BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVE GARDNER, Claimant, v. MAGIC VALLEY BUSINESS SYSTEMS, Employer, and BANCINSURE, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-007524** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed April 17, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on June 1, 2012 in Twin Falls, Idaho. Claimant was present in person and represented by Patrick D. Brown of Twin Falls. Employer ("Magic Valley") and Surety (collectively referred to as "Defendants") were represented by Susan R. Veltman of Boise. The Industrial Special Indemnity Fund ("ISIF") was represented by Thomas B. High of Twin Falls.

Oral and documentary evidence was admitted, and post-hearing depositions were taken. The matter was briefed, and Claimant filed a Motion to Exclude the Post-Hearing Deposition

Testimony of Brian Tallerico, D.O. Defendants opposed the motion,[1] which was denied by order dated January 30, 2013. Defendants moved to strike Claimant's post-hearing reply brief on January 15, 2013. That motion was ultimately denied on March 7, 2013. The case came under advisement on March 8, 2013. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The parties seek adjudication of the following issues:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code Section § 72-448;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Whether Claimant suffers from a compensable occupational disease and, if so, what is the date of the manifestation;
4. Whether Claimant's condition is due in whole or in part to a preexisting and/or a subsequent injury or condition;
5. Whether and to what extent Claimant is entitled to the following benefits:
    a. Medical care;
    b. Temporary partial and/or temporary total disability benefits;
    c. Permanent partial impairment; and
    d. Disability in excess of impairment;
6. Whether apportionment for a preexisting or a subsequent condition pursuant to

[1] ISIF did not respond to the motion.

Idaho Code § 72-406 is appropriate;

7. Whether the Industrial Special Indemnity Fund is liable;
8. Apportionment under the *Carey* formula; and
9. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant, a copy machine repairman, contends he suffered injuries to both knees as a result of over 22 years of kneeling, squatting and heavy lifting at his job for Employer. He further contends that his injuries constitute an occupational disease rendering him totally and permanently disabled, and that he is entitled to attorney fees for unreasonable denial of the claim. Claimant relies upon the expert opinions of Colin E. Poole, M.D., Tracy Ervin, P.T., and Nancy J. Collins, Ph.D.

Defendants counter that Claimant's knee pathology is the result of natural degenerative processes from multiple non-industrial factors, including obesity, varus alignment (bow-leggedness), gout, and, to a lesser degree, Claimant's age. They also assert that Claimant cannot establish that his condition constitutes an occupational disease because the evidence is insufficient to establish that it is characteristic of or peculiar to his job, and even if he could, his claim must fail because, at most, his condition is the result of a permanent aggravation of his preexisting knee condition. Thus, under the *Nelson* doctrine, he must do what he concedes he cannot do – that is, prove his condition is the result of a workplace accident. Defendants also posit that Claimant failed to provide timely notice of his condition pursuant to Idaho Code § 72-448. Finally, Defendants argue that Claimant is not totally and permanently disabled because jobs for which he is competitive exist in his local labor market. They deny that Claimant is

entitled to attorney fees under Idaho Code § 72-804. Defendants rely upon the opinions of Brian Tallerico, M.D., and Dave Duhaime, ICRD consultant.

ISIF contends that Claimant cannot establish he suffers from an occupational disease, that he is not totally and permanently disabled, that his knee conditions are not the result of a combination of impairments such that ISIF is liable, and that none of Claimant's nonindustrial conditions constituted subjective hindrances to his employment prospects.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition testimony (including exhibits, where applicable) of:
    a. Claimant, taken August 10, 2010 and February 2, 2012;
    b. Dennis Moon, Terry McCurdy and Beverly Shewmaker, taken August 11, 2010;
2. Claimant's Exhibits numbered 15, 18-22, and 24-26, admitted at the hearing;
3. Defendants' Exhibits numbered 1-26, admitted at the hearing;
4. The testimony of Claimant, John Redollozo, Don Marzitelli, Tracy Ervin, and Beverly Shewmaker, taken at the hearing; and
5. The post-hearing deposition testimony of:
    a. Nancy J. Collins, Ph.D., taken July 18, 2012;
    b. Colin E. Poole, M.D., taken August 22, 2012; and
    c. Brian Tallerico, D.O., taken October 2, 2012.

