BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARLENE BOATMAN, Claimant, v. TARGET CORPORATION, Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2017-020961** **2020-014730** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JULY 12, 2024 IDAHO INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on November 8, 2023. J. Brent Gunnell represented Claimant. H. Chad Walker represented Employer and Surety. The parties presented oral and documentary evidence. A post-hearing deposition was taken. The parties submitted briefs. The case came under advisement on March 18, 2024. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

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

2. Whether and to what extent Claimant is entitled to:
   a) Permanent disability in excess of impairment, and
   b) Medical care;

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

This case involves an accepted accident and claim. Medical care has been paid. Future

medical care has been resolved with a Medicare Set-Aside. The causation issue is limited to a question of section 406 apportionment.

CONTENTIONS OF THE PARTIES

Claimant contends that she fell on her right shoulder in compensable industrial accidents in 2017 and 2020. She underwent shoulder surgeries, one after each accident, and then a total shoulder arthroplasty. PPI has been rated at 17% upper extremity which is equivalent of a 10% whole person PPI. This was paid by Defendants. Only the extent of permanent partial disability is at issue. Cali Eby evaluated Claimant's permanent disability by weighing Claimant's loss of access (69%) more heavily than her loss of earning capacity (0%) and opined a 46% PPD.

Employer and Surety contend that both accident claims were accepted and paid. PPI has been paid. Claimant has retired, is on Medicare, and should not be allowed PPD in excess of PPI. A Medicare Set-Aside is in place for future medical care which anticipates a future reverse total shoulder arthroplasty. Ms. Eby's analysis is based in part upon insufficient knowledge. She did not have Claimant's early low back records from California nor Dr. Friedman's report and opinions.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, her husband Dale Boatman, and of vocational expert Cali Eby;
2. Joint exhibits 1 through 21; and
3. Post-hearing deposition of Robert Friedman, M.D.

The Referee finds that Joint Exhibit 17 pertains to a functional capacity evaluation (FCE)

for a person who is not the Claimant. Thus pages 1959 through 1979 receive no weight.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

Introduction and Accidents

1. On July 21, 2017, Claimant fell at work. She felt significant shoulder pain.

2. On June 20, 2020, Claimant again fell at work. She felt significant shoulder pain.

Medical Care: July 21, 2017 to end of year

3. On July 21 Claimant visited St. Luke's emergency department in Nampa after her fall at work. In addition to her shoulder she was treated for right hip pain and for lesser issues with other body parts on the right. Multiple X-rays were consistent with earlier imaging of her spine and shoulder. No fractures were identified anywhere. On follow-up three days later Claimant's relevant diagnosis was right shoulder strain. Temporary work restrictions included restricted use of her right upper extremity, no use of her right hand.

4. An August 2 MRI of Claimant's right shoulder showed partial tears of the supraspinatus tendon and subscapularis tendon, and an issue with the inferior glenohumeral ligament together with some degenerative tears, bursitis, and osteophytes. An AC joint injection was performed.

5. An August 7 follow-up supported Claimant's claims of continued pain and acute injury to the shoulder.

6. On August 9 another shoulder injection was performed. "Frozen shoulder" was added to her shoulder diagnoses.

7. On August 16 physical therapy began. Although therapists' notes mention emotional or psychological components associated with her fear of additional pain, Claimant was cooperative, and therapists were able to provide a physical therapy regimen.

8. Claimant did return to light-duty work. St. Luke's records of follow-up visits for physical therapy or other medical treatment of her shoulder show a slow progression of improvement which was occasionally affected by her work. In September a diagnosis of adhesive capsulitis was added. At discharge on September 22 a note recorded that her "response to Therapy interventions was Poor [sic]."

9. Claimant's last St. Luke's visit in 2017 occurred with an injection into her shoulder on October 26. Temporary work restrictions were more specifically stated. They included "no lifting, carrying, pulling, pushing of objects greater than 10lbs," and "avoid repetitive shoulder height activities" with "[n]o overhead motion."

Medical Care: 2018

10. On January 3 Claimant visited St. Luke's Orthopedic Clinic. She reported that a prior steroid injection provided no relief and worsened her pain. She was instructed that "diligent" stretching in home exercises was essential to ameliorate her adhesive capsulitis. Surgical options were discussed.

