BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANICE WOOD, Claimant, v. REESE POYFAIR RICHARDS, PLLC, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-017840** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 11/9/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on May 29, 2018. Claimant, Janice Mitchell (formerly Wood), was present in person and represented by Michael J. Whyte, of Idaho Falls. Defendant Employer, Reese Poyfair Richards, PLLC, and Defendant Surety, State Insurance Fund, were represented by Trent J. Belnap, of Idaho Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 20, 2018. 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

The issues to be decided are:[1]

[1] In her briefing, Claimant asserted the issue of retention of jurisdiction. Defendants objected to present treatment of this issue. Retention of jurisdiction was not mentioned in Defendants' Request for Calendaring or in Claimant's Response to Request for Calendaring. Consequently, it was not listed as an issue in the Commission's Notice of Hearing. Pursuant to Idaho Code § 72-713, it cannot be addressed in the present decision.

1. Claimant's entitlement to additional medical care, including whether the conditions for which she seeks medical benefits were caused by her industrial accident;

2. Whether Claimant is medically stable and, if so, the date thereof;

3. The permanent impairment of Claimant's right knee;

4. The extent of Claimant's permanent disability;

5. Apportionment pursuant to Idaho Code § 72-406; and

6. Claimant's entitlement to an award of attorney fees.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered an industrial accident on July 21, 2011, when she tripped and fell on a sidewalk while on her way to a UPS drop box. Defendants accepted the claim and provided medical benefits for her broken right arm and her shoulder, back, neck, and left knee injuries. Claimant now asserts she is entitled to further medical treatment for her right knee, reimbursement for additional chiropractic treatments provided by James Gardner, D.C., and attorney fees for Defendants' denial thereof. Defendants maintain that Claimant has not proven her entitlement to any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits 1 through 11 and Defendants' Exhibits 1 through 28, admitted at the hearing; and

3. Claimant's testimony taken at hearing.

FINDINGS OF FACT

1. Claimant was born in 1964. She was 54 years old and resided in Idaho Falls at the time of the hearing. Reese Poyfair Richards, PLLC (Reese), was a law firm maintaining an office in Idaho Falls at all relevant times.

2. **Background.** In January 1997, Claimant began working in the office for Reese. On July 20, 2011, Claimant presented to James Gardner, D.C., for chiropractic care of headaches and neck, shoulder, and back symptoms. Claimant had no pre-accident knee complaints.

3. **Industrial accident and treatment.** On July 21, 2011, while working for Reese, Claimant was on her way to a UPS drop box when she tripped over a raised section of sidewalk and fell landing on her hands and knees on the sidewalk.[2] She fractured her right elbow and noted immediate bilateral hand and knee pain. Claimant was earning approximately $15.00 per hour at the time of the accident.

4. Claimant presented to Dr. Gardner the day of her fall reporting pain in her right arm and both knees. He provided chiropractic treatment. On July 22, 2011, Claimant presented to orthopedic surgeon Brigham Redd, M.D., with persisting right arm symptoms. Right elbow x-rays showed "nondisplaced fracture of the radial head." Claimant's Exhibit 8, p. 151. Dr. Redd prescribed medications and Claimant later attended physical therapy for several months. Claimant continued to treat with Dr. Redd, who recorded her bilateral knee complaints. She also received periodic chiropractic treatment from Dr. Gardner for her low and upper back symptoms. On August 10, 2011, Dr. Redd recorded Claimant's left knee was significantly bothersome. Left knee x-ray showed no fracture or dislocation. On October 12, 2011, Dr. Redd again examined Claimant and suggested she stop physical therapy and pursue a home exercise program.

[2] Claimant settled her subsequent civil suit against the sidewalk contractor for $75,000.00.

5. On November 17, 2011, Dr. Gardner recorded: "the patient presented for treatment and a release examination. She feels resolved of symptoms related to the accident earlier this year. …. The patient has reached MMI and is released from care today." Claimant's Exhibit 11, pp. 245-246. Defendants provided payment for chiropractic treatments by Dr. Gardner until he released Claimant on November 17, 2011, from care for her industrial accident.

