

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

SAMANTHA AMARILLAS,

Claimant,

v.

ALTERNATIVE NURSING SERVICES,  
INC. dba GATHERINGS & ANS  
DEVELOPMENTAL THERAPY,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2014-024585**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

March 2, 2018

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Lewiston on March 7, 2017. Scott Chapman of Lewiston represented Claimant, Samantha Amarillas, who was present in person. Mark T. Monson of Moscow represented Defendant Employer, Alternative Nursing Services, Inc. dba Gatherings & ANS Developmental Therapy, and Defendant Surety, Idaho State Insurance Fund. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on December 14, 2017.

**ISSUE**

The sole issue to be decided as a result of the hearing is whether and to what extent Claimant is entitled to permanent partial disability.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

The Notice of Hearing included the following issues identified by the parties in their calendaring requests: medical care; temporary partial and/or temporary total disability benefits; permanent partial impairment; permanent partial disability; total permanent disability whether by the odd-lot doctrine or otherwise; and attorney fees. Claimant's counsel waived the issue of total permanent disability at hearing. Tr., 5:14-19. In post-hearing briefing, Claimant did not present any arguments on the issues of medical care, temporary disability benefits, impairment, and attorney fees. Those issues are also deemed waived. The only issue that Claimant argued in briefing was permanent partial disability. *See*, Claimant's Opening Brief at 8 – 14. Permanent partial disability, therefore, is the sole issue for decision.

### **CONTENTIONS OF THE PARTIES**

Claimant was working as a home health caregiver for Employer on September 9, 2014, when she fell on a client's staircase and injured her right knee. She initially received conservative medical care, including physical therapy. After an MRI revealed a tear in her right meniscus, she underwent an arthroscopic surgery with meniscectomy on December 19, 2014. She continued to receive physical therapy through March 2015. An April 25, 2015 independent medical examination (IME) by Joseph R. Lynch, M.D., found Claimant to be at maximum medical improvement (MMI) with no permanent work restrictions. Dr. Lynch rated her lower right extremity impairment at two percent, equivalent to a one percent whole person impairment. Surety paid the impairment. Thereafter, Claimant returned to work for Employer at light duty. An IME performed by John McNulty, M.D., on December 21, 2016, agreed with Dr. Lynch's findings that she had reached MMI and that her whole person impairment was one percent. Dr. McNulty, however, found that Claimant's right knee condition warranted certain work restrictions, including but not limited to no lifting above 50 pounds from waist to chest level.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

Claimant argues, based upon Dr. McNulty's restrictions, that her inability to lift or transfer patients has prevented her from working full time, reducing her wage earning capacity and ability to perform her previous duties as an in-home caregiver. Due to her physical restrictions, limited educational background, and limited job opportunities in her rural home of Pierce, Idaho, Claimant contends that she is entitled to permanent partial disability in the amount of 25%.

Defendants argue that Claimant returned to work for Employer in the same capacity, at the same rate of pay, and for the same number of hours as she worked at the time of injury. They further argue that Claimant should have no work restrictions as reflected in the findings of Dr. Lynch. Based upon these factors, they urge the Commission to find that Claimant has suffered no permanent partial disability beyond the one percent impairment, which Surety paid.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Joint Exhibits 1 through 13,<sup>1</sup> admitted at the hearing;
2. The telephonic deposition transcripts of the following physicians:
  - a. John McNulty, M.D., taken on April 27, 2017; and
  - b. Joseph R. Lynch, M.D., taken on July 19, 2017.

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

### **FINDINGS OF FACT**

1. **Claimant's Background and Education.** Claimant was born on March 3, 1988. She was 29 years of age at the time of hearing. She resided in Pierce, Idaho, her entire life,

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<sup>1</sup> Ex. 13 is the transcript of Claimant's deposition taken on October 17, 2016.

including at the time of hearing. Claimant described Pierce as a “mill town, and then the mill went out so it has just faded and become a retirement town. There’s just a few businesses left.” Pierce is located approximately an hour’s drive east from Orofino in northern Idaho. She attended public schools in the Pierce area but dropped out of school in the 10<sup>th</sup> grade. Claimant was working on a high school diploma online at the time of hearing. She did not complete any education or training beyond the high school level except for a medicine certification course to help assisted living clients take their medications. She also took some certified nursing assistant (CNA) courses but did not complete certification as a CNA because she did not pass the test. She had basic computer skills that include accessing the Internet, using social media, emailing, and word processing. Claimant was married and had three children. She and her family resided with her grandfather in his house in Pierce. Tr., 13:1-15:15; Ex. 13:273-275.

2. **Vocational History; Time of Injury Employment.** Aside from working briefly in a gas station without pay to help out a friend, Claimant’s entire work experience was in-home healthcare. Ex. 13:276. She first began working as home health caregiver for Employer on March 2, 2009. Employer then laid her off, so she went to work in a similar position for Clearwater Health and Rehabilitation from April or May until December 2009. She resumed her position with Employer on January 4, 2010 and was continuously employed in that position through the date of hearing. Tr., 15:19-16:19; Ex. 11:99-100; Ex. 13:275-276.

3. Claimant recalls that prior to the industrial accident, she consistently worked for Employer on a schedule of 40 hours per week, 10 hours per day for four days per week. Tr., 16:20-24; 17:17-20.

4. Claimant’s rate of pay when she first worked for Employer in 2009 was \$7.25 per hour. When Employer rehired her in 2010, she earned \$8.25 per hour. Claimant was earning

\$8.75 per hour from Employer at the time of her injury. She was still earning \$8.75 per hour in October 2016. Her position did not include any employee benefits. Ex. 11:99-100; Ex. 13:275.

