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Hartgrave v. City of Twin Falls Appellant's Brief Dckt. 44552

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

CHARLES LEROY HARTGRAVE,

Claimant-Appellant,

vs.

CITY OF TWIN FALLS,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants-Respondents

Supreme Court No. 44552

* * * * *

APPELLANT'S OPENING BRIEF

Appeal from the Idaho State Industrial Commission

Chairman Thomas E. Limbaugh, Presiding

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STATEMENT OF THE CASE

I. Nature of Case:

The nature of the underlying case concerns the single issue of whether the need of/for right TKA by Appellant herein, Charles LeRoy Hartgrave (hereafter referenced as "LeRoy") was hastened, accelerated and/or advanced in time by reason of LeRoy's two industrial left knee injuries, of February 3, 2009 and/or August 23, 2012, or the combination thereof.

II. Course of Proceedings and Disposition:

LeRoy suffered industrial injuries to his left knee during the course of his employment with the City of Twin Falls (hereafter referenced as "City" and/or "the City") upon February 3, 2009, and again upon August 23, 2012. Hearing in this matter was originally scheduled for September 23, 2015. However, LeRoy was a "reluctant" Claimant. LeRoy had been an employee with the City in excess of thirty-eight (38) years. He was then sixty-one (61) years of age, and wished to continue his employment with the City until retirement. LeRoy had become friends with his co-workers and supervisors, and expressed to his attorney that he was greatly uncomfortable in proceeding through an adversarial Title 72 proceeding against the City. *R.*, p. 82.

It was by reason of LeRoy's "relationship" with the City that he entered into the Modified Lump Sum Agreement against the recommendation of his counsel. The Modified Lump Sum Agreement reserved from that settlement the issue of whether LeRoy's manifestation of right knee symptomatology and, thusly, need for right TKA was as consequence of his two industrial left knee injuries, status-post two left knee surgeries.

Following approval of the Modified Lump Sum Agreement, the parties agreed to submit this reserved issue to the Commission "upon the record," such that LeRoy would not be required to

testify or be personally involved in an adversarial Title 72 claim against the City. Of note, consideration paid to LeRoy by the Title 72 Defendants, Respondents herein, pursuant to the Modified Lump Sum Agreement included consideration for "Disputed Medical Benefits," totaling \$1,927.17, being the amount of LeRoy's out-of-pocket expenses for the disputed right TKA, for his contractual "co-pays" pursuant to the terms and conditions of his group healthcare provider, Blue Cross of Idaho.

The issue before the Commission was assigned to Referee Michael E. Powers, who filed his Findings of Fact, Conclusions of Law, and Recommendation by instrument dated July 25, 2016. *R.*, pp. 41-52. Following review of Referee Powers' proposed decision, the Commission agreed with the result, but concluded "...that a different treatment of the issue of causation is warranted, and therefore substitutes (its) decision for that proposed by the Referee, and entered its Findings of Fact, Conclusions of Law, and Order, dated and filed August 30, 2016. *R.*, pp. 53-66.

Believing the Commission's decision to be in error, LeRoy's Notice of Appeal was filed by instrument dated October 5, 2016. Subsequently, upon review of the Agency's Record, it was discovered by LeRoy's counsel that the same failed to include any of the parties' Joint Exhibits, such that he filed Claimant's/Appellant's Motions for Suspension of Appeal and Temporary Remand to the Industrial Commission, following which the Court entered its Order Granting Motions for Suspension of Appeal and Temporary Remand, dated January 19, 2017. *R.*, pp. 78-79. Following the parties' Modified Lump Sum Agreement, the Commission inadvertently destroyed the parties' Joint Exhibits. The Commission's record was then augmented by/with the parties' Joint Exhibits.

On June 23, 2017, the Commission entered its Findings of Fact, Conclusions of Law, and Order, determining that, "Claimant has failed to prove his right knee TKA is compensable."

III. Statement of Facts:

1. Personal Data and Employment History for Claimant/Appellant, Charles

LeRoy Hartgrave:

LeRoy was born upon [REDACTED] and graduated high school in Murtaugh, Idaho, in 1973. *Hartgrave Depo.*, p. 6, LL. 1-17. LeRoy became employed by the City of Twin Falls, with/for the Street Department, and has been so employed since April 4, 1978. *Hartgrave Depo.*, p. 7, LL. 14-19; and, p. 7, L. 20-p. 8, L. 11.

While in high school, LeRoy tore the meniscus in his right knee playing football, and underwent meniscectomy in his junior year. From the date of his release from that procedure to his initial left knee industrial injury of February 3, 2009, LeRoy had not presented to any physician by reason of his right knee, and was fully able to engage in his work-related activities as well as such recreational activities as hunting, without restriction. *Hartgrave Depo.*, p. 6, LL. 17-20; p. 30, L. 15-p. 32, L. 18.

2. Accident and Injury of February 3, 2009:

Upon February 3, 2009, LeRoy suffered his initial left knee injury during the course of his employment with the City. LeRoy came under the care of orthopedic surgeon R. Tyler McKee. Following failure of conservative care, LeRoy underwent arthroscopic surgery upon May 6, 2009. *JE. B.*, pp. 33-34. Following arthroscopic surgery, although LeRoy still complained of left knee symptomatology, he was released to return to work by Dr. McKee. *JE., B.* pp. 50-52. Upon August 30, 2010, LeRoy presented to orthopedic surgeon Dr. James Retmier, for a second opinion related to his continuing left knee pain. Dr. Retmier recommended left TKA. *JE., C.1*, pp. 53-56.

Upon receipt of Dr. Retmier's request for authorization for left TKA, Defendant-Respondent State Insurance Fund (hereafter referenced as "Fund,") required LeRoy to undergo IME by Dr. Brian Tallerico, who is affiliated with O-M-A-C. Within his December 16, 2010, report, Dr. Tallerico noted that LeRoy was "...a very hard working and straight-forward individual who has no secondary gain issues"; but, determined that LeRoy's left knee injury was an aggravation of pre-existing plica and the findings on MRI and the arthroscopy done by Dr. McKee were degenerative in nature. Dr. Tallerico advised that there was no need for left TKA and, if there was need, that need was not related to the February 3, 2009, industrial event. Upon that basis, the Fund denied Dr. Retmier's request for left TKA. *JE. G.1.*, pp. 271-280. LeRoy then returned to work with/for the City.

