BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELLE HANSON, Claimant, v. Z., INC., dba PAUL'S MARKET, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-021218** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: March 10, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on November 4, 2009. Todd M. Joyner of Nampa represented Claimant. Kimberly A. Doyle of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on January 13, 2010 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;

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

A. Permanent partial impairment (PPI);

B. Permanent partial disability (PPD); and

3. Whether apportionment for a pre-existing or subsequent condition is appropriate under Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant asserts that she had no pre-existing left knee condition as evidenced by the medical records and the surgical findings of her treating physician. Claimant contends that the Commission should disregard George Nicola, M.D.'s, 0% impairment rating, because there is no medical evidence to support it. Claimant relies on the opinion of Paul Collins, M.D., who conducted an independent medical exam (IME) and awarded Claimant 4% whole person PPI due to post-surgical changes and persistent weakness following her left knee surgery.

Claimant contends that she has sustained disability in excess of her impairment because the restrictions imposed by Dr. Collins reduce her opportunity for gainful employment. Claimant seeks disability over impairment of 10% based on the expert opinion of her vocational expert.

Because Claimant had no pre-existing left knee condition, apportionment pursuant to Idaho Code § 72-406 is not appropriate.

Defendants contend that medical records support Dr. Nicola's determination that Claimant sustained no additional impairment from the 2008 injury. Absent permanent impairment, Claimant cannot sustain permanent partial disability and the issue of apportionment of disability pursuant to Idaho Code § 72-406 becomes moot.

Even if Claimant does have *some* permanent impairment, Defendants have paid Claimant

for 2% impairment based on the average of the two physicians' impairment ratings. Claimant suffered neither wage loss nor loss of labor market access, so has not sustained any permanent disability as a result of her industrial injury, rendering the apportionment issue moot.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Terry Lynn Montague, and Darrell Holloway, offered at hearing; and

2. Joint Exhibits A through S, admitted at hearing;[1]

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was forty-nine years of age at the time of hearing. She resided in Homedale with her husband.

2. Claimant graduated from high school in 1978, and thereafter worked in general office and customer service positions with frequent periods of unemployment between jobs. For three years preceding her move to Homedale, Claimant was self-employed in a multi-level marketing venture. Claimant had worked as a cashier for Employer for nearly a year when she had the industrial accident that led to this proceeding. At the time of her injury, Claimant was

[1] The parties prepared and tendered Exhibits A though S, as identified in their Rule 10 filings, a copy of which was provided to the court reporter. However, the transcript of the hearing repeatedly references exhibits A through F. Because there is nothing in the transcript correcting the misstatement, the Referee presumes that the truncated exhibit list appearing in the transcript was not the result of an oral misstatement captured by the reporter, but an instance of the reporter mishearing reference to the exhibits.

earning $8.78 per hour.

INJURY

3. Claimant injured her left knee, left hip and low back when she slipped in a puddle of water while hurrying to return a wallet to a customer. The date of Claimant's injury was June 27, 2008, and the accident and injury are undisputed. The claim was accepted and Claimant received appropriate medical care, including surgical intervention to repair a torn meniscus in her left knee. Claimant's low back and left hip problems resolved with time and treatment and only the consequences of the left knee injury are before the Commission in this proceeding.

PRE-EXISTING CONDITIONS

4. Claimant had a number of serious health issues that pre-existed her employment as a cashier for Employer. Most of her health concerns have no bearing on the issues before the Commission in this proceeding and will not be enumerated and discussed. Claimant's medical history related to her knees is limited to four medical visits with Kaiser Permanente in 2002.

5. In March 2002, Claimant sought medical care for pain in her *right* knee occurring without known injury or overuse. On exam, she had full range of motion, no instability, and no swelling. Her diagnosis was pes anserinus bursitis/tendonitis, for which she received a prescription anti-inflammatory. Claimant returned for follow-up in April. At that time, she had no effusion, and full range of motion. All ligaments were intact and x-rays were negative for fracture or degenerative joint disease. Claimant received an injection of Kenalog and lidocaine in her pes anserine bursa and was advised to apply ice, elevate her leg, and use the prescription anti-inflammatory.

6. In August 2002, Claimant returned to the clinic with an unrelated primary complaint. Secondarily, she reported that her knee pain had returned, but this time *in both knees*.

