

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES HARTGRAVE,

Claimant,

v.

THE CITY OF TWIN FALLS,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2009-005461

IC 2012-022300

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

Filed June 23, 2017

INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above referenced matter to Referee Michael E. Powers. Claimant is represented by L. Clyel Berry of Twin Falls. Defendants are represented by Paul J. Augustine of Boise. Two complaints were filed on January 23, 2014 and later consolidated in an order dated March 28, 2014. On October 30, 2015, the parties submitted a lump sum settlement, which was approved November 6, 2015, and records were archived and purged on December 31, 2015. The lump sum settlement specifically reserved the issue of whether the Claimant's right TKA is casually related to the left knee injuries.

The case was reopened January 14, 2016 by Referee Powers to decide one remaining issue regarding the compensability of Claimant's right knee surgery. On January 25, 2016,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

Claimant requested certain exhibits to be withdrawn and others admitted, and on February 11, 2016 submitted amended and corrected joint Rule 10 exhibits. In lieu of a hearing, the parties stipulated to having this matter decided on the record. The parties took two depositions and submitted briefs. This matter came under advisement on May 17, 2016. The Commission reviewed the proposed decision and agreed with the result. However, the Commission concluded that different treatment of the issue of causation was warranted and therefore substituted their decision for that proposed by the Referee.

After the Commission issued its decision on August 30, 2016, Claimant appealed. On appeal, Claimant objected to the record because it was incomplete; specifically, it was missing joint exhibits A, B, C except pg 63, G except pages 271-295 and 332a-332zzzz, I, O, and P.¹ The Supreme Court issued a stay and granted Claimant's motion for suspension of appeal and temporary remand. On remand, the Supreme Court instructed the Commission to review the omitted exhibits and take whatever action is necessary; this revised decision follows.

Contemporaneous herewith, the Commission has also addressed Claimant's Motion to Reconsider that portion of Referee Power's order of March 1, 2017 denying Claimant's request to reopen the record in order to correct a "manifest injustice."

ISSUE

The sole issue to be decided is whether Claimant's right total knee arthroplasty (TKA) is compensable.

¹ Exhibit R, the deposition of Claimant, was considered in the August 30, 2016 decision because the parties submitted the original to the Commission, as were the depositions of Drs. McKee and Tallerico.

CONTENTIONS OF THE PARTIES

Claimant contends that the need for his right knee² TKA was hastened by a change in his gait following two industrial accidents and surgeries to his left knee. Because Claimant was in a non-weight bearing status and on crutches after his last left knee surgery, he was forced to bear a greater load on his right knee that created unbearable pain that was previously mostly asymptomatic. Claimant's right knee TKA was required due to this increase in pain.

Defendants counter that the medical evidence does not support Claimant's position in that Claimant did not complain of any pain in his right knee until three months after his full-duty release from his March 13, 2013 left knee surgery. Further, as Claimant can identify no accident involving his right knee, *Nelson* prevents recovery. Moreover, Claimant was a candidate for a right TKA before either of the accidents involving his left knee injuries/surgeries. Finally, Claimant never informed Defendants of his TKA until he answered discovery in March of 2014 and never made a claim for income or disability payments, and a Lump Sum Settlement Agreement limits the issue to whether Blue Cross has a subrogation interest in the medical expenses it paid for Claimant's TKA.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits (JE) A, B, C, G, I, O, P, and R (Claimant's May 20, 2015 deposition transcript).
2. Deposition transcript of Brian D. Tallerico, D.O., taken by Defendants on March 17, 2016.

² It is undisputed that Claimant's right knee was severely arthritic at the time of his left knee injuries.

3. Deposition transcript of R. Tyler McKee, D.O., taken by Claimant on March 31, 2016.

All pending objections made during the course of taking the above-mentioned depositions are overruled, with the exception of Claimant's objection at pages 21-22 of Dr. McKee's deposition regarding the use in cross-examination of a medical record previously withdrawn by stipulation, which is sustained, and any testimony by Dr. McKee regarding that withdrawn exhibit is stricken.

FINDINGS OF FACT

1. Claimant is 62 years of age and residing in the Magic Valley. He graduated from Murtaugh High School in 1973.

2. Claimant spent 38 years as an employee of the Twin Falls Street Department.

Previous accidents/injuries

3. In the first grade, Claimant broke his right leg.

4. While in high school, Claimant injured his right knee resulting in a meniscectomy in 1971. He healed without residual symptoms.

