

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

CINDY CUTTS,

Claimant,

v.

NEW PLYMOUTH SCHOOL DISTRICT  
372,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2012-031901**

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

**Filed February 10, 2014**

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on October 7, 2013. Claimant was present and represented by Richard S. Owen of Boise. Neil D. McFeeley of Boise represented Employer (NPSD) and Surety (collectively, Defendants). The parties presented oral and documentary evidence. One post-hearing deposition was taken. Claimant and Defendants then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on January 24, 2014. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

## **ISSUES**

By agreement of the parties, at the hearing the issues to be decided were identified as:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) as a result of the industrial injury;
2. Whether and to what extent Claimant is entitled to disability in excess of impairment; and
3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

In her briefing, Claimant acknowledged the absence of any evidence of permanent restrictions attributable to her industrial right knee meniscus tear and, consequently, she waived the issue of disability in excess of impairment. Therefore, Issue 2, above, will not be addressed herein.

## **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant underwent right knee anterior cruciate ligament (ACL) reconstruction, meniscectomy and debridement in 1999 and that she suffered an industrial right knee twisting injury on November 26, 2012 that led to another right knee repair surgery.

Claimant contends that she is entitled to 3% PPI as a result of her industrial loss of 25% of her right meniscus. She relies upon the testimony of Randolph E. Peterson, M.D., her treating orthopedic surgeon. She also relies upon the evidence quantifying her PPI attributable to her medial meniscal tear contained in the independent medical evaluation (IME) report of Christian Gussner, M.D., a physiatrist. However, she disputes Dr. Gussner's apportionment of all of her PPI to her preexisting condition.

Defendants counter that Claimant's right knee PPI is wholly due to her preexisting condition and, therefore, they are not liable for any PPI benefits. They rely upon the conclusions reached by Dr. Gussner as presented in his IME report.

### **OBJECTIONS**

Defendants' objections recorded at pages 21 and 22 of Dr. Peterson's deposition transcript are overruled. "Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing as well as on expert testimony developed in post-hearing depositions." JRP Rule 10.E.4. Claimant's questions pertained to Dr. Peterson's opinions regarding the functional capacity evaluation (FCE) report admitted at the hearing and, more generally, regarding Claimant's functional abilities as demonstrated by evidence admitted at the hearing. Further, Defendants do not dispute that Dr. Peterson is an expert witness.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibits (CE) A through L admitted at the hearing; and
3. Defendants' Exhibit (DE) 1 admitted at the hearing;
4. The post-hearing deposition of Randolph E. Peterson, M.D., taken November 1, 2013.

### **FINDINGS OF FACT**

1. Claimant was 56 years of age at the time of the hearing and residing in New Plymouth. She was working as a music teacher at NPSD, teaching kindergarten through fifth grade, from 8 a.m. until 3:30 p.m., four days per week, when she stood up from her desk and twisted her right knee. That event resulted in a right knee injury that required surgery in March

2013 and, ultimately, an accepted workers' compensation claim. Claimant's PPI claim is complicated by her prior history of right knee injuries and surgery.

### ***PREEXISTING RIGHT KNEE CONDITION***

2. Claimant has always been active and athletic. For example, her favorite class in school was PE and she played community league softball into her adult life. When Claimant was 22, she injured her right knee playing softball when someone fell on it. The next day, a doctor drained some fluid off of her knee, and she had no further problems related to her softball injury.

3. In 1998, Claimant again injured her right knee. This time, she was at work (for a prior employer) when her foot got stuck on a rubber mat and she twisted her knee. Claimant's knee pathology included a 100% acute tear of her ACL, a medial meniscal tear, and severe degenerative changes to her patella. In January 1999, Dr. Peterson performed surgery on Claimant's right knee to reconstruct her ACL. He also performed a meniscectomy and debridement in which he trimmed out approximately one-third of the medial meniscus.<sup>1</sup> Following surgery, Claimant again injured her right knee, hyperflexing it while doing her home exercises. After six months, Claimant's knee was much better, but she still had residual pain when it was cold or rainy.

4. In December 1999, Claimant still had some pain on the outside of her right knee that Dr. Peterson opined was due to degenerative changes in her patellofemoral joint, and not to her meniscus injury. Otherwise, she was doing well. Dr. Peterson released her to full-duty work without restrictions. Her most significant problem was her degenerative condition, which he opined would likely worsen over time at an unpredictable rate.

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<sup>1</sup> Although MRI imaging suggested a lateral meniscal tear, as well, Dr. Peterson did not visualize this intraoperatively.