Claimant suffered a heart attack in the summer of 2002 and could no longer take the prescription anti-inflammatory; instead, she received a prescription analgesic for her knee pain.

7. In September 2002, Claimant received a referral to the orthopedic clinic for consultation concerning her bilateral knee pain. She reported that her knee pain had begun in the spring of 2002 and that her right knee had been more painful than her left knee. Claimant experienced sharp pain, primarily at rest. Claimant reported no sharp pain with activity and *denied any mechanical symptoms*. By the time of the September visit, her left knee was more painful than her right. Claimant's knees were unremarkable on exam and all testing was within normal limits. X-rays taken in August and on the date of the orthopedic visit revealed no "significant abnormalities. The joint space is well preserved, and there is no evidence of a loose body." Ex. G., p. 58. The orthopedist could find no cause for Claimant's complaints and suggested that her symptoms could be the result of her prior fibromyalgia diagnosis.

POST-INJURY TREATMENT

8. Following her injury, Claimant first saw Kevin Chicoine, M.D., who ordered an MRI of the knee. Based on her symptoms and the MRI, she received a referral to Dr. Nicola for treatment of her knee. Claimant first saw Dr. Nicola on July 24, 2008. Dr. Nicola discusses in his chart note his review of the MRI:

> She did have an MRI scan on her left knee done at Intermountain Medical Imaging, which shows articular cartilage thinning and fissuring over the weightbearing portion of the medial femoral condyle and to a lesser extent the lateral. The ligaments appear to be intact. There is a significant amount of maceration and an undersurface tear of the body of the medial meniscus. Lateral meniscus is unremarkable. She has a small cyst adjacent to the posterior cruciate ligament, which I [sic] probably unremarkable. But they do state *this patient has a very degenerative disease.*

Ex. L., p. 142 (emphasis added). The chart note goes on to state that Claimant's symptoms are entirely consistent with a torn medial meniscus, though Dr. Nicola

expressed suspicion regarding Claimant's complaints. He recommended surgical repair and noted the need for "rapid, decisive treatment." *Id.*

9. Dr. Nicola took Claimant to surgery to repair her left medial meniscus on August 29, 2008. Operative notes state:

> The knee joint was thoroughly examined. There appeared to be *no significant arthritic changes* in the knee. *Medial compartment was pristine* with exception of a large posterior flap tear and I removed that using adaptive and rotating shaver. The remainder of the *medial joint line was perfect*. The *lateral joint line showed a pristine joint*. *No evidence of significant meniscal tearing. No evidence of any other significant pathology*. . . . The patellofemoral groove likewise was thick including the underside of the patellofemoral joint especially with no chondromalacia. After a thorough debridement of the medial meniscus and making sure there is no other significant pathology, the knee was thoroughly examined once more to make sure there was no other issue and the patient was sent to recovery room in good condition . . .

Ex. F., p. 47 (emphasis added.)

10. Claimant had a slow recovery, but by late September 2008 her knee was doing well, but was somewhat weak and in need of some strengthening. On December 1, Dr. Nicola noted:

> [Claimant] is seen for evaluation of her knee. Her knee has issues with pain. She states her therapist told her she has something mechanical in the knee. The patient, at the time of arthroscopy, had really *a very good looking knee* with an isolated meniscal tear. I looked over the knee thoroughly and found *no significant arthritis and no significant chondromalacia*. I probed both menisci and examined thoroughly for a loose body.
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> The patient, in my opinion, has no other mechanical issues at this point other than her meniscal tear, which I resected completely. I do not fell [sic] there is a significant basis for the patient's knee problem other than some weakness of the quad, which may be contributing some chondromalacia.

Ex. L., p. 153 (emphasis added.) Dr. Nicola opined that "no further treatment is needed for the knee at this point other than a self-directed strengthening program." *Id.*

11. By letter dated December 10, 2008, Surety sent Dr. Nicola copies of Claimant's medical records from Kaiser Permanente because they "may be helpful in addressing whether there is any apportionment of her knee." Exhibit L, p. 156. On January 14, 2009, Claimant returned to Dr. Nicola with complaints of left SI pain. After addressing her SI complaints, Dr. Nicola noted:

> She states her left knee is swollen. There is a small amount of swelling, which I think is just due to some quadriceps atrophy. She had an isolated meniscal tear, which we resected. I am going to turn her loose from that. The patient did have a note in the chart that she had some mechanical symptoms in her knee in 2002. For that reason, I am not going to give her an impairment rating on her left knee.

