked primarily as a truck driver (tractor-trailers) and as a warehouseman until he went to work for Employer in 1992. Claimant began his workday before midnight, and finished for the day in late morning. Claimant worked a four-day week with Saturday, Sunday, and Wednesday off.

### *EMPLOYER*

3. Employer is a supplier of various dairy products to grocery stores, convenience stores, restaurants, and institutional customers. Claimant began working for Employer as a delivery driver in 1992. In the many years Claimant worked for Employer, he drove a variety of delivery routes. There is nothing in the record to suggest that Claimant was anything other than a good employee.

4. Claimant sustained three industrial injuries in the early years of his employment with Employer. In November 1992, Claimant suffered a foot contusion. In November 1993, he slipped and fell, injuring multiple body parts. And in January 1997, Claimant injured his ankle. In each of these incidents, Employer received notice of the accident and injury on the day it occurred. A workers' compensation First Report of Injury or Illness (Form 1) was prepared and submitted to Surety for each incident. The injuries were minor and were medical-only. Claimant made a full recovery from each injury.

***RELEVANT PRIOR MEDICAL***

5. Claimant's left knee started to bother him in the fall of 2007, and got progressively worse over time. By December 2007, Employer was aware that Claimant was having trouble with his knee, and inquired whether Claimant's knee problem was work-related. Claimant told Employer that it was not. When the schools closed for Christmas break and school delivery routes were on hiatus, Employer assigned a school route driver to ride along with Claimant and assist him with his route.

6. In December 2007, Claimant sought care for his left knee from Roman Schwartsman, M.D., an orthopedic surgeon. Claimant described pain along the medial joint line with "locking and catching sensations." Def. Ex. 7, p. 001. X-rays of the left knee were negative for fracture. On exam, Dr. Schwartsman noted some signs of pathology and diagnosed a posterior horn medial meniscal tear. Dr. Schwartsman ordered an MRI of Claimant's left knee, which confirmed the clinical diagnosis.

7. Dr. Schwartsman performed a left knee arthroscopy with patellar chondroplasty, medial femoral condyle chondroplasty, and posterior horn medial meniscectomy on January 16, 2008. Claimant's private insurance paid for the surgery. Claimant had a normal recovery and Dr. Schwartsman released him without restrictions on February 28, 2008. Claimant returned to his job as a route driver for Employer.

***JUNE 6, 2008 INJURY***

8. Claimant testified that on Friday, June 6, 2008, he was delivering ice cream mix to Dairy Queen, the last stop on his regular route. He estimated he arrived at the Dairy Queen around 10:00 a.m. Claimant related that he loaded the hand truck with six boxes of ice cream mix, and was halfway down the ramp of his delivery vehicle when he felt his left knee pop.

There was momentary pain, which quickly resolved. Claimant completed his delivery and finished his workday. Claimant did not report the incident when he returned to the shop that day.

9. Saturday and Sunday were regularly scheduled days off for Claimant. He reported that his knee was fine Friday night and Saturday, but when he woke up Sunday, it was "pretty swollen." Tr., p. 64. Claimant said that the knee was not particularly painful, just a little twinge when he sat or stood; the discomfort resolved quickly following the change of position. Claimant described the left knee discomfort as a dull achy feeling, in contrast to the sharp stabbing pain he had experienced prior to his January 2008 surgery. Claimant described the discomfort as being under the kneecap on the inside (medial) part of his knee. Before his first surgery, the pain was beneath his kneecap on the outside (lateral) part of his knee.

10. Claimant returned to work on Monday, despite the discomfort of the swollen knee. He did not report the incident. Claimant believes that he reported the accident and injury to his supervisor, Steve Phillips, on Tuesday (June 10) or Thursday (June 12). Claimant reported the conversation thusly:

> Q. [By Mr. Monroe] And what did you tell Steve Phillips?
> A. I told him my knee was swollen. And I told him, I says, "I did it when I was taking the Dairy Queen mix down." And I'm not sure if I showed him how swollen it was, not by picking my pant legs up, but stretching my pants over the knee. But I told him the knee was swollen.
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> Q. So did you explain to him how the accident happened the same way you explained it to us today?
> A. Yes.
> Q. And what did Steve say to you at that time?
> A. Steve told me, he says, well, he says, "It's too bad you didn't file for the first surgery," he says, "because what they're going to probably do, is they're just going to say it's a pre-existing injury. And it's probably not going to go anywhere." So I left it at that.
> Q. When you say you left it at that, what do you mean by –
> A. I didn't – I accepted his explanation and didn't bother going ahead and filing for paperwork or anything. I says, "You're probably right." So I didn't do anything.

