BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NELLIE WHITELEY, Claimant, v. LIFE CARE CENTERS OF AMERICA INC., Employer, and OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2019-034248** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **JUNE 11, 2025** **IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. A hearing was conducted on January 16, 2024. Claimant Nellie Whiteley was represented by Johnathan W. Harris of Blackfoot, Idaho. Chad Walker of Boise represented Defendants. The parties presented oral and documentary evidence and took post-hearing depositions. The matter came under advisement on January 13, 2025, and is ready for decision.

ISSUES

Based on the contentions of the parties and the issues noticed, the issues to be decided are:

1. Whether Claimant is entitled to future medical care;
2. Whether Claimant is entitled to temporary disability (TPD/TTD);
3. Whether Claimant is entitled to permanent partial impairment (PPI); and
4. Whether Claimant is entitled to permanent partial disability (PPD).

The parties did not present evidence or argue in briefing the issue of temporary disability. It is deemed waived.

CONTENTIONS OF THE PARTIES

Claimant, a licensed certified nurse assistant (CNA), slipped on ice in Employer's parking lot and suffered a left ankle fracture and syndesmotic soft tissue injury—which required three surgeries due to the fibula's non-union. Claimant contends this injury resulted in 34% PPD inclusive of 4% whole person PPI. To support her PPD claim, Claimant relies on her vocational expert along with a functional capacities assessment (FCA) issued by a physical therapist. She contends there has been a substantial loss in labor market access. If she were to lose the activities director position which Employer has provided, she may not be able to find another employer willing to accommodate her limited physical abilities. The FCA report, the IME doctor, and Claimant's treating doctor's last medical visit record all corroborate one another on this point. As for future medical care, the issue ought to remain open in case it becomes necessary to seek further medicals in the future.

Defendants concede PPD but would limit it to 17% or less inclusive of PPI. Claimant's own treating doctor released her with no PPI or standard medical restrictions. Limiting her to perform the tasks of the activities director job that Employer has provided is not a standard worker's compensation restriction. She has even performed occasional limited CNA work for Employer since the accident. Claimant's vocational expert's opinion hinges upon the questionable validity of an out-of-state physical therapist's FCA which contains questionable capacities and is founded on a hypothetical job loss. Finally, Claimant's entitlement to future medical benefits is now precluded because she presented no medical evidence proving it necessary.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The Idaho Industrial Commission legal file;

2. Oral testimony at hearing of Claimant and her husband, Kyle Whiteley;

3. Joint Exhibits A through R; and

4. Post-hearing depositions of vocational expert Kent Granat, and of orthopedic surgeons Mark Wright, M.D., and James Bailey, M.D.

Referee Donohue 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

Work History and Industrial Accident

1. At the time of hearing, Claimant was 55 years old and living in Jerome, Idaho. She grew up in Rupert. Her early work history includes dishwashing, shelf stocking, mowing, and babysitting. After graduating high school in 1986 she attended one year of college at Idaho State University, worked for Simplot peeling potatoes, and then joined the Army where she was trained in military policing and Korean language. She served in Nuremburg, Germany. After four years of active duty, she served six years in the National Guard Reserves. Beginning sometime in her youth or early adulthood, Claimant smoked cigarettes and did not stop until winter 2020.

2. In late 1991 Claimant trained in Police Officer Standards Training (POST) under the GI Bill at the College of Southern Idaho. She simultaneously worked dispatching for the Cassia County Sherriff's Office. She moved with her parents to Las Vegas in 1994. She worked 12 years as a security officer for Sam's Town in Las Vegas. She supervised other officers, patrolling private property while carrying a weapon as she rode on a bike or in a car. Her duties

included chasing people on foot, as well as addressing stolen vehicles and drunkards. Claimant quit patrol work in 2005 and returned to Idaho. Claimant left the work force for a period, then took part-time work driving school bus plus some work for a daycare and other odd jobs. Schedules and low wages kept Claimant from returning to security or law enforcement.

3. As a displaced worker, Claimant then took Department of Labor's suggestion that she certify as a nursing assistant. She graduated College of Southern Idaho's six-month CNA program in 2018 and began working for Employer shortly after passing the certification exam.