3. Accident and Injury of August 23, 2012:

Upon August 23, 2012, LeRoy suffered another work-related left knee injury during the course of his employment with the City. Following failure of conservative care, LeRoy again presented to Dr. McKee and ultimately required surgery upon March 13, 2013. *JE. C.3.*, pp. 111-112. Post-surgery, LeRoy complained of constant pain in the left knee. *JE. C.3.*, pp. 143-144. However, Dr. McKee released LeRoy to return to work effective August 9, 2013, with permanent restrictions of no squatting or kneeling, and lifting limited to fifty (50) pounds. *JE. C.3.*, p. 145.

4. Manifestation and Progression of Right Knee Symptomatology Culminating in Right TKA on November 25, 2013:

Upon November 8, 2013, LeRoy re-presented to Dr. McKee with bilateral knee pain. LeRoy advised the doctor, "that his right knee is worsening." In fact, he was in constant pain, which was disabling at times. Dr. McKee noted that LeRoy was limping, favoring both lower extremities and, following discussion of medical options, LeRoy and the doctor elected to proceed with right TKA.

JE. C.3., pp. 146-149. LeRoy underwent right TKA by Dr. McKee upon November 25, 2013. *JE. C.3.*, pp. 162-164.

Within its June 23, 2017, decision, the Commission noted that, “[t]he sole issue to be decided is whether Claimant’s right total knee arthroplasty (TKA) is compensable.” *R.*, p. 173. The Commission also noted that,

[h]ere, 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 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.

R., pp. 185-186. Ultimately, the Commission determined that LeRoy failed to prove his right TKA was compensable.

ISSUES PRESENTED ON APPEAL

1. Did the Idaho State Industrial Commission err in its determination that Claimant’s right TKA was not compensable, as an indirect result and/or consequence of Claimant’s primary industrial left knee injuries, status-post surgeries?
2. Whether the Idaho State Industrial Commission’s Findings of Fact, Conclusion of Law, and Order dated/filed June 23, 2017, was erroneous as a matter of law; supported by substantial and competent evidence of record; set forth specific findings necessary and required for meaningful appellate review; and/or, whether relevant thereto, failed to make proper application of law to the evidence of record, in reaching the same?
3. Whether, pursuant to Idaho Code § 72-804 and/or Rule 41, IAR, Claimant is entitled to reasonable attorney fees on appeal herein?

ARGUMENT

I. Standard of Appellate Review:

Upon appeal, the Supreme Court will uphold the Commission's Findings of Fact, if supported by substantial, competent evidence. The "substantial evidence rule" requires a Court to determine whether the Commission's Findings of Fact are reasonable. In deciding whether the Findings of Fact are reasonable, the Court should not read only one side of the case and, if any evidence is therein found, sustain the Commission's action and ignore the record to the contrary. *Kirk v. Karcher Estates, Inc.*, 135 Idaho 230, 16 P.3d 906 (Idaho 2000); *Ewins v. Allied Security*, 138 Idaho 343, 63 P.3d 469 (Idaho 2003); *Rudolph v. Spudnik Equip.*, 139 Idaho 776, 86 P.3d 490 (Idaho 2004). Put simply, the substantial evidence rule requires the Court to determine whether the Findings of Fact are reasonable. *Mulder v. Liberty N.W. Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (Idaho 2000).

The Supreme Court freely reviews the Commission's Conclusions of Law. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 21 P.3d 890 (Idaho 2001). Determining the meaning of a statute or applying law to undisputed facts constitutes matters of law on appeal. An Appellate Court may apply the law to undisputed facts, *de novo*. *Martel v. Bulotti*, 138 Idaho 451, 65 P.3d 192 (Idaho 2003). The Court is required to set aside the Order of the Commission where the Commission failed to make a "proper application of law to the evidence." Where the Commission's Conclusions of Law are unsupported by its Findings of Fact, the decision of the Commission must be vacated. *Bortz v. Payless Drug Store*, 110 Idaho 942, 719 P.2d 1202 (Idaho 1986).

II. Claimant's Right TKA is Clearly Compensable, Pursuant to the Doctrine of Compensable Consequences:

As noted by the Commission within its June 23, 2017, decision, when a primary injury (LeRoy's two left knee injuries) is shown to have arisen out of and in the course of employment, every natural consequence that flows from that injury (LeRoy's right TKA) is itself compensable. *R.*, p. 186. Two physicians stated their respective opinions of record in this matter, being Dr. Brian Tallerico, Defendants' IME expert; and, Dr. R. Tyler McKee, LeRoy's orthopedic surgeon following the initial industrial left knee injury of February 3, 2009, through current.

Dr. McKee examined LeRoy upon thirty (30) occasions; performed surgery upon LeRoy's left knee upon May 6, 2009 and March 30, 2013; and, performed right TKA upon November 26, 2013. *JE. B.*, pp. 20-52; and, *JE. C.3.*, pp. 87-191.

Conversely, as Respondents' IME physician, Dr. Tallerico never treated LeRoy. Rather, Dr. Tallerico examined LeRoy upon IME basis upon December 16, 2010, relative to left knee presentment; August 6, 2011, relative to the left knee and hip; November 21, 2013, relative to the left knee; and, April 17, 2014, relative to the left knee. Thusly, Dr. Tallerico examined LeRoy upon but four (4) occasions, with none of these examinations being specific to LeRoy's right knee. *JE. G.1-7*, pp. 271-327; and, *Tallerico Depo.*, p. 25, LL. 8-14

During Dr. Tallerico's post-hearing deposition he was asked whether, in conjunction with his IME examinations of LeRoy's left knee, he examined LeRoy's right knee. Dr. Tallerico responded that, "I probably did at least a cursory exam of the right knee... ." *Tallerico Depo.*, p. 12, LL. 19-23. These "cursory" examinations would, "not (be) as thorough as the accepted body part for the claim... ." *Tallerico Depo.*, p. 28, LL. 1-9. Dr. Tallerico's opinions upon LeRoy's right knee

presentment, inclusive of issues of causation, were not upon personal examination specific to right knee presentment or upon records review which encompassed actual diagnostic film of LeRoy's right knee, subsequent to Dr. Tallerico's initial examination of LeRoy upon December 16, 2010. *Tallerico Depo.*, p. 27, LL. 2-23.