Tr., pp. 68-69. Steve Phillips has no recollection of such a conversation with Claimant.

11. Claimant presented to Dr. Schwartsman for treatment of his swollen left knee on July 1, 2008. By way of history, Dr. Schwartsman discussed the January 2008 surgery and noted that Claimant had done well since February. The subjective history goes on to state:

> However, in the past month he has noted increased pain in his knee. He has noted increased swelling. He has had difficulty with flexion extension and started walking with an antalgic gait pattern because of increasing pain.

Def. Ex. 7, p. 011. Based on his examination of Claimant's knee, Dr. Schwartsman suspected a recurrent posterior horn medial meniscal tear. He ordered an MRI, which confirmed the diagnosis. The imaging also showed significant degeneration in the knee that was more extensive than that described in the January 2008 operative notes. Findings included extensive cartilage loss and delamination of the medial femoral condyle and lateral patellar facet and apex.

12. Dr. Schwartsman recommended a second arthroscopy to perform a meniscectomy, chondroplasty, and any other procedures indicated once he scoped the knee. Dr. Schwartsman performed the surgery on July 18, 2008. Following the surgery, Dr. Schwartsman noted:

> Progressive cartilage loss in the medial compartment was identified down to grade 4 chondral changes over the medial femoral condyle and medial tibial plateau. The medial meniscus was further debrided to address a complex retear of the posterior horn.

*Id.*, at p. 019. Claimant's private health insurance paid the costs of this second arthroscopic procedure.

13. Claimant's *third* post-surgical follow-up with Dr. Schwartsman was August 7, 2008. For the *first* time since Claimant returned to Dr. Schwartsman on July 1, the chart note includes a discussion about the origin of Claimant's injury:

> Originally, patient presented to see me on 12/13/07. He had injured the knee in December and presented within about a week of injuring the knee. The patient is now concerned about the long terms [*sic*] sequela of the knee injury and has spent some time talking to the human resources personnel at his employers [*sic*] regarding his eligibility for workmen's [*sic*] compensation claim in this case. The patient's described mechanism of injury is that during the first week of December approximately a week prior to presenting to my office with his complaints, he was working in his usual capacity as a delivery driver. He was carrying a load of milk on a handcart down a ramp. While trying to slow down and brace the ramp, the patient felt a sharp pain in his knee along the medial joint line. This was a sharp stabbing pain. This is what caused him to seek attention when the pain did not go away and increased. The described mechanism of injury provided by the patient is consistent with the typical mechanism of injury for a meniscal tear and a chondral lesion.

*Id.*, at p. 021. Immediately following the history portion of the typed note is a hand-written sentence: "There was an additional injury in June '08." *Id.* Under "Plan," Dr. Schwartsman wrote:

> The patient is going to file the workers' compensation claim on this. Based on the described mechanism of injury, it is reasonable to conclude that this was the root cause of his injuries and the need for subsequent surgeries. The patient was simply not aware of the workers' compensation process and did not file the claim at that time. He is going to be filing at this point.

*Id.* Dr. Schwartsman returned Claimant to his regular work without restrictions on August 7, 2008.

***ADDITIONAL MEDICAL HISTORY***

14. On September 9, 2008, Claimant returned to Dr. Schwartsman complaining of pain in his left knee. Dr. Schwartsman reiterated in the patient history that:

> To a reasonable degree of medical certainly, [*sic*] I would conclude that the injury pattern seen at the time of his arthroscopy is consistent with the mechanism of injury described by the patient with regard to industrial events.

*Id.*, at p. 023. Dr. Schwartsman also reviewed x-rays taken during the visit and reported "progressive medial joint space narrowing with progressive varus deformity of the knee. These are posttraumatic degenerative changes, which have been evolved [*sic*] in the past few months."

*Id.* Dr. Schwartsman wanted Claimant to continue working and to continue his physical therapy. Dr. Schwartsman wanted to see Claimant again in six weeks for repeat x-rays. He concluded his chart note:

> The patient alternately will be a candidate for a total knee arthroplasty. The time course of this remains undetermined at this point. The industrial event described by the patient is at the very least a major contributing factor to the need for total knee arthroplasty and any further treatments.

