BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN BARTON, Claimant, v. SEVENTH HEAVEN RECREATION, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-031084** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 9, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas Donohue, who conducted a hearing in Boise on April 9, 2010. Claimant was present and represented by Richard S. Owen. Defendants were represented by Kimberly A. Doyle. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The parties submitted post-hearing briefs. This matter came under advisement on October 19, 2010. 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 as limited by the parties at hearing are:

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

2. Whether and to what extent Claimant is entitled to:

a) temporary disability;
b) permanent partial impairment;
c) disability in excess of impairment; and
d) medical care.

The parties agreed Claimant's average weekly wage at time of injury was $840.00. Claimant withdrew issues regarding attorney fees and retention of jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

It is undisputed by the parties that Claimant crushed his toe in a compensable accident.

Claimant contends that as a sequel of his compensable injury he suffered a meniscus tear to his right knee. Medical and income benefits related to this injury and attendant surgery are due him. By combination of factors, including loss of access to jobs because of restrictions and the fact that his wage and income are significantly reduced, Claimant's disability should be awarded in the 50% to 60% range.

Defendants contend they have paid all benefits due Claimant related to the September 2, 2008, industrial injury. They paid medical benefits related to the crush injury to Claimant's foot. They paid the one percent PPI for a ligament strain to Claimant's upper calf. However, Claimant suffered a degenerative meniscus tear, which is not compensable. This knee condition and subsequent surgery are attributable to pre-existing degenerative changes. A subsequent intervening accident at home on December 10, 2008, which Claimant attributes to the onset of meniscus symptoms, is not compensable. Because Claimant has returned to work with Employer, his permanent disability is "very small," in the 13% to 23% range.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, of Employer's service director Sean Fox,

and of vocational rehabilitation expert Nancy Collins, Ph.D., taken at the hearing;

2. Claimant's Exhibits 1-15 (including subparts) admitted at the hearing;

3. Defendants' Exhibits A-T and V admitted at the hearing; and

4. The post-hearing depositions of orthopedic surgeon Andrew Curran, D.O., IME orthopedic surgeon Roman Schwartsman, M.D., and vocational rehabilitation expert Mary Barros-Bailey, Ph.D.

As part of their Rule 10 offering, Defendants offered Exhibit U, Claimant's pre-hearing deposition. Claimant objected to the introduction of this deposition into evidence. The Referee assigned to this case sustained Claimant's objection. In their brief, Defendants renewed their request for the inclusion of the deposition in the record. For the following reasons, the Commission feels that the deposition should have been admitted.

First, we note that per *Hagler v. Micron Technology, Inc.,* 118 Idaho 596, 798 P.2d 829 (1977), strict adherence to the rules of evidence is not required in Industrial Commission proceedings, and admission of evidence in such proceedings is more relaxed. Moreover, even under the Idaho Rules of Civil Procedure, it seems that Claimant's pre-hearing deposition is properly admitted as substantive evidence. Under Rule 32(a) IRCP, the deposition of a party may be used by an adverse party "for any purpose". (*See,* Rule 32(a)(2), IRCP). In *Blankenship v. Myers,* 97 Idaho 356, 544 P.2d 314 (1975), the Supreme Court considered the predecessor to the current Rule 32(a)(2), and concluded that it was error for the trial court to have declined to admit the depositions of two of the parties which were offered into evidence by an adverse party. In such a situation, the deposition of a party may be introduced as independent original evidence by an adverse party, and not merely for purposes of impeachment. (*See also, Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000). For these reasons, we believe the Referee erred in declining to admit the pre-hearing deposition of Claimant, offered by

Defendants. However, we deem the Referee's failure to admit the deposition to be harmless error, since there is no testimony in the deposition significant to the Commission's decision that is not also contained in the hearing testimony.

FINDINGS OF FACT

Introduction and Accident

1. Claimant worked for Employer, a recreational vehicle (RV) dealer, as a technician. At this job and for most of his adult life, he repaired RVs, inside and out, and fixed appliances.

2. Claimant's foot was crushed by a trailer hitch. One X-ray showed a nondisplaced fracture of the third toe; other X-rays did not show it. The record inconsistently identifies August 28, September 2, and September 8, 2008, as well as other dates within and around this time frame as the date of the accident. This inconsistency relates to Claimant's inability to provide a good history and is not relevant to compensability.

3. Claimant testified that as a consequence of the crushing injury to his foot, he sometimes had difficulty bending his toe. When this happened, Claimant testified that it would feel like his toe would "catch", and he would have difficulty pushing off with his right foot while walking. As a result, when he experienced one of these episodes, he would frequently limp or stumble in some way. *(See,* Hr. Tr., pp. 31/7-32/22*)*.

4. On or about December 10, 2008, Claimant experienced one of these episodes while walking in his carport, between his car and his house, hereinafter referred to as the "carport incident." He testified that when he felt the catch in his toe, he stumbled, hitting his right knee on the concrete, but breaking his fall to some extent with his right hand. He testified to experiencing a sudden sharp pain in the right knee as a consequence of this fall. (*See,* Hr. Tr., pp. 32/23-33/21*)*. Claimant contends that as a result of this incident, he has suffered further injury to

his right medial meniscus, such as to require corrective surgery by Dr. Curran in 2009.

5. Surety paid all medical benefits related to the foot injury. It paid TTD through March 2, 2009. Further, Surety paid permanent partial impairment for a ligament strain to Claimant's right upper calf, which was rated at one percent of the whole person.

6. The major dispute among the parties is whether Claimant's increase of knee pain and resulting knee surgery was caused by the industrial accident or was due to his pre-existing arthritis and degeneration in and around his meniscus. Surety denied liability for the medical care associated with the knee surgery and denied liability for permanent disability, which may arise from the knee condition.

Medical Treatment

7. Claimant first sought medical attention for his crushed foot on September 19, 2008. A physician's assistant examined him, noted that he suffered visible continued pain, and noted that an X-ray showed no fracture.