6. Claimant testified at hearing that after her release by Dr. Gardner, both of her knees continued to be symptomatic, with audible popping, stiffness, and weakness.

7. In December 2011, Claimant fell while walking down the steps at the YMCA. She testified that her knees gave out causing her fall and skin her left shin.

8. On April 5, 2012, Claimant returned to Dr. Redd reporting right elbow and bilateral knee pain, left much worse than right, and bilateral knee popping. He recommended glucosamine and chondroitin supplements with possible left knee arthroscopy if her condition did not improve.

9. On May 1, 2012, Claimant sought further treatment from Dr. Gardner at the request of her attorney for "recurring symptoms from the work injury that haven't resolved and she continues to feel pain and numbness in the bilateral upper extremities …. The patient has intermittent headaches …." Defendants' Exhibit 13, p. 248. Claimant testified she sought treatment from Dr. Gardner due to her subsequent fall; however his notes make no mention of any fall subsequent to her July 21, 2011 accident or of any ongoing knee complaints.

10. On June 18, 2012, Claimant was examined by Gary Walker, M.D., at Defendants' request. He recorded her complaints of bilateral knee pain (left much greater than right), and right arm, shoulder, neck and back pain. Claimant further reported plantar fasciitis which she related to her industrial accident. Dr. Walker rated Claimant's permanent impairment of her

right elbow at 10% of the upper extremity, equating to 6% of the whole person. He recommended consideration of further treatment for her left knee.

11. In July 2012, Claimant fell to the ground in her backyard. She testified at hearing that she did not trip but her knee or knees gave out. She could not recall which knee gave out. She reported subsequently worsened right knee pain.

12. On August 2, 2012, David Simon, M.D., examined Claimant at Defendants' request and concluded that her right elbow and left knee conditions were related to her industrial accident. Dr. Simon did not relate Claimant's right knee condition to her industrial accident, rather after recording her report of falling in July 2012 in her backyard, he noted: "However, since her right knee pain is currently worse following the more recent fall, I think that the fall on 7/2/12 is the predominant cause of her current right knee problems." Defendants' Exhibit 22, p. 351. He agreed with Dr. Walker's impairment rating of Claimant's elbow, but opined she had not reached maximum medical improvement for her left knee and recommended further treatment including physical therapy. On September 24, 2012, Dr. Gardner agreed with Dr. Simon's findings, conclusions, and recommendations. Defendants' Exhibit 13, p. 282. Also on September 24, 2012, Dr. Walker agreed with Dr. Simon's findings. Defendants' Exhibit 24, p. 377.

13. On October 17, 2012, Claimant began receiving treatment for her left knee from Dr. Walker. He prescribed physical therapy for her knee symptoms. On November 7, 2012, Dr. Walker prescribed "bilateral knee sleeves with lateral buttress to … help stabilize the patella better." Defendants' Exhibit 24, p. 380. Dr. Walker saw Claimant periodically for several months thereafter and provided left knee injections. He provided no other right knee treatment. Claimant testified she wore the knee braces for only two weeks as they were very cumbersome.

14. On January 16, 2013, Claimant underwent a left knee MRI that revealed bursitis and a small synovial cyst but no meniscal pathology or significant arthritic changes. Claimant continued to have pain with audible clicking or popping in her left knee.

15. On May 1, 2013, Dr. Redd performed a left knee arthroscopy with chondroplasty procedure of retro-patellar and medial femoral condyle chondromalacia. Claimant's left knee symptoms improved but did not entirely resolve. She continued to note painful left knee popping. Dr. Redd recommended repeat left knee arthroscopy.

16. On July 29, 2013, Stan Griffiths, M.D., examined Claimant at Defendants' request. He noted Claimant's July 21, 2011 fall onto both knees and her reports of bilateral knee symptoms (left greater than right) since that time. He recommended repeat left knee arthroscopy.

17. On October 2, 2013, Dr. Redd performed a follow-up arthroscopy and chondroplasty of Claimant's left knee. Thereafter, Claimant's left knee popping and pain improved further, but did not entirely resolve.