It is within the context of this "background," that the doctors' opinions must be considered. In this regard, it is within this same vein that the rationale of the Commission in adopting and emphasizing certain of the opinions of Dr. Tallerico as expressed within the June 23, 2017, decision must be considered within the context of the instant appeal.

Discussion of the Commission's June 23, 2017, decision is as follows:

1. Finding of Fact 12, *R.*, p. 177: The Commission noted Dr. Tallerico's initial IME report, at *JE. G.1*, pp. 275-276, 278, that, "(Leroy) has had ongoing problems with the right knee in the past (open meniscectomy in 1971 with ongoing swelling and symptoms)."

Dr. Tallerico did not elaborate as to the degree of any "ongoing swelling and symptoms" within his report. In his deposition, Dr. Tallerico testified that "he believed" he recalled LeRoy advising him that he had intermittent symptoms of swelling and pain dating back to 1971. *Tallerico Depo.*, p. 23, LL. 19-23. Of note, Dr. Tallerico also indicated that he was not "surprised" by the fact that, prior to LeRoy's initial industrial left knee injury, if LeRoy overused his right knee, any resultant right knee symptomatology was controlled by and Advil or aspirin. *Tallerico Depo.*, p. 38, LL. 4-10.

The Commission also noted that Dr. Tallerico recorded that LeRoy "limped." However, that "limp" was by reason of LeRoy's ambulation, "...with a slightly antalgic gait favoring the left lower extremity." (Emphasis added.) *JE. G.1*, p. 276. With regard to any "swelling" within LeRoy's right

knee, such was to be anticipated. As explained by Dr. Tallerico, “[o]ne of the findings of osteoarthritis is that they develop an effusion.” *Tallerico Depo.*, p. 12, L. 25-p. 13, L. 6. No one is denying that LeRoy had pre-existing right knee degenerative joint disease/osteoarthritis.

2. Finding of Fact 20, *R.*, p. 179: Here, the Commission noted that during LeRoy’s November 21, 2013, repeat IME examination by Dr. Tallerico, there was apparently no discussion about LeRoy’s “...upcoming right knee replacement or its relation to the accident,” referencing JE. G.5. In this regard, it should again be noted that none of LeRoy’s IME presentments to Dr. Tallerico were with reference to the right knee. Most certainly, LeRoy was aware of the “purpose” of these presentments, as being with respect to his left knee and not his right. Dr. Tallerico was not a treating physician for LeRoy. Thusly, there was no need or purpose in LeRoy discussing any medical condition with which he presented to Dr. Tallerico which was not related to his left knee. LeRoy would not have discussed his right knee presentment with Dr. Tallerico absent having knowledge of the “compensable consequences” doctrine. In this regard, LeRoy’s “history” within the context of Title 72 is that, prior to the February 3, 2009, initial industrial left knee injury at issue herein, he had had a soft tissue injury to his face; and, had been struck in the nose, with neither of those injuries being other than med-pay only and with both of those injuries healing without residuals. *Hartgrave Depo.*, p. 23, L. 21-p. 24, L. 19. *JE. O.I.a.*, pp. 560-562. As will be discussed subsequently herein, such also provides logical explanation as to any failure by LeRoy to discuss the “when, how and whys” of the manifestation of right knee symptomatology with Dr. McKee prior to the right TKA.

3. Finding of Fact 28, *R.*, p. 182: Here, the Commission emphasized Dr. Tallerico’s testimony that, at the time of Dr. Tallerico’s “...first IME of Claimant, he believed Claimant was a candidate for a right knee TKA at that time.” (Emphasis added). Dr. Tallerico’s actual testimony

is as follows:

- Q. At that point, did you feel that the condition of (Leroy's) right knee was at an arthroplasty level, based upon your examination, the history, and your review of the films?
- A. Yes.

Tallerico Depo., p. 12, LL. 7-11. Such was Dr. Tallerico's testimony as Respondents' IME physician during direct examination by Respondents' counsel herein, Mr. Augustine. However, Dr. Tallerico could not support that opinion upon cross examination.

Dr. Tallerico conceded that prior to LeRoy's initial industrial left knee injury, there was nothing in LeRoy's records or otherwise that Leroy was restricted in going up or down stairs, steps or ladders; stooping, squatting, crawling, or walking; or, was experiencing any difficulty involving the right knee whatsoever. *Tallerico Depo.*, p. 38, L. 16-p. 39, L. 13. Responsive to these inquiries, Dr. Tallerico, himself, emphasized that as Claimant's counsel had "...pointed out earlier, yourself, that wasn't the focus of these four exams when I saw him. It was for the left knee." (Emphasis added). *Tallerico Depo.*, p. 39, LL. 13-15.

Referencing Dr. McKee's finding upon LeRoy's first presentment to him following the initial industrial left knee injury of February 3, 2009, that LeRoy then presented with severe right-sided arthritis, but without pain/symptomatology, Dr. Tallerico testified that had LeRoy presented to him with right knee presentment, exactly as LeRoy did to Dr. McKee,

- Q. Under those same circumstance, if this was your patient—same circumstances—and your patient said, 'my right knee is not the issue; I'm getting along pretty well with it; I take an aspirin once in a while,' would you have recommended a right TKA at that point?
- A. At that point in time? No.
- Q. Pardon me?
- A. No.

Tallerico Depo., p. 41, L. 23-p. 42, L. 8. Dr. Tallerico conceded that at the time that LeRoy first presented to Dr. McKee, the right knee was discussed but that LeRoy advised Dr. McKee that his symptoms were well-controlled with aspirin, taken “once-in-a-while,” and he did not want or need right knee treatment. **Tallerico Depo.**, p. 38, LL. 4-10; and, p. 39, L. 21-p. 40, L. 11.