OBJECTIONS

The following objections are sustained: Dr. Tallerico's deposition: ISIF's objections at pages 61, 64 and 84, and Defendants' objections at pages 47 and 88. All other pending objections are overruled.

FINDINGS OF FACT

1. **Background.** Claimant was 56 years of age and residing in the Twin Falls area at the time of the hearing. He had worked as a copy and fax machine repairman for Employer for over 22 years.

2. **2007 Bilateral Arthroscopy.** On December 20, 2007, Claimant underwent arthroscopic surgery on both knees to repair degenerative medial meniscal tears with grade 2 and 3 chondromalacia of the medial femoral condyles and tibial plateaus. During this procedure, among other things, he underwent debridement in the medial compartments of his knees. Following the procedure, he was diagnosed with "early" arthritis. DE-466.

3. Claimant testified that, at the time, he believed his knee problems were related to his work activities. He also testified that he conveyed this belief to his supervisor, Dennis Moon. Mr. Moon, however, does not recall being so informed.

4. There is no contemporaneous evidence in the medical records, including those prepared by Mark B. Wright, M.D., Claimant's treating orthopedic surgeon, of Claimant's or Dr. Wright's (or anyone else's) beliefs regarding the cause of Claimant's knee conditions in 2007. The subject simply is not addressed. Dr. Wright's records do establish, however, that Claimant's medical insurance was applied to the costs of his 2007 surgeries, and there is no indication that any workers' compensation carrier was ever contacted.

5. As discussed more fully below, Colin E. Poole, M.D., is the only physician to opine that Claimant's meniscal tears may have been work-related.

6. **2009 Bilateral Partial Knee Replacements.** On December 7, 2009, Claimant underwent bilateral partial knee replacement ("PKR") surgeries to alleviate bilateral end-stage medial compartment osteoarthritis. Claimant ascribes this condition to an occupational disease he developed over more than 20 years of daily kneeling, squatting and heavy lifting at work repairing copy machines for Employer. Claimant has not returned to work since this surgery.

7. On December 2, 2009, Dr. Poole advised Claimant that his need for PKR surgery was probably work-related. Claimant notified Employer that same day.

8. Claimant does not argue that any specific event occurred that prompted his need for bilateral PKR surgeries. Likewise, Claimant's medical treatment records do not indicate that he or any physician attributed his end-stage arthritis to any particular event at his Employer's.

INDEPENDENT MEDICAL EVALUATION

9. **Brian Tallerico, D.O.** Dr. Tallerico, like Dr. Poole, routinely performs partial and total knee arthroplasties in his medical practice. He performed an IME on December 16, 2010. He opined that Claimant's knee arthritis in 2009 was unrelated to his work activities but, was instead caused by varus alignment (bow-leggedness), obesity, gout and, to a lesser extent, natural degeneration related to his age. Further, Dr. Tallerico opined that kneeling and squatting may, in certain circumstances, lead to some medial compartment degeneration, but not in the absence of significantly greater patellofemoral compartment degeneration, which Claimant does not demonstrate.

DISCUSSION AND FURTHER FINDINGS

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, 956, 793 P.2d 187, 188

(1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc*., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

STATUTE OF LIMITATIONS

10. The requirements for notice and filing of occupational disease claims are set out at Idaho Code § 72-448, which provides in pertinent part:

> (1) Unless written notice of the manifestation of an occupational disease is given to the employer within sixty (60) days after its first manifestation, or to the industrial commission if the employer cannot be reasonably located within ninety (90) days after the first manifestation, and unless claim for worker's [*sic*] compensation benefits for an occupational disease is filed with the industrial commission within one (1) year after the first manifestation, all rights of the employee to worker's [*sic*] compensation due to the occupational disease shall be forever barred.

11. Claimant asserts that he provided timely notice to Employer on December 2, 2009 – the day he was diagnosed by Dr. Poole – when he advised that he had bilateral knee injuries caused by repetitive squatting and kneeling, and other activities, at work. Defendants do not dispute that Claimant notified Employer on December 2, 2009. However, they contend that Claimant did not comply with Idaho Code § 72-448 because Claimant believed as early as 2007, when he underwent bilateral arthroscopic knee surgery, that his knee problems were industrially related. Nevertheless, Claimant did not file his claim for benefits until March 25, 2010, well outside the one-year statutory window.