8. On September 25, 2008, Ronald Kristensen, M.D., examined Claimant. He noted tenderness and swelling in the forefoot. He reported that a repeat X-ray showed a nondisplaced fracture of the proximal phalanx of the 3rd toe. He noted Claimant exhibited pain, in Dr. Kristensen's opinion, out of proportion to a toe fracture and suspected a crush injury.

9. Claimant attended sessions of physical therapy in September, October, and November. Therapists repeatedly noted improper weight bearing as he limped and a reduction of the range of motion in his right ankle. When he began reporting "shooting" pains in his right lower leg, therapists noted that. A major part of therapy visits included attempts to desensitize Claimant's foot.

10. On October 13, 2008, Dr. Kristensen noted that a repeat X-ray failed to show the toe fracture.

11. At other visits in October and November, Dr. Kristensen again noted Claimant's hypersensitivity continued beyond expectations. He referred Claimant to Kevin Krafft, M.D.

12. On December 2, 2008, Claimant was seen by Kevin Krafft, M.D., on referral by Ron Kristensen, M.D. Claimant presented to Dr. Krafft with complaints of stabbing, aching pain in the right foot following the incident with the trailer hitch. Importantly, Claimant did not present to Dr. Krafft on that date with any complaints of pain or discomfort in the right knee. Dr. Krafft's report also tends to suggest that in the course of his examination of Claimant, the right knee was examined, but without eliciting any complaints of pain, or revealing any other symptoms consistent with a right knee injury:

> He currently reports a stabbing, aching type of pain in the right foot with some pins and needles that radiates up the bottom of his foot. He has difficulty bending his toes and notes that his discomfort is approximately a 5 out of 10 on a visual analog scale. He is having no vegetative signs or symptoms. He has difficulty with current activities, including fishing, motorcycle riding, and four wheeling. He can walk for about five minutes, stand for 10-15 minutes. He has no difficulties sitting. He is able to lift small amounts. His pain is increased with heavy lifting, but alleviated with rest and is most severe when he is bending his foot walking and at night. He has trialed some modalities without benefit as well as chiropractic and these have not been particularly helpful, other than his hydrocodone.
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> Def. Exh. H., p. 166.

13. Following his examination of Claimant, Dr. Krafft diagnosed Claimant as having suffered a crush injury to his right foot, involving the third toe. Dr. Krafft did not make any findings concerning Claimant's right knee.

14. Claimant was next seen by Dr. Krafft on December 11, 2008. His note of that date is in sharp contrast to the previous note of December 2, 2008. Dr. Krafft's December 11, 2008, note demonstrates that in the interval between the visit of December 2, 2008, and the visit of December 11, 2008, Claimant suffered a trip and fall injury involving his right knee when his

"foot gave out." In this regard, Dr. Krafft recorded the following:

> He is seen in follow up for his history of right foot injury with a chief complaint today of right knee pain. He reports that his foot gave out on him and he went to catch himself with his knee and strained it. He had noted immediate pain and inability to bear weight on the right knee. He trialed some hydrocodone. He awoke this morning and was unable to flex his knee, it was so swollen. He reported that his pain was a 10/10 on a visual analog scale. He described it as deep inside the knee and under the patella with some pain in the back of the knee. He describes it as achy and burning. It was as again as a 10/10 and currently is a 7/10 with hydrocodone, which reduces his discomfort. He notes he has had no other trauma to the knee.
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> Def. Exh. H., p. 170.

The MRI evaluation conducted on December 17, 2008, demonstrated a complex tearing and maceration of the Claimant's right medial meniscus, thought by the interpreting radiologist to represent moderate to severe degenerative changes with probable loose bodies. Dr. Krafft also noted edema of the medial head of Claimant's right gastrocnemius, which was thought to be secondary to a muscular strain.

15 On December 18, 2008, Dr. Krafft opined Claimant's gastrocnemius strain was related to the industrial injury.

16. A December 29, 2008, physical therapy note recited the history of the event which precipitated Claimant's increase in knee pain. It was more elaborate and possibly inconsistent with the history which Claimant gave Dr. Krafft. The physical therapist's examination noted the limp, knee tenderness in the medial joint line, posterior knee pain with resistance testing of the musculature. The physical therapist agreed with Dr. Krafft's assessment of a calf muscle or ligament strain. Claimant progressed slowly over multiple visits.

17. Multiple evaluations in January and February 2009 to attempt to qualify Claimant for St. Alphonsus' Work Star program all determined Claimant was not physically

ready to try that yet.

18. Among those evaluations, Robert Calhoun, Ph.D., opined Claimant displayed mild depression and anxiety, although he found these conditions of insufficient severity to preclude Claimant from Work Star.

19. On February 24, 2009, a Key Functional Capacity Assessment was performed. Claimant gave a valid effort. He displayed movement and lifting limitations for which restrictions were suggested.

20. On February 23 and March 3, 2009, Dr. Krafft examined Claimant. Although he was a treating physician in the chain of referral, his reports of these evaluations show he thought himself an IME physician for purposes of the evaluations. He opined Claimant suffered no PPI to his foot, but suffered a 1% whole person PPI attributable to the industrial injury as a result of his gastrocnemius strain. The two reports are identical except that in the first, Dr. Krafft reported Claimant was not medically stable.

21. Andrew Curran, D.O., took over Claimant's care on March 13, 2009. Because Claimant's knee condition beyond the muscle strain had been opined to be unrelated to the original industrial injury, Claimant addressed payment through his health insurance. Dr. Curran examined Claimant and ordered an X-ray. It showed osteoarthritis and degenerative changes. As he treated Claimant, he determined Claimant suffered a meniscus tear. He recommended Claimant undergo arthroscopic knee surgery.

22. On May 19, 2009, Dr. Krafft opined the meniscus tear shown on the MRI appeared to be arthritic changes as opposed to an acute tear.

