BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHLEEN L. HANSON, Claimant, v. UNITED PARCEL SERVICE, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND.	**IC 2007-038562** **IC 2009-025929** **IC 2010-014499** **IC 2010-016099** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 29, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee John C. Hummel, who conducted a hearing in Boise on April 4, 2016. Richard S. Owen represented Claimant, Kathleen L. Hanson, who was present. Susan Veltman represented Employer, United Parcel Service, and Surety, Liberty Insurance Corporation, collectively "Defendants." Paul J. Augustine represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence. After post-hearing depositions, the parties submitted briefs. The case came under advisement on August 9, 2016.

PROCEDURAL BACKGROUND AND PREVIOUS FINDINGS

Referee LaDawn Marsters held a previous hearing in this case on March 22, 2013. That hearing resulted in a decision on May 14, 2014 in which the Commission ordered as follows:

1. Claimant proved that she sustained injuries from industrial accidents on November 7, 2007, September 30, 2009, May 28, 2010, and June 24, 2010 that were treated and healed by the time of hearing.

2. Claimant proved that her preexisting right knee degenerative condition was permanently exacerbated by her industrial accident on May 28, 2010.

3. Claimant proved that she sustained permanent impairment of 7% of the right lower extremity (25%, with 18% apportioned to preexisting conditions) due to her right knee injury and 1% of the whole person due to her low back injury, both from her May 28, 2010 industrial accident.

4. Claimant proved that she was totally disabled under the 100% method.

5. Claimant failed to prove that her industrial impairments contributed to her total and permanent disability, therefore neither Defendants nor ISIF were liable for disability benefits.

On May 22, 2014, Claimant moved for clarification/reconsideration of the Commission's May 14, 2014 decision. Defendants opposed reconsideration and requested permission to deduct the permanent partial impairment amount previously paid from benefits yet owing. In her motion for clarification/reconsideration, Claimant contended that she was entitled to whatever medical treatment her physicians feel was appropriate for her right knee condition. Defendants contended that Claimant's right knee condition was declared stable in the decision.

In ruling on the request for reconsideration, the Commission stated in pertinent part as follows:

> The Commission was not asked to address Claimant's entitlement to additional medical care. The decision analyzed the 2010 accident and its resulting injuries within the context of determining causation, impairment and disability.
> …

> The Commission does not know the extent of Claimant's entitlement to medical care. The potential exists that Claimant is entitled to surgery related to the aggravation of her preexisting right knee condition.
>
> …
>
> There is nothing inconsistent with finding Claimant is medically stable as of hearing, yet recognizing she may require further treatment in the future. But the extent to which she is entitled to future medical benefits is not at issue in this proceeding.

Order for Clarification/Reconsideration (August 1, 2014), 4-5.

ISSUES

The issues to be decided according to the Notice of Hearing are as follows:

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

2. Whether and to what extent Claimant is entitled to the following benefits:

   a. Medical care;
   b. Temporary partial and/or temporary total disability benefits; and
   c. Permanent partial impairment;

3. Whether the Commission should retain jurisdiction beyond the statute of limitations;

4. Whether the Commission's decision in this matter of May 14, 2014 and Order on Reconsideration of August 1, 2014 have become final pursuant to Idaho Code § 72-718;

5. Whether the receipt of additional income benefits is precluded by the doctrine of collateral estoppel, quasi-estoppel, and/or judicial estoppel; and

6. Whether a determination that Claimant was totally and permanently disabled due to nonindustrial factors pursuant to the 100% method precludes a subsequent finding of temporary total disability.

CONTENTIONS OF THE PARTIES

Following the Commission's 2014 rulings, Claimant sought further treatment for her right knee. Andrew R. Curran, D.O., evaluated Claimant on September 3, 2014, and recommended a partial knee replacement. Claimant subsequently received that surgery on March 2, 2015. Claimant relies upon the opinion of Dr. Curran that the surgery was causally related to her industrial accident of May 28, 2010. She further argues that she is entitled to total temporary disability benefits related to her period of recovery following the surgery, as well as permanent partial impairment benefits based upon the impairment rating she received following her recovery.

Defendants contend that the Commission's prior finding that Claimant's right knee injury had been treated and fully healed is inconsistent with a further award of additional medical benefits. Nevertheless, they conditionally approved and subsequently paid for Claimant's right knee surgery and related treatment. They dispute their liability for Claimant's September 3, 2014 medical evaluation by Dr. Curran because it occurred before Surety approved him as Claimant's treating physician. They rely upon the opinion of Lance E. LeClere, M.D., that Claimant's need for surgery was unrelated to a permanent aggravation of her right knee but rather was the result of preexisting, nonindustrial degenerative arthritis. Defendants contend Commission's previous decision of May 14, 2014 has become final pursuant to Idaho Code § 72-718 and precludes any additional benefits. Thus, they assert that the Commission's prior findings concerning maximum medical improvement and permanent impairment of Claimant's right lower extremity are conclusive and may not be re-litigated. Finally, Defendants assert that Claimant had a 100% disability due to nonindustrial conditions at the time of the 2013 hearing and thus is ineligible for further indemnity benefits.

ISIF argues that regardless of the outcome of this proceeding, it is not liable for any of the benefits that Claimant is seeking nor may ISIF's liability for a portion of total and permanent disability be re-litigated.

OBJECTIONS

All objections preserved in post-hearing depositions are overruled.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant taken at the hearing;
3. Claimant's Exhibits A through H admitted at the hearing;
4. Employer/Surety's Exhibits 1through 42 admitted at the hearing;
5. The deposition transcript of Andrew R. Curran, D.O., taken on April 1, 2016; and
6. The deposition transcript of Lance E. LeClere, M.D., taken on April 28, 2016.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. **Claimant.** Claimant was 59 years of age at time of hearing and resided in Unity, Oregon. She had not worked since her thirty-year employment with Employer as a truck driver ended in 2010 and a part-time job with the postal service ended in 2012. She had no intention of returning to the workforce. She became a recipient of Social Security Disability benefits in or about 2011. She was also the recipient of a disability pension connected to her employment with Employer. Tr., 15:6-7; 27:21-28:3; Ex. 7:512 (30:20-22); Ex. 36:1247 (104:16-106:23).

2. **Right Knee Prior Medical History**. On August 30, 2000, Claimant underwent an X-ray of her right knee at Holy Rosary Medical Center in Ontario, Oregon. The reason for the

study was that Claimant was complaining of right knee pain following her 1999 ATV accident in which she had also sustained a serious head injury. The result of the X-ray, as read by John Gambino, M.D., was that there was no sign of joint effusion or arthritic changes in her right knee. There was, however, ossification at the tendinous insertions on the superior and inferior patella. Ex. 17:834.

3. On May 28, 2008, John Q. Smith, M.D., an orthopedic surgeon, examined Claimant. She presented to Dr. Smith after a fall in the shower in which she landed hard on her right knee, left shin and left shoulder. Claimant also reported that she had sustained a hyperextension injury to her right knee three months prior and it still hurt to straighten the knee, which worsened with the shower injury. Dr. Smith diagnosed a right knee contusion. He noted that he suspected "a lot of her knee issues will resolve." Dr. Smith proceeded to perform a rotator cuff surgery on her left shoulder. Ex. 26:952-956.

4. In a follow-up examination on June 18, 2008, Dr. Smith noted that Claimant's right knee "shows some patellofemoral crepitus." He diagnosed right knee patellofemoral arthritis. *Id*. at 958.

5. **Industrial Accident**. On May 28, 2010, Claimant was assisting another driver in loading his truck at Employer's Payette facility. She tripped when she caught her left toe on a tall package. She fell over boxes to the floor of the truck, landing on her elbows and knees. Ex. 7:495 (65:4-16) (Claimant Dep. 7/19/2011); Ex. 36:1240 (76:5-77:13) (Hearing Trans. 3/23/2013).