5. Until her 2012 industrial injury, Claimant's right knee generally did well. "It was fine. I had issues when it got really cold or it seemed like it would predict the weather when it was going to rain, but that's just one of those things." Tr., p. 30. When Claimant had pain, it was aching pain that waxed and waned for a few hours during the day. She sometimes had similar aching in her left knee. Claimant took ibuprofen as needed. She continued to perform her regular work and daily living activities, including standing, kneeling, walking, dancing, swimming, and others. Recreationally, she and her husband sometimes went camping or hiking. Claimant did not recall any limitations due to her right knee.

6. Claimant does not dispute that she reported having "tired joints" to Dr. Stark<sup>2</sup> on November 7, 2012, due to kneeling and squatting at her former job with a mobile home manufacturer. "...I think that over time I - - my old jobs caught up with me, apparently." Tr., p. 67. Claimant admitted that her knees were "creaky" (and still are) and acknowledged that Dr. Stark told her that her right knee symptoms were due to osteoarthritis.<sup>3</sup> Dr. Stark also recorded Claimant's height (5'5") and weight (190 #).

7. On November 21, 2012, Claimant was again evaluated by Dr. Stark. This time, he noted, "...she has had heavy labor in the plumbing, sheetrock, [*sic*] and developed problem [*sic*] in her knees....The osteoarthritis in several joints including the knees, the hands, and to a lesser extent, the shoulders, are felt to be osteoarthritic in nature." CE-164. Dr. Stark prescribed Nabumetone, 750 milligrams twice per day, for Claimant's joint pain.

8. Claimant admits that swimming was her only recreational sport by the time of her 2012 industrial injury. She attributes this reduction in activity to getting older.

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<sup>2</sup> Claimant's OB-GYN referred her to Dr. Stark for follow-up on suspicion of scleroderma, an autoimmune disease, based on blood test results. After further testing, Dr. Stark ultimately ruled out scleroderma. He also ruled out acute arthritis.

<sup>3</sup> Dr. Stark wrote, "...I think she has a good understanding that there is a probability of poorly tolerated and slowly progressing osteoarthritis, which explained most of her symptoms." CE-163. See also Tr., p. 68.

## ***INDUSTRIAL INJURY AND TREATMENT***

9. On November 26, 2012, Claimant again twisted her right knee. She turned and “immediately felt a horrible pain in my knee.” Tr., p. 38. After finishing her workday, Claimant went home, elevated and iced her knee, and took ibuprofen. Her symptoms did not improve, so the next day she called her principal, Carrie Aguas, to report her status. Ms. Aguas brought Claimant some crutches. Later, Claimant called the school nurse, Surety, and, eventually, Dr. Peterson.

10. Claimant’s first evaluation by Dr. Peterson for her industrial injury occurred on December 3, 2012. After x-rays and examination, Dr. Peterson prescribed an anti-inflammatory medication and placed her on light duty. A couple of weeks later, Dr. Peterson ordered an arthrogram.

[I]t showed apparent meniscal tear to the medial meniscus, it also showed what appears to be a flap tear of the articular cartilage in the medial femoral condyle. This may very well have occurred at the twisting injury in that area. She also shows significant degenerative changes to the patellofemoral joint and this is symmetric.

CE-92.

11. Dr. Peterson took Claimant to arthroscopic surgery on March 7, 2013. Intraoperatively, he found “[s]evere chondrocalcinosis<sup>4</sup> and calcific accumulation throughout the synovium, loose body, complex tear of the medial meniscus, and severe degenerative arthritis of the patellofemoral joint.” CE-97. He debrided about 25% more of Claimant’s medial meniscus to repair the tear and performed chondroplasty and synovectomy of the entire joint. He opined that the loose body was causing significant irritation to her knee, and also that her industrial injury created an inflammatory response which ignited pain from her chondrocalcinosis.

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<sup>4</sup> Dr. Peterson explained that chondrocalcinosis is also known as “pseudogout.” “It’s called pseudogout, made by calcium pyrophosphate deposition or CPPD. That can cause a lot of irritation, inflammation in the knee.” Peterson Dep., p. 15.

12. In recovery, Claimant's symptoms improved but she continued to have swelling. She started physical therapy in Fruitland on April 2, 2013. On April 17, 2013, Dr. Peterson noted, "She has been doing physical therapy and is doing substantially better." CE-103. He also noted that she had no current intra-articular swelling. Yet, he acknowledged that Claimant still had a lot of retropatellar pain, that she was using a cane for ambulation assistance, and that she walked with an antalgic gait.

13. Claimant apparently attended physical therapy through May 15, 2013. Her therapist noted improvements, but she still had 2/10 pain to the center of her right knee as of May 2. There are no specific notes of Claimant's physical therapy progress after that date.

14. On May 17, 2013, Dr. Peterson noted Claimant was substantially better, with "marked improvement of her motion and strength." CE-105. However, she still had 3/10 retropatellar pain which he wanted to improve. He recommended a follow-up to gauge Claimant's progress, but no follow-up records are in evidence. He advised in or around July 2013 that he does not do impairment ratings.