5. For approximately four years prior to the industrial accident, Employer assigned Claimant to work for one client, a stroke patient who used a wheelchair for mobility. The patient resided in Orofino. Claimant assisted the patient with lifting in and out of vehicles and her wheelchair. She drove the patient to appointments, errands, and restaurants. She performed the following household chores: doing laundry, making the bed, washing breakfast dishes, shopping and cleaning the bathroom. She assisted the patient in getting up, dressing and undressing, washing, and attending to personal hygiene. Although the patient could bear some weight in transfers to and from her wheelchair, a typical workday for Claimant involved multiple transfers of the client in and out of the car and wheelchair both at home and in public. She also lifted the client's wheelchair in and out the car and carried groceries. Tr., 17:1-18:18; 33:14-20; Ex. 11:100.

6. **Prior Medical History.** Prior to the industrial accident, aside from the births of three children and an episode of kidney stones, Claimant had not been hospitalized for any serious medical issues. She did not have a history of any significant injuries, health conditions, or illnesses. Although she had a history of obesity and an ovarian cyst, she considered herself to be in good health and did not have any physical limitations prior to the industrial accident. Her right knee did not bother her prior to the accident. Ex. 4:8; 13:277.

7. **Industrial Accident.** On September 9, 2014, Claimant's shift began at 6:45 a.m. She was performing her normal duties for the stroke patient whom she had served regularly for the past four years. After making the patient's bed, she gathered clothes to take downstairs to the laundry. Halfway down the stairs, Claimant slipped and fell on a cat toy. She recalls in pertinent

part as follows: “And my right leg went back behind me, and my left leg went out. And at that point I felt something pop, and my [right] knee swelled.” She sat for a minute, then got up and proceeded to do the laundry. Claimant went back upstairs to tell the patient that she had injured herself. She then called Employer’s office and informed them what had happened. Employer’s staff instructed her to come to the office and pick up an incident report, which she completed. She returned to the client’s home and remained until her shift ended at 4:00 p.m. Tr., 18:19-20:4; Ex. 13:277-278.

8. **Medical Care.** After leaving work at the patient’s home, Claimant sought medical care at the Clearwater Valley Medical Clinic in Orofino. PA Hal Joseph evaluated her. Claimant reported that she had slipped on a client’s stair and twisted her right knee, straining both hips. While her hips were minimally sore at the time of examination, her right knee was “quite tender with weight bearing and range of motion.” The physical exam demonstrated that her right knee was mildly tender along the medial and increased over the lateral joint line. There was significant anterior edema. PA Joseph ordered X-rays of the right knee, prescribed icing and crutches, took Claimant off of work for two weeks, and limited her weight bearing. He also ordered a two-week course of physical therapy, three times weekly. Ex4:8-11.

9. The X-rays ordered by PA Joseph occurred on the same date, September 9, 2014. The findings, as read by Dean Easton, M.D., showed a small right knee joint effusion, no fractures, no subluxations, no acute changes and no arthritis. Ex. 4:12-15.

10. Claimant returned to PA Joseph for follow-up on September 25, 2014. He noted that she had gone through three sessions of physical therapy with only very slight improvement. Claimant was experiencing considerable pain on the inside of her right knee, increased by going up stairs. She felt that the knee was catching when walking and weight bearing. Upon

examination, she demonstrated full range of motion and full extension limited by tenderness that was over the medial anterior compartment. PA Joseph prescribed Vicodin for pain and Naprosyn for inflammation, recommended continued physical therapy, and ordered no further work until further notice. He also ordered an MRI. Ex. 4:17-20.

11. Claimant underwent MRI imaging on October 3, 2014 at the Clearwater Clinic. The findings of the MRI, as read by Dr. Easton, showed a large obvious oblique tear of the posterior horn of the medial meniscus, extending to the inferior articular surface. Dr. Easton did not observe any other tears in the knee joint and observed that the cruciate ligaments were intact. *Id.* at 21-22.

12. Claimant returned to PA Joseph for follow-up on October 16, 2014. She reported continued symptoms of tenderness, with popping and clicking in the right knee. Physical therapy had not alleviated her symptoms. Based upon the MRI finding of a significant tear in the medial posterior horn of the meniscus PA Joseph referred Claimant for an orthopedic surgical consultation with Marvin R. Kym, M.D. He continued the order of no work until further notice and continued previous medications. *Id.* at 23-28; Tr., 21:9-19.

13. Dr. Kym of Kym Orthopedics in Lewiston evaluated Claimant on October 22, 2014. Claimant reported the same symptoms that she had reported to PA Joseph. Upon examination Dr. Kym observed that Claimant's right knee had painful active range of motion. He noted that physical therapy had provided only mild relief in swelling to Claimant. In reviewing the MRI, he observed that the right knee had an oblique medial meniscus tear, with no fractures or dislocations. Dr. Kym recommended an outpatient right knee arthroscopy with meniscectomy as the plan of treatment, with Claimant anticipated to return to work six weeks following surgery. Ex. 5:29-33.

14. After Surety approved Claimant's surgery, Fawna Huffman, NP-C, conducted a pre-surgical consultation with Claimant on December 12, 2014. Ex. 5:37-40. Dr. Kym then performed the right knee arthroscopy with meniscectomy on December 19, 2014 at St. Joseph Regional Medical Center in Lewiston. The procedure confirmed the MRI's pre-surgical finding that Claimant had a complex tear of the posterior horn of the medial meniscus. Dr. Kym debrided the meniscal tear to stable margins. He observed all other joint components of the knee to be intact. Claimant tolerated the procedure without complications. *Id.* at 42-46.