6. **Medical Care and Evaluation – 2010-2012**. Claimant sought treatment on June 1, 2010, with Ralph M. Sutherlin, D.O., of Saint Alphonsus Medical Group. Claimant reported pain of two out of 10. Dr. Sutherlin diagnosed a bilateral knee contusion and strain. He released Claimant to return to work and recommended that she avoid climbing stairs or ladders

or other high impact activities. He prescribed icing, Ibuprofen, and bilateral knee braces. Ex. 29:1096-1098.

7. Claimant returned to Dr. Smith on June 4, 2010. He noted that both of her knees had been "really bothersome, the right knee especially" since the accident on May 28, 2010. Claimant reported difficulty going up stairs. X-rays of both knees showed lateralized patellae with narrowing of the lateral patellofemoral joint spaces and facets, with no traumatic findings. Dr. Smith diagnosed bilateral knee patellofemoral arthritis. He injected Claimant's knees with cortisone. He recommended exercises and knee braces. Ex. 26:964.

8. On July 20, 2010, Dr. Sutherlin noted the results of MRIs performed on July 13, 2010 on Claimant's knees, which showed the right knee to have a 1.2 cm focus osteonecrosis to the superior aspect of the patella as well as marrow edema, and a small 4 mm focus of marrow edema to the left femoral condyle; otherwise there was no ligamentous or meniscal tear. Dr. Sutherlin diagnosed bilateral knee contusions with chronic changes and probable exacerbation of preexisting osteoarthritis. He limited Claimant to light office work with no running, jumping, squatting, kneeling, or walking on uneven surfaces. He noted that Dr. Smith would resume care for Claimant's knee condition. Ex. 29:1105.

9. On July 26, 2010, Dr. Smith reviewed Claimant's knee MRIs. He noted that both knees showed some degenerative changes about the joint itself, but the menisci and ligaments appeared to be intact. Claimant and Dr. Smith discussed treatment options and he recommended against any surgical intervention at that point, but rather to treat her knees "more expectantly" with exercises and perhaps repeating cortisone injections. Ex. 26:967.

10. Upon referral from Dr. Smith, Claimant received physical therapy at Mountain Land Physical Therapy and Rehabilitation in Caldwell from September 20, 2010 until

December 15, 2010. The therapy included work on both her left shoulder and knees. Ex. 30. At the conclusion of physical therapy, Claimant entered a work hardening program with Saint Alphonsus Rehabilitation Services (in Boise from December 21, 2010 to January 31, 2011. Ex. 32. At the conclusion of work hardening, her therapist concluded that Claimant had demonstrated the ability to return to medium-heavy work, although she still reported bilateral knee pain. *Id*. at 1194-1195.

11. Rodde D. Cox, M.D., a physiatrist with Boise Physical Medicine and Rehabilitation Clinic, evaluated Claimant on October 27, 2010. He expressed surprise that her knee pain was not better, given the amount of time since her injuries. He ordered the work hardening program for Claimant. On January 4, 2011, Dr. Cox noted that he did not see "any evidence of any obvious knee pathology on the right." On March 1, 2011, following work hardening, he evaluated Claimant for an impairment rating, observing as follows: "From the standpoint of her knee, she did have preexisting knee symptoms. I do not see any indication for impairment over and above any that would have preexisted this injury." Ex. 28:1083; 1090; 1094.

12. On June 1, 2011, Dr. Smith opined as follows regarding Claimant's knee injury: "My impression [was] that she has had pain and symptoms from the injury, however, related to her underlying condition of patellofemoral arthritis. As such, I do agree with care and management of these injuries. She does not qualify for a permanent impairment due to her underlying condition." Ex. 26:985.

13. At her deposition on July 19, 2011, Claimant testified as follows regarding continued symptoms of her right knee: "I just know that going up stairs, my right knee will absolutely hurt so bad I cannot force myself. You know, I can go up maybe 10 or 15 stairs. But if

I did that on a daily basis, it just hurts so bad, I cannot – I just can't, cannot. So I can't stand that kind of pain all day." Ex. 7:491 (49:4-9).

14. Paul C. Collins, M.D., an orthopedic surgeon, performed an independent medical examination of Claimant at her attorney's request on August 23, 2011. Dr. Collins reviewed Claimant's medical records in addition to examining her. Claimant reported her right knee continued to hurt, with some swelling. She reported that prior to the accident of May 28, 2010, she was not having symptoms of this severity. Her left knee had returned to her pre-injury status. He opined in pertinent part as follows:

> Relative to the right knee, I think she may at some point require surgical patellofemoral treatment up to and including a lateral patellar release on the right. The left knee appears to have returned to its preinjury status and I believe any changes on the left knee and subsequent surgeries would be more likely than not due to underlying degenerative changes. On the right knee, however, because of the ongoing complaints and the physical assessment, her ongoing symptoms are related to the incident when she fell. Certainly, some of her patellofemoral problems are preexisting and degenerative, but on the right knee, her ongoing physical symptoms since the fall indicate that she does have some limitation that is related.

Based on the contusion to the patellofemoral joint, the anatomic changes, and the ongoing complaints, Dr. Collins assessed a 25% impairment of the right lower extremity, with 7% being due specifically to her industrial injury and the remainder due to progressive degenerative changes. He restricted Claimant to no squatting or kneeling, no continuous ambulation for more than 15 to 20 minutes without rest, and no lifting in excess of 40 pounds. Ex. 35:1216-1220.

15. At her deposition on November 1, 2012, Claimant testified that her "right knee never did get any better. In fact it's worse … I can't take a long stride. It seems to grate sometimes … I can't go up stairs with it. I pull – I use my left leg, and then I pull my right one up. It hurts too much to go up stairs, and I don't know why. Dr. Smith hasn't explained to me enough why I would hurt that bad. It hurts." Ex. 7:538 (132:20-21; 23-24; 133:5-9).

16. In a letter dated October 3, 2012,[1] Dr. Smith stated his opinion of the independent medical examination report of Dr. Collins in pertinent part as follows: "These findings are consistent with our recommendations and our records as well … I also agree with his … his comments and recommendations regarding her right knee." Ex. C:25.

17. On December 3, 2012, Kevin R. Krafft, M.D., performed an independent medical record review at the request of counsel for Defendants. For an impairment rating regarding Claimant's right knee, he opined as follows: "She was given significant lower extremity impairment for her degenerative arthritis [by Dr. Collins], however, this preexisted her injuries of record. At the end of her work hardening program, after her injuries, Dr. Cox did not give her any further impairment. I would concur with this." Ex. 9:584.

18. **Claimant's Condition at Time of First Hearing.** At the first hearing held on March 22, 2013, Claimant testified as follows regarding the state of her right knee:

> Q. Dr. Collins said in his report that at some point you might need some surgery to make it some better. Are you to the point now if the doctor looked you in the eye and said I could fix that, would you do it?
> A. Yes.
> Q. Okay.
> A. Yes. I –
> Q. Okay. How is you your left knee?
> A. It has some pain and swelling, but it's usable. It's not something that keeps me from getting around.
> Q. Okay. All right.
> A. But –
> Q. Are you able to squat down with that right knee or kneel down?
> A. I haven't even attempted to, because I think that would probably be a disaster.
> Q. Okay.
> A. By disaster I mean I think I would have roll over and pull myself up with something. I don't think it would possibly pull me up.

[1] Testimony in Dr. Smith's deposition indicates that this letter was misdated and should have been dated October 3, 2011 instead. Ex. 38:1294-1296 (19:25-21:11).

> Q. Dr. Collins indicates he didn't think you should be walking continuously for more than about 15 to 20 minutes walking without some rest. What is your take on that?
> A. That's probably pushing it. When I do have to go somewhere I use my cane or something to lean on to take weight off.
> Q. Okay.
> A. I mean that's pushing it for – to go 15 minutes.
> Q. You said you usually – you use a cane?
> A. Yes.
> Q. Are you still wearing the brace on your right knee?
> A. Not today.
> Q. Do you other days?
> A. Yes.
> Q. What makes you wear the brace when you –
> A. He told me that it will heal up. No. The pain and the fact that it just doesn't want to do anything and I still want to try to do things. It will just hurt too much.

