BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD, Claimant, v. KENTUCKY FRIED CHICKEN, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2004-526113** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed June 7, 2013

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on September 23, 2011. Claimant was present and represented by Starr Kelso of Coeur d'Alene. Defendants were represented by H. James Magnuson, also of Coeur d'Alene. The hearing was continued due to the illness of Claimant's counsel.

On February 29, 2012, the matter was reassigned to the Commissioners, who conducted a hearing on April 17, 2012. Mr. Kelso represented Claimant, who was present. Mr. Magnuson represented Defendants. The parties presented oral and documentary evidence, and post-hearing briefs were submitted.[1] The matter came under advisement on November 5, 2012. It is now ready for decision.

ISSUES

As agreed upon at hearing, the issues to be decided by the Commission are:

1. Whether and to what extent Claimant is entitled to permanent partial impairment

[1] Defendants attached certain documents to their brief that have not been admitted into the record as evidence. The Commission did not consider these documents in arriving at its findings of fact and conclusions of law.

(PPI) benefits;

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

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered a work-related accident on November 13, 2004, when he slipped on ice and struck his knees on a concrete barrier. Claimant alleges that as a result of the accident, he suffered a posterior cruciate ligament (PCL) injury, resulting in 7% whole person PPI, as well as PPD that "substantially" exceeds 28%.

Defendants reply that Claimant suffered no permanent impairment as a result of his industrial accident. Defendants dispute that Claimant suffered a PCL injury and contend that Claimant's present knee symptoms are likely the result of patellofemoral pain syndrome, which was not caused by the industrial accident. Alternatively, if Claimant is entitled to PPI, he has failed to demonstrate disability in excess of impairment.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The testimony of Claimant taken at the April 17, 2012 hearing;

2. Claimant's Exhibits A-K, admitted at the April 17, 2012 hearing;

3. Defendants' Exhibits 1-14, admitted at the April 17, 2012 hearing;

4. The post-hearing deposition testimony of Mark Bengtson, M.P.T.; Dan Brownell; Douglas N. Crum; John M. McNulty, M.D.; and William R. Pace III, M.D.; and

5. The Industrial Commission legal file pertaining to this claim.

All pending objections are overruled.

After having considered the above evidence and the arguments of the parties, the

Commissioners issue the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

1. Claimant was born on May 22, 1988 and was 23 years old at the time of the 2012 hearing. He is married with three children and currently resides in Vancouver, Washington. Prior to moving to Vancouver, Claimant lived in Coeur d'Alene, where he grew up. Claimant is a skilled musician who began playing the viola at the age of five. He also plays the violin and the piano. As a teenager, Claimant played in local quartets, orchestras, and symphonies. He testified that he planned to join the United States Air Force orchestra after high school in order to obtain financial assistance for higher education. Claimant ultimately hoped to attend the San Francisco Conservatory of Music.

2. In addition to music, Claimant enjoyed athletic activities. He was an avid runner and weight lifter, and possibly participated in football.[2] He also worked part-time in high school, first as a lifeguard and later at Dairy Queen. At the time of his accident, Claimant was a cook for Employer, earning $7.15 per hour and working 15 hours per week. His duties included food preparation and kitchen clean-up.

Accident and Medical Treatment

3. On November 13, 2004, Claimant was carrying garbage out to a dumpster when he slipped on ice and fell on a concrete barrier, striking his knees. The impact caused Claimant's knees to bleed. He went inside to bandage his knees and inform his supervisor of the accident. His father picked him up at the end of his shift.

4. Claimant did not immediately seek medical treatment for his injuries, but on

[2] It is unclear from the record whether Claimant actually participated in organized sports. At the 2012 hearing, he testified that he played football, but during his deposition on April 19, 2005, he testified that he was not on any sports team.

December 16, 2004, he presented to Howard N. Brinton, M.D., at the After Hours Care Clinic in Coeur d'Alene. Claimant complained of ongoing knee pain, "particularly in the anterior aspect of his knees just below his knee caps." D.E. 3, p. 41. Claimant stated that he had never had similar pain before. Dr. Brinton examined Claimant and diagnosed patellofemoral pain following bilateral patella contusions. Dr. Brinton prescribed knee braces and stretching exercises, as well as Naprosyn and ice. He advised Claimant that he should avoid running, jumping, and "duress" bending, stooping, and kneeling. *Id*.