15. Dr. Kym followed up with Claimant on January 28, 2015 for her six-week post-surgical review. He noted that Claimant had fallen two weeks after surgery and had increased swelling about the knee and quadriceps inhibition. He ordered continued physical therapy and anticipated that Claimant would be able to fully return to work on March 2, 2015. *Id.* at 50-51.

16. In a three-month post-surgical consultation on February 26, 2015, Claimant had continued complaints of retro-patellar pain. She did not feel that she could return to her time-of-injury job because of the requirement to transfer a patient who weighed up to 200 pounds on a regular basis. Dr. Kym ordered four more weeks of physical therapy for a total of 12 visits, with a tentative return-to-work date of March 30, 2015. He also prescribed a Palumbo knee sleeve for Claimant to wear during activity. *Id.* at 53-56.

17. On March 25, 2015, after a total of 14 weeks of post-surgical physical therapy, Claimant reported to Dr. Kym that she felt her right patella dislocated. She still had complaints of retro-patellar pain and posterior knee swelling. His exam showed no joint line tenderness or effusion; the patella was tender with palpation. He had ordered X-rays that showed a well-tracking patella, no spurring, no cysts, no fractures and no dislocations. Dr. Kym opined that Claimant could return to work but continue with physical therapy. He did not feel further

surgical intervention was warranted. Dr. Kym advised Claimant that she might need to retrain for a new job if lifting and patient transfers were not feasible. He gave Claimant a limited release to return to work with limited kneeling and transferring, which restrictions were temporary pending a final determination by an independent medical examiner. Ex. 5:61-62.

18. Claimant received physical therapy at Riverside Physical Therapy in Orofino first, after her industrial accident on September 9, 2014, and then following her surgery on December 19, 2014. She attended 12 sessions before her surgery and 31 sessions after her surgery. She received a discharge from therapy on April 3, 2015. PT Alison Thomas noted upon discharging Claimant that she had “improved stiffness/loss of ROM improved weakness improved gains post surgery yet still unable to make it thru a full day without pain.” She further observed that Claimant continued to limp due to pain and also that Claimant feared poor stability. Thomas rated Claimant’s progress as adequate. Ex. 12:120-222.

19. Claimant described her progress following surgery as follows: “Not good. It didn’t fix anything except where it was tore.” Tr., 22:10-12.

20. **Independent Medical Examinations.** Surety scheduled Claimant for an IME with Dr. Lynch, an orthopedic surgeon with Objective Medical Assessments, on April 25, 2015. Dr. Lynch met with Claimant in Lewiston, took her medical history, and asked her to describe the industrial accident. He reviewed medical records from PA Joseph, Dr. Kym, and physical therapy notes, as well as all relevant imaging studies including X-rays and the MRI. Dr. Lynch also reviewed a job description of Claimant’s position as a home health caregiver that reflected the requirements to transfer the patient from wheelchair to car and in various settings, as well as lift the wheelchair, including the ability to lift 75 pounds on an occasional basis. Claimant told Dr. Lynch that her knee surgery helped but it also left her with some catching and grinding in the

front of her knee. Claimant felt that her kneecap was dislocating. She described difficulty lifting, kneeling, sitting in a car for too long, and pivoting. She had pain while sitting, ranging anywhere from 6 to 7 out of 10. Claimant had not yet returned to work. She was not taking any medications. Dr. Lynch then performed an orthopedic examination of Claimant. He recorded no abnormalities or other findings indicative of physical dysfunction of the right knee. She demonstrated an antalgic gait favoring the lower right extremity. She also leaned to the right side while walking. At the conclusion of the examination, Dr. Lynch observed Claimant ambulating with a normal gait pattern without obvious abnormality as she exited the exam room. After Dr. Lynch approached her in the waiting room, Claimant then demonstrated a much more exaggerated gait as she was exiting the building compared to what she had just demonstrated upon leaving the exam room. He diagnosed Claimant with a right knee meniscus tear, related to the industrial accident, and post right knee partial meniscectomy, without signs of swelling or effusion. Ex. 6:68-76.

21. Dr. Lynch determined that Claimant was medically stable, that no further treatment was necessary, and that she could return to work without the need for any restrictions. Based upon the AMA *Guides*, he assigned her a two percent lower extremity impairment, equivalent to a one percent whole person impairment. This finding was based upon a physical examination that showed no atrophy, no abnormality, no deformity, no swelling, normal stability, with her gait examination deemed unreliable. *Id.* at 77-78.

22. On May 7, 2015, Dr. Kym responded to a form letter from Surety stating that he agreed with Dr. Lynch's IME findings. Ex. 7:87.

23. Claimant's counsel scheduled her for an IME with Dr. McNulty, an orthopedic surgeon with the Benewah Community Hospital/St. Maries Family Medicine in St. Maries on

December 21, 2016. Similar to Dr. Lynch, Dr. McNulty conducted a review of the relevant medical records, including the records of PA Joseph, Dr. Kym, and the MRI. He also reviewed Dr. Lynch's IME report. He conducted a physical examination in which Claimant demonstrated an antalgic gait with a short stride. She favored her lower right extremity. He observed swelling in the right knee compared to the left, with a very small effusion on the right. Claimant had moderate patellofemoral crepitus, medial joint line tenderness and had knee discomfort when attempting to stand on her heels and toes. Other physical findings were essentially normal. Dr. McNulty diagnosed Claimant's status as post right knee arthroscopic partial medial meniscectomy, with a chondral lesion on her lateral facet right patella with chronic knee pain. Ex. 8:88-90; 92-93.