11. On June 4 Claimant returned to St. Luke's Orthopedic Clinic in anticipation of a right shoulder arthroscopic surgery.

12. On June 20 Claimant underwent an EKG as St. Luke's Nampa facility.

13. On June 26 Claimant was admitted for surgery. However, after initial administration of anesthesia she vomited, and surgery was postponed.

14. On July 5 Claimant's surgeon, Jared Johnson, M.D., noted that on June 26 during an anesthetic nerve block he "was able to passively move her shoulder to 180 degrees forward flexion." He opined this indicated that she did not have adhesive capsulitis and, therefore, surgery was unlikely to help her. He authored a light-duty work release which recommended she continue cashier duty with no repetitive overhead work and no lifting over 15 pounds.

15. On August 30 Claimant underwent another injection.

16. On September 6 Claimant underwent an annual physical examination.

17. On September 27 Claimant underwent another injection and an MRI. The MRI report noted, "She has a little bit of everything going on in the shoulder." It showed mild osteoarthritic changes, a "small injury" to the labrum, a bone spur causing inflammation around the rotator cuff with "some tearing." The clinic note also showed Claimant expected to return to her surgeon in January.

18. On November 15 X-rays showed mild AC joint osteoarthritis. Although Christopher Lawler, M.D., had been Claimant's primary treater through St. Luke's Orthopedic in the past, this examination was conducted by James Beckmann, M.D. He acknowledged Dr. Johnson's doubts about adhesive capsulitis but opined that his examination indicated adhesive capsulitis was present. Dr. Beckmann recommended Claimant exhaust physical therapy options before considering surgery.

Medical Care: 2019 to August 21, 2019

19. On January 9 Claimant returned to Dr. Johnson. Claimant reported her symptoms were now "travelling up her neck" as well. After examination, they discussed surgery.

20. On January 17 another MRI was performed. It showed shoulder degeneration and

injury as before.

21. On February 13 surgery was decided upon and scheduled.

22. On February 21 Dr. Johnson and Bradley Heninger, PA-C, performed arthroscopic surgery with manipulation and capsular release. Post-operative diagnoses were right shoulder adhesive capsulitis and chondromalacia of the glenohumeral joint. The operative report documents the presence of scar tissue. Fraying tissue was debrided. Dr. Johnson's operative report reveals his significant concern upon finding chondromalacia.

23. The course of post-operative recovery included several follow-up visits including physical therapy. Physical therapy continued until about the end of May. Her attempts to use her shoulder beyond her temporary restrictions showed her willingness to become fully functional but did occasionally set back her progress.

24. On July 3 Claimant's use of Ambien was a raised concern. Deemed "hypnotic dependence" by her physician, Claimant signed a controlled substance contract in which she agreed to "drug of abuse" testing.

25. On August 21 Claimant described post-operative pain with limited shoulder motion, particularly after a long shift at work. Dr. Johnson opined she had reached maximal medical improvement (MMI). He opined it "likely" that she would need a shoulder arthroplasty in the future. He was silent about whether or to what extent this future surgery would be related to the accident or to her degenerative osteoarthritis.

Medical Care: August 22, 2019, to year end

26. On September 5 Claimant visited St. Luke's Nampa facility for an annual physical examination. She mentioned her shoulder and chronic headaches as problems.

27. During this time interval Claimant visited St. Luke's for headache and other unrelated problems.

Medical Care: 2020

28. On June 20 Claimant visited St. Luke's ER after her second industrial accident. She complained of right shoulder pain and some right wrist pain. X-rays were negative for traumatic injury but did show AC joint osteoarthritis. She was temporarily restricted from all right arm work.

29. On July 1 and thereafter Claimant visited St. Luke's for headache, insomnia, and other unrelated problems as well as occasionally for her right shoulder. Lumbar pain became an issue.

30. On September 10 Claimant again visited Dr. Johnson. He performed an injection. His temporary restrictions proscribed against lifting, pushing, or pulling with using her right arm.

31. On November 5 Dr. Johnson, after examination, noted, "The right shoulder is stable." This comment appears to relate to structural stability rather than a prognosis about recovery. He recommended an "attempt at formal PT" before considering additional surgery. He characterized her condition on that date as a "subsequent work related fall with partial re-tear" as of the date of the second accident.