*Id.*

15. Claimant returned to Dr. Schwartsman on October 21 for another set of x-rays to track interval changes in his left knee. In the patient history portion of his chart note, Dr. Schwartsman revisited the origins of Claimant's left knee problem. The chart note emphasized that Claimant's December 2007 injury "did not involve a specific traumatic event. The patient was simply performing his regular duties as a delivery driver." *Id*., at p. 024. The note then goes on to describe a second event on June 6, 2008:

> At that time the patient was walking down a ramp bracing a heavy load of milk on the hand [cart]. He felt a sharp pain in his knee and an audible pop while bracing himself with the left leg against this heavy load on a downward sloping ramp. The patient felt the knee pop and give way while going down this ramp. He experienced sharp pain. The patient had significant pain, which caused him to seek medical attention. He presented to my office at the earliest possible appointment, which was 07/01/08.

*Id.*, at p. 024. Dr. Schwartsman went on to opine (twice) that the recurrent tear of the meniscus was a "distinct new injury different from the one encountered in December of 2007 . . ." *Id.* Dr. Schwartsman noted that the second arthroscopic surgery left Claimant with a complete loss of cartilage over the medial femoral condyle and extensive loss of the posterior horn and mid-body of the medial meniscus. Dr. Schwartsman concluded his review of the history of Claimant's left knee problems by restating his causation opinion:

> It is my opinion to reasonable degree of medical certainty that the second injury significantly accelerated the progression of post-traumatic degenerative change in [the] medial compartment of the knee. This had significantly accelerated the need for further surgical intervention possibly in the form with a total knee arthroplasty.

*Id.*, at p. 025. Dr. Schwartsman advised Claimant to keep working and put off a total arthroplasty as long as possible.[1]

16. Claimant continued to work at his usual job, and his posttraumatic degenerative left knee continued to deteriorate at a rapid rate, as documented by x-rays taken at six-month intervals. In late January 2010, Claimant and Dr. Schwartsman concluded that Claimant had exhausted his non-operative treatment options. Dr. Schwartsman sought authorization from Claimant's private health insurance carrier for authorization for a total knee arthroplasty (TKA) on his left lower extremity.

17. Claimant had a TKA on his left lower extremity in February 2010. He was off work for some time, but when he was able, Employer offered him light-duty work, which Claimant accepted. Dr. Schwartsman released Claimant to full duty, without restrictions, on September 21, 2010. At that time, Claimant had returned to his regular work for Employer. Claimant was still working for Employer at the time of hearing.

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[1] One of the many preliminary matters taken up at the outset of the hearing related to a possible error in Dr. Schwartsman's October 21, 2008 chart note. The two-page document appears in Def. Ex. 7, pp. 024-025, in Cl. Ex. 3, pp 37-38, and in Cl. Ex. 4, pp. 03-04. The first two exhibits (Def. Ex. 7 and Cl. Ex. 3) appear to be the same document, with the first page dated October 21, 2008, and the second page dated July 5, 2008. In Cl. Ex. 4, the second page of the chart note bears the date October 21, 2008. Counsel for Claimant represented that the page 04 of Cl. Ex. 4 represents a correction made by Dr. Schwartsman's office when the date discrepancy was discovered.

***PPI***

18. Dr. Schwartsman rated Claimant's permanent partial impairment (PPI) to be 25% of the lower left extremity. Dr. Schwartsman based his rating on the *AMA Guides to the Evaluation of Permanent Impairment,* 6th ed. That same reference provides a conversion from a lower extremity rating to a whole person rating; in this case, the 25% impairment of the left lower extremity is equivalent to 10% whole person impairment.

***ADMINISTRATIVE HISTORY***

19. In his opening statement, and again in his brief, Claimant observes that this is a complicated case, and that it is complicated, in some part, by sloppy handling by Claimant, by Employer and by Surety. Regardless of how one characterizes the administrative history, it is often at odds with the other evidence in this proceeding. The Referee makes the following findings *vis-à-vis* the administration of this claim.

***Claimant's Exhibit 1—Employer Internal Reports***

20. Neither Claimant nor Employer prepared or filed a "First Report of Injury of Illness" (IIC Form 1) in the days or weeks immediately following the June 6, 2008 incident. After Claimant returned to work following his July 2008 arthroscopic surgery, he decided to file a workers' compensation claim, and asked Employer for the necessary paperwork.