24. Dr. McNulty determined that Claimant had reached MMI. He noted that Dr. Kym's operative report disclosed no obvious lesions in the patella or in the preoperative MRI, nevertheless he noted that Claimant had sustained a fall injury approximately two weeks after surgery while attending physical therapy (slipped on ice); he opined that the fall could have caused the lesion. Dr. McNulty assessed a similar impairment to that found by Dr. Lynch, a two percent lower extremity impairment equivalent to a one percent whole person impairment. Unlike Dr. Lynch, however, he determined that his findings in the patellofemoral joint warranted work restrictions, as follows: avoid activities such as repetitive squatting; avoid kneeling except on an occasional basis; stairs and/or climbing should be on an occasional basis only; and a maximum lifting restriction of 50 pounds from waist to chest level. *Id.* at 90-91.

25. On February 12, 2017, Dr. Lynch responded to a form questionnaire asking him whether he agreed with Dr. McNulty's findings by stating that he partly agreed with them.

Dr. Lynch agreed with Dr. McNulty's findings of MMI and the impairment rating. He disagreed with the diagnosis and need for restrictions. Ex. 10.

26. **ICRD Rehabilitation Efforts and Return to Work.** Surety referred Claimant to the Idaho Industrial Commission Rehabilitation Division (ICRD) on September 24, 2014. ICRD Consultant Diane Hairston began working with Claimant to help her return to work. Ex. 11:96-97. Ms. Hairston gathered intake information from Claimant, including facts concerning her injury, job duties, family history, financial status, medical history, treatment status, education, work history, transferable skills, and vocational interests. *Id.* at 98-100.

27. Claimant disclosed to Ms. Hairston the following annual income from her job with Employer, as follows: 2009, \$13,440; 2010, \$13,440; 2011, \$13,650; 2012, \$14,000; and 2013, \$14,000. *Id.* at 99.

28. On September 30, 2014, Ms. Hairston conducted a job site evaluation interview. Employer's supervisor informed her that Claimant was a valuable employee and modifications/accommodations would be made to assist her if necessary to enable her to return to work. *Id.* at 101.

29. Claimant's vocational goal was to return to work with Employer if she was capable of doing so, however throughout the rehabilitation process she consistently expressed concerns about her ability to perform patient transfers and lifting that she had previously performed. In particular, she was concerned about her ability to work for the stroke patient with whom she had worked for approximately four years. Claimant remained off work from the day after her injury until her return to work on modified, light duty on May 12, 2015. *Id.* at 101-117.

30. Ms. Hairston focused rehabilitation efforts on returning Claimant to work for Employer, while also exploring other possibilities. Discussions with Employer about placing

Claimant with new clients who did not require patient transfers or lifts continued until May 2015. Meanwhile, Claimant continued to remain off work while receiving physical therapy. Ms. Hairston counseled Claimant of a “Plan B” in the event that Employer could not accommodate her needs; she helped Claimant prepare a resume and assisted Claimant in applying for a position with Stone Mountain Bowstrings in Orofino, a light manufacturing position. She encouraged Claimant to apply for another light manufacturing position. Ms. Hairston also researched other potential positions. Ex. 11:101-116.

31. After Dr. Lynch determined that Claimant could return to work with no restrictions, Ms. Hairston learned that Claimant had returned to work with Employer. Claimant’s initial work assignment was for two new clients at the same rate of pay (\$8.75/hour) for 24 hours per week. Claimant’s start date was May 12, 2015. *Id.* at 11.

32. Ms. Hairston confirmed that Claimant worked for 18 hours during her first week of returning to work, and at 16 hours for her second week. Work for the two clients was lighter in nature because it did not require Claimant to perform lifts or transfers. After returning to work, Claimant informed Ms. Hairston that she no longer required vocational services. Ms. Hairston closed Claimant’s ICRD case effective June 12, 2015. *Id.* at 117-119.

33. Claimant’s temporary disability benefits ended on May 4, 2015 and Surety paid her one percent whole person impairment on May 5, 2015. Ex. 3:3.

34. Claimant did not search for other employment between when she returned to work for Employer and the date of hearing. Ex. 13:279. She was laid off and received unemployment benefits from January through April 2016 because Employer had no work to assign to her during that time, however she resumed working for Employer when more work became available. *Id.*

35. As of the date of hearing, Claimant continued in her position with Employer at light duty, which she described as follows: “Light duty, just kind of like a little bit of housecleaning here and there, cooking for some people, taking them to appointments if they have to go, but that’s about it.” The major difference between her resumed duties and those at the time of injury was that she no longer performed lifting or transferring patients. As of the date of hearing, she was working with four clients. Her work schedule varied between 20 and 30 hours per week, depending upon the client or clients with whom she was working. Claimant recalled that her work schedule before the industrial accident did not vary and was full-time. Tr., 24:6-14; 30:7-31:22; 35:9-25.

36. Claimant explained her reason for not looking for any alternative employment after returning to her job with Employer in pertinent part as follows: “And there’s no job that I can do without – the only jobs out there in my area is like standing for long periods of time. There is not like desk jobs.” Nevertheless, she admitted that she did not undertake any formal job search beyond the brief one for which Ms. Hairston of ICRD assisted. *Id.* at 32:1-16.