32. On December 16 Claimant appeared for physical therapy. The therapist performed the session with her. He noted that they were awaiting Surety approval to schedule more. Claimant was instructed about a home exercise program.

33. At Claimant's December 17 visit with Dr. Johnson he emphasized that she had received only one physical therapy visit (he attributed it to "insurance issues") and no home

exercise program. He reported that she had again developed adhesive capsulitis.

Medical Care: 2021

34. On January 7 Claimant attended her second physical therapy session. Two more visits occurred at weekly intervals.

35. On January 21 Dr. Johnson noted that physical therapy had begun and that Claimant's strength had improved. He performed another injection. His temporary restrictions allowed use up to five pounds.

36. After a February 18 physical therapy visit, Claimant saw Dr. Johnson's physician's assistant. The PA called her condition arthrofibrosis of right shoulder.

37. Claimant attended five more physical therapy visits through April 1.

38. After an April 1 visit Dr. Johnson recommended an MRI.

39. On May 13 a right shoulder MRI showed degenerative tearing of the rotator cuff and progression of other degenerative indicators with adhesive bursitis.

40. On May 20 Dr. Johnson reviewed the MRI with Claimant. He recommended non-surgical options but acknowledged a total shoulder arthroplasty remained a possibility in the future.

41. On August 17 additional X-rays were taken. They were consistent with prior X-rays.

42. On August 25 Dr. Johnson performed a total shoulder arthroplasty.

43. On October 7 Dr. Johnson noted Claimant was "not doing well" post-surgery. She also had undergone urgent surgical kidney stone removal in the interval. He again adjusted her restrictions and recommended physical therapy.

44. On October 12 Claimant resumed physical therapy. She attended 15 more sessions through the end of 2021.

45. On November 19 Dr. Johnson noted that she was making "gradual progress." He recommended home exercises.

46. After surgery some of Employer's supervisors or managers accommodated Claimant's restrictions imperfectly. Employer did move her from the Starbucks kiosk to self-checkout to allow her to avoid lifting boxes of supplies. On occasions a supervisor or manager would tell her to perform a task outside of her restrictions. She has been orally chastised, but never written up for her refusal to perform a task outside of her restrictions.

Medical Care: 2022

47. On January 6 Dr. Johnson recommended a gradual amelioration of temporary work restrictions, including a 6-week reconditioning program. He anticipated this to be completed about the 6-month mark after surgery.

48. On January 12 Claimant continued to attend physical therapy. She attended three sessions in January.

49. On February 17 Dr. Johnson rated Claimant's permanent impairment. He found a 10% whole person impairment attributable to the work injury without apportionment. He recommended a 15-pound lifting restriction without repeated lifting and no cashiering. He opined it probable that she would in the future require a reverse total arthroplasty. Claimant's last examination by Dr. Johnson occurred on May 19.

50. On December 8 Dr. Johnson responded to questions from Claimant's attorney. Dr. Johnson opined Claimant's condition was wholly related to the work accidents including a

permanent aggravation of underlying asymptomatic arthritis.

Relevant Prior Medical Care and Conditions

51. In 1986 Claimant underwent an appendectomy and hernia surgery.

52. In 1992 Claimant injured her back while working for Circle K. In 2001 back surgery was required.

53. In 2003 Claimant injured her back when she was rear-ended in her vehicle. A second back surgery was required. Since her lumbar fusion, Claimant has self-limited to protect her back. On multiple occasions in subsequent years she sought medical care for flare-ups of chronic back pain. No physician has imposed restrictions related to her low back condition. Indeed, Dr. Friedman recently opined that any reasonable restriction related to the back surgery would be eclipsed by Claimant's shoulder restrictions.

54. In early 2009 Claimant underwent left knee arthroscopic surgery after a diagnosis of chondromalacia.

55. Later in 2009 Claimant was working behind the counter when a customer accidentally discharged a rifle near her. She experienced some temporary tinnitus.

56. In 2011 Claimant underwent an open repair of an incisional hernia.

57. October 2011 X-rays showed a wedge compression deformity at L4 as well as the prior L5-S1 fusion surgery. This followed Claimant's visit with a complaint of recent low back pain.