21. Claimant filled out a portion of a form entitled, "Checklist for Injury/Accident," which appears as Cl. Ex. 1, p. 02. Claimant filled out the first two lines of the form, which included his name and the date of the injury. Claimant wrote "December 07" for the date of injury. Additional writing, not Claimant's, appears on the document. Based on the testimony of Steve Phillips, the Referee finds that Dina Richard, Employer's HR manager at the time, wrote the additional notes on the IIC Form 1. The annotations indicate that Claimant did not provide a

specific date of injury; that the safety director was not notified at the time of the injury; that proper reports were given to Claimant at Claimant's request after the July 2008 surgery; and that the claim was called in to Liberty Mutual at 866-933-3326 on August 13, 2008 at 2:20 p.m. A note in the right margin notes that the writer had called in two claims at that time. The line for a supervisor's signature and date are both blank.

22. Page 03 of Cl. Ex. 1 is a document titled "Employee Incident Report." Claimant filled out the top portion of the form with his name, job title, and the name of his supervisor, signed the form, and dated it August 10, 2008. The remainder of the handwriting on the document is of uncertain origin. "Delivering milk" is written in response to the question asking what job activity Claimant was doing at the time of the injury. A hand-written detailed description of events states:

> [I]njury occurred over time through consistant [*sic*] and repeated use in making deliveries. Including getting in and out of truck and box of truck, making deliveries up and down ramps.

Claimant admits that the language sounds like something he would write, but he was not certain that the handwriting was his.

23. Pages 04 through 015 of Cl. Ex. 1 consist of forms for witness reports and a multiple-page investigative report form. These forms were left mostly blank, with only pages 07, 010 and 012 containing information about the claim.

***Claimant's Exhibit 2—Employer Internal Reports***

24. Claimant's Ex. 2 consists of the same set of forms as are found in Cl. Ex. 1. Claimant filled out the forms contained in Cl. Ex. 2 at the same time he completed the forms in Cl. Ex. 1. The information contained on the forms, however, is different. Page 01 of the exhibit, the "Checklist for Injury/Accident," includes the Claimant's name and a date of injury of May

16, 2008 in Claimant's handwriting. A number of annotations in Ms. Richard's handwriting note that the reporting and paperwork requirements were not completed at the time of injury, but were done after Claimant's surgery. The form indicates that Ms. Richard phoned the claim to Liberty Mutual on August 13, 2008 at 2:20 p.m. Like its companion document (Cl. Ex. 1), the checklist is not signed or dated.

25. Page 2 of Cl. Ex. 2 is the Employee Incident Report. Claimant signed the form, but did not date it. His name and job title appear in his handwriting, but he did not fill in the name of his supervisor as he had done on the companion form. There is a handwritten description of the incident including the location, "Making delivery at Dairy Queen," the task being performed, "Delivering milk," and this description of the event: "Delivering milk down a ramp and heard and felt left knee pop. I felt no pain. Two days later knee swelled up and I started to feel pain." Claimant testified that though the language sounded like something he would write, he could not be certain that it was his handwriting.

26. Pages 03 through 09 of Cl. Ex. 2 consist of forms for witness reports and a multiple-page investigative report form. These forms were left mostly blank, with only pages 05, 08 and 09 containing information about the claim.

27. Once Claimant had filled out portions of both sets of documents (Cl. Ex. 1 and Cl. Ex. 2), he left the forms with Mr. Phillips, and observed Mr. Phillips give the documents to Ms. Richard. Claimant heard nothing more about these claims from Employer or Surety.

***First Report of Injury or Illness***

28. When Claimant heard nothing about his claim for a month or so, he contacted the Commission and learned that the Commission had no record of his claims. On September 24, 2008, Claimant filled out and signed two IIC Form 1 documents. The Commission filed the

forms the same day (Def. Ex. 3 and 4). The Referee takes judicial notice that the IIC Form 1 is a triplicate carbon form. Commission practice is to retain the original form, send one of the copies to the Surety or the third-party adjuster (TPA) for the surety, and provide the remaining copy to the claimant.