Ex. 36:1248 (110:3-111:17).

19. Claimant testified in the hearing held on April 4, 2016 that in or about March 2013, she could not climb stairs, she limped, and her right knee constantly hurt. Furthermore, her right knee "felt like there was little pieces of gravel or pebbles underneath it. It just hurt all the time." Tr., 15:17-21.

20. **Medical Testimony following First Hearing**. Dr. Collins testified that when he examined Claimant on August 23, 2011, she continued to have symptoms in her right knee for which surgery might be appropriate in the future. Ex. 37:1265 (17:15-19).

21. Dr. Collins opined in pertinent part as follows regarding causation:

> Q. Why is it you think that the right knee condition is related to her injury at work?
> A. Just basically, from her non-improvement. Despite the fact that she improved in her left knee and elbow, she didn't in the right knee.
> Q. What is the mechanism of injury when you fall on your kneecaps? How does that impact the physiology, of your knees?
> A. Well, it's hard to know because we haven't looked in there, but a lot of times you'll bruise the cartilage. The cartilage covers the kneecap, you'll bruise it, and it will start to have degenerative changes based on that, and/or because of the

weakness that develops in the right knee, the alignment of the kneecap with knee flexion and extension, bending, can be symptomatic.
Q. When the under lining of the kneecap is injured, what do you call that?
A. Well, the big name is chondromalacia. It's wear and tear.
Q. Is it your opinion that that was traumatically aggravated by the accident when she fell on her right knee?
A. Yes.
Q. What is the natural progress of that, Doctor?
A. Well, even – in many people, women especially, because of the alignment of their knees, they tend to get chondromalacia, so some of it could be preexisting and ongoing, but after the incident that occurred, the symptomatology increased. And it's of interest that she improved her left knee; that got better, but her right did not.
Q. Do you hold the opinion with regard to the causation of Ms. Hanson's right knee, as it relates to her work injury, to a reasonable degree of medical probability?
A. Yes, sir, I do.
Q. In other words, you feel that her injury is related to that accident to a reasonable degree of medical probability?
A. From the history, yes, sir, I do.
Q. Did you believe that it was appropriate to impose restrictions on Ms. Hanson as far as her right knee is concerned?
A. Yes, I did.

Ex. 37:1265-1266 (17:22-19:17) (Collins Dep. 4/9/2013).

22. Dr. Smith testified regarding his opinion that Claimant did not qualify for a permanent impairment for her underlying knee condition, and that the injury of May 28, 2010 did not cause arthritis in her right knee. Nevertheless, he opined that the injury caused a flare up of pain in both knees. He further opined that the injury did not permanently aggravate Claimant's right knee condition for the following reason: "We had seen her prior to this with complaints of knee pain, prior to the fall, prior to her even – you know, for other issues. So it's my impression that this was an underlying problem worsened by her fall. But even with her MRIs and stuff, I still don't consider this a permanent impairment-type lesion or problem." Ex. 38:1291-1292 (16:20-17:14).

23. Upon cross examination, Dr. Smith agreed that trauma can aggravate chondromalacia, a degeneration of the lining underneath the patella. He explained that "when you take a hard blow to it such as in trauma it can damage the cartilage cells and injure the matrix of the cartilage which is the structure of the cartilage to the extent where it causes symptoms." He further stated that continuing symptoms in a patient like Claimant is a probable indication that chondromalacia has progressed. The loss of cartilage results in "this arthritic complaint," in which kneeling, squatting, and climbing stairs becomes difficult, worse with weights. Ex. 38:1313-1315 (38:11-40:6).

24. **Claimant's Condition after First Hearing**. Claimant recalled that after the first hearing in March 2013, her right knee "just continued to get worse and worse and worse." Tr., 15:24-25. She explained that she continued to have more pain, her limping worsened, and her right heel became swollen and painful "because I was walking crooked and limping on it." She continued to have difficulty climbing stairs due to pain. To climb stairs she would lead with the left leg and then pull up her right leg, however she tried to avoid stairs altogether. Tr., 16:5-18. She also experienced "catching" under her right knee cap that made walking difficult; she used a cane to compensate and to keep from falling. *Id*. at 18:5-24. Kneeling was not possible due to pain and walking on uneven ground was dangerous. *Id*. at 19:8-20:1. Claimant's pain was localized underneath her right kneecap. *Id*. at 20:17-22. Her condition progressed to the point where she had difficulty performing household chores. *Id*. at 20:23-21:13.

25. **Parties' Communications regarding Further Medical Care.** Following the Commission's decision of May 14, 2014 and reconsideration decision of August 1, 2014, the parties' legal counsel exchanged correspondence between August 6, 2014 and January 14, 2015. They agreed that the Commission did not specifically determine Claimant's entitlement to

further medical care for her right knee. Claimant sought another treating physician while Surety scheduled Claimant for an independent medical examination. Defendants selected Lance E. LeClere, M.D., an orthopedic surgeon with Impartial, as an independent medical examiner. Claimant ultimately selected Andrew R. Curran, D.O., an orthopedic surgeon with Saint Alphonsus Medical Group, as her treating physician. Unaware that Dr. Curran had already evaluated Claimant's right knee as a "second opinion" on September 3, 2014, Defendants approved Dr. Curran as Claimant's treating physician on November 24, 2014 and approved surgery by Dr. Curran on January 14, 2015. Ex. 39:1325-1349.

26. On October 9, 2014, Gallagher Bassett Services, Inc., the third party administrator for Defendants, issued a Notice of Claim Status to Claimant. The notice provided in pertinent part that "Employer agrees to pay for medical treatment related to the aggravation of your preexisting right knee arthritis." Employer did not waive any defenses by agreeing to pay for such medical treatment. Employer further asserted that disability and impairment benefit issues were resolved by the May 14, 2014 Commission decision. Ex. 41.

27. **Medical Care and Evaluation 2014 - 2015.** Dr. Curran[2] first evaluated Claimant in an office visit on September 3, 2014, prior to his acceptance as a treating physician by Defendants. He noted that Claimant initially injured both knees in her work injury but then her right knee became more symptomatic. Claimant continued to complain of mostly anterior right knee pain, which was intermittent but sometimes was sharp enough to make her knee give way. He also noted that Claimant had a lot of discomfort with stairs. X-ray findings showed moderate patellofemoral arthrosis bilaterally. An MRI of the right knee showed osteoarthrosis involving

[2] As of the date of his deposition, Dr. Curran had practiced orthopedic medicine in Idaho for 16 years. His subspecialty is sports medicine, primarily knees and shoulders. He is board certified. Curran Dep., 1:14-25. On average he performs 130 knee surgeries each year, of which partial knee replacements are approximately 15 %. *Id.* at 14:17-20.

the patellofemoral joint. Upon examination, Claimant's right knee had no gross deformity, ecchymosis or edema. Dr. Curran noted moderate patellofemoral crepitation, no ligamentous instability, and no joint tenderness. He assessed knee pain and osteoarthritis – leg primarily, localized. For treatment of her knee pain, Dr. Curran discussed with Claimant a patellofemoral arthroplasty surgery, or partial knee replacement. Ex. F:67-70.

28. Right knee X-rays ordered by Dr. Curran for Claimant and completed on September 3, 2014, as read by Matt T. Moore, M.D., showed tricompartment degenerative joint disease most prominent with the lateral and patellofemoral compartments. No acute bony abnormalities were noted. There were prominent enthesophytes off of the superior and inferior aspect of the patella. Ex. F:69.

29. Dr. Curran noted that in her past treatment Claimant had received cortisone injections, physical therapy, and work hardening program, which did not help her with continuing pain complaints. Curran Dep., 7:7-11. He agreed with the mechanism of injury to Claimant's right knee that Dr. Collins had described in his deposition. He explained that post-traumatic arthritis in the knee occurs usually with the patellofemoral joint; a direct impact results in arthritis. He opined that a patient could have no symptoms, and no arthritis, and then develop post-traumatic arthritis, or the patient can have asymptomatic arthritis and once it is aggravated it becomes symptomatic. *Id*. at 7:12-8:23.