23. On May 28, 2009, Roman Schwartsman, M.D., evaluated Claimant at Defendants' request. He noted X-rays failed to show a fracture of the 3rd toe and Claimant's

foot pain had resolved. He opined Claimant's then-current knee pain and resulting need for surgery was "clearly preexisting" and unrelated to the original industrial accident as well as the December 2008 carport incident. He opined that only the gastrocnemius strain was related to the December event. In deposition, he distinguished between a displaced meniscus tear and a nondisplaced meniscus tear as a potential source of pain. He stressed that Dr. Curran's operative report which noted a degenerative tear supported his opinions.

24. On June 15, 2009, Dr. Krafft examined Claimant. He found the foot problem resolved. He reported Claimant's continuing knee tenderness and possible surgery were unrelated to any industrial injury.

25. Dr. Curran performed arthroscopic surgery on July 16, 2009. Dr. Curran's operative note reflects that at surgery, Claimant's degenerative findings were found to be somewhat less severe than was suggested by the December 17, 2008, MRI study. Even so, Claimant was found to have complex degenerative tears involving the posterior horn of the medial meniscus, along with Grade II to III chondromalacia over the weightbearing surfaces of the medial femoral condyle. At surgery, Dr. Curran debrided the damaged tissue, taking out approximately 80% of the posterior horn of the medial meniscus. Claimant's lateral meniscus showed much less significant damage, and Dr. Curran's treatment of this compartment required removal of only a very small portion of the lateral meniscus. No significant arthritis of the lateral compartment was noted. (Curran Depo. pp. 13/14-15/11).

26. Dr. Curran authored a letter at the request of Claimant's Counsel in which he expressed his views on the cause of Claimant's medial meniscus tear and a need for surgical treatment. Discussing this letter at the time of his July 9, 2010, deposition, Dr. Curran stated that his opinion on causation was informed by the objective findings on exam and at surgery, as well

as by Claimant's history to him of the evolution of his subjective complaints. In this case, Claimant's subjective history assumes particular importance, since neither the MRI, nor Dr. Curran's visualization of the knee at surgery, yields information sufficient to make a judgment as to whether or not the damage to Claimant's knee was acute versus chronic in origin:

> Q. So what would be the cause of that kind of tear?
>
> A. So therein lies the question. A person can have – as we get older a person's meniscus becomes less stable, so to speak. You can have maceration and break down of a meniscus and it can be asymptomatic. There are people walking around with meniscus tears right now that are doing just fine. You can also aggravate a preexisting tear. Or make it worse.
>
> Now, can you tell by looking at it arthroscopically whether this is long-standing or just happened? Not really. We base it off of the history and then the physical findings. And if a person comes in and says, "My knee was doing okay. I fell. Now it hurts." And they've got a meniscus tear and they are not getting better. That is when we go in and treat it. To say what percent of this was preexisting, and what was new, you really can't tell based on MRI or arthroscopic findings, to be quite honest.
>
> Curran Depo., pp. 33/23-34/18.

27. Because of the dearth of objective evidence pointing one way or another on the question of whether the trip and fall incident contributed to Claimant's right knee condition, Dr. Curran necessarily relied heavily on Claimant's history to him of the evolution of his subjective complaints. In this regard, Dr. Curran opined:

> Q. Doctor, let me ask you for your opinion now. Based on the onset of these symptoms, the history that Mr. Barton gave to you about how he fell, the onset of the symptoms, and pain, and swelling immediately after the fall, and the findings you made during surgery, do you have an opinion to a reasonable degree of probability as to whether or not that fall ended up causing these meniscal tears?
>
> A. I believe that based on the patient's history, given the fact that he did not have symptoms prior to the fall, that the meniscus tear was now causing his symptoms.

Curran Depo., pp.15/21-16/8.

From the foregoing, it is clear that Dr. Curran thought it significant that Claimant did not have a pre-injury history of right knee symptomatology; that is, Dr. Curran evidently took a history from Claimant that Claimant had not had any problems with his right knee prior to the carport incident occurring at some point between December 2, 2008, and December 11, 2008. However, as developed *infra*, the history upon which Dr. Curran relied is belied by certain of Claimant's pre-injury medical records establishing that Claimant was, indeed, symptomatic with right knee complaints at various points and time prior to the trip and fall episode of December 2008. The question before the Commission is whether this correct history of Claimant's pre-injury symptomatology denigrates Dr. Curran's opinion on the etiology of Claimant's meniscus tear.

28. Although Dr. Curran eventually opined that Claimant's pre-existing medial meniscus injury was permanently aggravated by the incident of December 2008, he was much more circumspect on the question of whether or not Claimant's degenerative arthritis was aggravated by the fall of December 2008. On direct examination Dr. Curran testified:

> Q. Doctor, if we assume that Mr. Barton's knee was not symptomatic before this fall, and that he had no restrictions on his abilities, do you have an opinion as to whether or not this accident made his underlying arthritis symptomatic?
>
> A. It appears to have made it more symptomatic.
>
> Curran Depo., p. 18/13-20.

29. Therefore, based on the assumption that Claimant was asymptomatic prior to the December 2008 incident, Doctor Curran initially proposed that Claimant's degenerative arthritis was made more symptomatic by the December 2008 incident.

30. On cross examination, Dr. Curran acknowledged that the degenerative arthritis of the type seen in Claimant's right knee ordinarily develops over time. (Curran Depo. pp. 26/24-

27/7).

31. On cross-examination, Defense Counsel reviewed a number of Claimant's pre-injury medical records with Dr. Curran. As discussed, *infra*, a number of these records suggest that Claimant did have symptomatic right knee complaints prior to the date of the subject accident. Addressing the issue of what caused Claimant's pre-injury symptoms, and what caused a worsening of his symptoms following the December 2008 carport incident, Dr. Curran stated:

> A. Well, we are dealing with more than one diagnosis. He has evidence of arthritis in his knee. It is certainly possible that the mild to moderate arthritis could have been causing his symptoms in the past. And then he fell and damaged the meniscus. And now it is way more symptomatic because of that. But, again, it is really hard to say with 100-percent certainty what was causing all of the pain back before I ever saw him.
>
> B. Sure.
>
> Curran Depo. p. 36/9-19.

