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

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| JERRY ZAPATA,<br><br>Claimant,<br><br>v.<br><br>LIGNETICS OF IDAHO, INC.,<br><br>Employer,<br><br>and<br><br>STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | ) | **IC 2005-526341**<br>**IC 2005-528820**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed: September 3, 2010 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on December 2, 2009. Claimant, Jerry Zapata, was present in person and represented by Starr Kelso of Coeur d'Alene. Defendant Employer, Lignetics of Idaho, Inc. (Lignetics), and Defendant Surety, State Insurance Fund, were represented by H. James Magnuson of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on May 25, 2010.

## ISSUES

The issues to be decided by the Commission are:

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

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.

3. Whether, and to what extent, Claimant is entitled to medical benefits.

## CONTENTIONS OF THE PARTIES

Claimant alleges that he suffered an industrial accident and injury to his left knee on October 3, 2005, and an industrial accident and injury to his right knee on December 21, 2005. He subsequently had arthroscopic surgery on both knees and now seeks left and right total knee arthroplasties.

Defendants assert that Claimant's right and left knee industrial injuries were minimal and have been adequately treated. They dispute Claimant's entitlement to medical benefits, including total knee arthroplasties, and contend that total arthroplasties are not currently medically indicated.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition testimony of Claimant, taken March 3, 2009, and admitted into evidence as Defendants' Exhibit 15;

3. The testimony of Claimant, taken at the December 2, 2009 hearing;

4. Defendants' Exhibits 1 through 23, admitted at the hearing, with the exception of page 310 of Exhibit 13 and pages 520 through 597 of Exhibit 14;

5. The post-hearing deposition of Michael R. DiBenedetto, M.D., taken by Claimant on December 18, 2009;

6. The post-hearing deposition of George E. Sims, M.D., taken by Defendants on February 22, 2010.

All objections posed during the post-hearing depositions are overruled. After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## FINDINGS OF FACT

1. Claimant was 54 years old and resided in Sandpoint at the time of the hearing. He moved to Sandpoint in 1994 and began working at Lignetics that same year. Claimant was hired as a fork lift driver and truck driver. He advanced to the position of yard foreman and was responsible for maintaining the yard and shipping area, shipping products, monitoring inventory available for shipment, and retrieving inventory from the yard. Claimant removed snow from the yard and kept the yard and shipping area clean.

2. In January 1998, Claimant twisted his right knee and experienced some swelling. He received medical treatment for his right knee, ending in December 1999. His right knee pain resolved. From December 1999 through March 2005, Claimant adequately performed all of his work duties and was physically active, hiking and hunting.

3. Commencing in September 2004, Claimant began taking a prescription medication, HCTZ, for hypertension. He subsequently noted intermittent swelling in his joints, specifically his ankles and knees.

4. On March 1, 2005, Claimant presented to Hugh Leedy, M.D., with complaints of pain and swelling on the top of his left foot several days after hiking. X-rays were normal, and Dr. Leedy suspected a left foot sprain or occult fracture. Claimant's left foot improved.

5. On September 28, 2005, Claimant presented to Daniel Meulenberg, M.D., with complaints of awaking in the night with sharp pain in his right ankle, foot, and great toe. Dr. Meulenberg suspected gout and speculated that one of Claimant's prescription medications might have raised his uric acid level. X-rays and diagnostic testing confirmed that Claimant had

gout, for which Dr. Meulenberg prescribed medications. Claimant continued to have gout pain until at least late October 2005.

6. On October 3, 2005, Claimant was at work reading a shipping order while he walked toward a curb. He stepped off the curb, twisted his left knee, and felt left knee pain. He continued working, attributing his left knee pain to gout (for which he was already taking medication).

7. On October 7, 2005, Claimant saw Dr. Meulenberg for ongoing treatment of his gout, hypertension, and migraines. Claimant did not report his left knee pain from stepping off a curb on October 3, 2005. Dr. Meulenberg noted that Claimant started HCTZ in September 2004 and that: "since that time, he's had some intermittent swelling in his joints, specifically in the great toes and ankles and sometimes in the knees." Exhibit 7, p. 105. Dr. Meulenberg recorded that Claimant's uric acid level was elevated and that he was still having intermittent pain.

8. On November 4, 2005, Claimant returned to Dr. Meulenberg for monitoring of his hypertension medication and complained of "three weeks of left knee pain and this is different than any pain he's had before. It does not feel like the gout and feels more like an internal pain." Exhibit 7, p. 104. Claimant reported that he could not recall any precipitating trauma. Dr. Meulenberg ordered an MRI, which revealed a radial tear of the posterior horn of the medial meniscus of Claimant's left knee.