12. Claimant does not deny that he believed his knee conditions in 2007 were work-related. He has testified that he reported his bilateral knee problems to Dennis Moon, his supervisor, and that he believed for several months after his arthroscopies that they were covered by Employer's workers' compensation insurance. However, Claimant's medical records prior to

December 2009 evidence no medical opinion that would support Claimant's belief that his bilateral knee conditions are industrially-related.

13. On December 7, 2009, Claimant underwent bilateral sequential cemented unicompartmental knee arthroplasties (PKR) to address end stage medial compartment osteoarthritis, early evidence of which was first noted at the December 20, 2007 surgery. *See* DE-21, p. 463. It is not disputed that the medial meniscus tears and other early degenerative changes noted at the time of the 2007 surgery contributed to progress until Claimant required the 2009 procedure. Also, there is medical testimony suggesting that the very act of treating the degenerative bilateral medial menisci in 2007 hastened the progression of Claimant's medial compartment arthritis. Poole Depo., pp. 11/22-12/16.

14. Defendants contend that these facts set up several defenses to Claimant's occupational disease claim. First, Defendants contend that although Claimant's bilateral osteoarthritic knee condition was more severe in 2009, that same condition existed in a milder form in 2007. Defendants argue that Claimant's current occupational disease therefore existed in 2007 as soon as it became manifest. Under *Sundquist v. Precision Steel and Gypsum, Inc.*, 141 Idaho 450, 111 P. 3rd 135 (2005), an occupational disease exists for the purposes of the Workers' Compensation Law when it first manifests. "Manifestation," of course, is a term of art under our law, and is defined at I.C. § 72-102(19) as follows:

> "Manifestation" means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

The definition is stated in the disjunctive. Manifestation can occur either when the Claimant "knows" that he suffers from an occupational disease or when he is so advised by competent medical authority. In this case, it is conceded that none of the physicians who treated Claimant in 2007 informed him that his bilateral knee condition was causally related to the demands of his

employment. Therefore, the only way that Claimant's bilateral knee disease could be said to have been manifest in 2007 is if Claimant independently knew at that time that his condition was related to the demands of his employment.

15. Defendants argue that Claimant was well aware in 2007 that the condition which had brought him to surgery was connected to the demands of his employment. A review of the evidence upon which Defendants rely in this regard is instructive:

> Q. [Mr. Brown] Okay. And did you have any discussions about whether or not you could do a worker's [sic] comp claim to deal with your knees in [2007]?
>
> A. [Claimant] I told [Dennis Moon] it bothered me and I believed it was a workmen's comp claim and his response to that is that they do not do workmen's comp on knees. That carpal tunnel and backs is the only thing he knew of.
>
> ---
>
> A. I believed that workmen's comp was handling it until I got the bills after the surgery was done and found out that Blue Cross was paying them.

Trans., p.20, p.79 at 15-21, 80 at 1-3.

> Q. [Ms. Veltman] By the time you had your first knee surgery in December of 2007, did you believe your knee problems were caused by the work at Magic Valley?
>
> A. [Claimant] I was in believement of that, yes.
>
> Q. Were you under the impression that, in fact, the worker's [sic] compensation process had been initiated?
>
> A. On – in 2007? Yes, I did.

Trans., p. 31, p. 122 at 9-15.

> Q. [Referee Marsters]. . . You said you had knee surgery in 2007. You thought the worker's [sic] comp had paid for it. You didn't pay a dime for that; is that right?
>
> A. [Claimant] Actually, I don't even know if it all got paid. Blue Cross, Blue Shield took it on.

Q. Whose is Blue Cross, Blue Shield? Yours? Your personal insurance?

A. My personal one that was through the company.

Q. Okay. And so when did you find out that that was not covered by worker's [sic] comp?

A. Actually several months later. I wasn't positive of it.

Q. Okay.

A. They didn't come to me. I just assumed it was paid and at that point it was not an issue to me, because, basically, the doctor already said it was going to take six weeks heal time on the first one and I said now get real with me, what are we talking on the time frame here. . . .So, it was just left lay with Blue Cross paying.

Q. Okay. And so – and you first found out when your insurance company, what, sent you a bill or –

A. My insurance company never sent me a bill.

Q. Okay. Because you said you found out a few months later.

A. Well, I had got wind of it and went in and talked to Dennis and I was told they don't cover that. It's not back or carpal tunnel.