Dr. Tallerico conceded that the actual decision to proceed or not with a TKA is pain-driven on the part of the patient. **Tallerico Depo.**, p. 43, LL. 9-13. The simple fact is that Dr. Tallerico agreed that no matter the severity of LeRoy’s right knee degenerative joint disease/arthritis upon diagnostic testing, unless and until LeRoy presents with right knee pain/symptomatology sufficient for him to make the decision to proceed with TKA, he is not a candidate for TKA. As Dr. Tallerico phrased it,

Q. Would you ever recommend a TKA based upon diagnostic film only?

A. No. We don’t treat x-rays. We treat people.

Tallerico Depo., p. 41, L. 1-p. 42, L. 8.

It was following LeRoy’s second left knee surgery that he first complained of right knee symptomatology sufficient to discuss TKA. Dr. Tallerico agreed that for LeRoy “...to ultimately make the decision to proceed with a right TKA, he was experiencing a different level of pain,...”

Tallerico Depo., p. 38, LL. 11-15.

In Dr. Tallerico’s practice, he has had patients “...who present with horrific osteoarthritic knees on film and yet have very little manifestation of complaint, of symptomatology”; and sees “...something happen where, after that occurrence, those previously, for the most part, asymptomatic patients develop manifestation.” **Tallerico Depo.**, p. 45, L. 18-p. 46, L. 3. It is respectfully submitted that Dr. Tallerico’s experience in his personal practice is perfectly compatible with that

experienced by LeRoy and his orthoped, Dr. McKee.

As noted by the Commission within Finding of Fact 30, “Dr. Tallerico might change his mind (causation opinion) if there was documentation that Claimant began complaining of right knee pain after his second left knee surgery, while he was non-weight bearing.” *R.*, pp. 182-183. The kind of evidence which Dr. Tallerico would be looking for was, “...either (LeRoy) telling me or him telling Dr. McKee in the window that we talked about.” Thusly, the opinion of Dr. Tallerico, upon which the Commission denied this claim, rested upon the single fact that the medical records failed to document LeRoy making complaint of increased right knee symptomatology within the appropriate “window.” This “window” was the subject of certain of Dr. Tallerico’s deposition testimony, as follows:

Q. So to the same extent, surgery on one knee would not affect pre-existing degenerative joint disease on the opposing knee because of the difference in gait, the difference in balance, the weight load, the equilibrium or the opposing knee?

A. ...I would state that it’s not impossible to have some effect. Typically, if it was a large person who had a lot body weight and there was prolonged non-weight-bearing or prolonged abnormalities, it could cause symptoms.

The caveat is the symptoms would occur during the actual recovery, during the 4-6 weeks after whatever surgery on whatever body part. ...

Q. So if Mr. Hartgrave would have testified that specifically after the second industrial left knee injury – and that’s the injury of August 23, of 2012 – and following the surgery on that left knee by Dr. McKee and, while he was non-weight-bearing, that his symptomatology on the right knee just flared up and it never went back to baseline, the way it was before and I think he testified he was non-weight-bearing for six weeks. So within 4 weeks, that’s within that continuum that you testified to?

A. It is.

Tallerico Depo., p. 46, L. 24-p. 48, L. 12.

LeRoy presented immediately prior to the March 13, 2013, left knee surgery as 68

inches in height and weighing 228 pounds, which most certainly would come within the category of a “large person.” *JE. C.3.*, p. 105. As to the onset/manifestation of his right knee symptomatology, LeRoy testified:

- 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.
- Q. What kind of problems? What were they?
- A. It was in extreme pain. I was having trouble bending it. It just was at the point where I couldn't get around anymore... – this right knee never came back after I got back to work. It still gave me severe problems. (Emphasis added.)

Hartgrave Depo., p. 62, L. 20-p. 63, L. 11. LeRoy continued,

- Q. After your left knee, you were on crutches?
- A. Yes.
- Q. ...at least as far as you can recall, you were on crutches for six weeks after your left knee surgery?
- A. Left knee surgery, yes.
- Q. Being on the crutches, you were placing most of your weight, if not all of it, on your right knee?
- A. It was non-weight-bearing on the left leg. Right. ...
- Q. By the time you get off your crutches and your right knee surgery in November, there is a period of time in there. What kind of problems were you having with your right knee after you got off of the crutches and before you had the surgery.
- A. It was extremely painful. I was having trouble bending it. It just wouldn't come back to what it used to be before the six weeks on the crutches. It wasn't – it just wasn't working.
- Q. Give me some examples of what you mean by that.
- A. It would try to lock up on me. It wouldn't – you know, it was painful. I couldn't bend it. I had trouble, you know, like climbing in and out of the equipment and some of the trucks. It wouldn't bend.
- I had to be extremely careful getting out of things. Either one of my knees at that point, the left one or the right one, may give me trouble, you know, when I hit the ground.

Hartgrave Depo., p. 63, L. 21-p. 65, L. 5.

LeRoy's testimony as to right knee manifestation of symptomatology which led to the TKA is uncontradicted, and must be accepted as true, absent it being inherently improbable or rendered improbable by facts and circumstances disclosed at hearing. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P. 2d 171, 175 (Idaho 1937); *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575, 581-82 (Idaho 1979); and, *Wood v. Hoglund*, 131 Idaho 700, 963 P.2d 383, 386 (Idaho 1998). Prior to the second left knee surgery, LeRoy had "no plans of having medical care or treatment involving the right knee, but following this surgery, LeRoy's right knee "...was swollen. I had walked on it for six weeks with the crutches. So it had just taken its toll." *Hartgrave Depo.*, p. 65, LL. 8-17.

Most certainly, had LeRoy described the onset of his right knee symptomatology/manifestation to either Dr. Tallerico or Dr. McKee, such that there would have been "documentation" within the medical records, Dr. Tallerico's causation opinion would have been favorable to LeRoy, and the Commission would have found the right TKA to be compensable. Thusly, the logical inquiry should be whether it is fatal to LeRoy's right knee claim that he did not report the right knee manifestation/onset to Dr. Tallerico and/or Dr. McKee.