Id., at p. 158. Dr. Nicola released Claimant from care for her left knee without restrictions.

12. By the time Dr. Nicola released Claimant without restrictions, Employer was cutting the hours of all existing employees due to a drop-off of business, and there was no work for Claimant. Claimant has not returned to work, having been unable to find employment.

13. On April 20, 2009, Claimant saw Dr. Collins for an IME regarding her left knee. In his review of her medical records, Dr. Collins particularly noted the discrepancy between Dr. Nicola's reading of the medical imaging of Claimant's knee and what he found intra-operatively. Following an examination, Dr. Collins opined that Claimant "still suffers from limits because of the postoperative changes" in her knee. Ex. M., p. 167. He noted that most of her limitations were as a result of the weakness that persisted after her left knee surgery. Dr. Collins imposed a fifty-pound lifting restriction, and prohibited repetitive kneeling or squatting. Referencing *The Guides to the Evaluation of Permanent Impairment,* 5th Ed., (*AMA Guides 5th*), Dr. Collins determined that Claimant had sustained a whole-person permanent impairment of 4%.

DISABILITY

14. Both parties presented vocational evidence at hearing. Claimant retained Terry Montague as her vocational expert. Defendants relied upon the testimony of Darrell Holloway, a rehabilitation consultant with the Industrial Commission Rehabilitation Division (ICRD).

Terry Montague

15. Claimant asked Mr. Montague to assess whether Claimant had sustained any loss of wage-earning capacity or loss of access to the labor market as a result of her knee injury. Mr. Montague met with Claimant to obtain employment and education history, and reviewed pertinent medical records, particularly those of Dr. Nicola and Dr. Collins. Mr. Montague also reviewed the ICRD case notes pertaining to Claimant's case.

16. Mr. Montague used the restrictions imposed by Dr. Collins to calculate that Claimant had lost access to approximately ten percent of the labor market as a result of her knee injury. In particular, Mr. Montague opined that Claimant's fifty-pound lifting restriction precluded her from heavy and very heavy exertion occupations, and her other restrictions precluded all sedentary, light, and medium exertion occupations that require frequent or repetitive kneeling or squatting.

17. Mr. Montague also considered Claimant's age, her education, her employment history and transferable skills, and her medical issues not related to the industrial injury, primarily in the context of Claimant's limited ability to compete in a tight job market.

18. Mr. Montague opined that Claimant had not sustained any loss of earning capacity, because it would not be difficult for her to replicate her time-of-injury wage in most employment that would be available to her in her labor market.

Darrell Holloway

19. Mr. Holloway testified that he had worked at ICRD since 2007, first at the Caldwell office and then in Boise. While he was working in Caldwell, he was the ICRD consultant assigned to Claimant's case.[2] Mr. Holloway first contacted Claimant in early August, 2008 for an initial interview. Thereafter, he met with Claimant on several occasions when he was in Homedale on other ICRD business. He testified that, primarily, he tries to get to know his clients and the factors that may touch on their ability to find suitable work.

20. Based on Dr. Nicola's medical records, Mr. Holloway initially determined Claimant had no impairment and no vocational handicap in her labor market, and did not pursue her case vigorously. Once Dr. Nicola released Claimant, Mr. Holloway contacted Employer to see if Claimant could return to her job as a cashier. However, since the time of her accident, business had slowed and Employer was cutting back on the hours of his existing workforce, and had no work available for Claimant.

21. Once it was clear that Claimant could not return to her time-of-injury employment, Claimant signed up with the Idaho Department of Labor. Mr. Holloway presumed that Claimant was taking advantage of the job search resources available there. Occasionally, he would provide her leads on job openings he found that seemed suitable for Claimant. Mr. Holloway stated, "I didn't hold her hand or monitor her very closely. And she—she would do better at getting her a job than I would. . . . She's a good candidate." Tr., p. 127.