5. Claimant followed up with Dr. Brinton on December 23, 2004. Claimant continued to suffer pain in both knees, despite the use of braces. Dr. Brinton prescribed physical therapy, which failed to alleviate Claimant's symptoms.

6. On January 6, 2005, Claimant returned to Dr. Brinton. Testing revealed "pain with medial structure, joint loading, particularly posterior aspect." D.E. 3, p. 38. Dr. Brinton suspected internal derangement involving the left medial meniscus posterior horn. He ordered an MRI of the left knee, which was performed on January 11, 2005. The MRI revealed that the meniscus was intact. Claimant's cruciate ligaments, anterior and posterior, also appeared to be intact.

7. Dr. Brinton reviewed the MRI scan with an orthopedist, Dr. Adam Olscamp, who stated that Claimant's treatment should consist of ambulation as tolerated. Dr. Brinton continued Claimant on physical therapy and anti-inflammatory medication. At the request of Claimant's father, Dr. Brinton referred Claimant to William F. Sims, M.D., for a second opinion.

8. Claimant presented to Dr. Sims, an orthopedic surgeon, on March 1, 2005. After examining Claimant and reviewing his medical records, Dr. Sims suspected that Claimant had a partial PCL injury in his right knee. Dr. Sims recommended an MRI of the right knee, but

Claimant apparently did not follow up on the recommendation. He did not return to Dr. Sims until nine months later, on December 13, 2005. Because of Claimant's persistent pain, Dr. Sims recommended MRI evaluations of both knees. These were performed on January 3, 2006. Radiologist Monte F. Zarlingo, M.D., recorded his findings for the right knee:

> The anterior cruciate ligament is intact. The posterior cruciate ligament demonstrates a focal area of signal hyperintensity within its distal fibers, which appears to saturate with fat saturation of uncertain significance. This may represent focal fat imbibed within the fibers. This could be the result of prior trauma and is of uncertain significance. The posterior cruciate ligament remains congruent. No evidence of an acute tear is seen.

D.E. 5, p. 61. The left knee MRI revealed no cartilage injury.

9. Claimant presented to Dr. Sims for follow-up on March 3, 2006. He reported that he continued to experience pain in both knees, but the right knee was more painful. Dr. Sims examined Claimant and reviewed the MRI results. Dr. Sims noted that Claimant's right knee MRI showed evidence of a PCL injury, and that this was consistent with an observed increase in laxity in Claimant's right knee. Dr. Sims diagnosed a partial right knee PCL injury and recommended a corticosteroid injection. Claimant agreed to undergo the procedure.

10. On March 31, 2006, Claimant reported to Dr. Sims that he experienced some relief from the injection, but his symptoms had returned. Dr. Sims discussed further treatment with Claimant but warned that an operative intervention would not likely be beneficial:

> I explained to him that…a reconstructive effort may return somebody to grade 2 laxity findings, which he presently has or slightly better.

D.E. 5, p. 56. After this appointment, Claimant did not return to Dr. Sims for almost a year.

11. On January 29, 2007, Claimant presented to Dr. Sims for evaluation. Claimant reported that he had returned to lifting weights and was also cycling. However, when he

attempted to run, he felt "significant pressure" in his right knee. On examination, Dr. Sims found "approximate grade 2 [laxity] findings with external rotation of the foot, which improves to 1+ findings with internal rotation of the foot." D.E. 5, p. 55. Dr. Sims reiterated his belief that while Claimant had a right PCL injury, his laxity findings indicated that operative reconstruction would not improve his condition. Dr. Sims recognized that his opinion on surgery was "somewhat debatable" and said a second opinion would be reasonable. *Id*.

12. On April 30, 2007, Claimant presented to Tycho E. Kersten, M.D., for a second opinion regarding surgery. After examining Claimant, Dr. Kersten concurred with Dr. Sims's diagnosis of a partial PCL injury, noting, "[Claimant] certainly does have some laxity." D.E. 6, p. 72. He also agreed that surgery would not be beneficial to Claimant:

> In the big picture, I think surgery is unlikely to change his symptoms and his condition much, and, as such, I would be in agreement with Dr. Sims that conservative treatment is the treatment of choice here….
>
> With regards to the PCL surgery, surgery is a big deal with a low likelihood of being able to improve on his current stability/instability pattern….[Surgery] is unlikely to reliably improve his condition.

Id.