First, with respect to Dr. Tallerico, each presentment of LeRoy to Dr. Tallerico was specific to the left knee and, upon each of those occasions, LeRoy would have known the purpose of the examination. *Tallerico Depo.*, p. 25, LL. 8-14; and, p. 29, LL. 9-12. Dr. Tallerico's questions to LeRoy regarding the right knee would not be as thorough as were his questions regarding the left knee. *Tallerico Depo.*, p. 28, LL. 2-11. Further, Leroy "...is tough. He doesn't complaint a lot." *Tallerico Depo.*, p. 71, LL. 3-5.

At the time of his deposition, Dr. Tallerico had not reviewed LeRoy's deposition transcript

or his Answers to Interrogatories, regarding LeRoy's description of the onset/manifestation of right knee symptomatology. *Tallerico Depo.*, p. 28, LL. 12-21. Had Respondents provided Dr. Tallerico with Leroy's deposition transcript, Dr. Tallerico would have considered the same. However, they did not. At the time of Dr. Tallerico's deposition, counsel referenced LeRoy's deposition testimony as to on-set/manifestation of right knee symptomatology, but Dr. Tallerico refused to consider that testimony or to express opinion upon the premise thereof, while conceding that LeRoy was forthright, straightforward, and honest. Rather, Dr. Tallerico responded "...why wasn't it – again, I don't have that transcript. All I have are my four reports and the medical records, Dr. McKee's importantly, all of my opinions are formulated on that." *Tallerico Depo.*, p. 53, L. 3-p. 54, L. 4.

4. Finding of Fact 43, *R.*, p. 187: There, the Commission noted Dr. Tallerico's testimony that the doctor was not aware "...of any medical literature to support the theory that loss of normal motion can accelerate degenerative joint disease," citing *Tallerico Depo.*, p. 50. Irrespective of whether Dr. Tallerico's "awareness" in this regard is accurate or not, it misses the point. No argument has been made upon behalf of LeRoy that his industrial left knee injuries, inclusive of the two surgeries by Dr. McKee, resulted in or caused acceleration of his right knee degenerative joint disease. Rather, the argument advanced upon behalf of LeRoy is that the manifestation of LeRoy's right knee symptomatology following the second industrial left knee surgery was as consequence thereof, and thusly must be considered as compensable. The instant claim concerns the catalyst and/or inciting cause of the manifestation of unacceptable symptomatology in LeRoy's right knee which, concededly, presented with pre-existing degenerative joint disease which was, mostly, asymptomatic prior to the second left industrial knee surgery.

5. Findings of Fact 39-43, *R.*, pp. 186-187: Here, the Commission addressed certain of Dr. McKee's deposition testimony, and criticized Dr. McKee for changing his opinion from that expressed within the doctor's July 29, 2014, report to that expressed within his subsequent report of August 28, 2015. *JE. C.3.a. and c.*, pp. 192 and 200, respectively. The Commission is clearly wrong in this regard. Rather, by his July 29, 2014, report, Dr. McKee side-stepped the question of whether LeRoy's right TKA was accelerated in time by reason of his industrial left knee injuries by advising that, "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." Such was clearly non-responsive to the inquiry.

Assuming that counsel's July 1, 2014, correspondence to Dr. McKee, which communicated the inquiry, may have been confusing to the doctor, counsel re-communicated the inquiry by his August 12, 2015, correspondence. The two correspondences to Dr. McKee are of record as *JE. C.3.a.(1) and c.(1)*, respectively. The August 12, 2015, correspondence to Dr. McKee attempted to clearly present the inquiry as

...even accepting that Mr. Hartgrave would have required right TKA regardless of this industrial left knee injuries, the specific issue is whether you believe it to be probable that the need for right TKA would have required surgery by November 25, 2013, had the industrial left knee injuries not have occurred.

That correspondence enclosed pages 62-66 of LeRoy's deposition testimony relating to onset of right knee pain. It was responsive to that inquiry that Dr. McKee's August 28, 2015, report advised that he recalled

...meeting Mr. Hartgrave in 2009 and commenting on his severe right-sided arthritis and that he told me at that point that he did not have pain and did not want to proceed with total knee arthroplasty at that time, because of that reason. 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 proceed with total knee arthroplasty. Therefore, yes, I believe that his industrial injuries moved up his need for total knee arthroplasty on the right.

Dr. McKee did not change his medical opinion as between his two reports. Rather, the July 29, 2014, report did not respond to the issue whereas the August 28, 2015, report provided specific response to the specific inquiry.

LeRoy's right knee became symptomatic following his second industrial knee surgery, when he was non-weight-bearing on the left and on crutches for approximately six weeks. With respect to the effect of being non-weight-bearing on the left, Dr. Tallerico testified, "...that means that they are bearing the weight on the right as a result,... ." *Tallerico Depo.*, p. 16, LL. 22-23. As Dr. Tallerico put it, "[o]bviously, if you are non-weight-bearing on one, you are putting more weight on the other." *Tallerico Depo.*, p. 58, LL. 16-20.

Dr. Tallerico, himself, has had patients who have "horrible degenerative conditions" who complain very little of symptoms, "[a]nd then something happens and it disturbs the equilibrium or the kinematics of the joint, and suddenly they have symptoms." *Tallerico Depo.*, p. 56, L. 13-p. 57, L. 1. Dr. Tallerico concurred that there was nothing within the records which suggested that prior to the second industrial left knee surgery, LeRoy experienced popping, cracking, crepitus, weakness, instability, or give-way sensations involving the right knee. *Tallerico Depo.*, p. 37, LL. 6-14. Significantly, Dr. Tallerico agreed that for LeRoy "...to ultimately make the decision to proceed with a right TKA, he was experiencing a different level of pain, being tough." *Tallerico Depo.*, p. 38, LL. 11-15.

LeRoy's second industrial left knee injury occurred upon August 23, 2012. LeRoy re-presented to Dr. McKee upon October 22, 2012, and thereafter upon several occasions prior to the second industrial left knee surgery of March 13, 2013. Throughout this period, Dr. McKee documented that LeRoy presented with an altered gait, being a limp on the left. *McKee Depo.*, p. 9, LL. 1-23; *JE. C.3.*, pp. 87-105. Following the March 13, 2013, industrial left knee surgery, LeRoy was non-weight-bearing on the left, with crutches, for a period of approximately six weeks, through April 23, 2013. *McKee Depo.*, p. 9, L. 25-p. 10, L. 6.

