BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIM A. CLARK, Claimant, v. R.C. WILLEY HOME FURNISHINGS, INC., Employer, and HARTFORD INSURANCE COMPANY OF THE MIDWEST, Surety, Defendants.	**IC 2009-000366** **2009-023691** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed January 30, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on February 4, 2011. Claimant was present and represented by Bradford S. Eidam of Boise. Eric S. Bailey, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented, and the record remained open for the taking of four post-hearing depositions. The parties then submitted post-hearing briefs, and this matter came under advisement on June 20, 2011. 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

As discussed at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to temporary total disability (TTD) and/or temporary partial (TPD) benefits;

2. Claimant's entitlement to attorney fees for Surety's wrongful denial of the above;

3. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits; and

4. Whether apportionment under Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant, a warehouseman with one full-time job and one part-time job, suffered two separate bilateral knee injuries resulting in bilateral knee surgeries. He contends that he was underpaid TTD benefits and not paid any PPD benefits due to his hours being cut while on light duty without justification, thus warranting an award of attorney fees. Claimant has been assigned permanent restrictions that have adversely affected his employability. He has been able to retain his full-time job with accommodations, but lost his part-time job with Employer herein, even though a permanent light-duty position was offered shortly before the hearing. Claimant seeks an award of PPD benefits without apportionment, as Claimant's bilateral knees were asymptomatic before his two industrial accidents.

Defendants acknowledge that Claimant cannot return to his time-of-injury job as a warehouseman, but question his desire to find another second job. While it may be difficult, Claimant will need some retraining in order to successfully change occupations. It is mere speculation that Claimant will lose his full-time job when his accommodating supervisor retires in a few years. Further, the job offered to Claimant by Employer was a real job and, despite Claimant's protestations to the contrary that he could not perform customer service/desk work, it will never be known because he did not even make an attempt. Claimant should not be awarded

an inflated PPD rating because he chooses to take it easy and spend more time with his grandson. Regarding TTD benefits, if Surety owes them, they will pay them. Regarding TPD benefits, none are owed as Claimant himself made the decision to work fewer hours. In any event, attorney fees should not be awarded as this was not a noticed issue.[1]

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's Human Resources Associate, Tamara Smith, taken at the hearing.

2. Joint Exhibits 1-19 admitted at the hearing.

3. The post-hearing depositions of: Jim Sereduk, taken by Claimant on February 9, 2011; Richard Radnovich, D.O., taken by Claimant on March 8, 2011; George A. Nicola, M.D., taken by Defendants on April 7, 2011; and Darrell Holloway, taken by Claimant on April 8, 2011.

All objections made during the taking of the above depositions are overruled with the exception of Claimant's objections at page 20 of Mr. Sereduk's deposition, which are sustained.

FINDINGS OF FACT

1. Claimant was 51 years of age at the time of the hearing and resided in Kuna. He stands six feet eight inches tall and weighs 340 pounds. He was employed full-time as a warehouseman/storekeeper for the State of Idaho Tax Commission. He was also employed by Employer as a warehouseman somewhat less than full-time until shortly before the hearing. This

[1] Defendants assert in their post-hearing brief that Claimant did not identify TTD/TPD as an issue until his initial post-hearing brief. However, TTD/TPD was identified as an issue in the Notice of Hearing and confirmed as an issue at hearing by Claimant's counsel. *See,* Hearing Transcript, p. 5.

concurrent employment lasted over ten years, and each employer was aware of such employment.

2. On December 11, 2008, Claimant injured his left knee at Employer's when he lost his balance while pulling on a mattress. He fell backwards, stumbled off a lift that was about 18 inches off the floor. Claimant landed on the floor. Claimant first sought medical attention on December 17, 2008, when he presented to St. Luke's Occupational Health Services. He was diagnosed with a left knee strain/sprain, placed on crutches, prescribed physical therapy and placed on certain work restrictions. Eventually, Claimant was brought to surgery by Kyle Palmer, M.D., on February 4, 2009, for a left knee meniscus tear (partial medial meniscectomy). On May 5, 2009, Dr. Palmer released Claimant to full duty work. On June 4, 2009, Dr. Palmer assigned a 2% left lower extremity PPI rating with no apportionment. Dr. Palmer did not give Claimant any permanent physical restrictions.