13. On September 20, 2007, Claimant underwent an independent medical examination (IME) with William R. Pace III, M.D., an orthopedic surgeon, and Linda Wray, M.D., a neurologist.[3] Dr. Pace reviewed Claimant's medical records, including the MRIs, and performed an examination of Claimant. He noted that Claimant walked with a normal gait. No laxity was observed. Dr. Pace found that Claimant was medically stable and had sustained no PPI. Dr. Pace declined to place any restrictions or limitations on Claimant.

14. After receiving the IME report, Surety forwarded it to Dr. Sims and asked if he

[3] Dr. Wray examined Claimant for an alleged injury unrelated to this claim.

agreed with the findings. Dr. Sims indicated that he did not:

> The [patient] does have increased laxity on [right] knee [posterior] drawer exam (partial PCL injury) — According to table 17.33 AMA Guides to PPI, this is consistent with a 3% whole person impairment rating — re "mild cruciate ligament laxity."

D.E. 5, p. 50. Surety then asked Dr. Pace to respond to Dr. Sims's opinion. Dr. Pace stated that his own opinion remained unchanged, as he observed no laxity on his examination of Claimant.

15. On April 23, 2009, Claimant underwent a functional capacity evaluation (FCE) performed by Mark Bengtson, M.P.T. Mr. Bengtson observed laxity consistent with a chronic PCL injury. Mr. Bengtson concluded that Claimant had "significant limitations" in walking, stair and ladder climbing, and weight bearing tolerance during prolonged ambulation. C.E. B, p. 3. He believed that Claimant would have difficulty performing work in medium or heavy duty jobs that required walking or standing more than 50% of the time. He noted that Claimant was capable of light duty work with standing and walking up to 50% of an eight-hour work day. However, he also noted that Claimant's walking and prolonged ambulation limitations were not permanent and could be improved in physical therapy.

16. On June 29, 2010, Claimant's counsel sent the FCE report to Dr. Sims. Counsel indicated that Claimant was seeking Surety approval for an appointment with Dr. Sims, but in a response sent on July 13, 2010, Dr. Sims wrote that it would be in Claimant's "best interest" to be seen by another physician. D.E. 5, p. 48.

17. On September 16, 2010, Dr. Pace saw Claimant for a second IME. He reviewed Claimant's medical records again, as well as the FCE. He also conducted a physical examination. Claimant reported that he continued to suffer from dull bilateral knee pain, with occasional sharp pains under his right kneecap. On examination, Dr. Pace observed no laxity. He reported that his opinion remained the same. He wrote:

> I believe Mr. Fairchild's current complaints are consistent with bilateral patellofemoral pain syndrome. This is common in young adults. There is no good curative treatment for it. Quadriceps strengthening exercises could be helpful. The [FCE's] comments regarding the "desperate need for a comprehensive lumbopelvic femoral balancing and strengthening program" are a little bit difficult for me to accept. This gentleman seems to be reasonably fit. He is working without any specific restrictions. I think his knee complaints are real. They may be minimally related to the slip and fall incident in 2004, but I would not consider that incident to be the major contributing cause to his present complaints.
>
> As in 2007, I failed to find any evidence in support of a diagnosis of a posterior cruciate ligament injury in the right knee. I think this is sort of a case of "the emperor's clothes" and I doubt the [FCE] came up with this diagnosis on a blind basis, but probably read it in the documentation. Certainly there is nothing on the MRI to support the diagnosis and, as I pointed out previously, even if there were a partial posterior cruciate ligament injury in 2004, it would have resolved by now. It is probably also worth nothing that I find it difficult to work out a mechanism of injury to the posterior cruciate ligament that would be caused by a slip and fall forward on an icy surface. The injury described is much more consistent with contusions to the patellae than with an injury to either cruciate ligament.

D.E. 1, p. 5. Dr. Pace opined that he would not put any restrictions on Claimant, as he "looked carefully at the functional capacities evaluation and failed to see the basis for restricting this man to light industrial work with limited standing." *Id*. at 6.

18. On August 31, 2011, John M. McNulty, M.D., examined Claimant at his request. Dr. McNulty recorded Claimant's complaints as bilateral knee pain, right more than left, with difficulty going up and down stairs. Dr. McNulty agreed with Dr. Sims that Claimant suffered a PCL injury; however, Dr. McNulty opined that Claimant's laxity was moderate, rather than mild, and that Claimant was entitled to 7% PPI under the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition. Dr. McNulty did not assign any limitations or restrictions.