4. As a CNA for Employer, Claimant worked an eight-hour night shift. For $13 per hour, Claimant worked 40 hours a week plus 10 hours overtime. She testified that her Fitbit recorded that she walked 7-8 miles each night. She lifted 75 pounds regularly. She occasionally lifted more when large and heavy patients required customary attention or someone took an extraordinary fall. She was the oldest CNA working for Employer. Most were in their 20's and 30's, with some fresh out of high school.

5. On November 30, 2019, Claimant slipped and fell in Employer's parking lot during her night-shift meal break. At the time, it was obvious that bones in her left leg were broken. The X-rays taken that day showed the lower portions of her left tibia and fibula were fractured, and her lower ankle tendons were torn from the bone. She did not work again until the end of January 2020.

Initial Medical Care and Work Activities, 2019-2020

6. On December 5, 2019, Dr. Mark Wright, M.D., performed the first ankle surgery. Claimant returned to work for Employer in late January 2020 in a wheelchair. She worked as a receptionist and performed odd jobs such as filling water containers for residents. As healing

progressed, she transitioned from wheelchair to scooter and took on clerical tasks. She worked in these ways during the first year after her first surgery.

7. One year later, in December 2020, Dr. Wright performed a second surgery due to Claimant's on-going pain. He removed one metal plate, replaced another, and performed a donor bone graft. She quickly returned to weight-bearing activities using a scooter and crutches. However, she continued to have pain and swelling. The fibula had not knitted. It was suspected that this was due to the use of a donor-supplied bone graft. During this time she continued in the reception area for Employer.

Medical Care and Work Activities, 2021-2022

8. In April 2021, Claimant visited an allergist to test for metal allergies, but results came back negative. Vital sign measurements indicate she weighed around 270 pounds at the time.

9. On October 7, 2021, Dr. Wright performed a third surgery, in which Claimant's own tissues were used to graft the fibula so that it might finally fuse and fully heal. Surgical procedure records say she had stopped smoking since the last operation and "…hopefully this will give her a better chance for healing." The doctor took surgical measures to generate more blood flow in the nonunion area and instrumented with another plate and more screws. Afterward, Claimant continued to have pain.

10. In December 2021, Claimant was assigned to the position of activities director, which she was still doing at the time of the hearing. She testified she enjoys the job duties very much. She works 40 hours a week, plus a little overtime doing CNA work when needed. She testified that pain and swelling in the left leg and ankle prevent her from doing more work than that. At the time of hearing, Claimant was taking an activities director certification course

funded by Employer, which she expected to complete in April 2024. The activities director position pays $18.03 per hour, approximately $5 per hour more than her time-of-injury CNA job. Since the accident, Claimant has worked fewer overtime hours. She has not worked a four-hour CNA shift for a year or more.

11. Claimant regularly attended physical therapy at Wright Physical Therapy (not connected with Dr. Mark Wright) from April 8, 2020, through March 4, 2022. Upon discharge, therapist Isaac Carlington reported to Dr. Wright that Claimant had progressed from 0% to 80% function. She had a robust home exercise program, which she reported doing each morning to improve her limp and to warm up for the day.

12. On April 27, 2022, Dr. Wright logged Claimant's last visit. She still had pain, as he expected. The surgery incision looked clean. Range of motion was good that day with mild crepitation. The bones in Claimant's lower left leg had finally healed. The doctor felt Claimant was doing well.

> I am going to keep her back to full duty without restrictions. I think she does fine with the activity director. As long as they can leave her in that job, she will do well. I will see her back on an as needed basis. If she has to go back and be more physical, it may be problematic for her. We spoke about doing more restrictions. She is really not interested in that. She thinks she can monitor herself and do what she needs to do. Ex E, p. 1464. Depo. 7, Hrg. Tr. 45.

Claimant's Status at the Time of Hearing

13. Claimant testified her injured ankle is the same today as it was in April 2022. She reports the following CNA tasks are difficult: walking, standing, getting up and down from the floor, stooping, and bending. She testified that neither CNA work for another employer nor security officer work are possible because of the walking requirements. She continues working as Employer's activities director. She continues to train for that certification.