9. On November 14, 2005, Claimant reported to Employer that on October 3, 2005, he had stepped off a curb at work and hurt his left knee.

10. On December 2, 2005, Claimant returned to Dr. Meulenberg who recorded:

> Jerry is here to follow up on his left knee pain. He's had a rough go of it recently with a lot of gout in his knees and ankles. When I saw him last, his left knee was really bothering him and at the time he did not recall any injury, but as he reflected on this after the visit and talked with his wife, he recalled [a] time when he was at work and stepped off a curb and sort of hyperextended his left knee. Even at that point, the knee pain initially was less problematic than the pain from the gout in his other knee and in his ankles. At any rate, now the gout has resolved very nicely … and the knee continues to be painful.

Exhibit 7, p. 103. Dr. Meulenberg diagnosed a work-related left medial meniscus tear. He referred Claimant to orthopedic surgeon Douglas Cipriano, M.D., who scheduled Claimant for left knee arthroscopy.

11. On December 21, 2005, Claimant arrived at work and found the shipping yard covered with sheer ice. While attempting to cross the yard, Claimant slipped on the ice and landed hard on his right side. He injured his hip, knee, and elbow. A co-worker witnessed his fall. Claimant continued working, but sought medical treatment at Bonner General Hospital the next day.

12. On December 23, 2005, Dr. Cipriano performed arthroscopic surgery on Claimant's left knee and completed a partial medial meniscectomy with debridement of loose bodies. Dr. Cipriano diagnosed a medial meniscal tear and tricompartmental osteoarthritis. Defendants paid for the surgery.

13. On February 28, 2006, Claimant presented to Dr. Cipriano complaining of persisting right knee pain from his fall on the ice at work in December. Dr. Cipriano ordered an MRI, which revealed meniscus tearing in Claimant's right knee.

14. On March 24, 2006, Dr. Cipriano performed arthroscopic surgery on Claimant's right knee and completed a partial medial meniscectomy. Defendants paid for the right knee surgery.

15. Claimant's left knee pain did not fully resolve after surgery. He received Supartz injections with no significant resolution of his left knee pain. On June 7, 2006, a left knee MRI revealed a post-surgical or degenerative meniscus tear.

16. On July 27, 2006, Dr. Cipriano rated Claimant's right knee impairment at 1% of the whole person.

17. On August 16, 2006, Dr. Cipriano performed a second arthroscopic surgery on Claimant's left knee and completed a further meniscectomy and joint debridement. Claimant received further left knee injections in the fall of 2006.

18. By November 7, 2006, Claimant reported that his right knee was 90-95% recovered, but his left knee was only 60-65% recovered. He could not fully extend his left knee.

19. On December 4, 2006, Dr. Cipriano rated Claimant's left knee impairment at 15% of the whole person. Claimant asked Dr. Cipriano for a work release without restrictions so he could return to work at Lignetics. Thereafter, Claimant returned to Lignetics and attempted to perform his duties, but was significantly hindered by his ongoing knee pain. He contemplated total left knee arthroplasty.

20. In March 2007, Lignetics terminated Claimant's employment.

21. On April 25, 2007, Stephen Sears, M.D., examined Claimant at Defendants' request. Dr. Sears opined that Claimant developed a spontaneous left medial meniscus tear as a result of aging, accelerated by Claimant's obesity and gout. He reported that Claimant's ongoing left knee pain resulted from a pre-existing condition and concluded that Claimant did not need total left knee arthroplasty. Dr. Sears rated Claimant's permanent impairment at 1% of the whole person due to his left knee.

22. In 2008, Claimant obtained employment as an assembler with Quest Aircraft. Quest was willing to modify Claimant's work station to accommodate his knee pain and reduced mobility. Quest permitted Claimant to lie on his side while assembling aircraft fuselages.

23. In January 2009, Claimant saw Dr. Cipriano, who took x-rays and scheduled Claimant for total left knee arthroplasty in February. Dr. Cipriano intended to perform a total knee arthroplasty of the left knee first, then an identical procedure on Claimant's right knee.

24. On March 3, 2009, orthopedic surgeon George Simms, M.D., examined Claimant at Defendants' request and opined that he needed no further medical treatment as a result of his industrial accidents. Dr. Simms opined that a total knee arthroplasty was not medically indicated for Claimant's left or right knee. Defendants denied payment for the proposed surgeries.

