BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANET LEE PEYTON, Claimant, v. RC WILLEY HOME FURNISHINGS, Employer, and TRAVELERS PROPERTY & CASUALTY CO. OF AMERICA, Surety, Defendants.	**IC 2013-020279** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** **Filed March 15, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on May 17, 2017. Todd Joyner of Nampa represented Claimant. W. Scott Wigle of Boise represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on November 14, 2017. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order for different treatment to the apportionment issue.

ISSUES

At hearing, the parties agreed to the following issues for adjudication:

1. Whether and to what extent Claimant is entitled to permanent partial disability benefits in excess of impairment; and

2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406, or a subsequent condition is appropriate.

CONTENTIONS OF THE PARTIES

Claimant asserts that she suffered permanent partial disability (PPD) in excess of her 16% whole person (WP) permanent partial impairment (PPI) rating as a result of her subject industrial injury. Claimant acknowledges her vocational expert's PPD calculation is probably a bit high at 70.5%, and Defendants' expert is too low at 16.75%. Instead, Claimant argues she is entitled to PPD benefits in the range of approximately 34% to 51%, inclusive of her 16% PPI.

Defendants argue that Claimant's expert's PPD benefit calculations are inflated, and in reality Claimant's permanent disability is not significantly greater than her 16% PPI.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Rebecca Marley taken at hearing;

2. Claimant's exhibits A through F admitted at hearing;

3 Defendants' exhibits 1 through 19 admitted at hearing; and

4. The post-hearing deposition transcripts of Delyn Porter, and Nancy Collins, Ph.D., taken on May 25, and July 10, 2017, respectively.

Claimant objected to the testimony of Dr. Collins on grounds that her deposition testimony differed from her report. That objection will be addressed during a discussion of her findings. All other objections preserved through the depositions are overruled.

FINDINGS OF FACT

PRE-EXISTING CONDITIONS AND TREATMENT

1. Prior to the July 29, 2013 accident, Claimant was treated for a number of other orthopedic problems. On November 27, 2012, Claimant underwent a right hip arthroplasty to treat end-stage arthritis of the right hip. On January 15, 2013, Claimant underwent left knee arthroplasty to treat end-stage degenerative disease of the left knee. Both the hip and the knee surgeries were performed by Ronald Kristensen, M.D. Dr. Kristensen's last note of March 14, 2013, reflects that Claimant was doing well following the total knee arthroplasty. However, she did have some complaints of sharp intermittent pain in the right hip. Several explanations for this were entertained by Dr. Kristensen, and he recommended an injection or injections to help diagnose Claimant's complaints. The record does not reflect whether or not this evaluation was undertaken. There are no medical records in evidence which reflect further treatment or evaluation of Claimant's right hip. Def. Exh., 2, pp. 53-54. Dr. Kristensen's records do not reflect that he rated Claimant for her left knee and right hip arthroplasties. Nor do Dr. Kristensen's records reflect that he gave Claimant any permanent limitations or restrictions regarding her left knee and right hip. Claimant testified that she enjoyed a good outcome from these procedures, and had no problems with physical activities because of her knee and hip. Tr., pp. 47:15-49:5; 72:16-20. Following her hip and knee surgeries, Claimant returned to full-time work as a cashier for Employer. Claimant described this as a standing job, and testified that she had no trouble performing this job following her return-to-work. Tr., p. 79:13-24; Clt. Depo., pp. 28:24-31:1. She required no accommodation following her return to work. Clt. Depo., pp. 32:25-33:9.

2. Claimant worked in her cashiering position for approximately two months before undergoing the first of several right shoulder surgeries. Claimant's right shoulder complaints evidently have their genesis in a non-work related accident occurring in March of 2012. See Def. Exh. 4, p. 57. MRI evaluation of the right shoulder performed on November 26, 2012 evidently demonstrated a large full thickness tear of the supraspinatus tendon, along with partial tears in the infraspinatus and subscapularis tendons. Subluxation of the biceps tendon was noted, along with significant AC joint arthritis. On April 23, 2013, Darby Webb, M.D., repaired Claimant's "massive" rotator cuff tear. Def. Exh. 4, p. 71.

3. Following her right shoulder surgery Claimant returned to work for Employer, but in the PBX room, owing to her inability to use her right arm during her period of recovery. She also attended physical therapy during this timeframe. Claimant testified that at the time of the subject July 29, 2013 accident, she was doing well with the right shoulder, and anticipated going back to her cashiering job. In fact, Claimant testified that as of July 29, 2013, she had only one more physical therapy visit scheduled, and that she had no further scheduled follow-up visits with Dr. Webb. Clt Depo., pp. 34:21-35:13. However, physical therapy notes from August 2, 2013, reflect that as of the date of the July 29, 2013 accident, Claimant had only met about 50% of her long-term goals for rehabilitation of the right shoulder. Def. Exh. 8, p. 264. The record does not reflect that Claimant had been declared medically stable vis-à-vis her right shoulder as of the date of the July 29, 2013 accident.