18. On February 3, 2014, Dr. Griffiths again examined Claimant at Defendants' request and issued an IME report, followed by an addendum on July 31, 2014. He rated Claimant's work-related left knee permanent impairment at 10% of the lower extremity and noted her traumatic left patella-femoral joint arthritis. Defendants' Exhibit 14, p. 297. He indicated that Claimant may eventually need a left knee replacement in the future.

19. On January 27, 2015, Shane Mangrum, M.D., examined Claimant at Defendants' request and determined she could be considered at maximum medical improvement at the date of his examination. He disagreed with Dr. Griffiths' impairment rating of Claimant's left knee, opining it should be 3% of the lower extremity or 1% of the whole person. Dr. Mangrum

diagnosed left knee pain with evidence of chondromalacia patella and right knee pain with chondromalacia. Dr. Mangrum reviewed Dr. Simon's conclusion that Claimant's right knee condition was not related to her industrial accident and expressly opined: "I would agree that the right knee pain is not causally related to the 07/21/2011 injury on a more probable than not basis. The right knee pain could be related to the lateral fall on 7/2/2012 or underlying biomechanical factors that might predispose her to patellofemoral type symptoms." Defendants' Exhibit 18, p. 326. He concluded that Claimant's right knee warranted "no impairment with lack of clear causal association." Defendants' Exhibit 18, p. 327.

20. On or about June 23, 2017, orthopedic surgeon Brian Tallerico, D.O., examined Claimant at Defendants' request. He noted Claimant's bilateral knee complaints and diagnosed bilateral knee contusions, related to the 2011 industrial accident. He reported: "She is medically stable for the industrial injuries of July 21, 2011. No treatment recommendations are necessary." Defendants' Exhibit 22, p. 363. Dr. Tallerico opined Claimant had no permanent impairment for her right arm radial head fracture. He further reported that her left knee chondromalacia was relatively mild and the prior impairment rating was exceedingly high. He suggested a 3% default impairment for both lower extremities. Defendants' Exhibit 22, p. 363. Dr. Tallerico assigned permanent restrictions of no kneeling or squatting and observed that Claimant's subjective complaints outweighed objective findings.

21. **Condition at the time of hearing.** At the time of hearing, Claimant reported continuing left and right knee pain and weakness. She worked as an office manager of a law firm earning an annual salary of $40,000.00, which she testified was more than she was earning at the time of her 2011 industrial accident.

22. **Credibility.** Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that Claimant is 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

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

24. **Medical care and causation.** Before addressing issues of the extent of Claimant's entitlement to worker's compensation benefits referable to her right knee condition, it must first be determined that her current right knee condition is causally related to her industrial accident or causally related as a compensable consequence of Claimant's industrial accident. 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. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. Dean v. Dravo Corporation, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. Pierstorff v. Gray's Auto Shop, 58

Idaho 438, 447-48, 74 P.2d 171, 175 (1937). *See also* Dinneen v. Finch, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979); Wood v. Hoglund, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

25. Other than demonstrating that her current right knee condition is a direct result of the subject accident, Claimant may establish the requisite causal relationship between the accident and her current condition by demonstrating that her right knee condition nevertheless "flows" from the subject accident:

> When a primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

Larson's Workers Compensation Law § 10 (2018). The compensable consequences doctrine is recognized in Idaho. "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." Castaneda v. Idaho Home Health, Inc., IIC 96-029370 (Issued July 27, 1999). Applied here, Claimant's argument is that if her current right knee condition is not directly caused by the subject accident, it is nevertheless a compensable consequence of the subject accident, because the subject accident caused her subsequent falls, which, in turn, caused further injury to Claimant's right knee.

26. Direct result of accident. Claimant complained of bilateral knee pain directly after the accident to both Drs. Redd and Gardner. Claimant consistently reported right knee symptomatology to her providers including pain, audible popping, and weakness; Claimant reported to her providers that her left knee was worse than her right knee, with the exception of her report to Dr. Simon, until her IME with Dr. Tallerico and at hearing, where she alleged both

knees were about the same. Claimant testified, consistent with her medical records, that she had no history of knee problems prior to the industrial accident.