Thereafter, LeRoy re-presented to Dr. McKee upon May 14, June 11, and August 9, 2013. Upon each of those occasions LeRoy presented with an altered gait, limping on the left. *McKee Depo.*, p. 10, LL. 7-11; and, *JE. C.3.*, pp. 132-145. Following the August 9, 2013, re-presentation, Dr. McKee released LeRoy to return to work, with permanent restrictions of no squatting, kneeling and lifting limited to 50 pounds. *JE. C.3.*, p. 145.

Dr. McKee testified as to the effect of LeRoy's altered gait by reason of a limp on the left, as follows:

- Q. With regard to the alteration of gait because of the left knee, would that affect the weight-bearing load on the right knee?
- A. Yes.
- Q. In what regard?
- A. Its just going to put more pressure on that knee when ambulating, even after being off crutches.
- Q. And because of the altered gait, would that affect where that pressure is located within the knee itself? In other words, does it tilt the plane?
- A. I'm not sure if that's the case. What I would say is that it does – it puts more pressure because he's leaning on it more.
- Q. Would the increased pressure affect the articulating surfaces within the knee joint?
- A. I think it could aggravate an already damaged joint, yes.

McKee Depo., p. 12, L. 22-p. 13, L. 14.

Both Drs. Tallerico and McKee agreed that as of the initial industrial left knee injury of February 3, 2009, LeRoy's right knee was significantly arthritic, being "bone-on-bone." However, LeRoy advised Dr. McKee that his right knee "didn't hurt," and, for that reason, did not require treatment. *McKee Depo.*, p. 7, LL. 2-16. Like Dr. Tallerico, Dr. McKee sees patients "...all the time that have no pain with severe arthritis, but something will set it off, whether its an injury or a fall or Mr. Hartgrave's situation. He had to depend on that right knee that was already worn." *McKee Depo.*, p. 14, LL. 1-6. Dr. McKee explained that a TKA requires the marriage of both a bad knee upon diagnostic studies and symptomatology "...that from the patient's perspective, he is not willing to tolerate." *McKee Depo.*, p. 14, LL. 13-18.

Following August 9, 2013, LeRoy next presented to Dr. McKee upon November 8, 2013. He was then complaining of bilateral knee pain, and advised Dr. McKee "...that his right knee is worsening. He reports constant pain. The pain is disabling at times. He can no longer enjoy his normal activities." Upon that presentment LeRoy and Dr. McKee elected to proceed with right TKA. *JE. C.3.*, pp. 146-149.

Dr. McKee's records did not "document" any discussion with LeRoy as to the "...when, how or why (the right knee) became symptomatic." *McKee Depo.*, p. 15, LL. 7-16. Dr. McKee testified that from his perspective, such did not become an issue until following LeRoy's right TKA, and the doctor's receipt of counsel's July 1, 2014, inquiry. *McKee Depo.*, p. 15, LL. 17-20; *JE. C.3.a.(1)*, pp. 193-197.

As of the date of Dr. McKee's August 28, 2015, report he had been presented with and had reviewed LeRoy's deposition testimony relating to the onset/manifestation of right knee pain which

led to the decision to proceed with right TKA. *JE. C.3.c.(1)*, pp. 201-202. Having benefit of LeRoy's testimony, Dr. McKee's August 28, 2015, report advised that following the second industrial left knee surgery,

...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 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. C.3.c., p. 200. Dr. McKee testified that upon accepting LeRoy's testimony, LeRoy's "...need for a knee replacement occurred earlier because of aggravation from being on crutches." *McKee Depo.*, p. 12, LL. 3-21. Dr. McKee testified that there was no other potential cause for the exacerbation of LeRoy's right knee symptomatology having greater probability than the altered gait following the 2013 surgery. *McKee Depo.*, p. 14, L. 23-p. 15, L. 6.

Dr. McKee explained the absence of "documentation" within his records of specific discussion with LeRoy as to the when, why and how of his increase in right knee symptomatology which led to the decision to proceed with right TKA. Simply stated, from Dr. McKee's perspective, it was not an issue until following LeRoy's right TKA, upon the doctor receiving counsel's correspondence of July 1, 2014. *McKee Depo.*, p. 15, LL. 7-20. Dr. McKee agreed with Dr. Tallerico that Leroy was obviously straightforward, honest, hardworking and exhibited no signs of symptom magnification. Dr. McKee added that LeRoy seemed like a stoic individual. *McKee Depo.*, p. 15, L. 21-p. 16, L. 11.

From the perspective of LeRoy, Dr. McKee agreed that for someone who is tough and stoic, it is reasonable to assume that LeRoy thought that after he was off of his crutches and after the gait

disturbance related to being on crutches went away, his right knee would get better and thusly there was no need to complain. *McKee Depo.*, p. 31, L. 17-p. 32, L. 15.

III. Claimant is Entitled to Attorney's Fees Pursuant to I.C. § 72-804; and/or, I.A.R. 41

Pursuant to I.C. § 72-804, attorney's fees shall be awarded if the Commission or any court before whom Title 72 proceedings are brought determines that the employer contested a claim without reasonable grounds. In the instant matter, it is submitted that the conduct of Defendants employer and surety, together with their representatives, are subject to the rule of good faith. Defendants should not be allowed to manipulate the opinions of their IME expert by withholding relevant, material and pertinent data from the expert.

In the instant matter, as above thoroughly discussed, Dr. Tallerico's causation opinion would have been favorable to LeRoy had he found documentation within the records of LeRoy's manifestation of right knee symptomatology following his second left industrial knee surgery. It is understandable that Dr. Tallerico never breached the subject, and the subject was never initiated by LeRoy, as none of Dr. Tallerico's examinations of LeRoy was specific as to the right knee. Further, LeRoy's orthopedic surgeon, Dr. McKee, did not believe the "hows and whys and whens" of LeRoy's right knee manifestation was an issue, such that he failed to initiate any discussion as to the same upon LeRoy re-presenting to him with increased right knee symptomatology.