58. In May 2016 Claimant reported chronic left knee pain. The diagnosis was osteoarthritis. By history she accurately reported which surgeries she had undergone but got most of the dates wrong. She was off by up to three years, before or after actual surgery dates. She did

correctly identify the date of the 2011 hernia repair. These dating errors were repeatedly reported in subsequent St. Luke's records.

59. Also, in May 2016 Claimant underwent significant workup to evaluate symptoms of possible allergic reaction in her throat. Ultimately the diagnosis was strep pharyngitis.

60. In August 2016 Claimant sought additional treatment, a steroid injection, for her left knee.

61. In September 2016 Claimant sought additional treatment for her chronic low back condition. X-rays showed the prior fusion and multilevel degenerative disease. An MRI showed the same.

62. In November and December 2016 Claimant sought additional treatment involving low back injections.

63. In February 2017 Claimant again sought treatment for her low back. Nerve blocks and ablation were discussed as possible treatment.

64. On March 29, 2017, Claimant sought treatment for significant headaches not deemed to be migraine headaches. On the same date she also reported and received treatment for right shoulder pain. She reported that she heard a "popping sensation" while reaching overhead at work. An X-ray showed AC joint degeneration. The diagnosis was arthritis. No workers' compensation claim arose from this report. At a May 11, 2017, follow-up visit for her shoulder, Claimant received an injection after a diagnosis of right shoulder rotator cuff impingement. She received no additional treatment until after her July 2017 industrial accident claim.

IME Physician's Opinions

65. On February 5, 2023, Robert Friedman, M.D. reviewed records and conducted a

forensic examination of Claimant at Defendants' request. He found that her right shoulder arthroplasty was due to an aggravation of chondromalacia caused by the work accidents. This included the need for prior rotator cuff repair surgeries. He noted her other conditions and found them all preexisting and non-industrially related. He opined Claimant had reached MMI from the 2017 accident in the fall of 2019. He concurred with Dr. Johnson's opinion that Claimant had reached MMI from the 2020 accident as of February 17, 2022. He noted that her low back condition imposed restrictions against lifting more than 50 pounds occasionally, 25 pounds repetitively, with no twisting or torquing to her low back. Shoulder restrictions resulting from the 2017 accident required no more than medium lifting and no repetitive above shoulder activity with her right upper extremity. The 2020 accident resulted in restrictions against all above shoulder activities and no lifting over 15 pounds. He rated PPI from the 2017 injury at 3% upper extremity with 50% apportionment for preexisting degeneration. Regardless, this ends up included and subsumed in Dr. Friedman's ultimate 17% upper extremity PPI.

66. Dr. Friedman's report contains an ambiguity best explained as a mere typographical error. He rated PPI from the 2020 injury at 24% upper extremity with 50% apportionment for the chondromalacia caused by the accident resulting in a 17% upper extremity PPI which he attributed to the accident. In their post-hearing brief Defendants suppose Dr. Friedman intended a 34%, not 24%, PPI to be halved to 17%.

67. Dr. Friedman opined against future medical treatment and termed a possible future reverse shoulder arthroplasty "optional." Dr. Friedman went on to rate PPI for each nonindustrial condition. He used the Guides combining value chart to arrive at 29% whole person PPI for preexisting and nonindustrial conditions.

68. In post-hearing deposition Dr. Friedman opined that Claimant reached MMI for the 2017 industrial injury in the fall of 2019 and for the 2020 industrial injury on February 17, 2022. He opined that the first accident restrictions included lifting only under 50 pounds occasionally, 25 pounds repetitively. The second accident restrictions included lifting only under 15 pounds. The unrelated lumbar restrictions were eclipsed by these shoulder restrictions.

Vocational Factors

69. Born November 15, 1954, Claimant was one week shy of 69 years of age on the date of hearing.

70. Claimant has been totally blind in her right eye since birth. Her one-eyed blindness has not hindered her daily function.

71. Claimant graduated from high school in 1972. She attended some college but received no degree.

72. She has worked in food service and retail.

73. After an accident working at Circle K required a back surgery, Claimant attended a vocational school to be a dental assistant. She received a certificate. She worked in that capacity for about 15 years. Her work as a dental assistant ended while she was recovering from back surgery after the vehicle accident.