30. Dr. Curran asserted Claimant's need for the surgery, for the following reasons: "Well, I think she presented with post-traumatic patellofemoral arthritis that had progressed to the point where it wasn't responding to conservative treatment. And I felt that the most appropriate thing to proceed with was surgical intervention … I do believe that this injury is what resulted in her symptoms." *Id*. at 10:24-11:5.

31. Dr. LeClere[3] performed an independent medical examination of Claimant on September 19, 2014. Dr. LeClere reviewed Claimant's past medical records as well as examined her personally. He diagnosed the following: bilateral patellofemoral arthritis and left knee medial compartment arthritis, preexisting condition, diagnosed and treated in 2008; and bilateral knee contusions sustained in the 5/28/10 work event. Dr. LeClere observed that Claimant's knees appear to have preexisting patellofemoral arthritis based upon the MRI studies. He further observed that Claimant had been diagnosed and treated for preexisting patellofemoral arthritis in 2008 by Dr. Smith after the fall in the shower. He stated that Claimant "actually has documented medical treatments for the right knee and persistent chronic pain complaints dating back to 2000. Certainly there is a long history of pathology and treatments as it pertains to the right knee specifically, but also the left knee as well." Dr. LeClere opined that a "standing fall" would be unlikely to cause significant damage to the knee, and that the injuries Claimant sustained from the industrial accident were merely a contusion of the bilateral knees. He disagreed that the accident worsened her preexisting arthritis and agreed with Dr. Smith that the work-related condition would not result in any permanent impairment above and beyond her preexisting patellofemoral arthritis. Thus, he recommended no permanent impairment and concluded that Claimant would be able to return to her job at the time of injury without restriction. He opined that Claimant's right knee had healed by the time of the 03/22/13 hearing and that none of the treatment recommendations were related to the industrial accident but rather were for Claimant's preexisting condition. Ex. 42:1367-1377.

[3] Dr. LeClere graduated from Loyola University Chicago, Strich School of Medicine, in 2006. He served an orthopedic surgery internship, followed by a residency, at the Naval Medical Center in San Diego. After that he served an orthopedic fellowship at Massachusetts General Hospital, Harvard. He is board certified in orthopedic sports medicine and currently serves as an assistant professor at the Uniform Services University of Health Sciences in Bethesda, Maryland. He is licensed to practice medicine in Indiana, California, Massachusetts, Oregon, and Idaho. Ex. 42:1378; LeClere Dep., 6:19-8:20.

32. Dr. LeClere testified that Claimant's right knee did not demonstrate any signs of posttraumatic arthritis related to the industrial accident based upon the following findings:

> There are no indications of an acute cartilage injury, full thickness cartilage injury, or partial thickness cartilage injury that would indicate damage to the cartilage from an acute traumatic event. There's no intraarticular loose bodies. There's no contusion in this joint, which is swelling, which would indicate a traumatic event that had occurred inside the joint itself.
>
> In addition, there's no evidence of fracture and there's no evidence of displacement of the joint surfaces from a fracture, most commonly a posttraumatic arthritis scenario occurs after there's been a fracture that occurs inside a joint and then there's a step-off, as we call it, or displacement or irregularity of the joint surface that would then concentrate the areas of force in this stepped-off area of cartilage and bones and accelerate the arthritic process in the knee.

LeClere Dep., 13:21-14:14. He further testified that findings pertaining to posttraumatic arthritis that he described would be observable in an MRI, however he did not observe the same in Claimant's 7/13/2010 MRI. Rather, what he observed were "classic findings of primary osteoarthritis." Dr. LeClere asserted that Claimant had preexisting symptoms of primary idiopathic osteoarthritis in her right knee dating back to 2000, including May 2008 and June 2008, when Dr. Smith treated her. *Id*. at 14:15-16:22.

33. Claimant followed up with Dr. Curran on February 18, 2015. She continued to complain of anterior right knee pain. As before, Dr. Curran noted moderate patellofemoral crepitation. Claimant and Dr. Curran discussed the procedure of a right patellofemoral arthroplasty and Claimant consented to the surgery. Work restrictions included no climbing ladders, no lifting over 30 pounds, and no running or jumping. Ex. F:65-66.

34. Dr. Curran performed a right patellofemoral arthroplasty on Claimant on March 2, 2015. The indications noted for the surgery were that Claimant had received conservative treatment for her bilateral knee pain, right worse than the left, but continued to have persistent

symptoms. Claimant's "pain was secondary to advanced arthritis involving the patellofemoral articulation." The post-operative report noted that upon "entering the joint, she is found to have advanced arthritis involving the patellofemoral articulation; there were grade 4 changes seen. The rest of her knee was unremarkable. She had no arthritic change involving the medial or lateral compartments." Dr. Curran completed the surgery without complications. Ex. G:71-72.

35. Dr. Curran testified that he recommended the patellofemoral arthroplasty, or partial knee replacement, because Claimant's arthritis seemed to be isolated to one compartment and because of her age of 58 years at the time. He described his findings at surgery as "[a]dvanced arthritis. She was basically grade four. Which is exposed bone." Curran Dep., 13:2-22.

36. Dr. LeClere agreed with the postoperative diagnosis of osteoarthritis right patellofemoral articulation. LeClere Dep., 17:12-16. He also agreed that a patellofemoral arthroplasty was a reasonable medical treatment for Claimant's condition. *Id*. at 27:21-25.

37. On March 4, 2015, Dr. Curran stated that Claimant would be restricted from working for two to three months and further should be restricting from jumping and climbing. Ex. F:62.

38. On March 17, 2015, Todd M. Otstot, P.A., evaluated Claimant's progress two weeks following her surgery. He noted that an X-ray demonstrated a well aligned and well fixed patellofemoral arthroplasty. He further noted that her incision was healing well. Mr. Otstot ordered physical therapy and scheduled Claimant for follow-up with Dr. Curran in four weeks. He indicated that Claimant would require further care and was totally incapacitated from working Ex. F:59-60.

39. On April 15, 2015, Dr. Curran examined Claimant and noted that her right knee wound was healing well. She had mild effusion. Her right knee range of motion was from 0 to 120. Central patellar tracking noted without crepitation. He reviewed her postoperative X-rays and noted that the right knee showed appropriate positioning of the patellofemoral arthroplasty. Restrictions included no climbing, squatting, kneeling, or lifting over 10 pounds. Ex. F:57.

40. On July 31, 2015 Dr. Curran noted that Claimant would need ongoing care and was restricted from repeated bending/stooping, and ordered no climbing and no lifting over 40 pounds. *Id*. at 54.

41. On September 11, 2015, Dr. Curran stated that Claimant should continue to follow a home exercise program and that she was ready for an impairment rating. He restricted her from repeated bending/stooping and ordered no climbing and no lifting over 75 pounds. *Id*. at 52. Dr. Curran opined that Claimant reached maximum medical improvement on September 11, 2015. Curran Dep., 15:19-25.