25. On October 15, 2009, Claimant was examined by orthopedic surgeon Michael Dibenedetto, M.D., who reported that Claimant's knees showed very significant medial joint line narrowing, with nearly complete loss of joint space, and concluded very strongly that total knee arthroplasty was the proper approach to treat Claimant's knee problems.

26. At the time of hearing, Claimant was still working at Quest Aircraft earning $12.55 per hour. Claimant takes two hydrocodone each morning, two more at break time, two more after lunch, and usually two more at the end of each work day. After work he sits and ices his knees. He is unable to walk any appreciable distance due to knee pain. Knee pain awakens him at night. Claimant has resigned his position as a sheriff's chaplain because he can no longer tolerate sitting in the chairs at the jail due to his knee pain.

27. Having observed Claimant at hearing and compared his testimony to the other evidence of record, the Referee finds that Claimant is not an infallible historian but is a generally credible witness.

## DISCUSSION AND FURTHER FINDINGS

28. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

29. **Accident and injury.** The first issue is whether Claimant suffered an injury from an industrial accident. Idaho Code § 72-102(17)(b) defines accident 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." An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." I.C. § 72-102(17)(a).

30. In their briefing Defendants acknowledge that Claimant suffered an industrial accident involving his left knee on October 3, 2005, and an industrial accident involving his right knee on December 21, 2005. However, Defendants assert that, at most, the injuries Claimant sustained from his accidents were exacerbations of pre-existing degenerative meniscus tears in his right and left knees. While stepping off a curb may seem minimal, this is sufficient to satisfy the statutory definition of an accident if it causes injury.

31. "If the claimant be engaged in his ordinary usual work and the strain of such labor becomes sufficient to overcome the resistance of the claimant's body and causes an injury, the injury is compensable." Wynn v. J.R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). The accident requirement was satisfied in Spivey v. Novartis Seed Inc., 137 Idaho 29, 33, 43 P.3d 788, 792 (2002), when an employee felt a pop and burning in her shoulder while performing her normal work duty of reaching across a conveyor belt.

32. Dr. Sears opined that Claimant developed a spontaneous left medial meniscus tear as a result of aging, accelerated by his obesity and gout. However, Dr. Meulenberg opined that Claimant's left knee injury was caused by his work. Defendants acknowledge that even their medical expert, Dr. Simms, testified that stepping off the curb on October 3, 2005, displaced previously shredded meniscus within Claimant's knee, wedging shreds of the meniscus into the joint, and thereby causing Claimant's knee pain. Dr. Dibenedetto attributed the onset of Claimant's right and left knee pain and reduced function to his industrial accidents.

33. The occurrence of an accident causing injury is not assumed merely with the onset of pain at work. However, the sudden onset of left knee pain after Claimant stepped off a curb at work on October 3, 2005, and the onset of right knee pain when Claimant fell on the ice

on December 21, 2005, constitute accidents causing injuries. The weight of the medical evidence establishes that Claimant suffered accidents causing injuries to his left and right knees while working for Lignetics.

34. **Causation.** The next issue is whether the alleged need for total knee arthroplasty is related to Claimant's industrial accidents. Claimant asserts that his industrial accidents caused his need for right and left knee arthroplasties. Defendants assert that any need for right or left knee arthroplasties is not caused by Claimant's industrial accidents, but is a result of the progression of his longstanding degenerative osteoarthritis.

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

36. As previously noted, Dr. Sears opined that Claimant developed a spontaneous left medial meniscus tear as a result of aging, accelerated by Claimant's obesity and gout. He reported that Claimant's ongoing left knee pain resulted from a pre-existing condition.

37. Dr. Dibenedetto testified that although Claimant suffered from degenerative osteoarthritis prior to his industrial accidents, he was functional and able to pursue work and other activities without limitation due to his knees and that subsequent to Claimant's industrial accidents, his knees have restricted his work and other activities. To Dr. Dibenedetto's knowledge the only intervening incident "that set this off would have been his industrial injury. … [Claimant] clearly had a level of function before his injury that was never returned after his injury." Dibenedetto Deposition, p. 13, ll. 3-4, 7-9. Dr. Dibenedetto explained the effect of

trauma and surgery on any pre-existing osteoarthritis in a knee: "When someone has a degenerative condition of their knee, that's called osteoarthritis. …. When you add a trauma on top of a degenerative condition it adds significantly to the progression of osteoarthritis." Dibenedetto Deposition, p. 14, ll. 8-10, 16-18.