74. Having moved to Idaho from California Claimant worked at Sportsman's Warehouse for about two years. She then began working for Target in its Starbucks kiosk.

75. Claimant's time-of-injury wage was $16.63 per hour, with benefits. Target was aware of her limitations resulting from her blindness and back surgeries. Claimant self-limited her lifting to about 25 pounds. Eventually she was assigned to self-checkout duties to accommodate

her condition.

76. Vocational expert Cali Eby prepared a written report and testified live at hearing. She interviewed Claimant and reviewed records. She determined from the interview that Claimant's subjective limitations were consistent with Claimant's professed difficulties in activities of daily living. Ms. Eby explained her methodology and how Claimant's vocational history applied to various categories of factors. Ms. Eby opined Claimant suffered a 69% loss of labor market access and no loss of earning capacity. Despite Claimant's representations to historical potential employers about her limitations due to her low back, Ms. Eby, seeing no formal restrictions, did not consider this in determining Claimant's pre-accident labor market access. Similarly, she did not adjust labor market access for Claimant's difficulty sitting for significant periods. Ms. Eby expressed reasons why an averaging of loss of labor market access and loss of earning capacity would not be her first choice for a PPD rating.

DISCUSSION AND FURTHER FINDINGS OF FACT

77. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

78. 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). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v. Hara's, Inc.*, 123 Idaho 472, 89 P.2d 934 (1993).

79. Uncontradicted testimony of a credible witness must be accepted as true, unless

that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

80. Claimant sat for about one hour on the witness stand before she stood briefly, then exhibited subtle indications of discomfort while sitting. This appeared to be entirely genuine, unconscious, and not exaggerated. Her demeanor overall while testifying was credible.

81. Both of the other two witnesses were credible, although Mr. Boatman's testimony was too brief to provide a useful basis for an opinion either way.

Causation

82. A claimant must prove that she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only his or her plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2001). Aggravation, exacerbation, or acceleration of a preexisting condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

83. Defendants have accepted and paid medical bills, TTDs, and PPI. Causation is no longer an issue.

Impairment

84. Permanent impairment is part of the calculation for disability. *See, e.g.. Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 52, 438 P.2d 291 (2019). Under I.C. § 72-422, 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." An injury is to be rated upon the date of medical stability. *Smith v. J.B. Parson Co.*, 908 P.2d 1244, 127 Idaho 937 (Idaho 1996). "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. I.C. § 72-424.

85. Both physicians, Dr. Friedman and Dr. Johnson, found that Claimant has reached medical stability and suffers 17% PPI of the upper extremity as a result of the work accident. This equates to 10% PPI of the whole person.

86. Dr. Johnson did not apportion impairment. Dr. Friedman apportioned Claimant's impairment of the shoulder 50% to pre-existing conditions, but did so before issuing his number for work-related impairment. His final opinion was that Claimant's work-related impairment comes to 17% UE; although Dr. Friedman did not specify his total impairment for Claimant's shoulder, mathematically it would equate to 34% UE. Dr. Friedman also opined that Claimant suffered 29% impairment related to conditions which Claimant has not contested are related to the

work accident, including Claimant's spinal fusion and blindness in one eye.

87. The weight of the evidence does not support adopting Dr. Friedman's opinion of apportionment. It assesses conditions which are outside the scope of the parties' dispute. Dr. Friedman also unnecessarily expands Claimant's shoulder impairment to 34% UE, and then cuts it in half, when both physicians agree the work-related impairment is 17% UE. Dr. Johnson's approach assigning strictly that impairment which is related to the work accident carries the greater weight.

88. Therefore, Claimant has suffered 10% PPI of the whole person as a result of the work accident, with no apportionment.

Permanent Disability

89. "Permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided by Idaho Code § 72-430.