22. At Defendants' request, Mr. Holloway prepared a "Labor Market Report" addressing Claimant's employment prospects. The report, dated October 23, 2009, includes a

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[2] Claimant's husband was also one of Mr. Holloway's clients, also having sustained an industrial injury while working for the same employer as Claimant.

summary of Claimant's personal information, her education, work history, and medical history. The report states that Claimant can work at a medium work capacity and the permanent restrictions imposed by Dr. Collins do not preclude Claimant from returning to her time-of-injury employment. The report identifies Claimant's labor market as the Boise City-Nampa Metropolitan area, the largest labor market in the state. Within thirty-five miles of her residence in Homedale, Claimant had access to jobs in Boise, Meridian, Emmett, Nampa, Caldwell, and Ontario (Oregon). On the date that Mr. Holloway completed his report, he identified nine openings in Caldwell, Nampa, Meridian, and Boise that were regularly available in Claimant's labor market. Mr. Holloway concluded:

> Claimant's access to the labor market has not been reduced by the industrial injury. The occupations claimant is competing for are more plentiful than most occupations. There are few jobs locally in Homedale and claimant will have to commute even as far as Boise to obtain employment.

Ex. C., p. 34.

DISCUSSION AND FURTHER FINDINGS

PERMANENT PARTIAL IMPAIRMENT

23. "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 non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized 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 Contractors*, 115 Idaho 750,

755, 769 P.2d 1122, 1127 (1989). Dr. Nicola determined that Claimant had no impairment as a result of her industrial injury. Dr. Collins opined that Claimant had whole-person impairment of 4%. As the ultimate arbiter of impairment, the Commission reviews the physicians' opinions and reaches its own conclusion.

Dr. Nicola

24. A review of the relevant medical records reveals significant factual errors underlying Dr. Nicola's conclusion, rendering it irrelevant. At hearing, Claimant testified that she had little trust in Dr. Nicola's treatment. She stated that he seldom examined her knee, ignored her complaints of swelling, and took no measurements to compare the circumference of her left knee and quadriceps with her right knee and quadriceps. He sent her for an MRI with contrast when contrast is contra-indicated for patients with impaired kidney function. He gave her a prescription for a "sleep aid" that was actually an anti-depressant. When Claimant told Dr. Nicola that she would not take anti-depressants, he walked out of the treatment room and did not return. When Claimant continued to complain of problems with her knee and reported that her physical therapist told her he believed there was a mechanical problem with the knee, Dr. Nicola chastised Claimant for not working hard enough at her physical therapy. Physical therapy notes from November 26, 2008 confirm Claimant's testimony in this regard.

25. Dr. Nicola interpreted the MRI of Claimant's knee as showing significant degenerative changes. Dr. Nicola's operative notes, however, are in stark contrast to his prior opinion regarding the condition of Claimant's knee. He repeatedly describes her knee as "good looking" or "pristine." The notes reiterate that the only thing wrong with Claimant's knee was the isolated meniscal tear, which Dr. Nicola "completely resected." Finally, Dr. Nicola references Claimant's 2002 medical records from Kaiser Permanente as a basis for denying her

an impairment rating, stating: "The patient did have a note in the chart that she had some mechanical symptoms in her knee in 2002. For that reason, I am not going to give her an impairment rating on her left knee." Ex. L., p. 158. In fact, what the 2002 chart note states is that *Claimant denied any mechanical pain*. The chart notes from the orthopedic exam are consistent with Claimant's denial of mechanical pain, finding no abnormality in Claimant's knee.

Dr. Collins

26. Dr. Collins' IME report specifically notes the inconsistencies in Dr. Nicola's statements. His examination confirmed that Claimant had swelling of the left knee, and that she continued to suffer from limitations as a result of post-operative changes. Dr. Collins correctly applied the *AMA Guides*, wherein a total medial meniscectomy results in a 7% lower extremity impairment which converts to a 3% whole person impairment. Dr. Collins awarded Claimant an additional 1% whole person impairment because of weakness that persisted following her surgery.

27. Defendants argue that it is appropriate to average the two impairment ratings (0% and 4%) to calculate Claimant's impairment, and note that they, in fact, paid 2% PPI. While averaging makes some sense where there are two well-supported ratings that vary in their ultimate conclusion, it makes no sense whatsoever when one of the ratings is so flawed as to be meaningless. Such is the case here with Dr. Nicola's opinion regarding impairment. The medical records, his examination, and the *AMA Guides* all support Dr. Collins' opinion that 4% represents a fair and reasonable measure of Claimant's PPI.