Post-Accident Employment

19. After his accident in 2004, Claimant worked his next two scheduled shifts but was terminated by Employer soon after. Claimant's testimony regarding his separation from Employer is contradictory. At his deposition on April 19, 2005, Claimant testified that he skipped his third post-accident shift to play at a concert with the Coeur d'Alene Symphony. When Claimant's supervisor called to ask where he was, Claimant replied that his "knees hurt and [he] would rather play the concert" than go to work; after this, he was discharged. D.E. 9, p. 97. In contrast, at hearing, Claimant testified that he worked for several weeks after the accident, but was discharged because of his post-accident physical limitations:

> They would not work with my limitations. They didn't really comply to not being able to lift or not being able to move quickly to their standards or to their customer demand…I did ask them just to find — maybe if I can just stay on register all day or do some light cleaning up for them. But they ultimately found that there was nothing that I could do in the company that would benefit them. So I — my employment was ended after they found no use for me.

Hearing Tr. 29-30.

20. Claimant testified that after leaving Employer, he attempted to work at Target but was unable to handle the position's physical demands. He then attained a night job cleaning at McDonald's. Upon graduating high school in 2005, Claimant enrolled at North Idaho College to study music. He testified that he was unable to follow through on his plan to join the Air Force because a recruiter looked over his medical records and told Claimant that he would not qualify physically.

21. While in college, Claimant worked at Carl's Jr. as a shift manager, earning $9.00-9.60 per hour. He left the job after two years due to a conflict with a former co-worker.

22. Claimant graduated in 2007 with an associate's degree in music education. He testified that he wanted to pursue an advanced degree at the University of Idaho or Eastern

Washington University but was unable to afford it.

23. Claimant began to work at Center Partners, a call center, where he handled customer service calls for various companies. He worked there from 2007 until July 2010,[4] when he was laid off.

24. Unable to find work in Coeur d'Alene, Claimant moved to Vancouver, Washington, where he secured a position with Home Depot. At the time of hearing, Claimant was still with Home Depot, earning $8.95 per hour and working anywhere from 15 to 30 hours per week.

25. While he lived in Coeur d'Alene, Claimant was able to supplement his income through musical performances; he belonged to a quartet that would play at events such as weddings. Claimant testified that his injury has not affected his ability to play; however, he does not have the connections in Vancouver that he did in Coeur d'Alene and has struggled to find music-related employment. He unsuccessfully looked for work as an elementary school music teacher. He would need an advanced degree to teach music at a middle school, high school, or college. Claimant testified that he would like to continue his education but is currently focused on supporting his family.

Vocational Opinions

26. Claimant retained Dan Brownell, a vocational rehabilitation consultant, to provide an opinion on the extent of Claimant's permanent disability. Mr. Brownell interviewed Claimant and reviewed his medical records and FCE. Mr. Brownell opined that Claimant sustained 28% or greater PPD based on his physical limitations as well as his limited education.

27. Defendants retained Douglas Crum, also a vocational rehabilitation consultant, to

[4] In 2009, Claimant left Center Partners after he violated the company's attendance policy. He was eligible for rehire and returned after a few months. During the interim, he worked at Panda Express.

opine on the extent of Claimant's permanent disability. After interviewing Claimant and reviewing his records, including the FCE, Mr. Crum concluded that Claimant sustained no permanent disability in excess of impairment. He explained that none of Claimant's doctors assigned permanent restrictions or indicated that the FCE was an accurate representation of Claimant's physical abilities. Furthermore, Claimant has earned a higher wage in his post-injury positions than he did at his time-of-injury position and therefore has suffered no appreciable wage loss. According to Mr. Crum, Claimant's post-injury jobs are consistent with his age and level of education.

Credibility

28. Having reviewed the record and observed Claimant at hearing, the Commissioners find that Claimant is not a credible witness. His hearing testimony differed from his prior statements in depositions, interviews, and appointments with medical providers. As mentioned above, he told strikingly different stories regarding his separation from Employer. He was also inconsistent about his involvement in organized sports and his academic achievements. At deposition, he testified that in college, he was a "great" student who earned As and Bs; to Mr. Crum, he stated that he was an average student in both high school and college, graduating at North Idaho College with a 2.5 GPA. *See* D.E. 10, p. 111; D.E. 13, p. 135. Claimant also appears to be prone to exaggeration. He boasted to Dr. Sims that, prior to his injury, he ran twenty miles per day. *See* D.E. 5, p. 68. (At hearing, this changed to the far more plausible five miles per day; *see* Hearing Tr. 23.) He insists that he used to be able to leg press 1,375 pounds. Hearing Tr. 23. It is difficult for the Commission to credit such extraordinary athletic feats to an adolescent who attended school full-time, worked part-time, and was heavily involved in music. Having considered all of the above, the Commission regards Claimant's testimony as suspect where it is

not supported by other evidence in the record.