5. Claimant testified that the only medical treatment he received between 1971 and 2009 was for right shoulder pain, heartburn, and asthma. Claimant testified that before 2009, his right knee: ". . . was in pretty good shape." JE R., pg 34. However, he would take an over-the-counter pain medication on occasion if he "overdid it." *Id.*

The medical evidence

2009

6. On February 3, 2009, Claimant stepped on a piece of uneven asphalt and injured his left knee. On February 17, 2009, Claimant presented to Douglas Stagg, M.D. at St. Luke's

Clinic for Occupational Medicine. Claimant presented with a “slight” limp and was prescribed a brace, ice, and Motrin. Claimant saw Dr. Stagg twice more before he was referred to Tyler McKee, D.O. for an orthopedic evaluation. JE A., pg 7.

7. Dr. McKee is a board certified orthopedic surgeon who practices in Twin Falls. Approximately 50% of his clinical practice is comprised of knee injuries. On March 13, 2009, Dr. McKee examined Claimant’s knees. His examination of the **right** knee noted no tenderness, full range of motion, no instability, normal skin tone, full strength in the leg, and an intact sensory exam. Dr. McKee also noted Claimant walked with a limp. JE B., pg 20.

8. After conservative treatment failed, Dr. McKee performed a left knee arthroscopy on May 6, 2009. Prior to surgery, Claimant recounted his medical history to Anna Hawker, FNP. She recorded Claimant’s report of “chronic right knee... pain.” JE B., pg 31.

9. At post-operative check-ups, Claimant continued to complain of **left knee** pain. In a follow-up questionnaire completed by Claimant on September 10, 2009 he wrote “The pain in my [left] knee that caused me to seek help is still there after surgery. Why.” JE B., pg 48. On November 16, 2009, Dr. McKee determined that Claimant was at MMI. *Id.* at 50.

2010

10. On August 30, 2010 Claimant presented to James Retmier, M.D. at St. Luke’s Clinic of Orthopedics and Plastic Surgery for a second opinion related to his left knee pain. Dr. Retmier recorded the following regarding Claimant’s left knee: “[Claimant] states that he is worse than he was prior to his injury. He feels that this has been ongoing and has never really ceased nor was he cured by his surgery.” Dr. Retmier diagnosed degenerative joint disease in the left knee and recommended a total knee replacement. JE C1., pg 55.

11. On December 16, 2010, Claimant saw Brian Tallerico, D.O., for his first IME at the request of Defendants. Dr. Tallerico lives and practices in Star Valley, Wyoming, a town of about 1200 residents. He is an orthopedic surgeon who conducts IMEs for OMAC.³ He is fellowship trained in knee replacement and reconstruction. He performs approximately 60-75 knee surgeries per year.

12. Dr. Tallerico examined Claimant and reviewed his medical history with him. Dr. Tallerico noted “he has had ongoing problems with the **right knee** in the past (open meniscectomy in 1971 with ongoing swelling and symptoms)” [emphasis added]. Dr. Tallerico also recorded that Claimant limped, was knock-kneed, and that his right knee range of motion was “significantly restricted.” Lastly, Dr. Tallerico wrote “Interestingly enough, his right knee is in much worse shape than his left knee with significant lateral compartment collapse and loss of cartilage interval.” JE G1., pg 275-76, 278.

2011

13. On August 6, 2011, Claimant underwent another IME with Dr. Tallerico. In his notes, he recorded that Claimant walked without a limp and that his right knee still had restricted range of motion and showed some minor swelling.

2012

14. Claimant suffered another injury to his left knee on August 23, 2012 when he slipped off of the bottom step of a water truck.

15. Claimant again presented to Dr. Stagg on August 28, 2012 following the second injury. Dr. Stagg noted Claimant walked with a “moderate” limp and that he had “significant”

³ According to Dr. Tallerico, he performs between 120 to 150 IMEs a year, of which about 10% are for Claimants.

degenerative joint disease in the left knee. After conservative treatment failed, Dr. Stagg again referred Claimant to Dr. McKee. JE A., pg 18.

16. Claimant saw Dr. McKee twice in October of 2012. At his October 19, 2012 exam, Dr. McKee noted Claimant limped favoring the left side and that he had significant degenerative joint disease in **both** knees, but noted it was “worse on the right than the left.” Dr. McKee requested authorization for a total knee replacement for the left knee but that request was denied in a letter dated November 13, 2012. JE G4b., pg 297.