Q. Okay.

A. And I had never heard of anybody getting surgeries for anything other than that, so I believed that.

Trans., pp. 44, 173 at ln. 11-25, 174 at ln. 1-21.

Similarly, in Claimant's answers to discovery, he stated:

ANSWER NO. 7: At the time of my first knee surgery in 2007, my Manager and company owner Dennis Moon knew I believed my knee problem was work-related; he told me that knees were not subject to work comp claims. We discussed knee problems at various times throughout the time we worked together (he left the business in approximately 10-09). Then Dr. Poole told me on 12-2-09 that he believed my knee problems were work-related and should be reported. I immediately telephoned the Office Manager at MVBS, Bev Shewmaker, and reported the injury. The following day, 12-3-09, I met with Bev Shewmaker and Terry McCurdy.

(DE-9, p. 194). He also made similar assertions in his August 2010 recorded statement. (DE-8,

p. 180). The significant fact to extract from these excerpts is that back in 2007, Claimant was assuredly of the belief that his bilateral knee injuries were caused by the demands of his employment, so much so that he briefly labored under the belief that his workers' compensation surety had accepted responsibility for his 2007 treatment.

16. The question that is presented by the quality of Claimant's belief in 2007 is whether his belief satisfies the demands of the statute, which requires a demonstration that he "know" that his condition is related to the demands of his employment before his condition can be said to be manifest. Thus, the distinction between believing and knowing is important, but it is not a distinction that is particularly subtle. To "know" is to perceive or understand as fact or truth; to apprehend clearly and with certainty. *Dictionary.com*, *Based on the Collins English Dictionary Complete & Unabridged 10th Edition*. http://dictionary.reference.com (HarperCollins Publishers, Accessed April 2013). To "believe" is to accept something as true, genuine or real. *Id*. Believing is holding an opinion. Knowing is to have direct experience of a fact.

17. Claimant did not testify that he knew back in 2007 that his bilateral knee injuries were causally related to the demands of his employment. Indeed, it would be a rare case in which a lay person could testify that he knew for a fact that the disease from which he suffered had its genesis in an occupational exposure. Equivocation and uncertainty abound even in the realm of professionals; physicians speak in terms of differential diagnoses, probabilities and possibilities when it comes to issues of causation.

18. In view of the foregoing, we cannot conclude that Claimant knew that his bilateral knee injuries were caused by the demands of his employment at the time of his 2007 surgery. Defendants have failed to establish a date of manifestation earlier than the date on which Dr. Poole advised Claimant in December 2009 that Claimant's condition was related to the demands of his employment.

19. Therefore, to the extent Claimant's current condition constitutes a single

occupational disease that developed over the course of many years, I.C. § 72-448 does not create a defense to the claim, because there is no demonstration that Claimant failed to give notice or make his claim within the time required following the date we have established as the date of manifestation.

OCCUPATIONAL DISEASE

20. Claimant's 2007 surgery is also implicated in another of Defendants' defenses to the claim. Defendants argue that the bilateral degenerative medial meniscus tears treated at the time of that surgery and the early medial compartment arthritis noted at that time constitute preexisting conditions that were aggravated or accelerated by the subsequent demands of Claimant's employment. The aggravation of a preexisting condition, in the absence of an accident, is not compensable under the rule announced in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). *Sundquist v. Precision Steel and Gypsum, Inc.*, *supra*, creates a special rule where the preexisting condition is, itself, occupational in origin. Per *Sundquist*, a preexisting occupational disease does not qualify for application of the rule of *Nelson* unless it is shown that the preexisting occupational disease was manifest before Claimant suffered subsequent aggravation of that condition. As developed above, we have determined that the condition for which Claimant was treated in 2007 was not manifest at that time.

21. Defendants urge us to focus on whether the preexisting condition for which Claimant was treated in 2007 was occupational in origin (therefore implicating the rule of *Sundquist*) or non occupational in origin (therefore implicating the rule of *Nelson*). However, we believe that a closer reading of *Sundquist* demonstrates that the key fact upon which the resolution of this matter lies is making a determination as to whether the condition, for which Claimant sought treatment in 2007, is in fact a "preexisting condition" in the context of Claimant's current occupational disease claim.