14. Claimant takes 800 mg ibuprophen for pain as prescribed. She also wears compression stockings. Scaring, mild deformation, and edema of the left foot and ankle were observed by the Referee at hearing.

15. The leg injury has impacted other areas of the Claimant's life and body. She no longer hunts, fishes, or performs mountain man re-enactments. Camping and fur trapping are limited. Her gait and balance are changed such that additional strain is placed on the joints in the right side of her body.

16. Claimant's husband, Kyle Whiteley, testified at hearing. Mr. Whiteley is currently on disability. He grew up in Buhl and Castleford, joined the Army for a short time, and "buckarooed" in the past. He testified about the effects of the injury on Claimant's ability to hunt, fish, and camp. He stated that Claimant's exercise levels are generally reduced and that she has gained 35-40 pounds. Mr. Whiteley testified about Claimant's reduced quality of life at home, which now involves ankle pain, rest, frustration with tears, and less gardening. He stated Claimant's stamina for shopping is reduced. He reported dramatic contrast in her mood and tolerance for interaction when comparing a day of activities director work against a day with a four-hour shift of CNA work.

Relevant Prior Medical Care and Conditions

17. Claimant's prior medical history includes kidney stones, bilateral plantar fasciitis, gout, carpal tunnel syndrome (right), a cervical fusion (2005), and a left shoulder humerus fracture with surgery (2003).

Future Medical Care

18. The record contains no evidence of future medical care which may likely be required for Claimant's left ankle injury.

Physician and Vocational Expert Opinions

19. Dr. James Bailey reviewed records and examined Claimant at Defendants' request on June 9, 2022. He is a military-trained orthopedic surgeon. After a private practice followed by teaching at medical school, he retired in 2023. Soon after, Dr. Bailey opened a small practice in Santa Barbara where he also performs some California QME's (Qualified Medical Exams). His evaluations involve record review from past to present, as well as intake forms and questionnaires.

20. Upon physical examination, Dr. Bailey noted Claimant's balance problems with heel-toe walking. He saw no obvious erythema or swelling. Range-of-motion loss was particularly evident with extended knee dorsiflexion and subtalar/forefoot inversion and eversion. He noted decreased sensation in a stocking pattern of the foot and ankle with tenderness at the ends of the tibia and fibula. On a pain diagram offered at the IME Claimant indicated pain in her left ankle, left knee, and right hip. In response to written questions by Surety Dr. Bailey opined Claimant's left ankle fracture was at maximum medical improvement (MMI) and that she would be rated with a 4% whole person PPI according to the AMA Guides to Permanent Impairment, 6th ed.

21. On December 1 and 2, 2022, Brendan Bagley, PT and DPT, performed a functional capacities evaluation (FCA) in Lehi, Utah. Claimant testified the FCA involved walking in a parking lot, going up and down stairs, carrying, lifting, and typing. It made her tired and sore. On a scale of 1-10, Claimant reported her pain levels between 3 and 6. PT Bagley reported Claimant gave consistent effort, was cooperative both days, and performed all that was asked. According to the Dictionary of Occupational Titles, he deemed Claimant could work at the light level. Claimant's physical capacities were recorded as follows:

SUMMARY OF FINDINGS				
ABILITIES	OCCASIONALLY 1-33%	FREQUENTLY 34-66%	CONSTANTLY 67-100%	Functional Considerations
1. Lift-Carry	30 lbs.	20 lbs.	10 lbs.	Dynamic instability, weakness of left ankle
2. From floor	30 lbs.	20 lbs.	10 lbs.	Dynamic instability, weakness, and decreased dorsiflexion left ankle
3. To shoulder	30 lbs.	20 lbs.	10 lbs.	Dynamic instability, weakness of left ankle, Upper quadrant weakness
4. Push Pull	Push 72 ft lbs Pull 78 ft lbs	Push 36 ft lbs Pull 39 ft lbs	Push 18 ft lbs Pull 19 ft lbs	Generate force off right leg or keep left ankle plantarflexed
5. Hand Grip Right Hand Grip Left	Right: 62 lbs. Left: 67 lbs.	Right: 31 lbs. Left: 33 lbs.	Right: 15 lbs. Left: 16 lbs.	
6. Pinch Grip (3 pt. right) Pinch Grip (3 pt. left)	Right: 12 lbs. Left: 11 lbs.	Right: 6 lbs. Left: 5 lbs.	Right: 3 lbs. Left: 2 lbs.	
7. Hand Coordination			XX	
8. Sit			XX	
9. Stand-Walk	WALK	STAND		Dynamic instability of left ankle with more difficulty on uneven surfaces
10. Bend-Reach (trunk)	XX			Dynamic instability, decreased dorsiflection left ankle
11. Low Level Activity	XX			Same as above
12. Elevated Activity			XX	
13. Climb Stairs	XX			Dynamic instability, weakness, and decreased dorsiflection left ankle
Hours Distributed Throughout Workday 0-3.0 hours (1-33% of workday) = Occasionally (O) 3-5.5 hours (34-66% of workday) = Frequently (F) 5.5-8.0 hours (67-100% of workday) = Continuously (C)				
(Estimate for an 8-hour work shift) Ergonomic conditions including breaks must apply.				