29. Claim No. 2008-030708. This claim (Def. Ex. 3) lists the date of injury as December 2007 with notice to the Employer the same month. The injury is described as a torn meniscus in the left knee that came on gradually as a result of getting in and out of the delivery vehicle and carrying product up and down the ramp of the delivery vehicle.[2]

30. Claim No. 2008-030709. This claim (Def. Ex. 4) identifies the date of injury as June 2008 with the annotation "6/6/08 per [insurance]" appearing below. June 2008 is identified as the date Employer was notified. The injury is described as torn cartilage and meniscus in the left knee that came on gradually as a result of getting in and out of the delivery vehicle and carrying product up and down the ramp of the delivery vehicle.

31. Def. Ex. 5. Defendants' Ex. 5 is an IIC Form 1 prepared by Dina Richard and dated November 11, 2008. The date of injury is July 16, 2008, and the date Employer was notified is November 11, 2008. The explanation of how the injury occurred states, "Employee was getting in and out of truck, going up and down ramps delivering product, tore meniscus in left knee." Claimant never saw, and had no knowledge of, the document identified as Def. Ex. 5.

32. The IIC Form 1 Ms. Richard prepared does not bear a Commission file stamp or claim number, and is not among the Commission's records. If Ms. Richards had sent this IIC Form 1 to the Surety or TPA, they were required to transmit the form to the Commission, either

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[2] This claim is not before the Commission in this proceeding; however, it bears on the determination regarding the companion claim, which is before the Commission.

by copy or electronic data transfer. Commission records establish that Surety and/or its TPA was aware of the claim *before* November 11, 2008. The Referee takes judicial notice of the file notes of Commission staff that on November 4, 2008, staff *received* additional information that it had previously requested from the TPA on this claim.

33. Def. Ex. 6, p. 02. Page 2 of Def. Ex. 6 is an IIC Form 1 prepared by Claimant's counsel and dated January 9, 2009. The exhibit does not bear a Commission file stamp, but the same document is a part of the Commission's legal file and is file stamped January 14, 2009. The Commission document is annotated at the top, indicating that it is claim no. 08-030709, and is an amendment to the date of injury of an IIC Form 1 already on file under that claim number (the hand-written form signed by Claimant and dated and filed on September 24, 2008). The date of injury is June 6, 2008, with notice to Employer around June 13, 2008. At the time of the occurrence, Claimant was unloading product using a hand truck to move the product down the truck's loading ramp. The specific description states, "While maneuvering hand truck containing 6 cases of product down the ramp, Claimants [*sic*] left knee popped and became painful."

## DISCUSSION AND FURTHER FINDINGS

### *APPLICABLE LAW*

34. 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).

35. 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).

36. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). However, the Idaho Supreme Court has held that the Commission is not required to construe the facts liberally in favor of the claimant when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

37. In the case at bar, the facts are so disparate as to defy reconciliation. Defendants would like the Referee to believe that Claimant concocted an elaborate but flawed scheme (possibly in collusion with Dr. Schwartsman) to try to obtain workers' compensation benefits for a non-compensable injury, once it became evident that he was going to require an arthroplasty and suffer significant time loss. Claimant would like the Referee to believe that the inconsistencies in the documentary and testimonial evidence were merely the result of carelessness on the part of Claimant, who has an aversion to filling out paperwork, together with sloppy handling of the claim by Employer and Surety.

38. The Referee agrees that this claim was poorly handled from the outset. It began with Claimant's admitted carelessness. It was compounded by the apparent malfeasance or nonfeasance of Ms. Richard in reporting the claim. It was exacerbated by Surety's apparent loss of the September 2008 claim forms. The Referee cannot find that either side in this dispute conspired, colluded, or lied—either to obtain benefits or to deny them. But because Claimant bears the burden of proving his entitlement to benefits, the primary responsibility to timely report and accurately inform also rests with him. Absent prompt reporting and full disclosure,

Employer lacks the opportunity to investigate and make further inquiries. Without a complete and accurate history, a treating physician is disadvantaged and may overlook important issues. The result is the muddle that is now before the Commission. For the reasons set out in the following paragraphs, the Referee cannot make the findings necessary to establish that Claimant sustained an industrial injury on June 6, 2008 that led, inevitably, to Claimant's need for a TKA.

***ACCIDENT/INJURY***

***What Claimant Said***

39. Claimant asserts that an accident occurred on June 6, 2008, at which time he injured his left knee. As discussed, *supra,* Claimant did not initially identify June 6 as the date of injury, and in fact, it was not until late September 2008 that evidence began to focus on a June 6 injury date. Prior to that time, Claimant variously referenced May 16, 2008, December 2007, or sometime in June 2008 as the date of his knee injury. Claimant's explanation of how he came to settle on a date of June 6, 2008 is unconvincing.