42. Dr. Howard Shoemaker, M.D., of St. Luke's Occupational Health – Nampa, evaluated Claimant's right knee for a permanent impairment on December 7, 2015. He observed that "Dr. Curran last saw her on September 11, 2015 and released her at maximum medical improvement. In his note it [is] somewhat confusing as he said she may 'return to work at full duty.' Then it says no running or jumping. No lifting over 75 pounds."[4] He noted that Claimant "has improved since her injury/illness onset." He further observed that Claimant was having "minimal pain" following Dr. Curran's surgery, she walked with a normal gait, and showed no signs of pain behavior. Dr. Shoemaker further noted that as a result of the industrial accident, "a patellofemoral arthroplasty was performed at which time it was observed that Claimant had

[4] It appears that the records from Dr. Curran are incomplete as the referenced note is not otherwise found in the record.

grade 4 chondromalacia." Using the Sixth Edition of the *Guides to Evaluation of Permanent Impairment*, he rated Claimant's lower right extremity impairment at 16%. He calculated this rating using the impairment guidelines on page 511 of table 16-3 "where patellofemoral arthritis indicates there is no cartilage interval, which would be equivalent to a grade 4, has a default impairment of 20% of the lower extremity." Due to Claimant's normal gait without any assistive devices, a functional grade modified would be 0, as defined in table 16-7. Dr. Shoemaker concluded that a net adjustment of -2 moving 2 places to the left of default was appropriate, resulting in a 16% lower extremity impairment rating, which would convert to a 6% whole person impairment. In reaching this impairment rating, Dr. Shoemaker noted that there "are no factors of which we are aware for apportionment given that there was no evidence of preexisting degenerative joint disease either by history or on the surgical operative report other than the patellofemoral area." Ex. H:74-75.

43. Dr. Curran testified regarding the need for future surgery, as follows:

> Q. What is the life span of this procedure?
> A. I would expect it could last her 15, 20 years or more.
> …
> A. Or longer. With the newer plastics we are using they very well may last longer. We don't know for sure.
> …
> Q. Is it probable that she will need some kind of procedure in the future for her right knee?
> A. *I don't know if I would say probable. I would say it's possible*. We don't know for sure.
> Q. Anytime in her lifetime?
> A. It's very possible.
> …
> Q. What is the overall prognosis for the right knee?
> A. I think she has a very good prognosis. The last time I saw her she was doing well. She said her knee was doing very well. And I think she will do fine with it for quite some time.

Curran Dep., 16:4:-5; 16:8-10; 16:16-21; 17:17-22 (emphasis added).

44. Dr. LeClere agreed that it was "possible," not "probable," that Claimant would be required to undergo more surgery on her right knee in the future. He opined that Claimant's surgery would be expected to last 10 to 15 years or even longer. LeClere Dep., 28:2-29:1.

45. **Claimant's Condition after Recovery from Surgery**. Claimant described her condition following recovery from surgery as "wonderful" and the surgical result as "fabulous." She no longer had problems managing stairs. She no longer used a cane and no longer limped. Tr., 23:2-24:11.

46. **Claimant's Credibility.** Having observed Claimant's testimony and demeanor at the hearing, and having compared it with other evidence in the record, the Referee finds that Claimant was a credible witness.

DISCUSSION AND FURTHER FINDINGS OF FACT

47. The provisions of the Workers' Compensation Law should 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 of the law leave no room for a narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Nevertheless, the Commission is not required to construe facts liberally in favor of the worker where the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

48. **Finality of Commission's Prior Decisions**. Idaho Code § 72-718 provides as follows:

> A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial

> of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

In *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984), the Idaho Supreme Court interpreted this statute as follow:

> We conclude that the legislature, by adding the phrase "as to all matters adjudicated," intended the decisions of the Commission to be final and conclusive *only* as to those matters *actually adjudicated*. This is a departure from the concept of 'pure res judicata,' applied prior to 1971, which accorded decisions by the Commission finality and conclusiveness as to all matters which were, *or could have been*, adjudicated.

Id., 106 Idaho at 721, 682 P.2d at 1268 (emphasis in original). In *Woodvine*, the Court remanded the case to the Commission for a further fact finding on whether a compensation agreement award was for permanent impairment or permanent disability because the agreement was ambiguous; if the Commission found that the agreement award was for disability, then the agreement would be considered "final and conclusive as to claimant's permanent disability." *Id*., 106 Idaho at 722, 682 P.2d at 1269.

49. In this case, the Commission clarified in its Order for Reconsideration and Clarification that Claimant was not precluded from seeking additional medical care related to her right knee because her right to future medical care was not at issue in the first hearing. Thus, the decision of May 14, 2014 was not final and conclusive under Idaho Code § 72-718 regarding Claimant's right to knee surgery and related care. Nevertheless, Claimant is still required to demonstrate a causal connection between the industrial accident's permanent aggravation of her right knee degenerative condition and the need for surgery. As for Claimant's rights to temporary disability benefits and impairment as they are affected by the finality and conclusiveness of the decision of May 14, 2014, those issues will be addressed below in the discussion of the merits of those issues.

50. **Causation**. Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support her contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). Compensation is recoverable where Claimant's work causes an accident that aggravates or accelerates a preexisting diseased condition. *Bush v. Bonners Ferry School District,* 102 Idaho 620, 621 636 P.2d 175, 176 (1981).

51. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

52. There is no dispute that Claimant had patellofemoral arthritis in her right knee that preexisted her industrial accident on May 28, 2010. Dr. Smith observed such arthritis in a second follow-up examination on June 18, 2008, after Claimant had slipped in the shower, landing on her right knee. He noted "some patellofemoral crepitus" in his examination.

Ex. 26:958. Subsequent opinions by other physicians after the industrial accident confirmed that Claimant had preexisting arthritis in her knee.

53. Nevertheless, Dr. Smith's observation concerning right knee arthritis in June 2008 was the first and only medical record that mentioned this condition prior to Claimant's industrial accident in May 2010. There is no record that Dr. Smith conducted any follow-up or that Claimant required therapy or other significant treatment for her right knee thereafter until the industrial accident. Furthermore, an earlier incident in August 2000 in which Claimant complained of right knee pain following her 1999 ATV accident, showed no arthritic changes in an X-ray. Ex. 17:834. Therefore, while there was some limited history of Claimant's arthritic right knee prior to the industrial accident in May 2010, it was minor and unremarkable. It is reasonable to conclude, as. Dr. Smith predicted in 2008, that Claimant's prior knee issues had resolved at the time of her industrial accident. Ex. 26:952.

54. Dr. LeClere noted in his independent medical examination that Claimant "actually has documented medical treatments for the right knee and *persistent pain complaints* dating back to 2000. Certainly there is a *long history of pathology and treatments as it pertains to the right knee* specifically, but also the left knee as well." Ex. 42:1376 (emphasis added). Dr. LeClere's characterization of the medical history of Claimant's knee arthritis is exaggerated. Two instances of seeking treatment for her knees (one each in 2000 and 2008, only the latter of which involved a diagnosis of patellofemoral arthritis) do not equate to either "persistent pain complaints" or a "long history of pathology and treatments." Such hyperbole was in service of his hypothesis that Claimant's right knee problem was solely the result of a preexisting condition and thus treatment for it was not due to the industrial accident. Dr. LeClere's opinion is thus discredited.

55. In contrast, Dr. Collins and Dr. Curran correctly analyzed Claimant's right knee when they observed that her persistent right knee pain complaints after the 2010 industrial accident, while her left knee complaints resolved, demonstrated that the accident permanently aggravated her right patellofemoral arthritis, or chondromalacia, ultimately requiring surgery. As Dr. Collins observed, "Well, even – in many people, women especially, because of the alignment of their knees, they tend to get chondromalacia, so some of it could be preexisting and ongoing, but after the incident that occurred, the symptomatology increased. *And it's of interest that she improved the left knee; that got better, but her right knee did not*." Ex:37:1266 (18:23-19:4) (emphasis added). Similarly, Dr. Curran noted that Claimant initially injured both knees in her work accident but then her right knee became more symptomatic. Because Claimant "presented with post-traumatic patellofemoral arthritis that had progressed to the point where it wasn't responding to conservative treatment," and because "this injury is what resulted in her symptoms," Dr. Curran opined that "the most appropriate thing was to proceed with was surgical intervention." Curran Dep., 10:24-11:5.

56. The fact that Claimant's right knee remained highly symptomatic, while her left knee improved after the industrial accident, as noted by Dr. Collins and Dr. Curran, is an important one. Both knees had preexisting arthritis. The causal relationship between Claimant's right knee condition and the industrial accident is thus not merely a sequential one.