32. Finally, it is notable that in his February 7, 2010, letter to Claimant's Counsel, Dr. Curran had the following to say concerning the cause of Claimant's right knee injury:

> I feel the injury he sustained at work and caused his limp, caused his fall, which resulted in an exacerbation of a pre-existing condition. I feel the arthritis was pre-existing and was not aggravated by his fall, but most likely the meniscus tear did result from his fall.

Dr. Curran was questioned about this statement on cross-examination, and testified that the quoted language from his February 7, 2010, letter contained a small (but important) typographical error. Dr. Curran testified that the language in questions should read as follows:

> I feel the injury he sustained at work and caused his limp, caused his fall, which resulted in an exacerbation of a pre-existing condition. I feel the arthritis was pre-existing and was aggravated by his fall, but most likely the meniscus tear did result from his fall.
>
> *See*, Curran Depo., p. 41/13-24.

The quoted language makes a good deal less sense with Dr. Curran's correction, leaving one to wonder what his true intentions were when drafting the February 7, 2010, letter. In addition to making this correction, Dr. Curran offered a few other comments concerning the impact of the December 2008 carport incident on the Claimant's pre-existing degenerative arthritis:

> Q. Do you have an opinion on whether that was a permanent aggravation? A temporary aggravation?
>
> A. I usually perceive these as temporary aggravations. But there are certainly cases where people can have permanent aggravations of arthritis with the fall. But I felt the majority of his symptoms were coming from the meniscus tear.
>
> Curran Depo., pp. 41/25-42/9.

33. At the end of the day, Dr. Curran's testimony does not readily lend support to the proposition that, on a more probable than not basis, the December 2008 carport incident caused a permanent aggravation of Claimant's underlying degenerative arthritis.

34. Roman Schwartsman. M.D., saw Claimant for the purposes of evaluation at the instance of Defendants on May 28, 2009, prior to the right knee surgery performed by Dr. Curran. Unlike Dr. Curran, Dr. Schwartsman had access to all of Claimant's pre-injury medical records at the time he authored his opinion on the question of causation. Essentially, although Dr. Schwartsman was willing to concede that the December 2008 incident did cause an injury to Claimant's gastrocnemius muscle, he did not believe that the mechanism of injury was consistent with an injury to Claimant's meniscus. Based on Claimant's pre-surgery radiological studies, Dr. Schwartsman opined that the extensive meniscal maceration seen on those studies strongly supported the existence of a long standing chronic condition. Based on this objective evidence, and excluding Claimant's subjective history, which Dr. Schwartsman found to be in conflict with the pre-injury medical records, Dr. Schwartsman did not feel that the December 2008 accident

caused any additional injury to Claimant's right knee. On cross examination, he was only willing to concede that it was possible in the "utmost hypothetical circumstance" that a fall of the type described by Claimant could cause additional injury to Claimant's medial meniscus. (*See,* Schwartsman Depo., pp. 53/23–54/4). However, from a realistic standpoint, with Claimant's medial meniscus as chewed up as it was on a pre-injury basis, there was really nothing left to "tear" with the fall on December of 2008.

Prior Medical Records

35. Claimant has a significant workers' compensation history. Relevant to the instant claim is an April 14, 1986, accident involving his right knee. Claimant underwent surgery following this injury for a meniscal injury. Claimant suffered two subsequent knee injuries resulting in workers' compensation claims in 1988 and 1990. It is unclear whether those subsequent injuries involved his left or his right knee.

36. Although the medical records generated in connection with the 1986 injury and surgery have been lost, there are a few subsequent medical records which reference Claimant's right knee. Notably, on September 11, 2005, Claimant presented to the Saltzer Medical Group with the following history:

> Mr. Barton presents with complaints of bilateral knee pain increased on right knee times three weeks increasing past week. Patient states that one week ago while four wheeling, he stuck his right leg out and since right knee has increased pain. … The patient presents to care complaining of joint pain. This is a long standing problem that the patient has been treated for in the past. He states that he has used over the counter and prescription medications. He isn't currently taking any anti-inflammatories because of abdominal pain with use. He complains mainly of right knee pain. He states that the pain begins approximately one hour after he goes to bed. He rates the pain 10/10. He is pain free when he is up and about. He has tried Vicodin that does work well. He was prescribed Vicodin for back pain.
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> Def. Exh. D., p. 84.

37. Claimant was seen in follow-up on September 13, 2005, at Saltzer Medical Group. At that time, the following history was taken:

> These symptoms have been worsening for the last 2 week(s). There is no history of injury or trauma. The character of his symptoms is constant, dull and achey (sic). The patient states that his symptoms are moderate to severe. He states that this condition started gradually. Activities that aggravate the symptoms include turning in bed and sitting. The patient is full weight bearing with no walking aids. The symptoms are associated with pain and swelling. The patient denies associated weakness, redness, paresthesias, distal symptoms and proximal symptoms. His right knee is the worst, but both knees hurt. There was some swelling on the right, but it has gone down. It hurts when he lays down at night as well. He has tried Vicodin and Ibuprofen for pain. He has some grinding and no locking or weakness.
>
> …
>
> He has a medical history of anxiety, osteoarthritis, coronary artery disease (CAD) and myocardial infarction.
>
> Def. Exh. D., p. 86.

Interestingly, Dr. Kunz's exam on the occasion of September 13, 2005, visit does not appear to have demonstrated any significant findings. Dr. Kunz's assessment was "joint pain."

38. On March 12, 2008, Claimant sought treatment for his right foot. An X-ray showed a hammer toe and degenerative joint disease. The Saltzer clinic record shows that Claimant complained of right foot pain and a right knee "lump." The knee condition is not further reported or diagnosed, although reference is made to positioning at work involving kneeling with a foot tucked under. Foot or knee problems are not mentioned in the next Saltzer clinic visit of April 23, 2008. They are not again treated or mentioned by any physician until after the subject accident which occurred August 28, 2008.