40. Claimant did not fill out an incident report for Employer until August 10, 2008. When he did fill out the Employee Incident Report (Cl. Ex. 2), he identified the date of injury as May 16, 2008. At hearing, Claimant explained the discrepancy:

> I knew it was on a Friday. And my sister's birthday is on June 9th. And I knew it happened right around my sister's birthday when I got to thinking about it. So that's how I knew that it had to be in June.

Tr., p. 64. When asked what got him "to thinking" about the date, he replied:

> I don't know. Maybe just I realized when – that the dates were important at the time. So I, when I thought about it, my sister's birthday, then I knew it had to be the Friday before her birthday.

*Id.* In the five weeks between June 6 and August 10, Claimant saw Dr. Schwartsman on several occasions, had a second arthroscopic knee surgery, and filed an insurance claim. The Referee

finds it unlikely under such circumstances that Claimant had not yet grasped the importance of accuracy and specificity when he was filling out the incident report. Furthermore, it is not clear from Claimant's testimony when it was that he commenced to think about the importance of the date of the injury—whether before or after he learned that he would likely need a TKA.

***What Claimant Did***

41. Accepting for purposes of argument that the accident occurred as Claimant later described, it is understandable that when he left work on Friday, June 6, he was unaware that he had actually injured (or re-injured) his knee. When Claimant returned to work on Monday, June 9, however, his knee was painful and swollen. Claimant explained why he did not report the injury to his supervisor on Monday, stating that usually Mr. Phillips was in meetings that day. Claimant did not provide any explanation as to why he did not fill out Employer's required incident report that day, or in the days following. Claimant testified that he had suffered three minor work injuries prior to the incident in question. He testified that he knew that he was supposed to complete an incident report for any injury—and, in fact, had done so on previous occasions for even minor injuries. Inexplicably, despite his previous work injuries, and in particular his prior knee surgery, Claimant did not file an incident report for the June 2008 incident.

42. Claimant asserts that he verbally reported the injury to Mr. Phillips on either Tuesday or Thursday of the week following the incident. The conversation Claimant described during his testimony included reference to his earlier left knee injury and subsequent surgery, whether that injury should have been handled as a workers' compensation claim, and whether the prior injury would be considered a pre-existing condition in relation to his new injury.

43. Mr. Phillips is the distribution supervisor for Employer. He supervises forty route drivers, and is on call twenty-four hours per day, seven days per week. He routinely fields calls from his drivers at all hours of the day and night. Drivers are supposed to contact him at the time of any incident so that he can make sure the employee is okay, investigate if necessary, and file an incident report within twenty-four hours. Mr. Phillips testified that he had no recollection of any conversation with Claimant about this injury. Mr. Phillips testified that if such a conversation had taken place, he would have immediately filled out an incident report. He did not deny such a conversation *could* have occurred. However, Mr. Phillips had nothing to gain, and much to lose, by failing to follow up on a known work injury. The Referee finds it unlikely that Mr. Phillips and Claimant had the conversation Claimant described in his testimony, due to the absence of documentation or recollection from Mr. Phillips concerning the matter.

***What is in the Medical Records?***

44. Claimant testified that he told Dr. Schwartsman about the June 2008 incident when he presented on July 1, 2008. The chart note states that Claimant's left knee had been bothering him for about a month (Def. Ex. 7, p.11), but makes no mention of any event or incident associated with the onset of this round of left knee complaints. Even after Dr. Schwartsman reached a clinical diagnosis of a recurrent medial meniscal tear, there is nothing in the chart note about an industrial injury in early June. Dr. Schwartsman's July 8, 2008 chart note confirming the meniscal tear via an MRI is similarly devoid of any discussion of a precipitating event. Dr. Schwartsman's post-operative chart note of July 22, 2008 confirms the clinical diagnosis of recurrent medial meniscal tear, and notes the progression of interval changes

in the knee. It includes no discussion of a causal mechanism of the recurrent meniscal tear. The July 24 chart note is similarly silent as to any precipitating event.