Throughout Dr. Tallerico's IME reports are his impressions that LeRoy was straightforward; honest; without indicators of secondary gain; and, a "stand-up" guy. As noted by Dr. Tallerico within his deposition, if LeRoy would have told the doctor something, the doctor would have believed him.

LeRoy's Workers' Compensation Complaints related to the February 3, 2009 and the August 23, 2012, injuries were filed by instruments dated January 22, 2014. *R.*, pp. 1-4; and, pp. 5-8, respectively. Each Complaint alleged entitlement to Title 72 benefits by reason of onset of symptomatology of LeRoy's right knee related to his change in gait, related to his industrial left knee presentments, ultimately requiring right TKA. In each of Defendants' Answers to Complaints, Defendants affirmatively denied liability for LeRoy's right knee injury. *R.*, pp. 10 and 12. LeRoy's Answers to Defendants' First Set of Interrogatories, dated March 31, 2014, asserted, "exacerbation of pre-existing/underlying non-industrial right knee degenerative joint disease related to and/or by reason of change in gait and/or altered biomechanics related to Claimant's industrial left knee injury... ultimately requiring right TKA." *JE. O.1.a.*, p. 545; and, *2.a.*, p. 584. LeRoy's deposition was taken by Defendants upon May 20, 2015, wherein, from page 62, line 9, through page 65, line 17, he discusses the on-set/manifestation of right knee symptomatology following the second industrial left knee surgery, in detail.

Dr. Tallerico was never requested to and did not examine LeRoy specific to right knee presentment. Rather, Dr. Tallerico's causation opinion was based upon review of the records provided him by Defendants. Defendants failed to provide Dr. Tallerico with copies of LeRoy's discovery responses or deposition transcript regarding on-set/manifestation of right knee symptomatology. Further, and even more disturbing, the correspondence to Dr. Tallerico from Defendants' attorney by which Dr. Tallerico was requested to provide causation opinion represented that,

[y]our evaluations took place on December 16, 2010, August 6, 2011, November 23, 2013, and April 17, 2014.

At the times of these examinations, Mr. Hartgrave's right knee was not an issue in the case. However, since your last evaluation Mr. Hartgrave has claimed that his total right knee arthroplasty which was performed on November 25, 2013, was necessitated, in part, by his industrial injuries to his left knee. (Emphasis added).

JE. G.9.a., pp. 332d-e.

Such representation to the doctor was obviously intended by Defendants/Defendants' counsel, to be relied on by Dr. Tallerico in the formation of his causation opinion. By this representation, Defendants affirmatively represented that LeRoy's right knee "was not an issue" prior to the doctor's examination of LeRoy of April 17, 2014. Such was abjectly false and conveyed the "message" that LeRoy's claim related to right knee presentment was fabricated following April 16, 2014, when Defendants had absolute and clear knowledge of that claim effective with the filing of LeRoy's Complaints, upon January 22, 2014.

This false representation by Defendants to Dr. Tallerico and Defendants' conduct in withholding LeRoy's discovery responses and deposition transcript from the doctor's review constitutes conduct giving rise to sanctions in the form of fees.

CONCLUSION

This Court has held that,

Idaho workers' compensation law is remedial legislation. It is a well-known cannon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature. (Citations omitted). The intent of the Idaho legislature in enacting the workers' compensation laws was to provide 'sure and certain relief for injured workmen...'

Page v. McCain Foods, Inc., 141 Idaho 342, 109 P.3d 1084, 1088 (Idaho 2005). Title 72 must be liberally construed in favor of the employee, in order to serve the humane purpose for which the law was promulgated. *Murray-Donahue v. Nat. Car Rental Licensee*, 127 Idaho 337, 900 P.2d 1348,

1351 (Idaho 1995).

The Supreme Court will uphold the Commission's Findings of Fact, if supported by substantial, competent evidence. The "substantial evidence rule" requires the Court to determine whether the Commission's findings are reasonable. In deciding whether the findings are reasonable, the Court should not read only one side of the case and, if any evidence is therein found, sustain the Commission's action and ignore the records of the contrary. *Kirk, supra.*; *Ewins, supra.*; and, *Rudolph, supra.* Put simply, the substantial evidence rule requires the Court to determine whether the Findings of Fact are reasonable. *Mulder, supra.*

In the instant matter, it is respectfully submitted that not only the preponderance, but the totality of the evidence of record established:

1. Prior to the March 13, 2013, second industrial left knee surgery, LeRoy's right knee presented as mostly asymptomatic, requiring only an occasional aspirin should LeRoy "overdo it." *Hartgrave Depo.*, p. 33, L. 23-p. 34, L. 2.

2. Following the March 13, 2013, surgery, LeRoy was instructed by Dr. McKee to be non-weight-bearing on the left, and ambulated with crutches. *JE. C.3*, pp. 111-125; *McKee Depo.*, p. 9, L. 17-p. 10, L. 6.

3. From and following the March 13, 2013, surgery, LeRoy was noted by Dr. McKee to ambulate with a limp, on the left, through August 9, 2013, when he was released to return to work with permanent restrictions. *JE. C.3*, pp. 143-145; *McKee Depo.*, p. 10, LL. 7-13.

4. LeRoy's uncontroverted testimony was that, after the two surgeries on this left knee, it changed the way he walked and he "started having a lot of trouble with this right knee."

(Emphasis added.) *Hartgrave Depo.*, p. 62, LL. 20-22. LeRoy explained that being on crutches for six weeks following the second industrial left knee surgery caused “all sorts of problems.” The right knee was in extreme pain, he was having trouble bending it. His right knee “...never came back after (he) got back to work. It still gave me severe problems.” *Hartgrave Depo.*, p. 63, LL. 1-11. After the six weeks on crutches, his right knee would “lock-up”; was painful; and, he couldn’t bend it. *Hartgrave Depo.*, p. 64, L. 13-p. 65, L. 5.