JE C p. 00024.

22. Mr. Bagley noted Claimant may require frequent breaks for standing, walking, and low-level activities accommodation. Dorsiflexion limits in the left ankle was most remarkable and apparent during movement and functional activities. Dorsiflexion and dynamic instability significantly affected Claimant's foot placement which would affect the dynamic motion required to pivot while transferring patients. Dorsiflexion limitation and dynamic instability of the ankle becomes more apparent on uneven slopes and surfaces, significantly affecting Claimant's recreational activities such as hiking, hunting, and trapping. Mr. Bagley agreed with Claimant's self-assessment that she can work partial CNA shifts occasionally. He felt some CNA tasks remained possible for her, without risk of injury to herself or the patients. Claimant testified PT Bagley's report is accurate regarding work history, medical history,

earnings, and the work description of a CNA. PT Bagley opined in writing about Claimant's safe capacity. He stated she could safely perform jobs rated "light" under the Dictionary of Occupational Titles. As for "medium" rated jobs, she could perform some lifting up to 30 pounds, but not on a full-time basis.

23. In a report dated January 6, 2023, Vocational Expert Kent Granat considered Claimant's future employability. Mr. Granat was deposed on February 9, 2024. Based on the written report and his deposition, Mr. Granat's process of assessing a workers' compensation disability involves an interview of Claimant, a medical records review, a determination of residual function based on medical opinions, the identification of job duties and their physical demand according to the Dictionary of Occupational Titles, a transferable skills assessment under the GOE codes, and a labor market access loss assessment.

24. Applying this process to the Claimant's case, Claimant was interviewed. Mr. Granat noted that Claimant graduated from Rupert High School, from the CSI law enforcement program in 1993, and from the CSI CNA program in 2018 with skills including typing, keyboarding, and other clerical and computer work. Employment history involved mostly semi-skilled work in the full range of heavy, medium, and light duty. Experience includes nursing, security services, dispatch, cashier, office/clerical, driving trucks and buses, childcare, and food processing. After the injury in which Claimant worked as a CNA, she returned to work for Employer as an activity's director. Since the industrial injury, Claimant has returned to work for Employer as a full-time activity's director. Of the 10 types of jobs she had performed, 5 were medium demand, 4 light, and 1 sedentary. Eight of the 10 jobs were semi-skilled.

25. Mr. Granat reviewed the pertinent medical records including Dr. Wright's April 27, 2022, final impressions, the IME by Dr. Bailey, and the FCA. Physical therapy notes and the FCA by PT Bagley were condensed to the above-described residual functional capacity including light physical demand work with occasional walking up to 1/3 of the time, frequent standing up to 2/3 of the time, and occasional squatting, kneeling, bending/reaching, and stair climbing. Claimant's self-described limitations were: 75 minutes on her feet before the injury began to impact her work; ongoing pain in the ankle, leg and knee; swelling, stability, and pivoting difficulties; standing limited to 10-15 minutes; lift 25-30 with occasional lifting of more weight; occasional kneel, stoop, or crawl; and taking walking breaks when driving over one hour.