57. Furthermore, unlike the prior medical history of her knees in 2000 and 2008 that resulted in minor and quickly-resolved complaints, Claimant consistently complained of right knee symptoms beginning with the May 28, 2010 industrial accident up until her surgery in March 2015. Dr. Smith noted how "bothersome" her right knee was since the May 28, 2010 accident on June 4, 2010. Claimant reported difficultly going up stairs at that time. Ex. 26:964.

At her deposition on July 19, 2011, Claimant testified that "going up stairs, my right knee will absolutely hurt." Ex. 7:491 (49:4-9). To Dr. Collins on August 23, 2011, Claimant reported that prior to the accident, she did not have knee symptoms "this severely." Ex. 35:1218. At her deposition on November 12, 2011, Claimant testified that her right knee never improved but rather got worse; she could no longer go up stairs. Ex. 7:538 (132:20-21). At the first hearing on March 22, 2013, Claimant testified that she would not attempt to squat or kneel with the right knee because it would be a "disaster." Ex. 36:1248 (110:3-111:17). After the first hearing, Claimant's pain symptoms in her right knee got "worse and worse and worse." Tr., 15:24-25. She had increased difficulty climbing stairs due to pain. *Id*. 16:5-18.

58. Although he adhered to his opinion that Claimant's knee symptoms were the result of underlying degenerative arthritis and not due to the permanent aggravation of her arthritis by the accident, nevertheless Dr. Smith agreed that trauma can aggravate chondromalacia, and that continuing symptoms in a patient like Claimant is a probable indication that chondromalacia has progressed, resulting in an "arthritic complaint" in which kneeling, squatting, and climbing stairs becomes difficult, the symptoms of which Claimant repeatedly complained after the industrial accident. Ex. 38:1313-1315 (38:11-40:6).

59. In summary, based upon the medical evidence and other supporting evidence in the record, the industrial accident permanently aggravated Claimant's underlying condition of chondromalacia in her right knee, requiring surgery to correct it. Claimant has proven a probable causal connection between the industrial accident of May 28, 2010 and her need for patellofemoral arthroplasty that Dr. Curran performed on March 2, 2015.

60. **Medical Care.** Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and

hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

61. In *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court held that the "Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach." *Id*., 158 Idaho at 798, 353 P.3d at 419.

62. There is no dispute among the medical authorities regarding Claimant's medical need for the patellofemoral arthroplasty performed by Dr. Curran on March 2, 2015. Dr. Collins predicted the need for such surgery in his independent medical examination on August 23, 2011. Ex. 35:1219. Dr. Curran, who performed the surgery, opined that he concluded that "the most appropriate thing to proceed with was surgical intervention." Curran Dep., 10:24-11:5. Although he disagreed on causation, nevertheless Dr. LeClere agreed that a patellofemoral arthroplasty was a reasonable medical treatment for Claimant's right knee. LeClere Dep., 27:21-25.

63. In addition to medical opinions supporting the reasonableness of Claimant's surgery, the factual record supports that it was a reasonable treatment due to Claimant's positive response to the surgery. Claimant described the result of the surgery as "fabulous." She further testified that it enabled her to climb stairs, she no longer limped, and she no longer needed a cane. Tr., 23:2-24:11. The evidence further shows that prior conservative treatment for the right knee, including injections and physical therapy, had failed to resolve Claimant's condition.

64. Based upon the totality of the circumstances, medical treatment for Claimant's right knee, including the patellofemoral arthroplasty performed by Dr. Curran on March 2, 2015,

and any related recovery treatment and consultations, excluding Dr. Curran's office consultation of September 2, 2014, were reasonable and compensable pursuant to Idaho Code § 72–432(1).

65. Defendants challenged the compensability of Claimant's consultation with Dr. Curran on September 2, 2014 because Claimant did not seek their prior approval of him as her treating physician. Idaho Code § 72–432(4)(a) provides in pertinent part as follows:

> The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer.

66. Defendants approved Dr. Curran as Claimant's treating physician on November 24, 2014 but had no prior knowledge of his evaluation of Claimant for a "second opinion" on September 2, 2014. Furthermore, there is no evidence that Claimant's prior treating physician referred her to Dr. Curran for consultation, nor did Claimant petition the Commission for a change of physician to Dr. Curran prior to September 2, 2014. Under these circumstances, Defendants are not liable for any expenses associated with Claimant's consultation with Dr. Curran on that date, pursuant to Idaho Code § 72-432(4)(a).

67. **Temporary Disability Benefits**. The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees during a period of recovery. Claimant argues that she is entitled to temporary disability benefits during her period of recovery from her surgery on March 2, 2015 until Dr. Curran determined that she was at maximum medical improvement on September 11, 2015. Defendants argue that the Commission's prior finding that

Claimant was 100% disabled due to nonindustrial factors precludes the receipt of temporary disability benefits.

68. The statutory purpose of temporary disability benefits is to compensate the injured worker for lost wages. Idaho Code § 72-102(11) defines disability "for the purpose of determining total or partial temporary disability income benefits, as a *decrease in wage-earning capacity* due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code." (Emphasis added.) Additionally, the law "speaks in terms of 'disability for work,' not in terms of disability in the medical sense." *Wilson v. Gardner Associated, Inc.*, 91 Idaho 496, 503, 426 P.2d 567, 574 (1967).

69. Claimant argues that temporary disability benefits do not compensate workers for lost wages because the "full language" of Idaho Code § 72-102(11) "does not indicate that it applies to total temporary disability benefits even though the language indicates that it does." *See*, Claimant's Reply Brief at 14. Claimant further argues that the reference to physical impairment and nonmedical factors in the statute should be interpreted to apply to permanent disability instead, and that the inclusion of the phrase "determining total or partial disability income benefits" in the statute should be considered anomalous and thus disregarded. *Id*.

70. In Idaho Code § 72-102(11), the Legislature stated that the purpose of the statute is to define disability "for the purpose of determining total or partial temporary disability income benefits" and that such definition is based upon a "decrease in wage earning capacity." Because the Legislature then stated that such decrease in wage earning capacity may be affected by the medical factor of impairment and nonmedical factors that are also relevant to and necessary for permanent disability does make the statute ambiguous, as Claimant suggests.

71. If Claimant's novel interpretation of Idaho Code § 72-102(11) were correct, then the provision for partial disability benefits in Idaho Code § 72-408 would make no sense. Under that statute, a worker who is able to work a partial work week during a period of recovery is entitled to partial temporary disability benefits, based upon the "decrease in wage-earning capacity," while a worker who is unable to work at all due to a temporary period of disability is entitled to total temporary disability benefits. The difference between total and partial temporary benefits is whether the worker earns any wages. Furthermore, a worker who earns his or her full weekly wage is ineligible for any temporary disability benefits whatsoever during a work week, regardless of whether he or she is still in a period of recovery.

72. Claimant would strip the statutory scheme for temporary disability benefits of its fundamental purpose of compensating a worker for wage loss during a temporary disability from work, and replace it with a medical benefit scheme based solely upon a period of recovery from an injury, regardless of whether the injury results in a wage loss. Such an interpretation is contrary to the relevant statutes. Idaho Code § 72-102(11) and § 72-408, read reasonably together and according to their plain meaning, clearly require a wage loss, either total or partial, for a claimant to recover temporary disability benefits.

73. An analogous case from other another jurisdiction provides helpful guidance. In *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 896 N.E.2d 140 (2008), the Ohio Supreme Court held as follows:

> Temporary total disability compensation is intended to compensate an injured worker for the loss of earnings incurred while the industrial injury heals. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533. There can be no lost earnings, however, or even a potential for lost earnings, if the claimant is no longer part of the active work force. As *Ashcraft* observed, a claimant who leaves the labor market "no longer incurs a loss of earnings because he is no longer in a position to return to work." When the reason for this absence

> from the work force is unrelated to the industrial injury, temporary total disability compensation is foreclosed.