3. On May 9, 2009, Claimant suffered an injury to his right knee while stretching pursuant to an Employer-mandated stretching program. He testified that his right knee "popped" followed by a burning sensation running down the inside of his right leg. Claimant again came under the care of Dr. Palmer, who performed a right knee partial medial and lateral meniscectomy on July 29, 2009. In an October 12, 2009 follow-up, Dr. Palmer noted that Claimant's bilateral knees were becoming inflamed due to the weather and degeneration, and that Claimant may want to consider changing his job activities. In a final follow-up note dated January 4, 2010, Dr. Palmer recorded that Claimant had failed a trial of full-duty work, and that permanent physical restrictions of no lifting over 50 pounds and no squatting, kneeling or climbing were warranted. He assigned a 2% right lower extremity PPI rating with 50% apportioned to "preexisting degenerative pathology in his knee." Exhibit 5, p. 27.

DISCUSSION AND FURTHER FINDINGS

TTDS:

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg*, *Id*.

4. Claimant asserts that after his right knee surgery, he did not receive TTD benefits during the five-day waiting period. Claimant is correct in that the five-day waiting period does not apply if the injured worker is hospitalized as an inpatient, as was Claimant. *See,* Idaho Code

§ 72-402(1). Claimant is entitled to the appropriate TTD benefits for the five-day waiting period regarding the right knee claim.

TPDs:

5. Claimant also asserts that he was not paid any TPD benefits under either claim while working light-duty as required by Idaho Code § 72-408(2).[2] He argues that because light-duty was available to Claimant for fewer hours than he was working full duty, he should be paid 67% of the difference. Defendants counter that while Claimant's calculations and wage records as set forth in his brief are correct, nonetheless, it was Claimant's choice to work fewer hours than he normally would have. Tamara Smith, Employer's Human Resources Associate, testified that it was her understanding that Claimant did not have much to do on Saturdays, so Employer let him take Saturdays off. At page 14 of Claimant's opening brief, Claimant's counsel indicates that Claimant asked his Saturday supervisor if he could leave early in order to rest his knee and he was allowed to do so.[3] In any event, the Commission finds that Employer did not reduce Claimant's Saturday work hours, and no TPD benefits are owed in that regard.

6. Regarding a reduction in hours of Claimant's weekday light-work schedule, it appears from Claimant's testimony, as well as the calculations found at pages 11-15 of Claimant's opening brief, that some TPD is owing. Because Defendants do not quarrel with those calculations, TPD benefits will be awarded accordingly with the exception of the Saturday hours.

[2] Idaho Code § 72-408(2) provides for partial disability benefits equal to 67% of the decrease in wage earning capacity.

[3] Claimant was recalled in rebuttal to Ms. Smith's testimony, and at that time testified that he did not ask his supervisor for fewer Saturday hours. *See,* Hearing Transcript, p. 195.

Attorney fees:

7. Claimant seeks an award of attorney fees for Surety's unreasonable denial of the above TTD/TPD benefits, and because such denial forced Claimant's counsel to spend time and energy calculating those benefits. Defendants respond that TTD/TPD benefits were not noticed as issues and attorney fees should not be awarded. However, as pointed out in footnote number 1, such issues were indeed noticed. Surety acted reasonably, and there is no basis for an award of attorney fees under these circumstances.