15. Claimant returned to work at NPSD in May 2013. She had trouble walking and had to sit to teach. She could no longer crouch or squat to assist her students. On recess duty, she limped and favored her right knee. She was notified on June 28, 2013 that she would not be rehired for the 2013-2014 school year. "I was told they were shifting some people around in the district and I wouldn't be teaching music." Tr., p. 23. Claimant testified that her right knee condition would prevent her from returning anyway.

16. On August 23, 2013, Claimant underwent a 4-hour (approximately) FCE at Elk's Rehabilitation Hospital in Boise. Based upon objective measures, Claimant's testing yielded valid results. With respect to her knees, Claimant complained sometimes about bilateral knee

pain, sometimes about left knee pain only, and sometimes about right knee pain only. For example, her right quadriceps manual muscle testing was limited due to right knee pain, but she complained of left knee pain on stair climbing. Crawling really hurt both knees, but Claimant complained of right knee pain, especially, on termination of that test. Based upon her testing, the physical therapist recommended no kneeling or squatting. No limitations were assessed specifically to Claimant's right knee. Also, according to the FCE, Claimant can stand for four hours each day, in six-minute durations, and walk for three to four hours in an eight-hour day. Claimant agrees with the standing description, so long as she can move around while she's standing. As for the walking assertion, "I don't know. I used to be able to walk around the track eight times. I could probably do one - - one lap now without sitting down." Tr., p. 52. Claimant also described how she goes down stairs sideways, leading with her left foot, which she did not need to do before her industrial injury. She admitted she had trouble with both knees on stair-climbing tests during her FCE, attributing her left knee problems to osteoarthritis.

17. Following review of the FCE results, Dr. Peterson advised Claimant that she would probably need to find a "sit down job." Tr., p. 50. He neither agreed nor disagreed with the limitations suggested by the FCE. Rather, he opined that Claimant should let pain be her guide in terms of determining what she can and cannot do. He attributed her restrictions to her patellofemoral joint arthritis, specifically rejecting a meniscus-based etiology to Claimant's ongoing right knee symptoms. He also rejected the notion that Claimant's industrial injury had any effect on her patellofemoral joint arthritis. *See Peterson Dep.*, p. 23.

18. At the time of the hearing, Claimant could still swim laps. She sometimes walked, too, approximately the equivalent of once around the track before she had to sit down. She shopped, but testified that visiting the mall would be difficult. Overall, Claimant's activities

were more limited than they were before her 2012 industrial injury, and she experienced more discomfort.

### ***INDEPENDENT MEDICAL EVALUATION***

19. **Christian G. Gussner, M.D.** On September 9, 2013, Dr. Gussner, a physiatrist, prepared a report addressed to Claimant's counsel detailing his opinions regarding Claimant's condition following an IME. Prior to preparing his report, Dr. Gussner had Claimant complete a new patient questionnaire and written tests including the Oswestry Function Test and Becks Depression Inventory – II. He also interviewed Claimant and reviewed her medical records related to her right knee condition and two related surgeries, as well as her physical therapy records and FCE report.

20. Dr. Gussner found Claimant to be a good historian. "The information she provided was consistent with the medical records." DE-1.<sup>5</sup> He also determined that she had a self-perception of minimal disability and did not demonstrate a significant mood disorder. On her pain drawing Claimant noted, among other things, bilateral knee pain, consistent with her pain reports recorded by Dr. Gussner. His exam findings revealed some differences between Claimant's right and left lower extremities, but there is no evidence from Dr. Gussner's report that these were significant.

21. Utilizing the *AMA Guides, Sixth Edition*, Dr. Gussner assessed 3% whole person PPI to Claimant's industrial right knee medial meniscal tear requiring partial meniscectomy. Then, curiously, he rated Claimant's preexisting right knee condition at 13% whole person PPI based, in part, on his exam findings, and concluded that because the preexisting PPI exceeded the industrial PPI, "there is no impairment related to the 11/26/2012 accepted injury claim." DE-8.

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<sup>5</sup> Defendants' Exhibit 1 consists of eight pages but bears only fax page numbering, starting with page two. For reference in this decision, the pages have been renumbered, from one to eight.

He then recommended permanent medium duty restrictions, all of which he opined applied prior to Claimant's last industrial injury.

### ***CLAIMANT'S CREDIBILITY***

22. After observing Claimant at the hearing and comparing her testimony with the remainder of the evidence in the record, the Referee found her to be a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

### **DISCUSSION AND FURTHER FINDINGS**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts 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).