22. In *Sundquist*, the claimant, Mr. Sundquist, worked as a dry wall taper for most of his adult life for a variety of different employers. This work evidently requires a good deal of strenuous use of the upper extremities. In late 2000, while working for an earlier employer, Mr. Sundquist began to note the development of pain in his bilateral upper extremities. His symptoms progressed to the point where he began to wear a wrist brace and take over-the-counter pain medications to address his discomfort. In 2002, Mr. Sundquist went to work for Precision, where he worked harder and for longer hours than he had in any previous employment. His symptoms continued to progress, and he eventually sought medical treatment in the course of which he was advised by his treating physician that he suffered from work-related cubital tunnel syndrome. Precision denied the claim, arguing that since this condition clearly predated Mr. Sundquist's employment by Precision, albeit in a less severe form, the rule of *Nelson* absolved Precision of responsibility for Mr. Sundquist's occupational disease. Since Mr. Sundquist did not suffer an aggravating accident while in the employment of Precision, Precision could not be held responsible for the acceleration of Mr. Sundquist's preexisting condition. In discussing Precision's theory of the case, the Court noted that the essence of *Nelson* is that a preexisting occupational disease is just like any other preexisting condition. For a current employer to be liable for the aggravation of the condition, there must be an accident. The Court then elaborated:

> The *Nelson* doctrine provides that a Claimant seeking compensation for the aggravation of a preexisting condition must prove that his injuries are attributable to an accident that can be reasonably located as to time when and place where it occurred. . . *Nelson* does not apply to all cases where there is an occupational disease, only in those where the Claimant's occupational disease preexisted employment with the employer from whom benefits are sought. . . .

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 453, 111 P.3d 135,138 (2005).

23. The medical evidence in this matter demonstrates that at the time of the 2007 surgery Claimant was diagnosed as suffering from bilateral degenerative medial meniscus tears with grade 2 and grade 3 chondromalacia of the medial femoral condyles and tibial plateaus. By 2009, Claimant's medial compartment arthritis had progressed significantly such as to require PKR surgery. The medical evidence does not establish that the condition for which Claimant required surgery in 2009 was anything but the continued progression of the condition first identified at the time of the 2007 surgery. In this sense, the instant facts are not dissimilar from the facts before the Court in *Sundquist*. Mr. Sundquist, too, initially suffered from a milder form of the condition which later required more aggressive medical therapy. The major difference between *Sundquist* and the facts of the instant matter is that Mr. Sundquist did, indeed, suffer from a condition which predated his employment by Precision. The same cannot be said of the facts before the Commission in this case. As far as the record reveals, Claimant's condition developed entirely within the time frame of his employment by one employer. Simply, there is no "preexisting condition." Therefore, it is not necessary for us to address Defendants' argument that the condition for which Claimant received treatment in 2007 was not occupational in origin such as to avoid the rule of *Sundquist* and escape liability by application of the rule of *Nelson*.

24. In 2007, Claimant underwent treatment for significant bilateral medial compartment disease. At surgery, bilateral degenerative tears of the medial menisci were identified and treated. Early medial compartment arthritis was also noted. It is the medial meniscus tears that arguably constitute a preexisting condition, distinct from the advanced gonarthritis which precipitated the 2009 surgery. However, we believe the medical record establishes that one, and only one, disease process is implicated in causing the damage to both

Claimant's medial menisci and medial compartment articular surfaces. The clearest expression of this is found in the testimony and records of Dr. Poole:

> Q. . . . Can you explain why you believe that his knee problems were related to his work as a copier repairman?
>
> A. (by Dr. Poole): Number one, he had meniscal problems prior to seeing me. And it was on both sides. Which indicate that whatever he was exposed to it was affecting both of his knees. Number two, he had seen a rheumatologist. There wasn't any underlying sort of non wear-and-tear arthritis that had been identified by the rheumatologist. So sort of by default, you know, just with his vocational exposure to me would seem apparent that that was the cause of his end-stage arthritis and the need for joint replacement.
>
> . . . .
>
> Q. What factors, if any, made Mr. Gardner more prone to developing that arthritis?
>
> A. I think it is the longevity that he had been exposed to in that vocation. Also, the fact that something had caused injury to his meniscus that I think was job-related, as well, that would accelerate the need for joint replacement surgery.
>
> Q. The prior meniscus injury, is that what you are talking about? When he had the earlier surgeries I think in 2006 or something?
>
> A. Yes.
>
> Q. And to what extend did those prior meniscal issues contribute to the joint surface problems?
>
> A. They contributed I don't think a significant amount to it. But to some extent.
>
> Q. Do you have an opinion as to whether or not Mr. Gardner would still have needed the bilateral knee replacements if he had not had those prior meniscal injuries?
>
> A. Very, very difficult to give an opinion on that.
>
> Q. Back to the December 2, 2009 chart note that we have identified as page 549 of the exhibits. And I note that—I think this is a similar sentence to what Mr. Brown read. "But I think his history of being with the same employer for the past 22 years, and his job description that he details, that more than likely his current symptom complex is related to his work environment and his work and work surfaces.