PPI:

8. Defendants have paid PPI benefits for Claimant's bilateral knee injuries. Claimant does not assert entitlement to a PPI award in addition to that paid by Defendants. Claimant contends that the issue of PPI is moot, and need not be considered by the Commission. However, as Claimant has noted, Defendants have devoted considerable discussion to the question of whether, or how, Claimant's PPI should be apportioned between the effects of the subject accidents, and Claimant's preexisting degenerative knee arthritis. As developed *infra*, in connection with the discussion of apportionment under I.C. § 72-406, the Commission concurs with Defendants that even though Claimant does not claim entitlement to additional impairment, the extent and degree of Claimant's permanent physical impairment, and more importantly, whether some part of Claimant's impairment predated the subject accidents, is important to resolution of the issue of apportionment under I.C. § 72-406.

Employer's job offers:

9. On January 19, 2011, Claimant was informed by Employer that his light-duty job was ending. He was offered office jobs that included customer service, jobs for which he claims he is not suited. His assertion in that regard, particularly involving customer service, is

supported by his testimony that on two separate occasions in 2009 he was told by his supervisor to stay away from customers and sales associates as he was having difficulty relating to them. Further support is found in Claimant's annual Associate Performance Appraisals. In the beginning of his employment in 1999 his performance evaluations were exceptional in all respects. Then, beginning in 2007, he was written up for treating sales associates badly. *See,* Exhibit 9, p. 24. Then, later that same year, Claimant left a nasty note for a co-worker and was reprimanded. In a May 2009 evaluation, it was noted, "Tim can sometimes be intimidating to other associates." Exhibit 9, p. 42. A performance evaluation in May 2010 listed nine separate "Unsatisfactory/Needs Immediate Improvement" in various areas of employment as well as for his overall work performance. Jim Sereduk, Claimant's supervisor at the Tax Commission, testified that he had Claimant on a "zero policy" the last couple of years regarding "bad mouthing" other employees. These evaluations and comments supply ample proof that Claimant would likely not have been suitable for the offered job. ICRD consultant Darrell Holloway agrees. While Employer's job offers were legitimate, it is the Referee's opinion that Claimant would be hard-pressed to succeed, and it would have been a set-up for failure.[4] Having observed Claimant at hearing, the Referee found that Claimant's failure to accept the customer service job was not unreasonable; he is simply not cut out for customer service in Employer's environment. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

Tax Commission job:

10. Claimant is concerned that upon his present supervisor's retirement, his replacement may not be willing to afford Claimant the accommodations he is now receiving. He

[4] A requirement for the job is to be able to type at least 30 words a minute, something that Claimant testified he cannot do.

is concerned that he will be unable to do his job without such accommodations and would be subject to termination. Defendants argue that whether Claimant will lose his job at the Tax Commission is based on pure speculation. The Commission agrees. Claimant has worked at the Tax Commission for the past 11 years and is considered to be an excellent employee (the "zero tolerance" issue aside). No evidence has been presented that he is now in danger of losing that job or that he may be in two years or so whenever Mr. Sereduk retires. The "possibility" that Claimant may eventually lose his job at the Tax Commission will not be considered in the analysis of his PPD.

PPD:

"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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, 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).

Claimant contends that he is entitled to whole person PPD benefits equaling approximately 50% inclusive of PPI. Defendants argue that Claimant is entitled to whole person PPD equaling 25% inclusive of PPI with 50% apportioned to preexisting conditions.

11. Claimant is a rather large individual with slow, deliberate movements and walks with a noticeable limp. The Referee noted at hearing that Claimant had a difficult time rising from his chair in the hearing room. At the time of the hearing, Claimant was still employed full-time by the Tax Commission with certain accommodations. He no longer had his job with Employer, as he decided not to accept the office/customer service positions offered shortly before hearing, so he was terminated.

12. Claimant cannot return to work as a warehouseman at Employer's or anywhere else. His treating physician has given permanent physical restrictions of no lifting over 50 pounds and no squatting, kneeling, or climbing. Dr. Nicola agrees with these restrictions, and Dr. Radnovich imposed similar restrictions.