37. Claimant acknowledged that there were more jobs available in Orofino, where she had previously worked for the client for approximately four years, than in Pierce where her home was.<sup>2</sup> She looked at applying for jobs in Orofino when ICRD was assisting her, however she qualified that there “were just a few, but they were all standing jobs.” *Id.* at 33:14-34:7.

38. Other than the information provided by Claimant through her testimony and that obtained by ICRD during its rehabilitation efforts, there is no information regarding Claimant’s wages or income in the record. Neither Employer nor Claimant supplied Claimant’s 2015 or

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<sup>2</sup> Administrative notice is taken that Pierce is located approximately 32 miles east of Orofino.

2016 W-2 forms or wage stubs for those years, while Claimant did not provide copies of her relevant tax returns.

39. **Claimant's Condition at Time of Hearing.** At hearing Claimant described her right knee as "painful," which she described in more detail as follows: "Just walking, getting up walking. It grinds, catches. It swells. If I'm on my feet for too long it is just a pain as soon as I walk for maybe ten minutes. Start walking around for ten minutes it starts bothering me." Claimant felt the need to sit down when her knee started bothering her, for up to 25 to 30 minutes. She no longer felt capable of assisting the stroke patient for whom she previously worked. She explained in pertinent part as follows: "Because if I were to lift her, I wouldn't want it to give out on me, and I wouldn't want to drop her." She believed that if her right knee gave out on her, she would drop the patient and it would "cause a lot of pain." Tr., 22:23-23:23.

40. At home, Claimant was able to perform most tasks of daily living, like cleaning, cooking, and doing the laundry. She did not perform yard work. Sometimes if her knee was hurting badly she took a break. She also had family members, including her children and grandfather, who helped out around the house. *Id.* at 36:1-37:1.

41. **Claimant's Credibility.** Claimant generally appeared to testify credibly at hearing. Nevertheless, her testimony regarding her work schedule before and after the industrial accident, and alleged resulting wage loss, cannot be reconciled with other information regarding her gross income in the record, as will be discussed in detail below. Thus, her testimony regarding these matters does not appear reliable. Claimant demonstrated forthright demeanor when testifying at hearing about her symptoms, leading to the conclusion that she genuinely believes that she accurately recounted them. As will be discussed in detail below, however,

Claimant's continued symptoms of right knee pain are not consistent with the preponderance of the medical evidence.

### **DISCUSSION AND FURTHER FINDINGS**

42. The provisions of the Idaho Workers' Compensation Law should be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990) (retraining benefits statute liberally construed to permit payment of travel-related retraining expenses rather than requiring claimant to pay them from his subsistence-level temporary disability benefits). 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) (substantial evidence supported Commission's finding that the industrial accidents did not cause claimant's breathing problems, where medical evidence was conflicting).

43. **Permanent Partial Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in section 72-430, Idaho Code." Idaho Code § 72-425.

44. The test for determining whether Claimant has suffered a permanent disability 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, 294, 766 P.2d 763, 764 (1988) (claimant at time of hearing was earning a salary equal to his pre-injury employment and did not present significant evidence of disability). 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. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995) (claimant's limitations preexisted industrial injury, thus he had no disability in excess of his impairment).

45. The proper time for determining Claimant's disability under most circumstances is the time of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012) (Commission's finding regarding disability was reached in error because it was based upon his circumstances at time of medical stability rather than hearing). Claimant bears the burden of proving that she has suffered a disability. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P.2d 1, 3 (1985) (claimant failed to establish disability where her complaints of chronic back pain were not supported by an anatomical cause of her pain or physical evidence of injury). "[A] permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in Idaho Code § 72-425, the claimant's 'probable future ability to engage in gainful activity' is accurately reflected by the impairment rating." *Graybill*, 115 Idaho at 294, 766 P.2d at 764.

46. As a prerequisite to determining Claimant's disability, the evidence must demonstrate that she is medically stable and that she has a permanent physical impairment. "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 evaluation. Idaho Code § 72-422.

47. There is no dispute that Claimant was medically stable nor is there any disagreement that she had a permanent physical impairment. Both Dr. Lynch and Dr. McNulty agreed that Claimant was medically stable and had a lower right extremity impairment of two percent, equivalent to a one percent whole person impairment. Dr. Kym, Claimant's treating surgeon, concurred. Therefore, these prerequisites to determining disability have been met.

48. Next, it must be determined whether Claimant's physical impairment, in conjunction with the non-medical factors provided by Idaho Code § 72-430(1), demonstrate that her capacity for gainful employment has been reduced or eliminated and, if so, the extent of her disability. To make this determination it is necessary to weigh both the medical and vocational evidence in the record.

49. **Medical Evidence.** In *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001 (permanent work restrictions assigned to claimant by independent medical examiner were appropriate), the Commission observed as follows:

In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity, which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination of an injured worker's disability in excess of physical impairment. *Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment*; if the injured worker is physically capable of performing the same types of physical activities as

he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

*Poljarevic*, 2010 IIC 0001.7 (emphasis added). Thus, for Claimant to prevail, the medical evidence must demonstrate that the industrial accident caused a functional loss in her physical capabilities justifying permanent work restrictions.

50. Claimant's independent medical examiner, Dr. McNulty, assigned certain permanent physical restrictions to Claimant. Dr. Lynch, Defendants' independent medical examiner, did not assign any such restrictions to Claimant as a result of her industrial injury. Both physicians testified in post-hearing depositions concerning their medical opinions regarding restrictions. The deposition testimony of each physician is discussed below.