27. Dr. Simon opined Claimant's current right knee complaints were related to her July 2012 fall and not her industrial accident, an opinion that both Drs. Gardner and Walker concurred with. Similarly, Dr. Mangrum did not relate Claimant's right knee condition to her industrial accident, but to her July 2012 fall or an underlying predisposition to patella-femoral symptoms.

28. Dr. Griffiths opined as follows:

> It seems within the degree of medical probability that the patient's ongoing knee problems are due to her work related injury. The patient denies any history of prior knee problems. She had a fall directly onto both knees and since that ti[me] has had problems with both knees; left more severe than the right… [t]he patient's [industrial] fall resulted in impact injuries to her patella-femoral joints; left worse than right.

Defendants' Exhibit 14, p. 294. Dr. Tallerico rated both of Claimant's knees at 3% of the lower extremity for soft tissue contusions and observed "mild and consistent motion deficits and definitely palpatory findings" in both lower extremities. Defendants' Exhibit 22, p. 363.

29. The weight of the medical evidence favors a finding that Claimant's right knee condition is not a direct consequence of her industrial injury. First, it is not clear that Dr. Griffiths was aware Claimant suffered a subsequent fall in July 2012 when he opined that Claimant's right knee suffered an impact injury from the industrial accident. Dr. Griffiths never mentions the nonindustrial fall in any of his reports, and Dr. Griffiths consistently recorded that the left knee was worse than the right knee, in contrast with Dr. Simon's report. We have no reason to doubt Claimant's account of her July 2012 fall, and therefore cannot accept Dr. Griffiths' opinion as to direct causation. Similarly, while Dr. Tallerico specifically recited Claimant's July 2012 fall in his records review, it is not clear whether the 3% lower extremity

rating he arrived at is based on the subject accident or injuries suffered as a result of the subsequent fall. Third, both treating and IME doctors, when asked directly about the relationship of the right knee to the industrial accident, opined unequivocally in the negative, and moreover, opined it was more likely related to her July 2012 fall. Based on the foregoing, but we cannot say that the medical evidence establishes a probable direct connection between the industrial accident and the current right knee condition.

30. Compensable consequence of accident. As noted, there is medical evidence which tends to support the conclusion that Claimant's current right knee condition is related, in some respect, to one or more of the subsequent falls described by Claimant. Therefore, we must consider whether there exists a causal nexus between the original accident and the subsequent falls sufficient to invoke the compensable consequences doctrine.

31. As noted above, Claimant must provide medical testimony establishing a causal connection between her original accident and her subsequent falls. To prevail under the compensable consequences doctrine, Claimant must adduce medical testimony demonstrating that: (1) her knees were weakened due to sequelae from the accident and; (2) this weakness caused her fall(s) and; (3) her fall(s) caused further injury to her right knee requiring medical treatment.

32. Claimant testified to one fall in December of 2011 where she described the cause as "just weakness and my knees[3] gave out." HT, p. 34. In describing a second fall in July of 2012, Claimant responded to questioning as follows:

Q: [By Mr. Whyte] So, what caused you to fall? Did you trip on something?

[3] Also in the record and read into the hearing transcript is a deposition taken from Claimant on January 20, 2015, where she alleges just the left knee gave out. See HT, p. 65 and Defendant's Exhibit 6, p. 75.

A: I do not - - I don't know. I don't - - I did not trip on anything, but I do not know the exact cause, other than my knee gave out.

Q: Okay. One of your knees? Both of your knees? Do you know?

A: I don't. I can't say for positive.

HT, pp. 46-47. Claimant further testified that she had "never experienced any weakness in [her] knees" prior to the 2011 accident. Id. at 48.

33. Dr. Simon examined Claimant on August 2, 2012, and he reported: "since her right knee pain is currently worse following the more recent fall, I think that the fall on 7/2/2012 is the predominant cause of her current right knee problems." Defendants' Exhibit 22, p. 351. He did not recommended any further treatment for her right knee. Dr. Gardner and Dr. Walker both agreed with Dr. Simon's findings and conclusions.