13. Claimant has no education beyond high school. His work history consists of briefly working at a service station shortly after graduation from high school in 1977; operating heavy equipment installing telephone and power lines; and working in the warehouse at Idaho Power for about six years. In 1999, Claimant began working in the warehouse at the Tax Commission and shortly thereafter secured his second job with Employer. Claimant worked concurrently for the Tax Commission and Employer for about 11 years.[5]

14. Claimant worked with ICRD consultant Cindy Lijewski and, after she left the Industrial Commission, Darrell Holloway following his knee injuries. Mr. Holloway has been an ICRD consultant for over four years. He prepared ICRD case notes as well as an Employability Report. He interviewed Claimant and sat through Claimant's hearing testimony. At the time Mr. Holloway was working with him, Claimant still had his job with Employer. Mr. Holloway identified some job titles that Claimant may be able to perform, but testified that Claimant's lack of mobility and having a full-time day job would be obstacles for him in obtaining employment in a second job. Mr. Holloway testified that if Claimant could not keep his job with Employer, his best option would be to keep his job with the Tax Commission and seek another second job. However, Mr. Holloway was skeptical that Claimant could restore his earning capacity:

> Well, it's hard enough for a person to get a job. Okay? Tim has done a highly skilled - - He does not have a very broad base of transferrable skills. So, having to get a job which is after hours, so to speak, and within his restrictions, and pretty good pay is what he was making at R. C. Willey, those are three things that are really tall orders to fill. And so, I just think, for that reason, it's doubtful that he could just restore his earning capacity at that - - in that way. He' going to have to - -He's going to have something that adds to his quiver full of arrows to make it happen. And I don't know what that is.

Holloway Deposition, pp. 33-34.

[5] Claimant worked at the Tax Commission from 7:30 a.m. until 4:00 p.m. Monday through Friday, and at Employer's from between 4:30 p.m. and 5:30 p.m. until sometime after the store closed. He would also typically work for Employer on Saturday mornings.

15. Because Claimant had been working at the Tax Commission for over 30 days, Mr. Holloway closed the ICRD file. In conjunction with doing so, Mr. Holloway prepared his vocational recommendations for Surety. He noted that Claimant was making $15.09 an hour for a 30-hour week with benefits at Employer's. He earned $14.73 an hour for a 40-hour week with benefits at the Tax Commission. Mr. Holloway opined that if Claimant lost his job with Employer and was able to secure another one, it would likely pay $7.50 to $8.00 an hour as an entry wage without benefits.

16. There is no doubt that Claimant lost a significant portion of his income (about 40% according to Mr. Holloway) when he lost his job with Employer. He is fortunate that he still has a full-time job to rely upon. His physical restrictions are onerous for an individual with Claimant's moderate-to-heavy work history. On the other hand, Claimant testified that he may be getting tired of working two jobs and was going to re-evaluate whether to attempt to get another second job. Defendants assert that Claimant should not be awarded a large disability because he chooses not to work or be amenable to changing career directions and being retrained. Their assertion in that regard is not without some merit, as the Referee did not come away from the hearing with an abiding belief that Claimant was at all sure about his vocational future.

17. Claimant calculates his loss of annual income and benefits at 20% of his pre-injury total if he keeps his job at the Tax Commission and gets another second job at $7.50 to $8.00 an hour without benefits. If Claimant cannot find a second job that would allow him to keep his job at the Tax Commission, he would experience a loss of annual income equal to 44%. Claimant's loss of access to the labor market has not been quantified, but there are certainly jobs that are no longer available to him due to his physical restrictions.

18. When considering Claimant's age (51), his motivation (or lack thereof) to find a second job, his education, his work history, his lack of transferrable skills, his physical restrictions, and his body size and appearance, and loss of earning capacity, the Commission finds that Claimant is entitled to whole person PPD benefits equaling 30% inclusive of his PPI.

Apportionment:

Idaho Code §72-406(1) 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.