51. *Dr. McNulty*. Dr. McNulty is a board-certified orthopedic surgeon practicing medicine in St. Maries, Idaho. McNulty Dep., 3:23-4:16. His credentials are well known to the Commission as his testimony or medical reports have been received into evidence in many past Commission cases.

52. Dr. McNulty explained the basis for his permanent restrictions on Claimant's physical activities, in pertinent part as follows:

So, really her main complaint was that patellofemoral joint, as outlined in Dr. Kym's evaluation as well, the last few clinic visits that she saw him. She had patellofemoral joint symptoms that would have limited her ability to squat and lift. Kneeling would have been a problem as well, and that's outlined, basically what I said, she should avoid activities such as repetitive squatting and should kneel on an occasional basis. Maximum lifting restriction should be 50 pounds from waist to chest level. Stairs and climbing should be occasional basis only, and that's because of the symptoms she was having in her patellofemoral joint.

McNulty Dep., 9:23-10:10.

53. Dr. McNulty opined that these restrictions were permanent because Claimant was still having problems with her patellofemoral joint in December 2016, when he examined her, a year after her surgery. McNulty Dep., 10:11-19.

54. Dr. McNulty agreed with Dr. Lynch regarding medical stability and impairment, however he saw their main disagreement as to whether Claimant had a problem in her patellofemoral joint. He described his reasoning as follows:

The restrictions are coming from the examination of her patellofemoral joint in the crepitus. So, one of the differences: Dr. Lynch didn't find any crepitus in her knee, and I did. When I examined her she had symptoms over the joint, particularly in the lateral aspect consistent with a chondral injury. I did the Apprehension Test, and she had trouble with that. Didn't have any gross instability but there was pain, and she had trouble squatting. And that was the basis of my restrictions.

*Id.* at 11:8-17.

55. Although Dr. McNulty determined that Claimant required permanent restrictions based upon the crepitus in her patellofemoral joint, nevertheless he determined that this finding was insufficient, without further evidence of arthritis, deformity or abnormality, to assign her any additional impairment rating per the *Guides*. *Id.* at 11:20-23.

56. *Dr. Lynch.* Dr. Lynch is a board-certified orthopedic surgeon practicing in Boise. He also has a certification in sports medicine from the American Board of Orthopedic Surgery. He specializes in the treatment of shoulder and elbow surgery. He is currently licensed as a physician and surgeon in Washington, Oregon, and Idaho, and was previously licensed in California. He has practiced medicine and orthopedic surgery since graduation from medical school in 2002. He has held a variety of academic appointments in addition to hospital privileges and positions in the states in which he has been licensed. Dr. Lynch has also published

academically in peer reviewed and non-peer reviewed medical journals. Lynch Dep., 3:22-5:10; Lynch Dep. Ex. 1.

57. Dr. Lynch began his physical examination of Claimant by observing her ability to walk. He noted that she demonstrated an abnormal, or antalgic, gait pattern consistent with a person favoring one leg over another, which could be the consequence of pain. Claimant, however, leaned over the right extremity while walking, which was atypical and not something he would expect to see in a patient with a painful leg. He observed in pertinent part as follows: “Typically they lean to the opposite side, not on the side that’s causing them pain.” Lynch Dep., 6:13-7:1. He also noted that at the conclusion of the examination, Claimant, unaware that Dr. Lynch was observing her, demonstrated a normal gait pattern as she exited the room. She then resumed an abnormal gait pattern upon exiting the building while being observed. *Id.* at 10:4-13.

58. Other key observations that Dr. Lynch made during his physical examination of Claimant were as follows: She had no swelling of either knee. While Claimant demonstrated limited range of motion with her right knee by an inability to fully straighten her leg, when Dr. Lynch tested her manual motor strength – quadriceps function, hamstring function – she demonstrated normal physiological motion, an inconsistent finding. She also demonstrated an ability to fully straighten her leg when he tested her kneecap, another inconsistent finding. Both of Claimant’s knees demonstrated no warmth to touch, no swelling about either knee, and were actually cooler than the side of the calf on both sides, which is a normal finding. Her knee stability was normal. When Dr. Lynch tested Claimant’s patella, there was no popping or snapping of the kneecap (crepitus), either actively or passively. There was no sign of instability in the kneecap in flexing and extending, side-to-side, forward, and straight, all normal findings.

Her motor testing was all normal. Her sensory examination (ability to feel light touch) was normal in the extremity. There was no atrophy in her calf of her right leg, compared to her left, which indicated normal movement. Lynch Dep., 7:7-10:4.

59. With regard to Claimant's patella, Dr. Lynch noted that of particular importance was that in the pre-surgical MRI, there was no objective evidence of abnormality that required further treatment or restrictions. The October 2014 MRI "demonstrated an entirely normal patella femoral joint without any abnormalities." Dr. Kym's operative findings were consistent with this finding. With regard to Dr. McNulty's finding that Claimant sustained an injury to her patella two weeks after surgery when she slipped on ice going to physical therapy, Dr. Lynch noted that this was based entirely upon Claimant's subjective complaints of pain and popping about the patella. His opinion was that the only way to objectively diagnose a chondral injury to the patella is through imaging, which Dr. McNulty did not do. Additionally, Claimant did not have any setback in physical therapy after the incident in January 2015; in fact, her range of motion improved thereafter. Claimant also reported popping and symptoms of her kneecap from the beginning of the treatment of her industrial injury through the completion of her physical therapy. *Id.* at 11:2-13:19.