34. Dr. Mangrum opined on January 27, 2015: "I would agree that the right knee pain is not causally related to the 07/21/2011 injury on a more probable than not basis." Defendants' Exhibit 18, p. 326. He observed Claimant's right knee pain could be related to her fall in July 2012 or to an underlying predisposition to patellofemoral symptoms. He did not recommend any further treatment of Claimant's right knee.

35. Dr. Tallerico reported on June 23, 2017, that Claimant was medically stable from the injuries from her industrial accident and although he recognized that Claimant sustained bilateral knee contusions from her industrial accident opined "No treatment recommendations are necessary." Defendants' Exhibit 22, p. 363.

36. Claimant's testimony that her knees did not "give way" until after the industrial accident is evidence from which a temporal connection could be inferred between the July 2012 fall and the industrial accident. However, temporal association alone does not establish causation. Dr. Mangrum acknowledged the possibility of a relationship between Claimant's

current right knee condition and her July fall, but did not state that the July 2012 fall was a compensable consequence of the industrial accident. Similarly, Dr. Tallerico recognized that Claimant sustained contusions from her industrial accident, but he did not opine that her July 2012 fall was a consequence of her industrial accident. While the medical evidence does lend some support to the proposition that Claimant's current right knee condition is casually related to one or more of the subsequent falls, there is no medical evidence supporting a medical link between the subject accident and the subsequent falls. In other words, the medical evidence fails to support the conclusion that the original accident, and the injuries associated therewith, weakened Claimant's knees, such as to contribute to her subsequent falls. We believe that this is an assertion requiring medical proof, yet the record fails to provide it.

37. Having found Claimant's current right knee condition is not causally related to the subject accident, her claims for further benefits referable to the right knee are moot.

38. Chiropractic care after April 2012. Claimant also asserts entitlement to reimbursement for chiropractic treatment for her back. Claimant herein acknowledged at hearing that all outstanding medical benefits have been paid by Defendants except the cost of chiropractic treatments by Dr. Gardner after April 2012.

39. A claimant is entitled to additional medical benefits related to her industrial accident. Idaho Code § 72-432 provides in pertinent part:

> the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, 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.

Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial

accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

40. Claimant seeks reimbursement of $2,560.00 for costs of 25 chiropractic treatments she received from Dr. Gardner from May 1, 2012 to October 9, 2012.

41. Defendants paid for Claimant's chiropractic treatments by Dr. Gardner from the time of her July 21, 2011 industrial accident through November 17, 2011. His treatments did not focus on her knees. As noted, on November 17, 2011, Dr. Gardner found Claimant had reached maximum medical improvement and released her from his care. On May 1, 2012, at her attorney's request, Claimant sought further chiropractic care from Dr. Gardner. On May 18, 2012, Dr. Gardner requested Defendants authorize further chiropractic care. Claimant had been seeing Dr. Gardner for chiropractic treatment of her back. Defendants arranged an independent medical examination by Dr. Walker.

42. On June 18, 2012, Dr. Walker examined Claimant and recommended physical therapy, noting: "She has been through physical therapy formally to try to increase her range of motion and stretching of the elbow. My recommendation if considered by the carrier would be to put her back into physical therapy for more aggressive and more active exercise." Defendants' Exhibit 24, p. 375.

43. On August 2, 2012, Dr. Simon also evaluated Claimant and concluded:

> In my opinion, ongoing chiropractic treatment is not medically necessary and related to the July 21, 2011 injury. Ms. Wood has a long history of going to a chiropractor and if she chooses to continue with chiropractic treatment as she did before the injury that is her prerogative, but it is unrelated to the work injury.

Defendants' Exhibit 21, p. 351. Dr. Gardner believed his chiropractic treatments were beneficial but expressly agreed with Dr. Simon's findings and conclusions on September 24, 2012. He noted that Claimant's loss of elbow range of motion was permanent and not likely to improve. On August 17, 2012, Claimant returned to physical therapy authorized and paid for by Defendants as recommended by Dr. Walker, who became her treating physician.

44. Defendants provided reasonable and necessary medical treatment as determined by Drs. Simon and Walker. Claimant has not proven her entitlement to reimbursement for chiropractic treatment by Dr. Gardner after April 2012.