89. 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 nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

90. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). Where preexisting impairments produce disability, all impairments and disability should be accounted for with a subtraction back for the compensable portions. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). An employer takes an employee as it finds him or her. *Wynn v J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

91. Vocational experts commonly calculate disability by averaging a worker's loss of labor market with his loss of wages. The averaging methodology is less reliable when the loss of labor market access is extremely high and the wage loss negligible. *Deon v. H&J, Inc.*, 050313 IDWC, IIC 2007-005950 (May 3, 2013). For example, a worker with 99% market access loss but 0% wage loss may be in a position where the averaging method indicates 50% disability, but the "actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery." *Id.* In such circumstances, the Commission may depart from a mechanical averaging of disability to account for the weight of the impact of these losses and the injured worker's nonmedical factors. Idaho Code § 72-430.

92. Here, only Cali Eby, Claimant's vocational expert, provided an opinion on Claimant's disability. She opined that Claimant has suffered 46% partial permanent disability as calculated from a 69% loss of labor market and 0% wage loss, weighting the average to account

for Claimant's age and physical work history.

93. Eby's opinion provides valuable information on Claimant's loss of labor market, supplying uncontroverted data on job categories in Claimant's area. Eby identifies Claimant as a semi-skilled worker, which is supported by Claimant's basic clerical skills. It considers Claimant's work as a dental assistant, cashier, and her time of injury employment as the barista for Employer's coffee kiosk. It simultaneously takes into account Claimant's limited computer skills and age. Additionally, Eby's assessment of Claimant as dropping from a medium level capacity to a light duty or sedentary work capacity due to her work accident is supported. Medium level work, which Claimant previously was able to perform carrying up to 48lbs, is no longer feasible. Claimant's restrictions on repeated lifting, climbing, and crawling rule out jobs such as cashiering (which was specifically excluded by Dr. Johnson), and significantly cut down access to jobs in food preparation and secretarial work, as well as other job categories. Eby states that the loss of access is likely an underestimate due to the limited data covering Claimant's restrictions of frequency of reaching and lifting away from the body. Moving on from the loss of labor market, Eby finds that Claimant's 0% wage loss as she retains access to past work and does not demonstrate loss of earning capacity.

94. However, Eby's ultimate placement of disability at 46% is not persuasive. Eby determined that applying a pure averaging method to Claimant would not accurately reflect disability due to Claimant's age, the existence of a gap between wage loss and market access loss, and Claimant's prior work history being physical. She weighed labor loss unevenly to compensate. While these factors do exist, it appears Eby overestimated Claimant's loss of capacity.

95. Eby overreads the 15-pound lifting limitation as being bilateral. There is no

disagreement that Claimant has a 15lb lifting restriction related to her right extremity. Both Dr. Johnson and Dr. Friedman opined to that effect. She cannot lift, push, or pull greater than 15 lbs. She cannot perform over shoulder activity. Claimant cannot climb or crawl, or perform repeated lifting. However, Eby expanded this restriction by assuming the 15lb restriction was intended to apply to Claimant's total capacity, rather than to just the right extremity. "If [that restriction] is for one arm only my analysis would be different." Hearing Transcript, 74:3-10. However, it is apparent from the record that Claimant's restriction indeed only relates to the right arm. Dr. Friedman explicitly mentioned that the restriction would be for the right arm. Dr. Johnson's analysis implicitly references the right shoulder in his letter, which states that "[i]f a conversion to reverse shoulder is needed in the future, she will need restrictions from overhead work, repetitive reaching, carrying, overhead work and lifting away from her body with the right upper extremity." A review of Claimant's injury and condition, all on the right side, also supports that the restriction was intended for the right shoulder only.

96. Because Eby treated Claimant's medical restriction as bilateral instead of as for the right arm only, her opinion that averaging fails to account for Claimant's true disability carries less weight. In particular, Eby had opined that the loss of labor market was likely inaccurately low. However, Eby underestimated Claimant's ability with her left arm, and Claimant has not lost as much capacity as Eby supposed. Weighting averaging is not necessary to accurately reflect Claimant's overall disability.

97. The remainder of Eby's opinion remains persuasive. Now, Defendants suggest that because Claimant may be considered retired there should be no PPD above PPI. However, this argument does not take into account Claimant's chronic pain and restrictions. These are related to

the industrial accidents and were important factors in her less-active job search. Defendants have also argued that Eby incorrectly relied upon Claimant's verbal report of her capabilities at her evaluation. However, Eby correctly separated Claimant's self-assessment of her capabilities from the medical restrictions provided by her doctor, and did not confuse the two. Except for the treatment of Claimant's restrictions as bilateral, which has already been addressed above, Eby's opinion is supported by an overall careful notation of facts and consistency with the medical record from Dr. Johnson.