39. Saltzer records of six visits dated October 2008 through January 2009 are for issues unrelated to the right knee or foot. These do not specifically mention any foot or

knee problem. This silence occurs despite other treating doctors during the same period of time reporting that Claimant demonstrated a pronounced limp and hypersensitivity to his foot and knee.

40. Among the Saltzer records, the first post-accident mention of foot or knee problems is dated March 13, 2009, when Claimant began seeing Dr. Curran for that problem.

Vocational Rehabilitation

41. On March 24, 2009, ICRD consultant Darrell Holloway reported he had worked with Claimant since November 3, 2008. An FCE describing Claimant's time-of-injury job was not approved by Dr. Krafft. Upon Claimant's inability to return to work at that time, Mr. Holloway closed his file. Mr. Holloway recorded, "I have found claimant to be conscientious and serious-minded about returning to work."

42. Nancy Collins, Ph.D., evaluated Claimant at Claimant's request. She opined Claimant suffered a 60% permanent disability, inclusive of PPI.

43. Mary Barros-Bailey, Ph.D., evaluated Claimant at Defendants' request. She opined Claimant suffered a 13% permanent disability if he returns to work for Employer; a 23% disability if he does not.

44. At the time of hearing, Claimant had returned to work for Employer, but not at his original job. He is no longer able to crawl and kneel and otherwise move around as required by his old job as a technician fixing and performing maintenance on recreational vehicles. He now works part time, at a reduced wage, showing RVs to customers.

DISCUSSION AND FURTHER FINDINGS

45 The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical

construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Credibility

46. The Commission finds no reason to disturb the Referee's findings on credibility. The Referee found Claimant's testimony rife with inconsistency when referring to historical dates and details. Nevertheless, Claimant's demeanor at hearing showed him to be forthright and straightforward when testifying. His handicap of imperfect memory does not undercut his honest demeanor. Nevertheless, where contemporaneously made medical records are present, these are considered more accurate than Claimant's memory.

Causation

47. The claimant in a worker's compensation case has the burden of proving compensable disablement caused by an accident arising out of and in the course of employment. The proof must establish a probable, not merely a possible, connection between cause and effect to support the contention that the claimant suffered a compensable accident. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982); *Vernon v. Omark Industries*, 115 Idaho 486, 767 P.2d 1261 (1989). Moreover, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973); *Bowman v. Twin Falls Construction Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). "Magic words" are not required. *Jensen v. City of Pocatello,* 135 Idaho 406, 18 P.3d 211 (2000).

48. It is not disputed that Claimant suffered a crush injury to his right foot in early September 2008. The parties acknowledge that Claimant is entitled to workers' compensation benefits for his foot injury. What is at issue is whether or not Claimant's right knee injury is, as

well, a compensable condition. First, it is clear that if the December 2008 carport incident occurred as alleged by Claimant, that incident is a natural and probable consequence of the original accident. Claimant testified that following the original injury, he sometimes had difficulty with his toe "catching," due to his inability to bend the toe. This evidently made him somewhat clumsy when walking, and he offered uncontradicted testimony that in December of 2008, one of these "catching" episodes caused him to trip and fall in his carport. Based on a preponderance of the evidence, the Commission concludes that the 2008 carport incident is but a natural and probable consequence of the original accident.

49. Even so, Claimant still bears the burden of demonstrating to a reasonable degree of probability that the right knee condition for which he seeks benefits is causally related to the December 2008 carport incident. On this point, there is considerable dispute in the medical testimony.

50. Dr. Schwartsman, who evaluated Claimant prior to the knee surgery, was unequivocal in his denigration of Claimant's theory that the December 2008 carport incident caused additional injury to his right knee. Dr. Schwartsman graphically described the extent and degree of Claimant's long standing right knee problems. He described the posterior horn of Claimant's right medial meniscus as being completely macerated; chewed up like hamburger meat. He questioned the significance of the December 2008 carport incident because even if it occurred exactly as alleged by Claimant, Claimant's medial meniscus was already so degraded, that there was simply nothing left to tear.

51. For his part, Dr. Curran, too, acknowledged that on a pre-injury basis, Claimant had a significant pre-existing degenerative process involving Claimant's right medial meniscus. On the question of whether or not the December 2008 carport incident caused additional injury

to Claimant's knee, Dr. Curran initially acknowledged that based on the objective medical evidence, *i.e.,* the radiological studies, and his observations at surgery, it is impossible to identify any defect or change in Claimant's right knee that is necessarily the product of an acute process. In other words, based on the objective findings alone, it is impossible to say that the subject accident did anything to increase or accelerate the problems already extant in Claimant's right knee. In reaching his conclusion that the subject accident did, at the very least, cause some additional injury to Claimant's right medial meniscus, Dr. Curran testified that because Claimant told him that he had had no right knee problems on a pre-injury basis, and only developed significant right knee symptoms after the December 2008 carport incident, it follows that that incident did cause some additional injury to Claimant's right medial meniscus. According to Dr. Curran, then, because the objective medical evidence is insufficient to demonstrate a causal connection between Claimant's right knee injury and the December 2008 carport incident, one must look to a history of Claimant's subjective complaints in order to make that association.

52. The problem, of course, is that contrary to the history originally given to Dr. Curran, Claimant's medical history <u>is</u> significant for right knee problems, and even a right knee meniscal surgery, that pre-date the subject accident. After being advised of this pre-injury medical history, Dr. Curran offered the following comments on the cause of Claimant's right knee condition:

A. So what is the specific question?

Q. What caused that tear?

Mr. Owen: Which tear?

Ms. Doyle: The meniscus tear.

Mr. Owen: Which meniscus tear?

Ms. Doyle: The medial.

The Witness: I think -- and, again, this is speculation—that he may have had some breakdown of the meniscus prior to the fall. But the fall either made the tear worse or made it symptomatic. Again, that is speculation.

Curan Depo., p. 35/16-21.