2013

17. Surety later approved surgery, and arthroscopy was performed on March 13, 2013. Claimant was instructed to not bear any weight on the left knee following surgery and was placed on sedentary duty. JE C3., pg 112.

18. Claimant saw Dr. McKee on March 19, 2013 for follow-up. He walked with crutches and did not complain of right knee pain. At his follow-up appointment on April 16, 2013, Claimant walked with crutches and did not complain of right knee pain. At his follow-up appointment on May 14, 2013, Claimant walked with crutches and did not complain of right knee pain; regarding that visit, Dr. McKee recorded “patient states that he continues to have quite a bit of pain and swelling on the left... with all the problems he had the knee [sic] I think it is reasonable to expect him to have more troubles.” *Id.* at 132-133. On June 11, 2013, Dr. McKee documented that Claimant walked with a “slight limp” and did not document complaints of right knee pain. Similarly, on July 9, 2013, Claimant walked with a slight limp and did not complain of right knee pain. At his last follow-up appointment on August 9, 2013, Dr. McKee wrote “patient states that he has persistent pain in the knee. It’s really not getting better. He feels like he is about the same as he was last time.” He also noted Claimant had a slight limp and did not

record any complaint of right knee pain. Dr. McKee declared Claimant at MMI with work restrictions and an impairment rating to follow. *Id.* at 144.

19. Claimant presented to Dr. McKee again on November 8, 2013. Claimant reported knee pain in **both** knees for the first time. Dr. McKee wrote “the patient states that his right knee is worsening” and that he “limps favoring both lower extremities.” Dr. McKee assessed degenerative joint disease of the right knee, and Claimant decided to proceed with a total knee replacement. *Id.* at 146, 148.

20. On November 21, 2013, Claimant was examined again by Dr. Tallerico. He noted a limp “favoring the left knee” and again noted limited range of motion in the right knee and “a trace amount of swelling” in the right knee. Dr. Tallerico observed crepitus and pain with “patellofemoral compression” in both knees. Dr. Tallerico did not record any discussion with Claimant about his upcoming right knee replacement or its relation to the accident. JE G5.

21. On November 25, 2013, Claimant underwent a total right knee replacement.

2014

22. Claimant had various follow-up appointments after the surgery with Dr. McKee. Of note, at an early January follow-up, Claimant reported the motion in his right knee was “better than it had been in years.” During any appointment regarding the left knee, the records contain a reference to the pending worker’s compensation claim; during any follow-up regarding the right knee, the records do not contain any such reference. JE C3., pg 173-191.

23. On April 17, 2014, Claimant underwent a fourth IME, again with Dr. Tallerico. The examination was again for the left knee, but Dr. Tallerico recorded Claimant’s right knee surgery and observed limited range of motion in the right knee. Under diagnosis, Dr. Tallerico

wrote: “preexisting history of right knee degenerative joint disease with recent total knee arthroplasty, unrelated to this industrial claim.” JE G6., pg 320.

24. Claimant’s attorney wrote to Dr. McKee on July 1, 2014 asking his opinion on a range of issues. Regarding the right knee, he summarized his understanding of the medical records related to the right knee, including that Claimant limped for a sustained period of time, and asked the following:

“Whether it is your opinion that Mr. Hartgrave’s right TKA was accelerated or advanced in time by reason of the either direct or indirect consequence of his industrial left knee injuries of 2009 and/or 2012? Put another way, would you have anticipated that Mr. Hartgrave’s right TKA would have been required at the point in time it was performed had the 2009 and 2012 industrial left knee injuries not have occurred? JE C3a1., pg 196.

Dr. McKee responded to this inquiry on July 29, 2014 with:

“Mr. Hartgrave had severe arthritis in his right knee that was noted on his initial visit in 2009. He would have required a total knee arthroplasty regardless of his industrial injuries.” JE C3a., pg 192.

2015

25. On August 12, 2015, Claimant’s attorney again wrote to Dr. McKee. He attached a portion of Claimant’s May 2015 deposition (discussed below), summarized it, and again posed his question about the cause of Claimant’s need for a right TKA:

“Whether, upon your perspective as Mr. Hartgrave’s primary orthopedic surgeon since February 3, 2009, through current date, you believe it to be probable that Mr. Hartgrave’s need for right TKA was accelerated to a point in time earlier than otherwise anticipated had the industrial left knee injuries not have occurred, specifically to encompass Mr. Hartgrave’s change in gait status-post the two industrial left knee surgeries.” JE C3c1., pg 202.