26. Applying these facts, Mr. Granat determined Claimant's loss of labor market access in three ways:

> **A)** Ability to return to jobs held prior -70% loss due to only 3 of 10 jobs previously performed remaining available. He knew from experience the potato grader and general dispatcher jobs were jobs available in her local economy.
> **B)** Transferable skills to jobs similar to those held in the past - 55% loss. An index showed 155 jobs available would be reduced to the remaining 58 jobs in the light and sedentary categories.
> **C)** Career change considering all jobs in the semi-skilled workforce - 77% loss with limitation now to sedentary, light, semi-skilled jobs that honor standing, walking and postural restrictions.

27. After a conversation with Claimant's attorney, Mr. Granat added to his report regarding the topic of wage loss. First, he provided wage earning capacity data from the Bureau of Labor Statistics comparing CNA's average wage, both mean and median, with a recreational activities director's wage means and medians. He compared these wage rates in Twin Falls and the nation. Overall, a CNA job paid 2% more than a recreational activities director position.

28. At deposition, Mr. Granat clarified concerns the parties had about his disability rating in regards to Claimant's reasonable geographic area, her on-going training, and her wage earnings. Mr. Granat explained the number of employees working in Jerome is not available. Furthermore, even though Employer is funding Claimant's certification as a recreational activities director, this certification will have no effect on her disability because she is already doing the work and it pays more than what she made at the time of injury. Claimant's wage earning capacity actually rose from $13 per hour as a CNA to $18 per hour as an activities director. Thus, Claimant's wage loss for disability purposes was 0%.

29. Finally, Mr. Granat assessed Claimant's present and probable future ability to engage in gainful activities as affected by the medical factor of PPI and by pertinent non-medical factors. The cumulative effects of multiple injuries reduced her to sedentary light physical demand. Restrictions included standing, walking, and postural activities. Disfigurement was not a factor. By averaging his three-labor market loss analyses he arrived at a 68% labor market access loss. He then proceeded with other statutory factors.

30. At age 52, Claimant went from being able to do medium-level CNA work at the time of the injury, to light-duty activities director work which limits the work she can do on her feet and the weight she can lift. Ultimately, Mr. Granat opined Claimant has a 34% PPD by averaging 68% loss in labor market with 0% wage earning capacity loss.

31. Dr. Wright was deposed June 12, 2024. He testified that Claimant's was a straightforward case, but the healing took a long time. The location of the break involved a complete tearing of the syndesmosis (ligament tissue), and the fibula was slow to knit.

32. Dr. Wright's final medical notations on April 27, 2022, include confirmation of Claimant's work as an activities director for Employer, but no standard work restrictions. In

deposition, he explained that knowing what one can and cannot do are two different things. He declined to issue permanent work restrictions because of the effect it would have on Claimant's ability to acquire future jobs in an at-will employment law state like Idaho. He deferred to Claimant, allowing her to decide when to come back to him to get permanent restrictions. He did not order the FCA, and he declined to comment on the limitations represented therein.

33. Dr. Bailey was deposed on September 19, 2024. He reaffirmed his record review, physical exam, and 4% whole person PPI rating without restrictions which he had issued earlier. Whether the doctor would normally issue restrictions in such a case, he would not say; people recover uniquely. Claimant had returned to perform a new job for Employer. On cross-examination Dr. Bailey did, however, concede that the restriction in this case is the new activities-director job, which is more administrative and does not require her to work much on her feet. He went on to explain that he does defer to valid functional capacity exams (FCE's). Furthermore, he had read Claimant's FCA and agreed with it in an addendum dated December 21, 2023, and he affirmed his ongoing agreement during his deposition. The addendum is not found.

DISCUSSION AND FURTHER FINDINGS OF FACT

34. 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). 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).

Credibility

35. 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, 447−448, 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).

36. Claimant's demeanor while testifying was credible. This is supported by vocational expert, Kent Granat, who found Claimant's self-perceived limitations consistent with Dr. Wright's and PT Bagley's statements in that she was not prone to exaggerate.

37. Testimony of Claimant's husband showed no indicia of lack of credibility, although it was too brief to provide a useful basis for an opinion either way.