19. A necessary prerequisite to the application of I.C. § 72-406(1) is a finding that Claimant suffered from a "preexisting physical impairment" which increased or prolonged the disability from an industrial injury. Absent a showing that Claimant suffered from such a preexisting physical impairment, I.C. § 72-406(1) apportionment is not at issue. Here, Defendants contend that the medical evidence establishes that Claimant does suffer from a preexisting physical impairment. Claimant is equally adamant that the medical evidence demonstrates that Claimant is not entitled to an impairment rating for his preexisting bilateral knee condition. Both parties cite the *AMA Guides to the Evaluation of Permanent Physical Impairment,* Sixth Edition *(Guides)* in support of their respective positions.

20. In analyzing these arguments, the Commission accepts that the record in this case establishes that Claimant suffered from degenerative arthritis of the knees, bilaterally, prior to the subject accidents. (*See*, Exhibit 5, pp. 6-7, 18-19, 29-31; Nicola Deposition, 9/21-10/16, 12/16-13/12; Radnovich Deposition, 11/15-12/14, 32/19-36/3). Second, the Commission accepts that these preexisting conditions were asymptomatic prior to Claimant's accidents. Claimant

argues that an asymptomatic preexisting condition, such as Claimant's bilateral knee arthritis, cannot constitute a preexisting physical impairment. Claimant argues that a prerequisite to a conclusion that he is entitled to an impairment rating for his preexisting condition is a finding that his preexisting condition was symptomatic prior to the industrial accidents. Cited in support of this proposition are a number of excerpts from the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition. (*See,* Claimant's Brief at 4-6).

21. The starting point for evaluating this question, however, must be the statutory scheme.

I.C. § 72-422 defines permanent impairment as follows:

> "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability.

By its specific language, the statute anticipates that an impairment rating may be awarded for either an anatomic or functional abnormality. The statute does not require a finding that the condition in question be symptomatic before it can be considered for an impairment rating. Nor does the Commission believe that the provisions of I.C. § 72-424 lend any particular support to the proposition that asymptomatic conditions are automatically foreclosed from consideration for an impairment rating. That section provides:

> "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members.

22. To paraphrase, a permanent impairment evaluation is a medical appraisal of the nature and extent of the injury in question, and how it affects the injured worker's functional abilities. The statute does not specify that asymptomatic conditions cannot qualify for a rating, although it does suggest that symptomatic conditions may warrant a higher impairment rating. We think it is clear that even asymptomatic conditions can interfere with an individual's function. For example, an individual with an aortic aneurysm might be counseled against engaging in strenuous activities that increase his risk of disecting the aneurysm, even though the individual is asymptomatic, or even ignorant of the existence of a problem.

23. It seems clear that there is no statutory prohibition against considering even asymptomatic physical conditions as conditions which might qualify as preexisting physical impairments under I.C. § 72-406. However, under I.C. § 72-424 it is important to note that for such a condition it must be shown that said condition impacted the Claimant's functional abilities before it qualifies for an impairment rating. Evidence on this point may come in the form of medical opinion rendered either before or after the industrial accident, demonstrating that Claimant either had, or should have had limitations/restrictions as a result of his preexisting condition. *Poljarevic v. Independent Food Corp.*, 2010 IIC 0001.1 (Jan 13, 2010). As we pointed out in *Poljarevic*, the fact that claimant demonstrated a pre-injury ability to engage in physical activity exceeding subsequently imposed limitations/restrictions does not necessarily denegrate the medical opinions. Limitations/restrictions are not specified for the purpose of defining what an individual is capable of doing. Rather, they are typically imposed in order to protect the individual from the risk of further injury.

24. In order to ascertain whether Claimant suffered from a preexisting physical impairment under the facts of this case, it must be determined whether his asymptomatic

preexisting condition (bilateral degenerative arthritis of the knees) affected Claimant's functional ability. *See*, I.C. § 72-424. On this point, both Dr. Radnovich and Dr. Nicola have offered opinions. Dr. Nicola testified as follows concerning the source of Claimant's limitations/restrictions:

> Q. (By Mr. Bowen) Now, do you have an opinion as to whether the need for these restrictions is in any fashion due to the meniscusectomies that were done on the right knee?
>
> A. Again, a meniscusectomy is not a procedure which requires a work restriction. You know, when you remove some meniscus, there should be no reason that you need to restrict, you know, kneeling, squatting, lifting weight.
>
> That restriction is due to his kneecap and the wear and tear behind his kneecap.
>
> Q. Is that an opinion you hold within a reasonable degree of medical probability, sir?
>
> A. Yes.
>
> Q. So, if I understand you correctly, the observance of restrictions with respect to this gentleman's knees would be the result of the underlying degenerative changes that studies documented early on?
>
> A. Yes.