DISABILITY

28. Under the Idaho worker's compensation law a "disability" is defined as "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is

affected by the medical factor of physical impairment, and by pertinent nonmedical factors." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425. The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

29. The analysis of disability in excess of impairment comprises two components: Loss of earning capacity, and loss of access to the labor market. A loss in either or both components may result in disability over impairment. Claimant concedes that she has not suffered a loss of wage-earning capacity—any job that she obtains is likely to pay at least as much as she was earning before her injury. Claimant does assert that she has sustained a loss of access to the labor market as a result of her knee injury. Mr. Montague testified that occupations deemed to require heavy or very heavy exertion make up about 10% of the labor market; that 11% of all occupations require frequent or repetitive stooping or squatting; that 4% require frequent or repetitive kneeling; and that .5% require frequent or repetitive crawling.[3] Using only Claimant's squatting and kneeling restrictions, Mr. Montague opined that Claimant had sustained disability of 10% in excess of her 4% impairment. Mr. Montague's statistical analysis is unrefuted, but not controlling.

30. Defendants take the position that Claimant is not entitled to any PPD, and set forth a number of alternative reasons in support of their position, including:

- Claimant had no PPI, so she could have no PPD;
- Claimant's restrictions did not preclude her from returning to her time-of-injury position

[3] Mr. Montague assumes, reasonably, that if an individual is precluded from kneeling, they are also precluded from crawling.

and she suffered no wage loss;

- Claimant has access to the largest job market in the state—even if she no longer has access to heavy and very heavy occupations, she still has access to 90% of the jobs in her labor market; and
- Claimant had never performed heavy or very heavy work before—she cannot lose access to jobs as a result of her injury that she did not have access to prior to her injury.

31. Defendants cite to *Davidson v. Riverland Excavating, Inc.*, 2007 IIC 0612 (September 7, 2007) on appeal (SC2 IIC 1260, decided May 29, 2009) for the proposition that without impairment there can be no disability. *Davidson* correctly states the law, but Defendants' argument falls as a result of our finding that Claimant did sustain permanent partial impairment as a result of her industrial accident.

32. Defendants cite to *Rivas v. K.C. Logging,* 134 Idaho 603, 608, 7 P3d 212, 217 (2000), and its progeny in support of their second argument—that Claimant suffered no disability because she did not suffer a wage loss and she could have returned to her time-of-injury position. The principal difference between the cited cases and the case at bar is that when this Claimant was able to return to work, there was no work for her to return to. Claimant did not decline a return to her former job, her former job was gone. Precluded from returning to her time-of-injury position, Claimant had no choice but to seek employment in the same labor pool as every other job seeker in southwestern Idaho. Competing in an open market, her restrictions became relevant because they reduced the amount of opportunity in her pool by about 13%, irrespective of any wage loss. Claimant need not prove both a wage loss *and* a loss of access in order to prove disability in excess of her impairment.

33. Although Mr. Montague acknowledged that Claimant had not suffered any wage loss as a consequence of the work accident, he did propose that Claimant had suffered a loss of access to the labor market in the range of 10%. Per Mr. Montague, Claimant's loss of access to the labor market is a consequence of the limitations/restrictions imposed by Dr. Collins:

Q. Based upon everything that you have looked at and reviewed and your discussions with Michelle, do you have an opinion as to whether she has a loss of the labor market access?

A. I do. I indicated in my report that I thought the Industrial Commission—it would be in—it would not be unreasonable for the Industrial Commission to find that she has an approximately ten percent loss of the labor market access and that is because she can't perform those jobs that require frequent or repetitive kneeling, frequent or repetitive squatting, frequent or repetitive stooping, those kind of things. And, then, the jobs that would be classified as heavy or very heavy.

Tr. pg. 87, ln 14 – pg 88, ln 1.

Despite the fact that Mr. Montague concluded that Claimant had suffered no wage loss as a consequence of the accident, he ultimately concluded that Claimant had suffered disability above impairment in the range of 10% of the whole person, an amount equal to her loss of access to the labor market.

34. Finally, Defendants urge the Commission to look to its decision in *Measel v. Idaho Lumber Products, Inc.,* 2008 IIC 0994 (December 16, 2008) for guidance in resolving the disability issue in this case. While *Measel* provides a useful summary of the factors considered in determining partial permanent disability, it is inapplicable on its facts. In *Measel*, the Commission determined there was no PPD when:

- Mr. Measel refused to return to a suitable job with the time-of-injury employer at his time-of-injury wage;
- Left the state;
- Worked part-time by choice and to ensure that his earnings did not reduce his social security benefits; and
- Earned more per hour in his part-time job than he had earned working for his employer.