53. Although Dr. Curran's last word on the question of causation was that Claimant's medial meniscus tear is, more probably than not, related to the December 2008 carport incident, (*See,* Curran Depo., pp. 46/23 – 47/8), his testimony when considered as a whole, is not as solid as one would like on the question of whether Claimant's right medial meniscus injury is related to the subject accident to a reasonable degree of medical probability.

54. In resolving this central dispute, it is important to recall that the Saltzer Medical records from September of 2005 clearly demonstrate that Claimant had significant and long standing right knee symptomatology as of that date. Claimant did not denigrate the accuracy of these records at hearing. What is problematic is that with the exception of the September 2005 Saltzer records, there really isn't anything else in Claimant's medical history relating to the right knee until the December 11, 2008, note generated by Dr. Krafft. The record is mostly silent as to the extent and degree of Claimant's right knee symptomatology between September of 2005 and December 11, 2008. However, the few medical records that do exist are particularly relevant to answering the question of whether the December 2008 carport incident did cause additional injury to Claimant's right knee.

55. On December 2, 2008, Claimant was seen for evaluation by Dr. Krafft for the injuries to his right foot. Claimant presented on that date with no complaints of right knee symptomatology. Dr. Krafft appears to have examined Claimant's right knee on the occasion of the December 2, 2008, visit, yet he made no report of any significant findings. The December 2,

2008, note stands in sharp contrast to the subsequent note of December 11, 2008. In the interim, of course, Claimant suffered the carport incident.

56. The December 11, 2008, note that demonstrates that Claimant presented with significant right knee complaints, from which he continued to suffer until surgery was eventually performed by Dr. Curran.

57. Although Claimant's testimony understates that the significance of his pre-injury right knee symptomatology, the medical record, and in particular, Dr. Krafft's notes of December 2, 2008, and December 11, 2008, tend to demonstrate that Claimant's pre-injury symptoms, whatever they may have been, were made worse by the December 2008 carport incident. Therefore, although his opinions are not without some internal inconsistencies, we find that Dr. Curran's opinion is more persuasive on the cause of Claimant's right medial meniscus injury. Although it is certain that Claimant had significant pre-existing maceration of the medial meniscus and degenerative arthritis of the right knee, the evidence establishes that the December 2008 carport incident, more probably than not, caused some additional injury to the right medial meniscus, such that Claimant is entitled to the medical treatment provided by Dr. Curran, along with related time-loss benefits.

58. Although we have concluded that the carport incident is responsible for causing additional permanent injury to Claimant's right medial meniscus, the evidence does not establish that the carport incident caused any permanent aggravation of Claimant's right knee degenerative arthritis. (*See*, paragraphs 28-33, *infra*).

Medical Care

59. Defendants' obligations for medical care are statutorily defined. Idaho Code § 72-432 *et. seq.* The record established that Claimant's knee condition and surgery were

causally related to the compensable industrial injury. Although we have found that Claimant's degenerative arthritis was not permanently aggravated by the carport incident, the surgery, appears to have been primarily directed to revision of the torn meniscus. Moreover, no evidence has been adduced which might invite consideration of how, or whether, Defendants' responsibility for right knee medical care rendered to date might be parsed. Accordingly, Defendants are responsible for 100% of right knee medical care required to date.

60. Defendants are liable for unpaid medical care, including Dr. Curran's treatment and surgery, related to Claimant's right foot, knee and leg to the date of hearing. Claimant did not show it likely he is entitled to future medical care.

Temporary Disability

61. Claimant lost work and wages as a result of his compensable knee condition and surgery. The parties do not appear to dispute the extent of benefits due him for the period of March 3, 2009, through September 30, 2009, once liability has been established. Defendants are liable for unpaid TTD/TPD for this time period.

Impairment and Disability

62. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

63. Claimant was rated at 1% whole person for his gastrocnemius strain. Dr. Curran testified Claimant suffered additional PPI as a result of the knee surgery, but he had not been asked to rate it.

64. Under the facts of this case, the lack of an additional PPI rating does not hinder

the Commission from determining permanent disability. A compensable PPI rating is in place, upon which disability may be analyzed. The additional PPI for the knee surgery would be relatively small compared to the permanent disability Claimant is left with.

65. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v, Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

66. In considering the issue of disability in excess of impairment, it is first helpful to identify Claimant's permanent limitations/restrictions. Several of Claimant's providers/ evaluators have addressed this issue. On or about February 24, 2009, Claimant underwent a key functional capacity assessment at St. Alphonsus Rehabilitation Services. That assessment informed Dr. Krafft's opinion on Claimant's permanent limitations/restrictions, as set forth in his evaluation of February 23, 2009. In that report, Dr. Krafft defined Claimant's limitations/restrictions as follows:

> Work Capacity: The examinee did undergo a functional capacity evaluation with noted limitations in relationship to his job requirements in climbing, kneeing and walking as well as lifting. At this time I would limit his lifting to 65 pounds on an occasional basis, kneeling to minimal basis, climbing to an occasional basis and walking to 4-5 hours occasionally at moderate distances.
>
> C. Exh. 4, p. 13.

Dr. Krafft elaborated on Claimant's permanent limitations/restrictions in his follow-up visit with Claimant of June 15, 2009:

> He will return to clinic for further medication management in the future if needed. Otherwise, he will follow up with Dr. Curran. His return to work status remains unchanged. He will limit his lifting to 65 pounds occasionally, avoiding unprotected heights. No walking on rough, uneven ground. No jumping, limiting climbing to an occasional basis, kneeling to minimal and walking initially to 4 [to] 5 (sic) hours. There may be further restrictions in relationship to Dr. Curran's surgery. I would be happy to see him back at the direction of his case manager for further finalization once he is finished with Dr. Curran.
>
> C. Exh. 4, pp. 2-3.