Nicola Depo., 18/23 – 19/17.

25. On direct examination, and again on cross examination, Dr. Radnovich testified that the limitations/restrictions he proposed for Claimant derived <u>both</u> from his underlying degenerative condition, and from the effects of the subject accidents:

> Q. (By Mr. Eidam) Okay, You've given him some restrictions as well. Did the injuries from the accidents <u>contribute</u> to the need for those permanent restrictions?
>
> A. Yes.
>
> Q. And what are those restrictions designed to avoid for him?

A. Further degeneration, further aggravation, further loss of function.

. . .

Q. (By Mr. Bailey) You indicated that the restrictions were in place to the meniscal tears and also as a component of containing the progression, I assume, of the degenerative disease. Is that –

A. It's very difficult – once the genie is out of the bottle, it's very difficult to say these restrictions were just for part "A" of the problem and not at all for part "B" of the problem.

In this case, the restrictions that I've provided are to try to maintain the health of the entire knee, which would include by necessity things that were already wearing out that weren't industrially related. And, so, I don't know of way that I can provide just restrictions that would just keep the meniscus from reinjuring without also restricting things that don't necessarily need restricted or things that are nonindustrially related and need restricting.

Radnovich Depo., 14/6 – 13. . . 24/1 – 18 (Emphasis Supplied).

26. Although this evidence may support a conclusion that Claimant's asymptomatic knee arthritis is significant enough to contribute to his current need for physician imposed limitations, this evidence altogether fails to support a finding that prior to the industrial accidents Claimant either had, or should have had, limitations imposed on his physical activities as a result of pre-existing knee arthritis.

27. Having found that Claimant has failed to prove the existence of a pre-existing physical impairment, the Commission does not reach the question of whether Claimant's disability should be apportioned between the effects of the subject accidents and a pre-existing condition.

CONCLUSIONS OF LAW

1. Claimant is entitled to temporary total disability (TTD) benefits during the five-day waiting period regarding his right knee.

2. Claimant is entitled to temporary partial disability (TPD) benefits to account for the fewer hours worked on light duty, with the exception of Saturdays, in accordance with the calculations found at pages 11-15 of Claimant's opening brief.

3. Claimant is not entitled to an award of attorney fees for Surety's denial of temporary total disability/temporary partial disability (TTD/TPD) benefits.

4. Claimant is entitled to whole person permanent partial disability (PPD) benefits equaling 30% inclusive of PPI.

5. Apportionment of permanent partial disability (PPD) benefits under Idaho Code § 72-406 is not appropriate.

ORDER

Based upon the foregoing analysis, IT IS ORDERED that:

1. Claimant is entitled to temporary total disability (TTD) benefits during the five-day waiting period regarding his right knee.

2. Claimant is entitled to temporary partial disability (TPD) benefits to account for the fewer hours worked on light duty, with the exception of Saturdays, in accordance with the calculations found at pages 11-15 of Claimant's opening brief.

3. Claimant is not entitled to an award of attorney fees for Surety's denial of temporary total disability/temporary partial disability (TTD/TPD) benefits.

4. Claimant is entitled to whole person permanent partial disability (PPD) benefits equaling 30% inclusive of PPI.

5. Apportionment of permanent partial disability (PPD) benefits under Idaho Code § 72-406 is not appropriate.

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

DATED this _30th_____ day of January, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_Participated but did not sign_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _30th_____ day of January, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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ERIC S BAILEY
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__/s/_____