DISCUSSION AND FURTHER FINDINGS

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

Causation

30. Causation was not an issue noticed for hearing, but the arguments of the parties have made it necessary to address. Claimant contends that he is entitled to PPI for a PCL injury. Defendants dispute that Claimant suffered a PCL injury. Dr. Pace, the IME physician, believes that Claimant suffered only contusions as a result of the accident, and that his current symptoms are consistent with an unrelated condition, patellofemoral pain syndrome.[5] In order to address the issue of PPI, we must first determine the nature of the injury Claimant suffered as a result of the accident.

31. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). The claimant is required to establish a probable, not merely possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-561, 511 P.2d 1334, 1336-1337 (1973). Medical evidence need not take the form of oral opinion testimony in order to be substantial and competent evidence of causation. *Jones*

[5] In his hearing exhibits, Claimant included excerpts about patellofemoral pain syndrome and how it may be caused by trauma. However, no doctor in this case has opined that Claimant suffered patellofemoral pain syndrome as a result of his industrial accident; there is therefore no need to address this condition.

v. Emmett Manor, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

32. Dr. Sims did not testify in this case, but it is clear from his records that he believed Claimant suffered a PCL injury as a result of the accident. Dr. Sims expressly disagreed with Dr. Pace's IME opinion, which stated that the accident caused only contusions and resulted in no PPI. Dr. Kersten also diagnosed a PCL injury, though he did not specifically opine on causation. Dr. McNulty agreed with Dr. Sims that Claimant suffered a PCL injury as a result of the accident. Dr. Sims, Dr. McNulty, and Dr. Kersten all noted findings on examination that were consistent with a PCL injury, notably laxity. Mr. Bengtson also observed laxity consistent with a partial PCL injury.

33. Dr. Pace, who conducted two IMEs, is the only physician who did not diagnose a PCL injury. He described the concurring diagnoses of his peers as a case of the "emperor's new clothes," in which later physicians pretended to see an injury that a prior doctor diagnosed. Dr. Pace avers that Claimant's MRIs revealed no evidence of a PCL injury. This would seem to ignore the interpretation of Dr. Zarlingo, the radiologist, who noted abnormalities in Claimant's PCL and stated that they could be the result of "prior trauma." *See* ¶ 8 above. Dr. Zarlingo did not clarify what he meant by prior trauma, but Dr. Sims believed the MRI was consistent with an accident-related PCL injury. (The MRI was taken more than one year after Claimant's accident, and Claimant had no pre-accident history of knee trauma.)

34. Dr. Pace essentially disputes the PCL diagnosis for two reasons. First, he observed no laxity during his two examinations; second, he does not believe that a frontal impact on the knees, of the sort suffered by Claimant, would cause an injury to a posterior ligament. We find neither of these reasons persuasive. What Dr. Pace observed in two examinations of Claimant does not outweigh what Dr. Sims observed in almost two years of treatment. Dr. Pace

hypothesized that Dr. Sims, Dr. Kersten, and Dr. McNulty all mistook Claimant's recurvatum, a knee deformity, for laxity, and that this explains their findings on examination, but we have difficulty believing that three doctors would make the same mistake. As for Dr. Pace's doubts about the mechanism of Claimant's injury, we note that no other physician in this case expressed similar doubts. Dr. McNulty stated in his report that the "mechanism of injury, which would be a direct blow to the anterior tibia with posteriorly directed forces, is consistent with injury" to the PCL. C.E. H. Dr. Sims, the physician most familiar with Claimant's knee condition, suspected a PCL injury after Claimant's first appointment and confirmed it after studying Claimant's right knee MRI. We find the diagnosis of Dr. Sims, which Dr. Kersten and Dr. McNulty agreed with, convincing.