Pierron, 120 Ohio St.3d at 41, 896 N.E.2d at 142. In *Pierron*, the claimant retired, albeit involuntarily, in 1997 and thereafter chose not to seek other work except for a brief period of temporary employment. When he sought temporary disability benefits in 2003 for a recovery period beginning in 2001, the court found that he was ineligible for temporary disability benefits because his absence from the workforce was unrelated to his industrial injury. *Id*.

74. Claimant last worked for Employer on July 29, 2010. Ex. 7:512 (30:20-22). Thereafter, she worked part-time for several hours per week for the United States Postal Service until being laid off in July 2012; she has not worked since. Ex. 36:1247 (104:16-106:23). During her period of recovery from knee surgery in 2015, therefore, Claimant was no longer an active participant in the workforce. She was also receiving both a disability pension as well as Social Security Disability benefits throughout her period of recovery. Additionally, Claimant testified that she had no intention of returning to work, regardless of her recovery from her surgery. Tr., 27:21-23.

75. In this case, like the claimant in *Pierron*, 120 Ohio St.3d 40, 896 N.E.2d 140, temporary disability benefits would not compensate Claimant for wages lost from her position at Employer or from any other job, as her last active participation in the workforce ended approximately three years prior to her surgery. Claimant had no actual wage earning capacity that suffered a decrease under Idaho Code § 72-102(11) during her period of recovery from surgery from March 2 until September 11, 2015. As a result, she is ineligible for temporary disability benefits.

76. Furthermore, Claimant was not temporarily unable to return to the duties of her employment with Employer or any other job because of her surgical recovery from her industrial

knee condition. Rather, she was already legally incapacitated from working because of the nonindustrial factors identified in the Commission's previous decision that concluded she was 100% disabled. As a legal matter, therefore, it cannot be concluded that, but for her industrial injury, Claimant would have been gainfully employed during her period of recovery.

77. Claimant argues that *Corgatelli v. Steel West Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) supports the conclusion that a prior finding of 100% total and permanent disability does not legally preclude her from a later period of entitlement to temporary disability benefits. *See*, Claimant's Reply Brief at 12. In *Corgatelli*, the Idaho Supreme Court held that the defendants could not receive a credit for previous impairment payments and thus receive a deduction from total and permanent disability benefits to be paid to the claimant. *Id*., 157 Idaho at 292-293, 335 P.3d at 1155-1156. The Court concluded that the statutory scheme did not provide for such a "credit." *Id*.

78. *Corgatelli* is inapposite for a number of reasons. First, the payment of temporary disability benefits was not at issue in that case, like it is here. Rather, the issue in *Corgatelli*, *Id*., was permanent disability and whether previous impairment payments could be counted as a credit against permanent and total disability benefits. Second, here Defendants are not arguing that any prior award of permanent disability benefits constitutes a "credit" against payment of temporary disability benefits. On the contrary, Claimant in this case received no permanent disability benefits award because her 100% disability was entirely due to nonindustrial factors.

79. The Commission's prior finding that Claimant was 100% disabled due to nonindustrial factors does not provide Defendants with any credit against payment of temporary disability benefits. Rather, it precludes Claimant from receipt of temporary disability benefits as a matter of law because the Commission's prior decision conclusively found that she had no

regular labor market and her nonindustrial medical conditions completely prevented her from working. In the decision of May 14, 2014, the Referee found in pertinent part as follows: "The evidence in the record establishes that there is no employment regularly available to Claimant in Unity and its closely surrounding areas." Findings of Fact, Conclusions of Law, and Recommendation (5/14/14), 46. The Referee further found as follows: "Claimant's loss of access to employment at the time of hearing due to her preexisting vision and left shoulder impairments and her non-medical factors render her 100% totally and permanently disabled." *Id*. at 47. Defendants note that Claimant, who still resides in Unity, Oregon, "has not alleged a change in her nonindustrial physical conditions or relevant non-medical factors that would impact her disability status, nor does she contend that she is no longer totally and permanently disabled." Defendants' Post-Hearing Brief at 22.

80. Defendants have thus correctly argued that because the Commission previously found Claimant to be 100% disabled due to nonindustrial factors, she is precluded from the receipt of additional temporary disability benefits. In this regard, the decision of May 14, 2014 is final and conclusive, pursuant to Idaho Code § 72-718, and precludes Claimant's eligibility for additional temporary disability benefits.

81. Claimant has failed to demonstrate her eligibility for temporary disability benefits based upon her period of recovery from her knee surgery from March 2 to September 11, 2015, both because she had no wage loss that would factually qualify her for such benefits and because the Commission previously found her to be 100% disabled due to nonindustrial factors.

82. **Permanent Partial Impairment**. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. While

utilizing the advisory opinions of physicians, the Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

83. Claimant alleges entitlement to additional permanent partial impairment (PPI) benefits based upon the impairment rating given on December 7, 2015 by Dr. Shoemaker of 16% of the lower right extremity. As they argued on temporary disability benefits, Defendants assert that claim preclusion should prevent Claimant receiving further PPI benefits, because she previously received payment of a 7% impairment of the lower right extremity, as determined by Dr. Collins on August 23, 2011, and subsequently awarded by the Commission in its previous decision of May 14, 2014.

84. Both the impairment ratings of Dr. Collins and Dr. Shoemaker were for the same body part and based upon the same industrial injury to Claimant's right knee that occurred on May 28, 2010. Setting aside the issue of claim preclusion for the moment, the standard method for resolving the correct amount of PPI to award to a claimant, when multiple physicians have rated the claimant for impairment of the same body part based upon the same injury, would be to convert the multiple impairment ratings to the statutory percentage for the whole person and then average them, as provided by IDAPA § 17.02.04.281.02. If this were done in this case, the 7% lower right extremity impairment rating by Dr. Collins would be converted to a whole person impairment, which yields 2.8%, rounded to its nearest whole number of 3%. Dr. Shoemaker's 16% impairment rating converts to a 6% whole person impairment. Averaging the two ratings yields an impairment rating of 4.5%. It follows that because Claimant already received payment of a 3% PPI, she would then be entitled to an additional PPI of 1.5%.

85. Nevertheless, the Commission's regulations further provide that if averaging multiple ratings results in a "manifest injustice," the Commission has the discretion to determine the correct impairment otherwise. IDAPA § 17.02.04.281.03. Here it would be unjust to average the two impairment ratings as they were found by the respective physicians, because the rating of Dr. Shoemaker failed to take into account any apportionment for preexisting arthritis, whereas the impairment rating of Dr. Collins did so. Dr. Shoemaker specifically noted that there "are no factors of which we are aware for apportionment given that there was no evidence of preexisting joint disease either by history or on the surgical operative report other than the patellofemoral area." Ex. H:75. This finding is perplexing, as the patellofemoral area of the right knee is precisely where Claimant had a preexisting pathology of degenerative arthritis, which was recognized by every other medical authority in this case, including Dr. Collins, who assigned Claimant a 25% impairment of the lower right extremity, with 7% being due specifically to her industrial injury and the remainder of 18% due to progressive degenerative changes. Ex. 35:1220.

86. Thus, it would be more accurate, prior to averaging the two impairment ratings, to apportion Dr. Shoemaker's rating based upon preexisting degenerative changes. Because Dr. Shoemaker did not do so, it would be reasonable to apply the same percentage of apportionment utilized by Dr. Collins in his impairment rating, in which he attributed 72% of Claimant's right knee condition to preexisting degenerative changes and 28% to the industrial injury. If a 72% deduction for apportionment of a preexisting condition were applied to Dr. Shoemaker's 6% whole person impairment rating, this would yield a 1.68% whole person impairment, rounded up to a 2% whole person impairment. Averaging this apportioned 2% impairment rating with the impairment rating by Dr. Collins of 3% equates to a 2.5% whole

person impairment. Even if this 2.5% impairment were rounded up to 3%, Claimant would be entitled to receive payment of no further PPI than she has already received because she already received a PPI award of 3%.