5. Prior to his second industrial left knee surgery, LeRoy “...hadn’t had any plans of having anything done with the right knee.” *Hartgrave Depo.*, p. 65, LL. 8-12.

6. When presented with LeRoy’s testimony as to right knee manifestation, his orthopedic surgeon, Dr. McKee, testified within a reasonable degree of medical probability that LeRoy’s alteration of gait following the second industrial left knee surgery affected the weight-bearing load on his right knee, and put more pressure on the right knee, “...because he’s leaning on it more.” Dr. McKee testified that LeRoy required right TKA earlier by reason of his right knee being aggravated from being on crutches. Dr. McKee testified that there was no other potential cause for the exacerbation of LeRoy’s right knee symptomatology having greater probability than the altered gait following the 2013 left knee surgery. *McKee Depo.*, p. 12, L. 3-p. 15, L. 6.

7. Dr. Tallerico testified that for LeRoy to make the decision to proceed with right TKA, he was experiencing a “different level” of pain. *Tallerico Depo.*, p. 38, LL. 4-15. Dr. Tallerico conceded that surgery upon one knee could affect pre-existing degenerative joint disease on the opposing knee by reason of related gait disturbance, difference in balance, and disruption of the weight load on the opposing knee. *Tallerico Depo.*, p. 46, L. 24-p. 47, L. 10.

8. Dr. Tallerico conceded that LeRoy's increase in right knee symptomatology following the March 13, 2013, left knee surgery fell within the anticipated period of time to be related. *Tallerico Depo.*, p. 48, LL. 2-12.

9. Both Drs. Tallerico and McKee testified that, in their respective practices, they have had patients who present with significant degenerative joint disease in the knee yet, who had very little complaints, when "something happens" and the previously, for the most part, asymptomatic patients develop manifestation. *Tallerico Depo.*, p. 45, L. 18-p. 46, L. 3. *McKee Depo.*, p. 14, LL. 1-6.

10. When asked as to any other cause having greater probability for LeRoy's increase in right knee symptomatology following the March 13, 2013, surgery than his altered gait, Dr. Tallerico replied that it was "coincidence." *Tallerico Depo.*, p. 54, L. 16-p. 55, L. 8.

Dr. McKee has been Leroy's orthopedic surgeon commencing with the February 3, 2009, initial left knee industrial injury, through current. Approximately 50% of Dr. McKee's practice is specific as to knees. *McKee Depo.*, p. 5, LL. 9-20.

In Finding 43, the Commission characterized Dr. Tallerico as one "...who specializes in knees." *R.*, p. 187. The Commission failed to note that Dr. Tallerico also "specializes" in being a hired gun upon behalf of defense. Dr. Tallerico conducts between 120 -150 IMEs per year. Dr. Tallerico is affiliated with O-M-A-C, an entity which supplies physicians for purposes of IMEs. The majority of Dr. Tallerico's IMEs are at the request of defendants. Although Dr. Tallerico indicated that "probably" 10% of his IMEs are upon behalf of claimants, he could not recall giving testimony upon behalf of a claimant or claimant's counsel in a contested workers' compensation claim in Idaho

in the past few years. *Tallerico Depo.*, p. 58, L. 21-p. 60, L. 15.

It is within this context that Dr. Tallerico's testimony that it was "coincidence," that LeRoy's manifestation of right knee symptomatology occurred within the period of time as would be anticipated if related to the alteration of gait from the second industrial left knee surgery must be weighed. It is submitted that Dr. Tallerico's "coincidence" opinion constitutes pure speculation without benefit of medical rationale or logic, and actually is in contrast to other of Dr. Tallerico's testimony above- referenced.

It is also within the context of Dr. Tallerico's role as Defendants' IME physician that the doctor's refusal to read or consider LeRoy's deposition testimony as to the manifestation/on-set of right knee symptomatology following the second industrial left knee surgery should be considered. Clearly, where Dr. Tallerico, himself, described LeRoy as honest, straightforward, and without secondary gain issues, such that if LeRoy told him something, the doctor would believe it, had Dr. Tallerico considered LeRoy's deposition testimony, which had been paraphrased to him by counsel during cross examination, he would have been without basis to sustain his negative causation opinion.

This Court has determined that proximate causation can be shown from a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable." *Sheridan v. St. Luke's Reg. Med. Center*, 135 Idaho 775, 25 P.3d 88, 98 (Idaho 2001). It is not necessary that the cause of the injury relied on be proven to the exclusion of other possible causes. *Suren v. Sunshine Mining Co.*, 58 Idaho 101, 70 P.2d 399 (Idaho 1937).

Recall, part of the consideration paid to LeRoy by Defendants for the Modified Lump Sum Agreement was the sum of \$1,927.19, being the amount of LeRoy's out-of-pocket medical expenses related to the right TKA procedure. As has oft-times been said, actions speak louder than words. In this specific matter, the action of the Fund in reimbursing LeRoy his expenses for the right TKA should speak loudly and clearly upon this issue.

The record in this matter not only supports the logical inference that LeRoy's need for right TKA was accelerated/hastened as consequence of the compensable left industrial knee injuries and related medical procedures, but is totally absent of any other cause having greater probability. There is, in fact, but one logical cause for the sudden manifestation of unacceptable right knee symptomatology resulting in need for LeRoy's right TKA at the point in time required, which is the aggravation of LeRoy's pre-existing but relatively asymptomatic right knee degenerative joint disease as consequence of the compensable left knee injuries, specifically encompassing the March 13, 2013, left knee surgery.

RESPECTFULLY submitted this 28 day of August, 2017.

STEPHAN, KVANVIG, STONE & TRAINOR

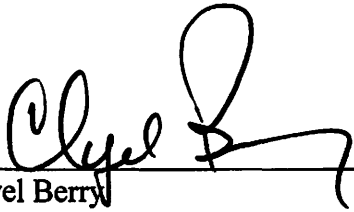
By


L. Clyel Berry
Attorney for Claimant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a resident attorney of the State of Idaho and that on the 28 day of August, 2017, I served two bound copies of the foregoing document by depositing true copies thereof in the United States mail, postage prepaid, addressed to the following:

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L. Clyel Berry