Dr. McKee responded with a letter dated August 28, 2015. He commented that he remembered telling Claimant that he had severe arthritis in the right knee in 2009, but that because Claimant

did not have pain, they did not proceed with a total knee replacement at that time. He wrote further:

“I do not recall addressing his right knee pain at all, until late 2013. At that point his knee was significantly more painful and he elected to proceed with right total knee arthroplasty. What I am trying to say is that I feel that his industrial injuries caused an aggravation to his right knee pain. Had there not been worsening symptoms we would not have proceeded with total knee arthroplasty. Therefore, yes, I believe that his industrial injuries moved up his need for total knee arthroplasty on the right.” JE C3c., pg 200.

Depositions

Claimant

26. Defendants deposed Claimant on May 20, 2015. Regarding his right knee, he testified that prior to his first industrial injury: “I would have to take an aspirin once in a while, but it was in pretty good shape... if I was on it a long time, sometimes, you know, it would just hurt” JE R., pg 34.

27. Claimant had the following to say regarding why he needed a right knee replacement:

Q. (By Mr. Augustine): To what did Dr. McKee attribute the need for the right total knee? Did you discuss it with him?

A: After the two surgeries on my left knee, it changed the way I walk and different things like that. I started having a lot of trouble with this right knee. Being on crutches for six weeks, totally on the right knee, it just caused all sorts of problems.⁴

...

Q. (By Mr. Augustine): Did Dr. McKee tell you that [the right knee surgery] was related to either of your left knee injuries?

A. I don't remember if he said anything like that or not.⁵

⁴ There is no evidence this discussion with Dr. McKee took place. Dr. McKee testified they never discussed why his right knee became symptomatic. McKee Depo., pg 15.

⁵ The Commission observes Claimant may have misunderstood the first question quoted above, especially in light of his answer to this question.

Dr. Tallerico

28. On March 17, 2016, Defendants deposed Dr. Tallerico. Regarding Claimant's 1971 right knee meniscotomy, Dr. Tallerico testified that patients undergoing an open meniscectomy have a 100% chance of developing bone spurs, flattening of the joint, and loss of joint space. He also stated that at his first IME of Claimant, he believed Claimant was a candidate for a right knee TKA at that time.

29. Dr. Tallerico, based on bilateral knee MRIs ordered by Dr. McKee in November 2013, testified that the films revealed end-stage arthritis in the right knee. When asked whether the films showed normal progression of arthritis after an open meniscotomy, he stated: "yes, forty years prior, he had the shock absorber, the cushion removed from the lateral, or outside, aspect of his knee. He actually made it forty years before knee replacement, which is longer than what I would have expected." Dr. Tallerico Dep., pg 19. He also testified that when comparing the November 2013 films to prior films that Claimant's arthritis appears to have "progressed." *Id.* at 20.

30. When asked whether the left knee aggravated the right knee and hastened the need for surgery, Dr. Tallerico stated:

"To my knowledge, there is nothing in the orthopedic literature that clearly defines a relationship such as that, meaning if you have end-stage arthritis in one knee... that having an injury to the contralateral side would cause undue or excessive pressures or forces on the uninvolved side...my opinion was that nothing related to the left knee claims or injuries would have hastened or accelerated the need for a total knee arthroplasty on the right."

Id. at 21-22. However, Dr. Tallerico might change his mind if there was documentation that Claimant began complaining of right knee pain shortly after his second left knee surgery and

while he was non-weight bearing. He testified that if a patient was experiencing difficulties with that switch to the right, one would expect complaints of pain within several days. *Id.* at 17.

31. Dr. Tallerico generally agrees with Dr. McKee's July 29, 2014 opinion that Claimant would have required a right TKA regardless of the industrial injuries to his left knee. Dr. Tallerico disagrees with Dr. McKee's August 28, 2015 letter opining that injuries to Claimant's left knee aggravated or accelerated his right knee pain and the need for his right TKA.

32. On cross-examination, Dr. Tallerico testified that Claimant was an honest person and that if he told him something, he would believe it. However, he admitted that he had not reviewed Claimant's deposition testimony or his Answers to Interrogatories regarding when Claimant may have complained of right knee issues. Dr. Tallerico reiterated that the purpose of his various visits with Claimant focused on his left knee problems; not his right knee, although he would examine his right knee to some extent on each of those visits. Dr. Tallerico testified that the decision regarding proceeding with a TKA is "pain driven."