35. Claimant suffered a right partial PCL injury as a result of his industrial accident.

PPI

36. Permanent impairment is any anatomic or functional abnormality or loss after maximum medical improvement has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. Evaluation (rating) of permanent impairment is a medical appraisal of the nature and extent of the injury 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. Idaho Code § 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).

37. Two PPI ratings for Claimant's PCL injury are in the record. In 2007, Dr. Sims

assigned a 3% whole person rating for mild laxity. In 2011, Dr. McNulty assigned a 7% whole person rating for moderate laxity. Both ratings were based on the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition.

38. Dr. Sims's rating was contemporaneous in time to the finding that Claimant was medically stable, whereas Dr. McNulty's rating was based on an examination conducted several years later. Dr. Sims's rating was also based on his knowledge as Claimant's treating physician, whereas Dr. McNulty's rating was based on a single examination. We find Dr. Sims's rating to be more credible.

39. Claimant is entitled to 3% whole person PPI for his PCL injury.

Permanent Disability

40. Permanent disability occurs when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental and marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. In determining the percentage of permanent disability, consideration should be given to the diminished ability of the afflicted claimant 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 the Commission may deem relevant. Idaho Code § 72-430. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries*,

136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

41. Two vocational opinions have been offered in this case. Mr. Brownell, at Claimant's request, analyzed the Coeur d'Alene labor market[6] and opined that Claimant suffered 28% or greater PPD as a result of the accident. Mr. Brownell based his rating on the limitations detailed in the FCE as well as on the non-medical factor of Claimant's limited education. Mr. Crum, at Defendants' request, also conducted a disability analysis. Mr. Crum pointed out that no medical doctor has imposed restrictions on Claimant or adopted the conclusions of the FCE. Furthermore, Claimant has suffered no wage loss, as every one of his post-accident positions has paid a higher wage than his time-of-injury position. Finally, Mr. Crum stated that Claimant's employment history is consistent with someone of his age and level of educational attainment. Mr. Crum concluded that Claimant suffered no disability in excess of impairment.

42. Claimant argues that some consideration should be paid to the fact that he was injured when he was in high school. It would be unreasonable, argues Claimant, to assume that he would have continued working in minimum wage jobs throughout his entire career and therefore has experienced no wage loss. Claimant dwells on his lost Air Force opportunity and how much his future has changed because his injury prevented him from joining the armed forces. Yet it would be speculative to conclude that, absent his knee injury, Claimant would have been accepted into the Air Force, much less that he would have succeeded in his plan of military service. We note that we have no evidence, other than Claimant's word, that he was found to be physically ineligible for military service; and, as held above, Claimant is not a credible witness. We note, too, that the loss of one employment opportunity does not necessarily equate to an

[6] The analysis should have been for the labor market in Vancouver, Claimant's time-of-hearing place of residence. *See Davaz v. Priest River Glass*, 125 Idaho 333, 870 P.2d 1292 (1994).

appreciable loss of labor market access.

43. While injuries at a young age can effect an individual's ability to compete in the labor market in the future, Claimant has not provided evidence that his permanent impairment has resulted in a diminished ability to compete in an open labor market. As Mr. Crum stated, neither Dr. Sims nor any other medical doctor who evaluated Claimant assigned permanent physical restrictions to Claimant. Even Dr. McNulty, who examined Claimant more than two years after the FCE, failed to impose restrictions. The only limitations or restrictions in the record are those from the FCE, a one-time evaluation, performed several years after the accident, which acknowledged that Claimant's limitations were not necessarily permanent, and which failed to affirmatively connect the limitations to the industrial accident. Given these facts, we find that the FCE is not substantial, competent evidence that Claimant suffered limitations or restrictions as a result of his impairment.

44. As there is no persuasive evidence in the record that Claimant's impairment has impeded his ability to compete in the labor market, we find that Claimant failed to prove that he sustained disability in excess of impairment. Claimant has thus failed to show that he is entitled to PPD.

45. Because Claimant has failed to prove his entitlement to PPD, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, the undersigned Commissioners conclude that:

1. Claimant has proven that he suffered a partial PCL injury as a result of his industrial accident.

2. Claimant has proven that he is entitled to 3% whole person PPI.

3. Claimant has failed to prove that he is entitled to permanent disability in excess of impairment.

4. The issue of Idaho Code § 72-406 apportionment is moot.

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

IT IS SO ORDERED.

DATED this 7th day of June, 2013.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2013, 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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