38. Substantively, Claimant's testimony is largely corroborated by other evidence in the record. However, she and her husband both testified that she gained 35 to 40 pounds after the accident. On the date of the accident, she weighed 262 pounds. At her April 2021 allergy testing appointment she weighed 270 pounds, and at the December 2022, FCA she weighed 247 pounds. Her weight at the time of the January 16, 2024, hearing is not in evidence. Claimant and her husband did not provide all the information necessary to determine the accuracy of their estimates of her weight gain, but it appears to have been a struggle.

Past Medical Benefits

39. Employers shall provide medical treatment if the claimant's physician requires the treatment and the treatment is reasonable. Idaho Code § 72-432(1). It is for the physician, not

the Commission, to determine whether treatment is required. *Chavez v. Stokes*, 158 Idaho 793, 797, 353 P.3d 414, 418 (2015). The Commission decides whether treatment is reasonable. *Id.*

40. A claimant bears the burden of proving that 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). Furthermore, a claimant must adduce medical opinion – by way of physician's testimony or written medical records – in support of her claim, and she must prove her claim to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 511 P.2d 1334 (1973). Defendants have accepted the claim and paid past medical bills, including a $40 prescription charge presented at hearing. No issue remains about past medical care.

41. Furthermore, Claimant has not shown she is likely entitled to an award for future medical care. In this case, there is less evidence about required future medical care than there was in *Dilulo v. Anderson & Wood Co., Inc.*, 143 Idaho 829, 153 P.3d 1175 (2007). *Dilulo* involved a medical provider's letter surmising "…provisions need to be made to cover any future problems…" with a spine injury. *Id,* 1178. The Court noted the referee was unable to locate any physician's opinion indicating Mr. Dilulo was in need of further medical care for any condition attributable to his industrial accident. *Id.*

42. Similarly, in this case, future medical expenses were not substantively argued in briefing or evidenced in any way. Claimant has not met her burden of proving entitlement to future medicals. No medical expenses are owing under Idaho Code § 72-432(1).

Permanent Impairment and Disability

43. The disability rating's fundamental requirement of anatomical loss after maximum medical improvement has been met in this case. Both Claimant's treating orthopedic

surgeon, Dr. Wright, and Defendants' IME orthopedic surgeon, Dr. Bailey, contribute evidence in support of a 4% PPI rating. Dr. Wright's medical records stated Claimant's ankle and leg injury was medically stable on April 27, 2022. Dr. Bailey later agreed with the diagnoses and medical stability findings, and he added his opinion that Claimant has a 4% whole person PPI. Claimant conceded this rating in briefing. Dr. Bailey's uncontested rating is well-founded and reasonable. Therefore, Claimant has proven she suffers a 4% whole person PPI as a result of her work accident and left ankle fracture with syndesmosis injury.

44. By combining nonmedical factors with Claimant's uncontested 4% PPI rating, Claimant's PPD may be determined. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* "Permanent disability" or "under 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 provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as

the Commission may deem relevant. Pursuant to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market access is the date of hearing and not the date that maximum medical improvement has been reached. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). Although the claimant bears the burden of proving disability in excess of impairment, expert testimony is not required to prove the degree of disability. *Bennet v Clark Herford Ranch*, 106 Idaho 438, 442, 680 P.2d 539 (1984) (citations omitted). The claimant bears the burden of establishing permanent disability. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). 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).

45. Claimant seeks 34% PPD inclusive of 4% PPI. Defendants seek 17% PPD.

46. Medical Factors. The Referee observed at hearing that Claimant's left ankle and foot area is mildly deformed with a scar and edema. Claimant testified to ongoing pain in her left lower extremity, which Dr. Wright says is to be expected. Defense concedes in briefing Claimant now endures pain. Claimant takes 800 mg of ibuprofen per day and wears compression hose.

47. Claimant's other medical conditions which existed at the time of the hearing include a prior left shoulder surgery, a cervical fusion, kidney stones, gout, arthritis, and carpal tunnel syndrome.

48. Claimant's medical restrictions are uncertain and are indirectly derived from the FCA. Dr. Wright declared her condition reached MMI on April 27, 2022, but he declined to issue restrictions or a PPI rating at that time. Dr. Wright did not impose specific lifting, motion,

or postural restrictions. He merely stated that she could work as activities director but perhaps not as a CNA because of possible additional lifting. Nevertheless, as needed on occasions since medical stability was reached Claimant has performed partial shifts as a CNA.