67. Dr. Schwartsman did not address Claimant's specific limitations/restrictions. However, Dr. Curran was asked about Claimant's limitations/restrictions at the time of his deposition. He described the limitations referable to Claimant's meniscal tear and the degenerative arthritis as follows:

> Q. The restrictions that you were talking about earlier with Mr. Owen on direct exam. What medical conditions would those recommended restrictions be related to? Like are they related to his meniscal tear? Are they related to his arthritis? What are they related to?
>
> A. The limited kneeling, squatting, running and jumping are related to a meniscus tear. If someone has arthritis you also may need to limit standing, long periods of walking, running and jumping, typically.
>
> Curan Depo. pp. 47/18-48/4.

68. Claimant retained Nancy Collins, Ph.D., to perform a vocational assessment in furtherance of his claim for disability benefits. To defend against the claim for disability benefits Defendants retained the services of Mary Barros-Bailey, Ph.D., who also performed a vocational assessment. Not surprisingly, the assessments vary not only in their methodology, but also in the ultimate opinion rendered on the extent and degree of Claimant's disability in excess of impairment. Each party has critiqued the others' vocational expert. Claimant has argued that it was inappropriate for Dr. Barros-Bailey to consider Claimant's five year earnings history in assessing whether Claimant has suffered a wage loss as a consequence of the subject accident.

Claimant also asserts that Dr. Barros-Bailey's analysis is flawed because she inappropriately concluded that because Claimant is currently employed, he has suffered no loss of access to the labor market as a consequence of his limitations/restrictions.

69. Turning to the wage loss issue, Claimant argues that it is only appropriate to consider Claimant's earnings at the time of injury when conducting a wage loss analysis. In support of this position, Claimant relies upon the definition of "wages" and "wage earning capacity," set forth at Idaho Code § 72-102(33). That section provides:

> "Wages" and "wage earning capacity" prior to the injury or disablement from occupational disease mean the employee's money payments for services as calculated under section 72-419, Idaho Code, and shall additionally include the reasonable market value of board, rent, housing, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as part of his remuneration, and gratuities received in the course of employment from others than the employer. "Wages" shall not include sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment.

From this, Claimant argues that when considering the impact of an industrial injury on an injured workers' wage earning capacity, it is only appropriate to consider the wage that Claimant was earning at the time of injury as compared to his wages or potential wages on a post-injury basis. Specifically, Claimant argues that in conducting a wage loss analysis as part of a disability evaluation, it is inappropriate to consider, as Dr. Barros-Bailey did, Claimant's earnings in the five years prior to the industrial injury, as compared to his earnings or likely earnings, on a post-injury basis.

70. We do not believe that a wage loss analysis conducted as part of a disability evaluation should be constrained in the manner urged by Claimant. Where Claimant's earnings in the years immediately preceding the industrial accident are variable, as was the case here, it may well be appropriate to consider Claimant's earnings over a three to five year range prior to

the industrial injury. Indeed, such is the convention among many vocational rehabilitation experts. Nor do we believe that the provisions of Idaho Code § 72-102(33) are intended to restrict wage loss comparison in the manner suggested by Claimant. Clearly, the thrust of Idaho Code § 72-102(33) is to provide additional guidance concerning the calculation of an injured worker's average weekly wage. Nothing in that subsection implies that in evaluating an injured workers' wage loss, the Commission is only authorized to look at the wage Claimant was earning on the day of injury, as opposed to a longer pre-injury earning history.

71. Idaho Code §§ 72-425 and 72-430 make it abundantly clear that the Commission is empowered to entertain consideration of a wide variety of "non-medical factors" in evaluating an injured workers' disability in excess of permanent physical impairment. In an appropriate case, the Commission is clearly empowered to entertain evidence of Claimant's earning history, not just the wage he was earning on the day of injury. Accordingly, the Commission rejects this criticism of Dr. Barros-Bailey's evaluation. Indeed, it seems likely that it is appropriate to consider Claimant's earnings in the five years prior to the subject accident, since the evidence tends to establish that his annual income was quite variable over this period. Consideration of Claimant's annual income over the five year period preceding the subject accident gives a truer picture of Claimant's wages than does the snapshot afforded by consideration of Claimant's time of injury wage alone would provide.

72. Claimant's criticism of Dr. Barros-Bailey's approach to loss of access to the labor market is, however, better taken. Dr. Barros-Bailey appears to have rejected any assertion that Claimant has suffered loss of access to the labor market simply because he was employed as of the date of hearing, albeit at a lower wage. In this regard, Dr. Barros-Bailey concluded:

> Should John continue his employment with the Seventh Heaven, due to the number of hours worked on an annual basis, he will likely have

sustained some wage loss, but no loss of access to the labor market.

Def. Exh. T., p. 408.

Loss of labor market access is one of the tools typically used by the Commission to assess disability. In measuring loss of access to the labor market, it matters not that Claimant is employed as of the date of evaluation. Labor market access loss is calculated by comparing Claimant's pre-injury access to the labor market, to his post-injury access to the labor market. On a pre-injury basis, because of his skills and physical abilities, Claimant had reasonable access to a certain percentage of the total labor market. Following the industrial accident, and because of the increase in his permanent limitations/restrictions, Claimant had access to a smaller segment of the labor market, as compared to his pre-injury access. Dr. Barros-Bailey's failure to assess Claimant's loss of access to the labor market in this fashion, makes her assessment of Claimant's disability in excess of physical impairment more than a little suspect. For these reasons, the Commission finds that the opinion of Dr. Collins is more helpful in assessing the extent and degree of Claimant's disability, even though Dr. Collins utilized Claimant's time of injury wage in making some judgment about the extent and degree of Claimant's wage loss. Dr. Collins provided a detailed explanation of Claimant's loss of access to the labor market, and concluded that Claimant's loss of access to the labor market is in the range of 50% to 60%. Dr. Barros-Bailey, as well, offered some comments on Claimant's loss of access to the labor market. She posited, in the alternative, that if one assumes that Claimant will <u>not</u> continue in his job with his time of injury employer, then it is appropriate to consider whether he will have suffered any loss of access to the labor market. Without any explanation as to how she arrived at her figure, she proposed that if Claimant loses his job at the Seventh Heaven, he will suffer loss of access to the labor market in the range of 10%.