60. Dr. Lynch noted another important consideration regarding knee crepitus, that it "actually can be a very normal finding in normal people, and it also can be normal if it's unilateral as Dr. McNulty documented in his notes." He opined that just because there is a finding of crepitus, it doesn't necessarily mean that a pathological process is taking place or something is abnormal. *Id.* at 13:20-14:5.

61. Dr. Lynch disagreed with Dr. McNulty on the need for work restrictions because he found "no objective evidence or requirement for the restrictions as it relates to her

[Claimant's] work injury." Additionally, he opined that just because someone has had a meniscal injury or tear doesn't necessarily mean they require any restrictions. He observed that a partial meniscectomy "is one of the most common procedures" that he performed in the military, and "it would be rare for those individuals not to go back to full-time duty." Lynch Dep., 15:9-19.

62. Finally, Dr. Lynch observed that it appeared that Dr. McNulty recommended restrictions not as a result of Claimant's meniscal pathology caused by her industrial injury but as a suspected chondral injury in her patella, for which he found there was no objective evidence. He also considered it significant that Dr. McNulty acknowledged in his report that there was no impairment associated with the alleged chondral injury. Dr. Lynch found it inconsistent that a condition that doesn't provide any basis for impairment could also provide a basis for permanent work restrictions. *Id.* at 15:20-16:15.

63. *Weighing the Medical Evidence.* Dr. Lynch's opinion that Claimant's industrial injury, after medical stability, required no permanent work restrictions is entitled to greater weight than the opinion of Dr. McNulty, who assigned her permanent restrictions. There are several reasons for this finding, as follows.

64. Dr. Kym, Claimant's surgeon, agreed with the findings of Dr. Lynch's IME, including his conclusion that there was no need for permanent work restrictions. Ex. 7. As Claimant's treating physician who monitored Claimant's progress in extensive physical therapy following her surgery and who was treating her at the time of her fall on ice in the parking lot of the physical therapist in January 2015, Dr. Kym was in a good position to assess Claimant's functionality and whether that fall aggravated Claimant's right knee sufficiently to warrant physical restrictions. He did not assign any significance to that event in his records. Rather, as

noted above, prior to finding that Claimant was at MMI, he ordered X-rays that showed she had a well-tracking patella, no spurring, no cysts, no fractures and no dislocations. Ex. 5:61-62.

65. If Dr. McNulty was correct that Claimant's slip and fall in January 2015 resulted in injury to her patella requiring work restrictions, her claim for disability would be compensable under the "compensable consequences doctrine," which provides that "when the primary injury is shown to have arisen out of and in the course of employment ... every natural consequence that flows from the injury and surgery ... likewise arises out of and in the course of employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct." *Mick v. The Home Depot, Inc. and The Insurance Company of the State of Pennsylvania*, 2008 WL 5426357, 6 (IC, December 19, 2008) (compensable consequences doctrine did not apply where an independent intervening cause did not allow coverage of claimant's additional surgery). Claimant was engaged in seeking physical therapy required by her primary injury and compensable surgery when she fell, thus it follows that if that secondary injury had consequences, including the assignment of permanent work restrictions, then compensable disability would be implicated.

66. Contrary to Dr. McNulty's opinion, however, there is insufficient medical evidence to find that the January 2015 slip and fall resulted in an identifiable physical injury to Claimant's right patella justifying restrictions. As noted above, Dr. Kym ordered X-rays that ruled out any observable physical injury to the patella. It is possible, however, that an MRI, a much more thorough imaging technique, might have revealed an injury to the patella that did not appear on the X-rays. But as Dr. Lynch noted, Dr. McNulty did not order an MRI to confirm his diagnosis. Rather, he diagnosed a patella condition based solely upon Claimant's complaints and his physical examination.

67. From their respective reports and testimony, it appears that Dr. Lynch documented a much more thorough and detailed physical examination of Claimant than that of Dr. McNulty. Dr. Lynch's observations regarding Claimant's antalgic gait require careful consideration. Although Claimant testified credibly regarding her symptoms, the fact that she did not demonstrate an antalgic gait when she was unaware that Dr. Lynch was observing her cannot be ignored. Additionally, she leaned to the right while walking, which was inconsistent with a patient who has a painful right leg. Most importantly, Dr. Lynch did not observe the crepitus that Dr. McNulty observed. In any event, Dr. Lynch's explanation that knee crepitus is a common symptom that by itself is not indicative of dysfunction or disease, without further significant findings, is cogent and entitled to greater weight than the opinion of Dr. McNulty.

68. Dr. Lynch noted that meniscal tears are commonplace and that arthroscopic surgeries to repair them are one of the most commonly performed orthopedic procedures. In his experience treating military personnel with such injuries, however, they rarely resulted in significant dysfunction requiring restrictions preventing the affected service members from resuming their duties. Of course, Claimant, who was an overweight medical caregiver, was likely not typical of Dr. Lynch's military patients, who one may presume had better overall physical fitness and thus a better prognosis for regaining full physical function than she did. Nevertheless, Dr. Lynch's observation in this regard is credible and has application to this case. It is difficult to credit that a relatively inconsequential meniscal injury that resulted in only a one percent whole person impairment could result in such significant loss of function justifying a 25% disability, as Claimant argues. Dr. Lynch's opinion that she required no permanent physical restrictions is more credible than Dr. McNulty's opinion that she has impaired physical function warranting permanent restrictions.

69. Finally, Dr. Lynch is correct that if the restrictions Dr. McNulty identified for Claimant came from her patella, then Dr. McNulty should have assigned at least some additional impairment to her based upon that body part. He did not. As noted above, permanent physical impairment is a prerequisite to determining disability.