98. In sum, Ms. Eby's opinions are unrebutted by evidence of record. Her loss-of-access rating constitutes the preponderance of evidence. However, a true averaging of loss of access and loss of wage-earning capacity is an equation from which she expressly deviates. Her decision to overweigh this aspect of permanent disability is not as well supported. A true average of Claimant's 69% market loss and 0% wage loss accurately reflects disability here; Claimant has consequently suffered a 35% permanent disability inclusive of PPI.

§72-406 Apportionment

99. Idaho Code § 72-406(1) provides as follows: "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." When disability is apportioned, it must follow a two-step analysis: "(1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident."

Davidson v. Riverland Excavating, Inc., 209 P.3d 636, 147 Idaho 339 (Idaho 2009). However, this two-step analysis does not apply merely because I.C. § 72-406 has been raised as an issue. For instance, it is not required where there is no disability in excess of impairment. *Davison v. Riverland Excavating, Inc.*, 147 Idaho 339, 209 P.3d 636 (2009).

> 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.

Clark v. R.C. Willey Home Furnishings, Inc., 013012 IDWC, IC 2009-000366 (Idaho Industrial Commission Decisions, 2012) (citing *Poljarevic v. Independent Food Corp.*, 2010 IIC 0001.1 (Jan 13, 2010). "[A] pre-existing permanent physical impairment . . . need not be a hindrance or obstacle to obtaining employment or re-employment to constitute an apportionable pre-existing physical impairment in cases less than total under I.C. § 72-406(1)." *Campbell v. Key Millwork & Cabinet Co.*, 778 P.2d 731, 116 Idaho 609 (Idaho 1989). One of the fundamental rules of procedure is that the party seeking affirmative relief has the burden of proof. *See Basin Land Irr. Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (Idaho 1988).

100. Section 406 apportionment is not established by a preponderance of the evidence of record. As discussed above, Dr. Johnson's opinion on impairment without apportionment is more persuasive in this matter. One should not speculate about what prior records, unseen or not entered into evidence, might say. The only evidence of disability in addition to or beyond that related to the work accident is from Dr. Friedman. However, in his apportionment opinion, Dr. Friedman spoke to causation from a medical and scientific perspective. He was not analyzing legal

standards of causation related to disability, and opined purely as to impairment. There is a dearth of information available from which to draw any informed conclusions as to what disability this speculative pre-existing impairment may have created. He acknowledged that Claimant's preexisting arthritis was permanently aggravated by the industrial accidents. This is sufficient to preclude apportionment.

101. Even if Dr. Friedman's opinions as to unrelated impairment were considered, applying a two-step apportionment analysis would change nothing. Claimant proved disability of 35% based solely upon Claimant's work restrictions resulting from the work accident and impairment related to the work accident. Eby's opinion did not include any additional restrictions for Claimant's other conditions. Exploration of what disability, if any, exists as a result of Claimant's non-work conditions would be speculative. Walking through the *Page* two-step analysis in this situation would consequently result in adding the non-work impairments and disability from Claimant's right shoulder restrictions, only to then subtract the non-work impairments. This futile exercise would result in the exact same estimate of disability as currently stands: 35%.

CONCLUSIONS

1. Claimant is entitled to permanent disability rated at 35% of the whole person, without apportionment and inclusive of PPI; and

2. All other issues have been resolved by the parties.

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 18th day of June, 2024.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail and Electronic Mail upon each of the following:

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Debra Cupp

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARLENE BOATMAN, Claimant, v. TARGET CORPORATION, Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2017-020961** **2020-014730** **ORDER** **FILED** **JULY 12, 2024** **IDAHO INDUSTRIAL COMMISSION**

Pursuant to Idaho Code § 72-717, Referee Douglas Donohue submitted the record in the above-entitled matter, together with his recommended 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 is entitled to permanent disability rated at 35% of the whole person, without apportionment and inclusive of PPI; and

2. All other issues have been resolved by the parties.

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

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DATED this _12th__ day of _____July_____, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2024, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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