73. Here, in assessing Claimant's disability, the Commission also considers it appropriate to consider the extent and degree to which he has suffered a wage loss as a consequence of the subject accident. Although we have concluded that it is appropriate to consider Claimant's pre-injury earnings history in performing this analysis, as Dr. Barros-Bailey did, there are certain other components of her wage loss analysis that make it less than compelling.

74. Dr. Barros-Bailey had access to Claimant's annual income for the years 2004 through 2008. Assuming a 2,080 hour work year, Dr. Barros-Bailey calculated that during the years in question, Claimant earned between $11.63 per hour and $19.87 per hour. She picked the mid-point of this range to represent the average of Claimant's pre-injury wage earning capacity, or $15.75 per hour. She compared this figure against the high point of the range, *i.e.* $19.87 per hour, to come up with a wage loss figure of 21%. The problem is that this analysis is not actually a comparison of Claimant's pre-injury versus post-injury wage loss. As of the date of hearing, Claimant was actually earning something in the range of $15.00 per hour, which would yield almost no wage loss, had Dr. Barros-Bailey compared Claimant's pre-injury earnings to his demonstrated post-earning wage. It seems clear, however, that Claimant has suffered significant wage loss when one compares his historical earnings to what he is likely to earn on a post-injury basis. However, just as Dr. Barros-Bailey has underestimated Claimant's wage loss, Dr. Collins has overstated it, for the reasons stated above.

75. After having considered the evidence on loss of access to the labor market and wage loss, as developed in the competing opinions of Dr. Barros-Bailey and Dr. Collins, we conclude that Claimant has suffered disability inclusive of impairment of 42.5% of the whole person.

APPORTIONMENT

76. At issue is the extent and degree to which Claimant is entitled to an award of disability in excess of impairment. Obviously, Claimant is only entitled to an award of disability benefits for his accident-produced condition. However, it appears that the issue of Idaho Code § 72-406 apportionment was not specifically identified as one of the issues to be decided at hearing.

77. Regardless, we believe that the issue of apportionment is always before the Industrial Commission where a claim for disability benefits is made, simply because the Claimant is only entitled to recover for disability which is causally related to the industrial accident. In this regard, it is worth reviewing the recent case of *Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). In *Page, supra,* one of the issues before the Industrial Commission was whether Claimant had suffered disability in excess of physical impairment, and, specifically, whether Claimant was an "odd lot" worker. In connection with the issue of Claimant's disability, the Commission speculated that although there was no evidence which would allow apportionment of Claimant's disability to a pre-existing condition, it was likely that most of Claimant's disability was related to pre-existing factors. Ultimately, the Commission made only a small award of disability to Claimant for her industrial injury. On appeal Claimant asserted that it was Employer, not Claimant, who bore the burden of putting on proof that some portion of Claimant's disability was referable to a pre-existing impairment under Idaho Code §72-406. In rejecting this assertion, the Court stated:

> There is no support for the proposition that apportionment is an affirmative defense. It is a statutory dictate that an employer is only liable for the disability attributable to the industrial injury or occupational disease when the permanent disability is less than total. I.C. § 72-406(1). Therefore, the statute calls upon the claimant to produce evidence to persuade the Commission as to the percentage of

permanent disability, if any.

Page v. McCain Foods, Inc., 145 Idaho at 309, fn. 2.

In keeping with the Supreme Court's direction that Claimant always bears the burden of proving the extent and degree of his accident-produced disability, it follows that Defendants need not raise Idaho Code § 72-406 as an affirmative defense in order for the Commission to consider whether Claimant's proven disability is wholly, or only partly, related to the subject accident. However, from the Court's discussion, it clearly does not follow that Defendants have no responsibility to come forward with evidence on the issue of apportionment. What is anticipated is that Claimant bears the burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. However, once Claimant makes a *prima facie* showing in this regard, the burden of going forward with evidence that some portion of Claimant's disability is, in fact, referable to a pre-existing condition, shifts to Defendants. *See Albright v. MGM Construction, Inc., 102* Idaho 269, 629 P.2d 665 (1981); *Keenan v. Brooks,* 100 Idaho 823, 606 P.2d 473 (1980) (Bistline, J., and Donaldson, J., specially concurring). Here, Claimant made a *prima facie* showing that his disability is referable to the subject accident. Thereafter, the burden of going forward with evidence on the issue of apportionment shifted to Defendants. The record fails to demonstrate that Defendants adduced proof which would allow the Commission to determine what portion of Claimant's disability should fairly be referred to a pre-existing condition.

78. Based on the foregoing, we find that Claimant has proven entitlement to disability of 42.5%; there being no proof upon which to base a decision on apportionment.

CONCLUSIONS OF LAW

1. Claimant suffered a knee injury in December 2008 as a result of his foot injury which was caused by a compensable accident.

2. Claimant is entitled to TTD/TPD benefits to the date of medical stability, September 30, 2009.

3. Claimant is entitled to medical care for his knee condition to the date of hearing. Claimant failed to show he was entitled to future medical care.

4. As a result of the compensable industrial injury, Claimant has suffered permanent disability rated at 42.5% of the whole person, inclusive of impairment.

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ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant suffered a knee injury in December 2008 as a result of his foot injury which was caused by a compensable accident.

2. Claimant is entitled to TTD/TPD benefits to the date of medical stability, September 30, 2009.

3. Claimant is entitled to medical care for his knee condition to the date of hearing. Claimant failed to show he was entitled to future medical care.

4. As a result of the compensable industrial injury, Claimant has suffered permanent disability rated at 42.5% of the whole person, inclusive of impairment.

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

DATED this __9th___ day of __December_____, 2010.

INDUSTRIAL COMMISSION

_unavailable for signature_____
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 _9th_____ day of __December____, 2010, 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:

KIMBERLY DOYLE
PO BOX 6358
BOISE ID 83707

RICHARD OWEN
PO BOX 278
NAMPA ID 83653

_/s/_____
Assistant Commission Secretary
cs-m