70. For all the foregoing reasons, the medical evidence is insufficient to warrant permanent physical restrictions as a result of Claimant's industrial injury. Without impaired physical function as result of an industrial cause, Claimant's claim for disability fails.

71. **Vocational Evidence.** While the medical evidence alone requires a finding that Claimant is not entitled to compensation for disability, a brief discussion of the available vocational evidence is warranted. This evidence demonstrates that even if the medical evidence supported a finding that Claimant sustained a significant physical dysfunction as result of her industrial injury, disability benefits would not be warranted because there is insufficient evidence of either loss of labor market or a wage loss.

72. The parties did not engage the services of any vocational experts. The only vocational evidence in the record, therefore, consists of Claimant's testimony regarding her work history, her job with Employer both before and after the industrial accident, and her non-medical factors, as well as the ICRD case notes admitted as an exhibit.

73. Crucial to Claimant's case for disability is her allegation that before the accident she worked full time (40 hours per week at \$8.75, her time of injury wage rate), with no benefits, in a position that required her to lift and transfer her stroke patient multiple times a day, as well as lift a wheelchair in and out a vehicle. She further alleges that the industrial injury impaired her from performing these functions, thus her job with Employer, when she resumed it, limited her to working with patients who did not require lifting or transfers. Because Employer had limited

availability of such patients, Claimant's hours were reduced to 20 to 30 hours per week. Somehow, without an explanation, Claimant extrapolates from these circumstances a 25% disability, without showing demonstrable factual impacts on either her labor market or wages.

74. Claimant's job search following her recovery from her industrial accident was self-limited by her decision to return to Employer, who voluntarily accommodated her limitations of not performing patient lifts or transfers or other heavy lifting. ICRD was in the process of exploring other job opportunities for Claimant in light industrial positions that might have accommodated her perceived limitations, when Claimant voluntarily returned to work on a less than full-time schedule. Claimant dismissed these other job opportunities because she assumed that they would require standing for most of the workday, a limitation that even Dr. McNulty did not assign to her. Claimant's low rate of pay (\$8.75) might have been matched in her geographical area, which included Orofino, even given her perceived limitations, nevertheless she never fully explored those opportunities. Without some evidence in the record that Claimant's opportunity for jobs other than with Employer were foreclosed to her, there is no quantifiable loss of job market.

75. There is also insufficient evidence of wage loss. Claimant's assertion that she worked full-time on a dependable 40 hour per week schedule is inconsistent with the available record. Specifically, when Claimant provided intake information to the ICRD following her accident, she disclosed annual income in the gross amount of \$14,000 for 2012 and the same for 2013. Ex. 11:99. If Claimant had worked consistently at her normal rate of pay (\$8.75), full time (40 hours per week) for an entire year, with no time off (she had no paid leave), then she would have earned at least \$18,200 in gross wages. ( $\$8.75/\text{hour} \times 40 \text{ hours} = \$350/\text{week} \times 52 \text{ weeks}/\text{year} = \$18,200$ ).

76. Even assuming that Claimant voluntarily took time off for breaks, sickness, personal reasons, etc., the discrepancy between what she would have earned and the \$14,000 annual income she reported to ICRD can only be explained by the fact that it is more likely that Claimant worked on a variable schedule of either less than a full 40 hour week, or that there were significant variations in her hours at times to result in reduced income. Thus, it is difficult to credit her testimony that she consistently worked full-time prior to her industrial accident and was forced only by her limitations to accept less than full-time work after the accident.

77. If, in fact, Claimant had a demonstrable wage reduction following her return to work, she could have easily proven it by either submitting her W2 form, a tax return for 2016, or wage stubs from May 2015 through the date of hearing. She did not. Even setting aside her period of unemployment from January to April 2016, it would have been a simple matter to show a wage loss with that information in the record. It is reasonable to infer that by its omission, the missing wage/income documentation does not support her argument concerning wage loss.

78. For all the foregoing reasons, there is insufficient evidence to find that Claimant's industrial accident resulted in either functional limitations based on the medical evidence, or that she sustained any significant losses to either her labor market or wage earning capacities. Under these circumstances, Claimant has not proven that she incurred disability beyond her impairment.

#### **CONCLUSIONS OF LAW**

1. Claimant sustained a whole person impairment in the amount of one percent.
2. Claimant did not sustain any permanent partial disability.

**RECOMMENDATION**

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

DATED this 15<sup>th</sup> \_\_\_\_\_ day of February, 2018.

INDUSTRIAL COMMISSION

/s/  
\_\_\_\_\_  
John C. Hummel, Referee

ATTEST:

/s/  
\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> \_\_\_\_\_ day of March \_\_\_\_\_, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

SCOTT CHAPMAN  
CHAPMAN LAW OFFICES  
PO BOX 446  
LEWISTON ID 83501-0446

MARK T MONSON  
MOSMAN LAW OFFICES  
PO BOX 8456  
MOSCOW ID 83843-8456

sjw

/s/  
\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

SAMANTHA AMARILLAS,

Claimant,

v.

ALTERNATIVE NURSING SERVICES,  
INC. dba GATHERINGS & ANS  
DEVELOPMENTAL THERAPY,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2014-024585**

**ORDER**

March 2, 2018

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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 sustained a whole person impairment in the amount of one percent.
2. Claimant did not sustain any permanent partial disability.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all

matters adjudicated.

**ORDER - 1**

DATED this 2<sup>nd</sup> day of March, 2018.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
Thomas P. Baskin, Commissioner

/s/  
Aaron White, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of March, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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/s/