33. Dr. Tallerico opined as follows regarding the affect of limping favoring one side over the other:

Q. (By Mr. Berry): Is it your testimony that a prolonged limp on one lower extremity would not affect the equilibrium or the flow of the motion with regards to the opposing knee?

A. When you limp, it affects, obviously, the mechanics of the involved extremity. However, I believe the question at hand is: Does it impact the contralateral or opposite extremity to any significant degree?

As I said, that gets thrown around a lot and discussed a lot, especially in the area of workers' compensation. However, I don't put a lot of stock in that.

I think, if we are talking about amputations, on one hand, that that increases forces across the joints above and proximal to. That's well documented in orthopedic and biomechanical studies.

As far as a limp on the left causing a worsening of arthritis in the knee or ankle or hip on the right? No.

Dr. Tallerico Dep., p. 46.

34. Dr. Tallerico opined that while a limp on the surgical side may have an affect on the non-surgical side, corresponding symptomatology should develop within the time frame of non-weight bearing on the surgical side. He does not believe that a disruption in the normal range of motion of the non-surgical knee would result in an acceleration of degenerative joint disease. Dr. Tallerico testified that it was coincidental that Claimant's right knee became symptomatic during the non-weight bearing phase of his second left knee surgery and, due to the natural progression of his underlying degenerative joint disease, he would have had to have a right knee TKA at some point in any event.

Dr. McKee

35. Dr. McKee was deposed by Claimant on March 31, 2016. Dr. McKee verified that Claimant had severe arthritis in the right knee when he saw him first in 2009, and that the decision not to treat was because "it didn't hurt." Through questioning, Dr. McKee confirmed that after reviewing Claimant's May 2015 deposition, he "believe[d] that [Claimant's] need for a knee replacement surgery occurred earlier because of aggravation from being on crutches." Dr. McKee Dep., pg 12. Specifically, he testified the aggravation was due to increased weight and pressure on the right knee while walking.

36. Under cross-examination, Dr. McKee stated that he was unaware that Claimant had testified that while he was on crutches for six weeks following his last left knee surgery his

right knee was extremely painful.⁶ Dr. McKee conceded that there was no mention in his records of Claimant complaining of right knee pain of any degree while he was on crutches. Further, Dr. McKee testified that Claimant was not complaining of right knee pain, at least according to his records, at the time Claimant was released to return to work following his last left knee surgery. He stated activities of daily living could possibly aggravate Claimant's right knee. Dr. McKee would have expected Claimant to complain of right knee pain of such severity that it caused his need for a TKA during the six week period that he was on crutches rather than waiting some eight months to finally complain to him. He also testified that when responding to attorney's letters, he does not rely on their representations of the medical record, but goes back and reviews the medical records himself. However, over defense counsel's objection regarding speculation, Dr. McKee testified that Claimant may well have thought that after he stopped using crutches his right knee would get better so there was no need to complain during that time period.

DISCUSSION AND FURTHER FINDINGS

37. The parties agree that Claimant's right knee was not injured directly in an industrial accident. However, the permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

38. Here, the argument is that Claimant's preexisting right knee condition was aggravated by the industrial accident by this path: Claimant suffered a left knee injury which required surgery. During his convalescence, Claimant was required to use crutches and this use

⁶ This is despite reviewing Claimant's deposition in which Claimant states exactly that. JE C3c1., pg 201; JE R., pg 64.

of crutches caused a gait alteration which aggravated his right knee condition. If this causal chain finds support in the medical record, Claimant's right knee injury would be compensable pursuant to the "compensable consequences" doctrine. When a primary injury (the left knee) is shown to have arisen out of and in the course of employment, every natural consequence that flows from that injury (the right knee) is itself compensable. Lex K. Larson, *Larson Workers' Compensation* § 10.01 (Matthew Bender, Rev. Ed.) The Industrial Commission has recognized the compensable consequences doctrine in prior cases. *See for example: Castaneda v. Idaho Home Health, Inc.*, 1999 IIC 0538 (July 1999); *Martinez v. Minidoka Memorial Hospital*, 1999 IIC 0262 (February 1999); and, *Offer v. Clearwater Forest Industries*, 2000 IIC 0956 (October 2000).

39. Claimant relies on the deposition of Dr. McKee to support his position. Dr. McKee initially opined in July 2014 that Claimant would need a total knee replacement in the right knee regardless of his left knee injuries. He gave this opinion with full knowledge as the treating physician and based on his own records that Claimant had been on crutches for six weeks, had limped after his 2009 and 2012 surgeries, and had severe arthritis in the right knee. After reviewing Claimant's deposition, Dr. McKee's opinion changed. Now according to Dr. McKee, the need for Claimant's right knee TKA occurred earlier than it would have due to aggravation to the knee from being on crutches. Dr. McKee Dep., p. 12.