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

39. It is undisputed that Claimant suffered degenerative osteoarthritis in both of his knees prior to his industrial accidents. However, it is well settled that "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). In the Commission decisions of Van Sickle, 1987 IIC 0241, and Smith, 1989 IIC 0626, the Commission applied the axiom that if an industrial accident hastens the need for surgery, the surgery is compensable.

40. In Van Sickle, the claimant injured her knees in an industrial accident in December 1983. She underwent arthroscopic knee surgery in March 1984 and a total knee replacement in November 1985. The Commission found her claim for medical benefits compensable, noting that while Van Sickle's pre-existing arthritis likely would have necessitated a total knee replacement at some future time, the industrial accident accelerated the progression of her arthritis and, thus, was the cause of her surgery at the time it was performed.

41. In Smith, the claimant had a history of prior knee problems and treatment, including ligament and meniscus surgery. In February and May 1984, Smith reinjured his knee when he slipped at work. In June 1984, Smith underwent a total knee replacement. Medical evidence established that his pre-existing knee condition would have required a total knee replacement at some future time; however, the Commission found Smith entitled to benefits for the total knee replacement surgery because the industrial accidents had exacerbated or aggravated his knee condition, thus requiring the replacement surgery in June 1984.

42. The opinions of Dr. Dibenedetto and Dr. Weiss are well-explained and persuasive. Claimant has proven that his need for total knee arthroplasty was aggravated and accelerated by, and is thus related to, his industrial accidents.

43. **Medical benefits.** The final issue is whether Claimant is entitled to medical benefits—specifically, right and left total knee arthroplasties at this time—due to his industrial accidents.

44. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The Idaho Supreme Court has held that Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The Court further held it was for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho

Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

45. In the present case, Dr. Sears concluded that Claimant did not need total left knee arthroplasty in April 2007. Dr. Simms evaluated Claimant on March 3, 2009, and recommended that no further treatment was then needed. He found Claimant's knees stable and opined that an individual needs to suffer prior to total knee arthroplasty to be satisfied with the outcome. He concluded that Claimant functioned quite well and did not need total knee replacement at that time. However, Dr. Simms opined that Claimant had osteoarthritis in both of his knees to approximately the same extent. In his deposition, Dr. Simms reiterated that Claimant was not in need of arthroplasty at the time he examined him.

46. Dr. Dibenedetto examined Claimant on October 15, 2009—more than six months after Dr. Simms examined Claimant—and testified that he has nothing short of total knee arthroplasty that will help Claimant's right and left knees. Dr. Dibenedetto reported that Claimant's knees showed very significant medial joint line narrowing, with nearly complete loss of joint space, and concluded very strongly that the proper approach to treat Claimant's knee problems was total knee arthroplasties. Dr. Dibenedetto offered Claimant total knee replacement, based upon the pain and reduced level of Claimant's knee functioning.

47. The Referee finds the opinion of Dr. Dibenedetto more current, more consistent with Claimant's demonstrated current level of functioning, and more persuasive than that of Dr. Simms. Claimant's treating physician referred him to Dr. Dibenedetto, who has recommended surgical treatment within his area of expertise. The Referee finds that Dr. Dibenedetto's recommendation is reasonable. Claimant has proven his entitlement to additional medical care, including right and left total knee arthroplasties.

## CONCLUSIONS OF LAW

1. Claimant has proven that he suffered injuries from two accidents arising out of and in the course of his employment.

2. Claimant has proven that his need for right and left knee arthroplasties is related to his industrial accidents.

3. Claimant has proven that he is currently entitled to medical benefits, including right and left total knee arthroplasties.

## RECOMMENDATION

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

DATED this 1st day of September, 2010.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2010, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83814

sc _/s/_____

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

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| JERRY ZAPATA,<br><br>Claimant,<br><br>v.<br><br>LIGNETICS OF IDAHO, INC.,<br><br>Employer,<br><br>and<br><br>STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | ) | **IC 2005-526341**<br>**IC 2005-528820**<br><br>**ORDER**<br><br>Filed: September 3, 2010 |

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

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

1. Claimant has proven that he suffered injuries from two accidents arising out of and in the course of his employment.

2. Claimant has proven that his need for right and left knee arthroplasties is related to his industrial accidents.

3. Claimant has proven that he is currently entitled to medical benefits, including right and left total knee arthroplasties.

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

DATED this 3rd day of September, 2010.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of September, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

H JAMES MAGNUSON
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sc _/s/_____