In the instant case, Claimant:

- Could not return to her time-of-injury employer;
- Remained unemployed; and
- Actively sought full-time work within a fifty-mile radius of her home.

35. In light of the considerations discussed herein, the Referee concludes that Claimant has carried her burden of proving that she has sustained permanent partial disability in excess of her impairment. The question then becomes one of determining an appropriate disability rating in view of all of the evidence. Mr. Montague's statistics are useful but not necessarily determinative of Claimant's disability. Moreover, in coming to his ultimate conclusion on Claimant's disability, it appears that Mr. Montague placed more emphasis on Claimant's loss of access to the labor market, and less emphasis on the equally important fact that Claimant had suffered no wage loss as a consequence of the accident. It is also relevant to the Industrial Commission's conclusion on this issue that Mr. Holloway, as well, concluded that Claimant had suffered no wage loss as a consequence of the subject accident. However, differing with Mr. Montague, Mr. Holloway also proposed that Claimant had not suffered any significant loss of access to the labor market as a result of the accident. Given that similar individual restrictions may eliminate the same occupation, Mr. Montague's approach of adding the percentages from individual restrictions overestimates Claimant's disability. Considering these factors, the Referee concludes that Claimant has suffered permanent partial disability (PPD) of 10%, inclusive of her 4% PPI rating.

APPORTIONMENT

36. The Commission's evaluation of permanent disability requires the evaluation of multiple factors, both medical and non-medical, that impact a Claimant's earning capacity. Similar considerations are at issue when considering apportionment under Idaho Code § 72-406.

That section provides:

> (1) 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.
> (2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease."

In *Poljarevic v. Independent Food Corporation*, IC 2006-510910, ¶ 25 (January 13, 2010), the Commission stated:

> . . . the *sine qua non* of a decision to apportion disability under Idaho Code § 72-406 is a determination that Claimant suffered from a pre-existing physical impairment that detrimentally impacted the Claimant's ability to engage in gainful activity.

As discussed in some detail elsewhere in these findings, there is little evidence that Claimant suffered from any pre-existing physical impairment related to her knees. Some six years prior to her industrial accident, she did report some knee pain—first in her right knee, and then bilaterally. A full orthopedic workup done at that time revealed no pathology that would account for her complaints. Ultimately, the orthopedist suggested that a prior diagnosis of fibromyalgia likely accounted for Claimant's knee pain. During the interval between September 2002 and Claimant's industrial injury of June 2008, there are no records of any medical care relating to either of Claimant's knees. In fact, the 2002 incidents were so inconsequential that Claimant forgot about them until reminded by Dr. Nicola after he received the Kaiser Permanente records. In the summer of 2002, Claimant received treatment for a myocardial infarction, diabetes, and fibromyalgia. It is not surprising that, in 2008, her prior transient knee complaints were not at the forefront of her memory. There is no substantial evidence to suggest that Claimant had a pre-

existing impairment, and if she did, there is no evidence that it detrimentally affected her ability to engage in gainful employment.

CONCLUSIONS OF LAW

1. Claimant sustained 4% whole person permanent partial impairment (PPI) as a result of her June 27, 2008 industrial injury.

2. Claimant sustained permanent partial disability in excess of her impairment of 6%.

3. Apportionment of disability pursuant to Idaho Code § 72-406 is not appropriate.

RECOMMENDATION

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

DATED this 18 day of February, 2010.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELLE HANSON, Claimant, v. Z., INC., dba PAUL'S MARKET, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-021218** **ORDER**

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

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

1. Claimant sustained 4% whole person permanent partial impairment (PPI) as a result of her June 27, 2008 industrial injury.

2. Claimant sustained 6% permanent partial disability in excess of her impairment.

3. Apportionment of disability pursuant to Idaho Code § 72-406 is not appropriate.

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

DATED this 10 day of March, 2010.

INDUSTRIAL COMMISSION

/s/_____
R.D. Maynard, Chairman

/s/_____
Thomas E. Limbaugh, Commissioner

/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of March, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

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djb /s/_____