49. Nonmedical factors. The primary and most weighty fact in assessing nonmedical factors is Claimant's return to work for Employer as activities director. This is a real, not a made-up or light-duty, job which Claimant competently performs apparently to Employer's satisfaction. She earns more than she did as a CNA.

50. Claimant based her permanent disability argument on the hypothetical future loss of the activities-director job. She resorted to PT Bagley for physical capacities information as if the FCA constituted permanent medical restrictions of a treating physician and not merely a snapshot of Claimant's limitations on that day. Defendants' IME expert, Dr. Bailey, acknowledged these FCA limitations at deposition, although he did not opine these to be restrictions. Rather he deemed her current job as activities director to satisfy an implied restriction of no more than 4 hours of standing and walking. Kent Granat's PPD rating is largely founded on Bagley's FCA limitations as endorsed by Dr. Bailey.

51. In this case, Kent Granat's PPD rating is not founded on medical restrictions designed to serve the Claimant over time. It's founded on PT Bagley's December 1 and 2, 2022, FCA. Vocational experts occasionally offer opinions based solely on an FCA/FCE. These vocational opinions are not afforded as much weight by the Commission because they are not vetted by a medical provider who understands the particular injury and the particular worker's abilities over time. An FCA/FCE is only one factor which a doctor considers when issuing medical restrictions for a patient. Other factors include the physician's experience with other patients' similar injuries and their course of healing, information the physician may have about

the injury from other medical resources, and any other personal or social considerations about the particular person who is injured. The FCA/FCE itself is only a medical or vocational expert's assessment about a person's physical capacities on a particular day. So, the restrictions Mr. Granat applied when formulating his 34% PPD rating are not likely appropriate to serve Claimant over the course of the next ten years. On the other hand, a medical provider's restrictions are designed, in part, to protect the worker from further injury over time, so the employee's capacity at a FCA/FCE may not match the bounds put into place by the provider. Unfortunately, Dr. Wright declined to issue restrictions in this case due to his "philosophical" opposition to the risk of issuing medical restrictions which may later hinder his patient from acquiring work in the future.

52. Mr. Granat opined that Claimant has a 34% PPD as calculated from a 68% loss of labor market and 0% wage loss. He recognized there has been an increase from her pre-injury wages to her current wages. It is standard for vocational experts in worker's compensation cases to calculate disability by averaging a worker's loss of labor market with their loss of wages. As has been held in a prior Commission ruling, 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.

Nevertheless, such deviation from the averaging-of-factors method is for the Commission, not for the vocational expert. Mr. Granat's analysis is appropriate.

53. Mr. Granat does offer several methods for assessing labor market access loss that aids our understanding of Claimant's diminished ability to compete in the open labor market. Mr. Granat's first method of ascertaining labor market access loss (Claimant's ability to return to only 3 of 10 jobs held before the industrial accident) was not tailored to Claimant's regional geographic area simply because the total number of jobs available in Jerome, Idaho, is not provided in a government study. That number is required in order to generate the proportions of jobs lost and remaining. By statute, the reasonable geographic area must be considered. But the number of total jobs contained within it need not necessarily be considered. The statute is silent on this topic.

54. Mr. Granat testified that he knew from personal experience that potato grader and general dispatch jobs do exist in the local economy. He is a well-qualified expert with years of experience in assessing workers' compensation disability. And he did provide national job data which presumably includes Jerome, Idaho. The Jerome area was considered because national data was used to generate the second method of labor market access loss and the third method of labor market access loss. Wage loss is zero, but labor market access has ranged between 55% and 77%.

55. Mr. Granat opined the non-medical factors of this case are a barrier to Claimant's future employment. This is essentially because Claimant has gone from being able to do heavy and medium category work to only light category work with a 30 lb. lifting "restriction".

56. Claimant's ability to compete in the Jerome labor market and engage in gainful activity has been reduced. Claimant's activities director job is a good match, but it may not last.