45. **Medical stability.** The next issue is whether Claimant has reached medical stability and if so, the date thereof.

46. Dr. Gardner found Claimant was medically stable and released her from care on November 17, 2011. However, thereafter he offered further treatment and Claimant subsequently received further treatment from Dr. Walker. Dr. Simon found Claimant's right arm medically stable on August 2, 2012. Dr. Gardner and Dr. Walker concurred. Dr. Griffiths found Claimant's left knee medically stable on February 3, 2014. Dr. Mangrum found Claimant medically stable from all of her injuries due to her industrial accident on January 27, 2015. Dr. Tallerico found Claimant medically stable on June 23, 2017.

47. Inasmuch as Claimant has not proven her entitlement to further right knee treatment and no physician has recommended further treatment of her right knee, the Referee finds that Claimant reached medical stability from all of the injuries resulting from her industrial accident no later than January 27, 2015.

48. **Permanent disability**. The next issue is the extent of Claimant's permanent disability due to her industrial accident. "Permanent disability" or "under a permanent

disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

49. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

50. Work restrictions. In the present case, the only work restrictions identified are those imposed by Dr. Tallerico of "no kneeling or squatting." Defendants' Exhibit 22, p. 363.

51. Opportunities for gainful activity. Vocation specialist William Jordan, MA, CRC, CDMS, interviewed Claimant on February 6, 2018 and evaluated her employability. On February 27, 2018, Mr. Jordan issued a report concluding:

> Considering the assessed PPI ratings for the lower extremities from evaluating physicians, it appears there is a range, which includes: 1% whole person (Mangrum), 3% whole person (Tallerico) and 5% whole person (Griffiths). The only medically documented physical restrictions recommended from an objective medical standpoint is for no squatting or kneeling (Tallerico, 06/23/17). In this case, averaging the loss of access to the labor market of 6% with the 0% wage loss would equate to 3%: the PPD would be covered by the average of the three PPI's (e.g. 3%).

Defendants' Exhibit 26, p. 409.

52. Claimant was working full-time and earning $15.00 per hour at the time of her industrial accident in 2011. At the time of hearing she testified she was working full-time as an office manager and earning $40,000.00 per year, equating to approximately $19.23 per hour assuming a 40-hour work week. Claimant testified that she was earning more at the time of the hearing than she was before her industrial accident. She further acknowledged that she performed similar job duties at the time of hearing as she did at the time of her accident.

53. Claimant has not proven she suffers any permanent disability in excess of her permanent impairment due to her industrial accident.

54. **Apportionment.** The next issue of apportionment pursuant to Idaho Code § 72-406(1) which provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

55. Claimant has proven no disability beyond her permanent impairment. The record provides no basis for apportionment of disability to preexisting conditions.

56. Apportionment pursuant to Idaho Code § 72-406 is moot.

57. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

58. In the present case, Claimant asserts entitlement to attorney fees for Defendants' unreasonable denial of medical benefits for her chiropractic treatments by Dr. Gardner after April 2012. Claimant's own briefing acknowledges that Defendants denied medical care in reliance on Dr. Simon's opinion. Dr. Simon's opinion has been found persuasive and Defendants' reliance thereon was not unreasonable. Claimant has not proven that Defendants contested her claim for benefits unreasonably.

59. Claimant has not proven her entitlement to an award of attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has not proven she is entitled to further right knee treatment due to her industrial accident.

2. Claimant has not proven her entitlement to reimbursement for medical benefits for treatment by Dr. Gardner after 2012.

3. Claimant reached medical stability from all of the injuries resulting from her industrial accident no later than January 27, 2015.

4. Claimant has not proven she suffers permanent impairment of her right knee due to her industrial accident.

5. Claimant has not proven she suffers permanent disability in excess of her permanent impairment due to her industrial accident.

6. Apportionment pursuant to Idaho Code § 72-406 is moot.

7. Claimant has not proven her entitlement to an award of attorney fees.

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

DATED this ___9th___ day of ___November___, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___9th___ day of __November__, 2018, 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:

MICHAEL J WHYTE
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TRENT J BELNAP
PO BOX 51630
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____/s/_____