Poole Depo., pp. 10/8-19; 20/3-21/6.

In his December 7, 2009 history and physical Dr. Poole offered the following observation:

> The patient is a 54-year old man who live in Twin Falls, works as a service manager for Magic Valley Business Systems, for which he has worked for the last 22 years. He gives a history of bilateral knee problems, but predominantly medial compartment location. Treatment to date has included previous arthroscopy with subtotal medial meniscectomies, evaluation through the rheumatology division with normal serology, but aspiration of his joint did reveal monosodium urate crystals. He has been treated for gout with the appropriate agents. The patient feels that over the past 4-5 years, his symptoms in both knees have progressed to a stage where they interfere with his ability to work as a service manager and interfere with his quality of life and activities of daily living. Additional treatments have included bilateral knee arthroscopy in 2007 with subtotal medial meniscectomies. No treatment to date has been particularly effective in long-term pain relief or improvement of his function. He has carefully considered treatment options, has weighed risks and benefits of each, now presents for elective bilateral sequential total joint replacement surgery.
>
> Exhibit 24, p. 550.

Finally, in the December 7, 2009 operative report Dr. Poole noted:

> Patient is a 54-year old man, who presents with disabling bilateral knee medial compartment gonarthrosis. He feels that symptoms have progressed in the past couple of years and have now reached a stage where they have become disabling. He is status post previous bilateral knee arthroscopy, subtotal meniscectomy, previous intra-articular injections, oral anti-inflammatory agents. None have been particularly successful in long-term pain relief. He continues to work, but feels that his work has had a significant impact on his disease process and his current end-stage arthrosis. Treatment options, as well as risks and benefits of each have carefully been discussed and presented to him. The patient now presents for unicompartmental replacement.
>
> Exhibit 24, p. 553.

25. From this evidence we conclude that Dr. Poole is of the opinion that Claimant's disease process is a unitary phenomenon; there is nothing in these injuries to suggest that Claimant was suffering from two separate diseases during the time frames at issue. There is no preexisting disease. There is only a disease. The fact that the 2007 surgery may have accelerated

or changed the course of the disease process does nothing to prove that the condition from which Claimant suffered prior to 2007 was a different disease, in its genesis, than that from which he suffered after 2007.

26. The question in this case is not whether Claimant suffers from a preexisting condition aggravated by the demands of his employment, but rather whether Claimant's longstanding bilateral knee disease is causally related to his employment. As noted, Dr. Poole has proposed that Claimant's work is so implicated. However, we find that Dr. Tallerico's explanation of the genesis of Claimant's bilateral knee injuries to be more persuasive than the explanations offered by Dr. Poole. Dr. Tallerico convincingly explained that the cause of Claimant's bilateral knee injuries is multi-factorial, and that to the extent kneeling, squatting and standing activities could be considered as contributing to Claimant's injuries, those activities would have to be accompanied by a sufficient forceful movement before they would become relevant to the question of causation. Such loading is not demonstrated sufficiently by the facts of this case. Moreover, Claimant's bending, squatting, and kneeling activities at work are unlikely to be the cause of Claimant's medial compartment damage, in the absence of evidence of significant injury to his patellofemoral joint, as kneeling and squatting activities would be expected to create greater damage to the patellofemoral compartment than was observed in Claimant.

27. For these reasons, we conclude that Claimant has failed to meet his burden of proving that the condition for which he seeks benefits is causally related to the demands of his employment. Discussion of further issues is moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove that his bilateral knee osteoarthritis constitutes an occupational disease.

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 _17th____ day of _____April_____, 2013

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

PARTICIPATED, BUT DID NOT SIGN.
_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _17th_____ day of ____April____, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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