87. In the alternative, Dr. Shoemaker's failure to appropriately apportion Claimant's impairment rating for preexisting arthritis in her kneecap demonstrates that his impairment rating lacked a proper foundation, and therefore should be entitled to no factual weight, as Defendants have argued. *See*, Defendants' Post-Hearing Brief at 24. Thus, regardless of whether Dr. Shoemaker's impairment rating, after apportionment, is averaged with that of Dr. Collins, or it is determined to have an insufficient factual foundation, the result is the same – Claimant is entitled to no further award of permanent partial impairment.

88. Claimant argues, however, that Dr. Shoemaker's impairment rating was "based upon the artificial components placed in Claimant's right knee" and that no apportionment was necessary or appropriate because "the surgery performed by Dr. Curran eliminated the degenerative changes in Claimant's patellofemoral joint." *See*, Claimant's Reply Brief at 18. This requires a closer examination of Dr. Shoemaker's report. *See*, Exhibit H:74-75. Of first concern is that there is no indication that Dr. Shoemaker reviewed prior medical records other than Dr. Curran's surgical report. This suggests that Dr. Shoemaker was unaware of Claimant's knee complaints prior to her industrial injury. Dr. Shoemaker noted the reason for his examination as follows: "The patient was referred by Dr. Curran for an impairment rating … The patient began having right knee problems since a work injury on May 28, 2010. As a result of that accident the patient had surgery on March 2, 2015 at which time she was noted to have grade 4 chondromalacia." Dr. Shoemaker summarized the basis for his impairment rating as follows:

> At this time we turn to the 6th addition [sic] of the impairment guidelines specifically on page 511 of table 16-3 where *patellofemoral arthritis indicates that there is no cartilage interval, which would be equivalent to a grade 4, has a default impairment of 20% of the lower extremity.* Functional grade modifier would be 0 based on a normal gait without any assistive devices as defined in table 16-6. Physical examination grade modifier would be a grade 2 based on a 2 cm atrophy as defined on table 16-7. Clinical studies modifier was nonapplicable [sic] as it was used to make the diagnosis. The patient therefore has a net adjustment of -2 moving 2 places to the left of the default which gives her a 16% lower extremity impairment rating. There are no factors of which we are aware, for apportionment given that there was no evidence of preexisting degenerative joint disease either by history or on the surgical operative report other than the patellofemoral area. This would convert to a 6% of the whole person.

Ex. H:75 (emphasis added).

89. Claimant's argument that Dr. Shoemaker's impairment rating was based upon the "artificial components placed in Claimant's right knee," therefore, is not reflected in his rationale for the rating. Rather, Dr. Shoemaker based the default impairment on a grade 4 chondromalacia of Claimant's right knee, meaning no cartilage interval, or a bone on bone arthritic condition. Thus, Dr. Shoemaker's impairment rating was based upon the arthritic condition of Claimant's right knee, regardless of the surgery. Furthermore, even though the patellofemoral surgery performed by Dr. Curran smoothed the edges of that degeneration in addition to placing hardware, that does not change the fact that Claimant's knee was impaired by chronic degenerative changes, as permanently aggravated by the industrial accident. That Dr. Shoemaker failed to take into account any apportionment for preexisting pathology renders it unreliable and entitled to no weight.

90. Because as a factual matter Claimant is entitled to no additional permanent partial impairment benefits as result of the industrial accident of her right knee, it is unnecessary to analyze the argument of Defendants for claim preclusion on this issue.

91. Claimant has not demonstrated entitlement to an award of additional permanent impartial benefits beyond what she already received as a result of the Commission's prior decision of May 14, 2014.

92. **Retention of Jurisdiction**. The final issue is whether the Commission should retain jurisdiction beyond the statute of limitations. Whether to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. When it is clear that there is a probability that medical factors will produce additional impairment in the future, it is appropriate for the Commission to retain jurisdiction. *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 896, 684 P.2d 297, 298 (1984). Similarly, where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. *Elmore v. Floyd Smith, Jr. Trucking*, 1986 IIC 0697.6.

93. There is insufficient evidence to show that there is a clear probability that medical factors will produce additional impairment in the future due to Claimant's right knee condition. She testified that her recovery from the surgery was "wonderful" and the surgical result was "fabulous." Furthermore, because of the surgery, Claimant no longer needed to use a cane to ambulate, no longer limped, and could climb stairs, which was her primary complaint prior to her surgery. Tr., 23:2-24:11. More importantly, however, there is no medical testimony in the record that Claimant will suffer any further impairment due to her right knee.

94. Additionally, there is insufficient evidence of a probable need for temporary disability benefits associated with surgery. Both Dr. Curran and Dr. LeClere opined only that it

was "possible," not "probable" that Claimant would require further surgery in the future on her right knee. Curran Dep., 16:8-21; LeClere Dep. 28:2-29:1. Moreover, because this decision has concluded that Claimant is ineligible for further temporary disability benefits both because she is 100% disabled according to nonindustrial factors and because she is no longer participating in the labor market, as a legal matter Claimant is foreclosed from receiving any further such indemnity benefits.

95. For the foregoing reasons, the Commission should not retain jurisdiction beyond the statute of limitations.

CONCLUSIONS OF LAW

1. Claimant has proven a probable causal connection between the industrial accident of May 28, 2010, the permanent aggravation of her right knee condition, and the need for the patellofemoral arthroplasty that Dr. Curran performed on March 2, 2015.

2. Medical treatments for Claimant's right knee condition, including the patellofemoral arthroplasty performed by Dr. Curran on March 2, 2015, and any related recovery treatment and consultations, are reasonable and compensable pursuant to Idaho Code § 72-432(1). Defendants are liable for such medical benefits.

3. Defendants are not liable for medical expenses associated with the consultation that Dr. Curran performed on September 2, 2014, because Claimant did not comply with Idaho Code § 72-432(4)(a).

4. Claimant is ineligible for temporary disability benefits during her period of recovery from knee surgery from March 2 to September 11, 2015.

5. Claimant is not entitled to an award of any further permanent partial impairment.

6. The Commission should not exercise its discretion to retain jurisdiction of this case beyond the statute of limitations.

RECOMMENDATION

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

DATED this 16th day of August, 2016.

INDUSTRIAL COMMISSION

___/s/______________________________
John C. Hummel, Referee

ATTEST:

___/s/_____________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

RICHARD S. OWEN
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P.O. BOX 1521
BOISE, ID 83701

___ /s/____________________________

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHLEEN L. HANSON,

Claimant,

v.

UNITED PARCEL SERVICE, INC.,

Employer,

and

LIBERTY INSURANCE CORPORATION,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND.

IC 2007-038562
IC 2009-025929
IC 2010-014499
IC 2010-016099

ORDER

Filed August 29, 2016

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

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

1. Claimant has proven a probable causal connection between the industrial accident of May 28, 2010, the permanent aggravation of her right knee condition, and the need for the patellofemoral arthroplasty that Dr. Curran performed on March 2, 2015.

2. Medical treatments for Claimant's right knee condition, including the patellofemoral arthroplasty performed by Dr. Curran on March 2, 2015, and any related recovery

treatment and consultations, are reasonable and compensable pursuant to Idaho Code § 72-432(1). Defendants are liable for such medical benefits.

3. Defendants are not liable for medical expenses associated with the consultation that Dr. Curran performed on September 2, 2014, because Claimant did not comply with Idaho Code § 72-432(4)(a).

4. Claimant is ineligible for temporary disability benefits during her period of recovery from knee surgery from March 2 to September 11, 2015.

5. Claimant is not entitled to an award of any further permanent partial impairment.

6. The Commission should not exercise its discretion to retain jurisdiction of this case beyond the statute of limitations.

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

DATED this 29th day of August, 2016.

INDUSTRIAL COMMISSION

___ /s/___________________________________
R.D. Maynard, Chairman

___ /s/___________________________________
Thomas E. Limbaugh, Commissioner

___ /s/___________________________________
Thomas P. Baskin Commissioner

ATTEST:

___ /s/___________________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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sjw ___/s/____________________________