Nevertheless, that possibility as it is, does not appear likely. No substantial evidence of record indicated that Employer intends to separate Claimant from that employment. Moreover, Claimant appreciates her job, even with the occasional CNA work that may or may not arise along with the physical pain it causes afterward. Claimant has performed some CNA duties since the accident, but for no more than 4 hours at a time, two times a week. She's done none of this work within the last year, which supports the conclusion that the FCA limits are not likely to serve Claimant over time. Employer is investing in Claimant's light category work skills with the activities director certification. If Claimant does require a career change to some other semi-skilled, light category career in the Jerome area in the future, factors other than her industrial injury are likely to prompt it. Claimant is 55 years old and her health is impacted by numerous physical conditions including 4% PPI for the industrial injury, gout, arthritis, and surgical effects on her shoulder and spine. She has broad life experience as well as computer typing and keyboarding knowledge.

57. Because PPD is founded on a hypothetical loss of the actual factual job she performs well, and because there is no substantial evidence that this job is endangered in any way, Mr. Granat's 34% PPD recommendation is overinflated. Nevertheless, some permanent disability is reasonable and likely despite Dr. Wright's reluctance to impose specific restrictions in order to preserve her chances in the job market should she re-enter it. Claimant has established it likely that she has incurred a PPD of 20% inclusive of her 4% PPI.

CONCLUSIONS OF LAW

1. Claimant failed to show it likely that she is entitled to future medical care; and

2. Claimant is entitled to 20% PPD, inclusive of 4% PPI.

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

DATED this _2nd__ day of May, 2025.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __11th____ day of June 2025, 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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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NELLIE WHITELEY, Claimant, v. LIFE CARE CENTERS OF AMERICA INC., Employer, and OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2019-034248** **ORDER AND DISSENTING OPINION** **FILED** **JUNE 11, 2025** **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 failed to show it likely that she is entitled to future medical care; and
2. Claimant is entitled to 20% PPD, inclusive of 4% PPI.
3. All other issues have been resolved by the parties.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this ___11th___ day of _____June_____, 2025.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Thomas E. Limbaugh

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay

Commission Secretary

COMMISSIONER AARON WHITE, DISSENTING:

After careful consideration of this case with my fellow Commissioners, I respectfully dissent to the award of only 20% permanent disability. The majority relies heavily upon Claimant's continued employment as an activities director. In so doing, it minimizes Claimant's physical condition and loss of access to the work that has formed the majority of her career.

At the physical level, every medical opinion in this case directly or indirectly supports a finding that Claimant cannot return to work as a CNA and has lost the capacity to perform medium and heavy level work. Dr. Wright stated work as a CNA would be "problematic," and declined to provide restrictions on philosophical grounds. Dr. Bailey felt it safe to read Dr. Wright as opining Claimant could not return to work as a CNA, and explicitly stated he agreed with the restrictions provided in the FCA report. The FCA report provided pinpoint measurements of Claimant's physical capacity, and separately included recommendations for work restrictions that rule out medium and heavy work. It, too, specifically expressed concern

over Claimant's work as a CNA. The majority's general objections to the FCA notwithstanding, no evidence contradicts these recommendations.

The most pressing issue is that Claimant's physical loss has indeed translated to loss of work access, and her ability to engage in gainful activity has been reduced. Since Claimant began full-time work in 1987, she has spent the clear majority of her career performing heavy or medium level work in CNA work, security, military, law enforcement, and other work with significant amounts of standing or lifting, such as work as a delivery driver lifting auto parts up to one hundred pounds. Claimant has now lost access to all of this. Granat's vocational opinion gave a detailed supporting analysis. Because of the physical nature of the work and her physical condition, Claimant has lost the utilization of her two current certifications in CNA work and in law enforcement, and has lost access to the work she has done for the majority of her career. In replacement, Claimant has only gained training as an activities director and, if all has gone well since the date of hearing, certification as such.

The majority's approach ignores standard vocational considerations in favor of the fact that Claimant currently holds a position. The resulting outcome fails to reflect Claimant's loss of freedom and limited ability to explore career alternatives. Even if Claimant's new position remains stable, Claimant's loss of physical capability and the career access it represented is a permanent present reality. For these reasons, I respectfully dissent from the award of only 20% PPD.

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __11th____ day of ___June_____, 2025, a true and correct copy of the foregoing **ORDER AND DISSENTING OPINION** was served by regular United States mail and Electronic Mail upon each of the following:

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