45. Medical professionals are cognizant that their reimbursement often depends upon whether a patient's care is covered by a surety, whether an industrial insurer or a private health insurer. Physicians usually collect this vital information at the outset of treatment by requiring a patient to fill out intake forms or by conducting an intake history that includes how and when the injury occurred. Dr. Schwartsman frequently treats workers' compensation claimants. The Referee finds it unlikely that Dr. Schwartsman would fail to inquire whether an injury is traceable to an industrial event, or to document an industrial event when reported by a patient.

46. The first date on which Dr. Schwartsman's chart note mentions an industrial injury is August 7, 2008—Claimant's *third* post-operative visit. The note indicates that the discussion arose because Claimant was concerned about the long-term prognosis for his left knee, and was discussing the possibility of a workers' compensation claim with his Employer. This is consistent with Claimant's preparation, just a few days later, of the incident report identified as Cl. Ex. 2.

47. Dr. Schwartsman's note, set out with particularity, *supra,* describes an event very much like Claimant's description of the June 6, 2008 event, but occurring in early December 2007, just a week or so before Claimant's first visit to Dr. Schwartsman late the previous year, and includes the hand-written addendum noting subsequent injury in June '08.[3] Based on this

[3] At hearing, for the first time and to the apparent surprise of the participants, Claimant related that his December 2007 knee injury was the result of a specific event at work. The event Claimant described at hearing was sufficiently dissimilar to his description of the June 2008 incident that it is not likely Claimant confused the two events. Defendants impeached Claimant's testimony using his prior deposition testimony, and Claimant offered no further explanation for the divergent version of events.

erroneous history, Dr. Schwartsman concluded that it was reasonable to attribute Claimant's December 2007 meniscal tear and a chondral lesion to Claimant's work-related activity of wheeling a loaded handcart down a ramp. Dr. Schwartsman gratuitously attributed Claimant's failure to file a workers' compensation claim for the December 2007 injury to his lack of awareness of the workers' compensation process—an assumption not supported by the record.

48. When Claimant returned for follow-up care in early September, Dr. Schwartsman notes for the first time that Claimant was a candidate for a TKA. Claimant could not recall if this was the first time that Dr. Schwartsman discussed the possibility of a TKA with him. Still relying on the erroneous history, Dr. Schwartsman offered his medical opinion on causation to a reasonable degree of medical certainty.

49. When Claimant returned to Dr. Schwartsman on October 21, 2008, the history of Claimant's knee injury changed once again. The chart note describes gradual-onset left knee pain in late 2007, eventually diagnosed as a torn meniscus, arthroscopy, recovery, and return to work. The note then describes the June 6, 2008 incident with the treatment history that followed. Dr. Schwartsman opined that the June 2008 accident necessitated the second arthroscopy. The repeat arthroscopy left Claimant with bone-on-bone in the medial compartment of his knee, accelerating Claimant's need for an eventual TKA.[4]

50. Once Dr. Schwartsman learned that he may have been treating Claimant for a compensable industrial injury, his chart notes become filled with the words and phrases used to establish medical causation. As a treating physician, and one familiar with the requirements of the workers' compensation system, Dr. Schwartsman knows that having the terms of art in the

[4] In the interval between Claimant's September and October visits to Dr. Schwartsman, he filled out the IIC Form 1 that instigated this proceeding (Def Ex. 4). That document describes a gradual-onset injury in June 2008.

chart notes will help a claimant pursue his claim. The Referee certainly does not question that the opinions Dr. Schwartsman expressed regarding the etiology of Claimant's left knee problems represent his best medical judgment. However, it is also clear from the chart notes that Dr. Schwartsman based his opinions on Claimant's reported history—a history that evolved over time and one that is not supported by substantial evidence.

## CONCLUSIONS OF LAW

1. Claimant has failed to carry his burden of proving that he suffered an injury from an accident arising out of his employment on June 6, 2008.

2. All other issues are moot.

## 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 12 day of July, 2011.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

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

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|---|---|---|
| JAMES J. BROWN,<br><br>Claimant,<br><br>v.<br><br>MEADOW GOLD DAIRIES,<br><br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br><br>Surety,<br>Defendants. | ) | **IC 2008-030709**<br><br>**ORDER**<br><br>Filed: July 29, 2011 |

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to carry his burden of proving that he suffered an injury from an accident arising out of his employment on June 6, 2008.

2. All other issues are moot.

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

DATED this 29 day of July, 2011.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
Thomas P. Baskin, Commissioner

/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29 day of July, 2011, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

djb /s/_____