### ***PERMANENT PARTIAL IMPAIRMENT***

23. **Maximum medical improvement (MMI).** As a prerequisite to determining Claimant's PPI, the evidence must demonstrate that she is medically stable. To wit, "permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. The statute does not contemplate that a claimant must be returned to her original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable

future. Another important consideration is that workers' compensation benefits are allocated based upon injuries stemming from specific workplace accidents and occupational diseases.

24. In this case, there is no dispute that Claimant is medically stable from her industrial injury. The Commission finds Claimant's industrial right knee condition is medically stable.

25. There is no dispute that Claimant suffered an injury as a consequence of the subject accident. At the very least, the accident aggravated Claimant's preexisting right knee condition, causing it to become symptomatic, and leading to the surgery performed by Dr. Peterson. Dr. Peterson testified as follows in this regard:

Q. Doctor, the surgery that you performed and the care that you offered, do you think that was reasonable and necessarily related to the injury that Ms. Cutts suffered at the school when she twisted her knee?

A. I do. I think the injury she did at school was the inciting cause for the need for surgery. Even though the findings were a degenerative, possibly acute meniscal tear, the time she went from asymptomatic to symptomatic was the thing that urged the surgical intervention.

Dr. Gussner reached a similar conclusion when he stated that the subject accident aggravated Claimant's preexisting medial meniscal tear.

26. As a result of the surgery performed by Dr. Peterson, Claimant lost an additional portion of her medial meniscus, a structure which is important to stabilizing the knee and absorbing shock. Dr. Peterson recognized that removal of a portion of Claimant's medial meniscus does constitute a ratable impairment. *See* Peterson Dep., p. 23, l. 25 – p. 24, l. 11. However, in keeping with his practice, Dr. Peterson did not attempt to quantify the extent and degree of that impairment.

27. Dr. Gussner, too, recognized that the subject accident and attendant surgery resulted in a ratable permanent physical impairment under the AMA guides. In this regard, Dr. Gussner stated:

The *AMA Guides to the Evaluation of Permanent Impairment*, 6<sup>th</sup> Edition, was referenced for the impairment rating. Her diagnosis related to the 11/26/2012 accepted Workmen's Compensation claim was a medial meniscal tear which resulted in partial meniscectomy. This is best described on page 509, table 16-3, meniscal injury with default impairment of 2%. The functional history adjustment grade modifier is 1. The physical examination adjustment grade modifier is 1. Clinical studies adjustment grade modifier is 3. The net adjustment formula was calculated and this equals a 3% whole person impairment.

28. Were this the end of Dr. Gussner's musings, it would be clear that the evidence supports an award of a 3% PPI rating to Claimant as a consequence of the subject accident. However, Dr. Gussner also provided an impairment rating for Claimant's well-documented preexisting condition, and it is in connection with the apportionment of Claimant's impairment between the preexisting condition and the subject accident that things become perplexing.

29. Dr. Gussner proposed that Claimant is entitled to a 13% PPI rating for the right knee condition which pre-dated the subject accident:

There is apportionment for a pre-existing condition. The pre-existing condition is best described on page 509, table 16-3, partial medial and lateral meniscectomies with default impairment of 10% whole person. The functional history adjustment grade modifier is 1. The physical examination adjustment grade modifier is 1. Clinical studies adjustment grade modifier is 3. The net adjustment formula was calculated and this equals a 13% whole person impairment.

He then concluded that because Claimant had a higher impairment rating for her right knee condition prior to the subject accident, the accident related impairment is subsumed within that higher rating, leaving Claimant with no ratable impairment for the effects of the subject accident:

The pre-11/26/2012 impairment rating is higher than the post-11/26/2012 impairment rating. Hence, there is no impairment related to the 11/26/2012 accepted injury claim.

How this result can obtain when Dr. Gussner also clearly recognized that Claimant suffered additional injury to her right knee as a result of the subject accident and attendant surgery is left unexplained. Since the accident caused additional permanent injury to Claimant's right knee, she is entitled to an impairment rating notwithstanding that she had significant preexisting right knee problems. Simply, the accident caused a permanent worsening of Claimant's pre-existing condition. Dr. Gussner was not deposed, so it is unclear how he would reconcile what appears to be a significant inconsistency in his analysis. We reject his views on apportionment, but conclude that both he and Dr. Peterson have correctly concluded that Claimant has a ratable permanent physical impairment referable to the subject accident of 3% of the whole person, as calculated by Dr. Gussner.

### **CONCLUSION OF LAW AND ORDER**

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

1. Claimant has proven that she has suffered permanent partial impairment as a result of her 2012 industrial medial meniscus tear of 3.0% of the whole person.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this \_\_\_10<sup>th</sup>\_\_ day of February, 2014.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/  
Thomas P. Baskin, Chairman

\_\_\_\_\_  
/s/  
R.D. Maynard, Commissioner

\_\_\_\_\_  
/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the   10th   day of  February , 2014, 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/ \_\_\_\_\_