40. However, Dr. McKee acknowledged that he had no knowledge of Claimant's right knee pain until several months after it allegedly became symptomatic, he never actually discussed with Claimant how or why the right knee became symptomatic, and that if Claimant had made any mention of right knee pain, he would have documented it given his preexisting right knee condition. Dr. McKee Dep., pp. 15-20.

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41. The first time Claimant mentioned right knee pain was November 8, 2013. JE C3., pg 146. Dr. McKee acknowledged that he would have expected any pain resulting from the non-weight bearing status of his left knee to occur within the 6 week period that he was on crutches. Dr. McKee Dep., pp. 26-27. Dr. Tallerico agreed that he would have expected any aggravation of the right knee due to the crutches to have occurred while Claimant was on crutches. Dr. Tallerico Dep., p. 16.

42. We note that this is not a case where the treating physician reviewed further medical records and then changed his opinion. In changing his opinion, Dr. McKee, instead, relied on Claimant's deposition where Claimant specifically attributes being on crutches as aggravating his right knee. JE R., pg 62. The Commission can find no other evidence of record that supports Dr. McKee's changed opinion other than that he accepted and adopted Claimant's subjective opinion and testimony regarding what caused the pain and when that pain occurred.

43. Even in adopting this opinion, Dr. McKee did not persuasively opine that the right knee surgery was necessitated by the left knee injuries. Dr. McKee opined that it might have been because he had no other explanation. He testified in his deposition that Claimant's need for a right knee TKA "could" have been due to his altered gait due to being on crutches and that it was "possible" that Claimant's pain could have begun while he was on crutches even though Claimant made absolutely no mention of right knee pain until several months later. Dr. McKee Depo., pp. 13, 32. Further, Dr. Tallerico, who specializes in knees, testified that there is absolutely nothing in orthopedic literature that shows a relationship between end-state arthritis being aggravated, or causing undue or excessive pressure, by an injury to the contralateral side. Dr. Tallerico Dep., p. 21. Nor is he aware of any medical literature to support the theory that loss of normal motion can accelerate degenerative joint disease. Dr. Tallerico Dep., p. 50.

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44. The medical evidence supports a more likely conclusion: Claimant's need for right knee replacement was due to the natural progression of his degenerative joint disease. Claimant underwent a right knee meniscotomy in 1971. Claimant's right knee was "bone on bone" in 2009. Claimant occasionally experienced pain in his right knee prior to his left knee surgeries. Claimant had documented swelling and limited range of motion in his right knee prior to the second left knee surgery and stated after his right knee surgery that his range of motion was better than it had been in years. Dr. McKee testified that "activities of daily living" could aggravate Claimant's right knee and that in cases of severe arthritis, "something is going to set it off." Dr. McKee Dep., pg 14. Dr. Tallerico opined it was clearly the expected progression of the preexisting disease, not the industrial accident to the other knee that led to Claimant's need for a right knee TKA.

Q: [By Mr. Berry] If it was just the natural progression of the symptomatology, then the sudden occurrence of extreme pain, difficulty with steps, and the phenomenon of his right knee locking up and not bending would all just – is that normal for those manifestations to occur so suddenly, without trauma, without any kind of outside force?

A: It sure is. It's progression of his severe post-traumatic right knee arthritis dating back to 1971... Again, no matter how we paint it, this individual was destined for a total knee arthroplasty..." Dr. Tallerico Dep., pg 55-56.

45. The medical evidence does not support the conclusion that it is more probable than not that Claimant's need for a right knee TKA was caused due to his left knee industrial injuries. Dr. Tallerico unequivocally opined that it was not. Dr. McKee's changed opinion appears to be founded almost entirely upon Claimant's subjective and late self-reporting. The medical evidence supports the conclusion that Claimant's right knee replacement was necessitated by the natural progression of his arthritis and unrelated to the industrial injuries.

46. Given the deposition testimony of both Drs. McKee and Tallerico, and the lack of medical evidence to support Claimant's claim, the Commission finds that the testimony of Dr. Tallerico is more persuasive and agrees that Claimant has failed to prove his right TKA is compensable.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his right knee TKA is compensable.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

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 23rd day of June, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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ka

_____/s/_____