INDUSTRIAL ACCIDENT AND TREATMENT

4. On July 29, 2013, Claimant was struck in Employer's parking lot by a fellow employee's car while Claimant was walking toward her vehicle. A co-employee took Claimant to the hospital for treatment. Her claim was accepted, and medical treatment ensued.[1]

5. At the emergency room on the day of her accident, Claimant had right-sided facial abrasions and right knee and left wrist pain. The medical records do not mention right shoulder injury.

6. Claimant did not progress as anticipated with her right shoulder therapy in the weeks following her accident and there was concern that the industrial accident may have disrupted Claimant's shoulder repair. A subsequent MRI in September 2013 confirmed that Claimant had re-torn her rotator cuff tendons. The radiologist also noted end stage osteoarthritis of the glenohumeral joint and labral degeneration. Claimant's physician felt Claimant needed a total right shoulder arthroplasty.

7. Claimant underwent a reverse total right shoulder arthroplasty on February 10, 2014. Upon discharge from the hospital Claimant fell on the sidewalk outside her home. The fall impacted Claimant's shoulder replacement, and led to a second right shoulder surgery to revise and repair the damage done from the fall. This surgery took place on March 3, 2014.

8. Soon after this second surgery, Claimant's physician noted Claimant's shoulder did not look normal. He determined she had again dislocated the prosthetic. This led to yet another shoulder revision surgery.

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[1] For the purpose of these findings, it is not necessary to detail Claimant's medical treatment visit by visit. An overview of Claimant's medical condition at the time of injury and at the time of medical stability is needed to assess her level of permanent disability.

9. Surety covered all three surgeries, related medical benefits, and temporary disability benefits until Claimant could again return to work. Additionally, Surety paid PPI benefits as detailed below.

10. As of March 2015, Claimant was declared to be at MMI and was assigned a permanent partial impairment (PPI) rating of 16% whole person (WP) for her right shoulder industrial injury.[2]

11. Claimant received permanent work restrictions of no lifting or working bilaterally above chest level, with a right arm lifting limit of five pounds from floor to chest. These restrictions were related to her industrial accident. No apportionment was provided.

12. Claimant returned to work for Employer in a part-time phone room job which did not violate her work restrictions. Employer did not have full time phone room positions.

13. Claimant voluntarily retired from Employer in June 2016, when she turned 65. At the time of her retirement she was making $13.50 per hour. After she retired, Claimant moved to Idaho Falls to be near her family and grandchildren.

BACKGROUND INFORMATION

14. Claimant was 66 years old at time of hearing. She is a high school graduate and attended college for a year and a half without obtaining any degrees.

15. In the remote past, Claimant worked as an office manager at a TG&Y "dime" store. She has also worked as a cashier at Toys 'R' Us. She was next employed for about a decade at Eastern Idaho Regional Medical Center where she sterilized medical equipment and performed some billing duties.

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[2] Claimant's PPI rating was figured at 33% UE PPI, 6% allocated to her pre-existing rotator cuff injury, 27% to her industrial right shoulder injury, which 27% UE PPI converts to a 16% WP PPI rating.

16. In 2001, Claimant moved to Meridian. There she taught preschool for about five years.

17. In 2006, Claimant began working for Employer. Her employment included stints as cashier, a return-to-vendor worker, (handling insurance claims and repossessions), and after her accident, answering telephones as a three-quarter and then half-time employee.

DISCUSSION AND FURTHER FINDINGS

PERMANENT PARTIAL DISABILITY (PPD)

18. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

19. 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 the accident causing the injury, 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. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [the claimant's] capacity for gainful

employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing her claim for permanent disability benefits.

VOCATIONAL REHABILITATION EXPERTS

20. Claimant hired Delyn Porter, a vocational rehabilitation counselor from Blackfoot, to prepare a vocational assessment and disability evaluation report on her behalf. Defendants hired Nancy Collins, Ph.D., from Boise, to perform a vocational assessment on their behalf. Both experts submitted written reports and provided deposition testimony.

Delyn Porter

21. As part of his assessment, Mr. Porter interviewed Claimant and reviewed medical records. He noted Claimant's educational background and social history, her work-related skill set and history, and labor and occupational data.

22. Using the information provided him coupled with his experience and labor market guides, Mr. Porter first calculated Claimant's loss of labor market access. Mr. Porter relied on and analyzed data contained in the Idaho Occupational Employment and Wage Survey for the Idaho Falls and Southeastern Idaho labor market area in calculating this loss.

23. Mr. Porter's analysis started with his conclusion that Claimant had access to and was competitive for approximately 14.5% of the total jobs in her labor market prior to her industrial accident. Considering the Claimant's "educational background, work history, transferable skills, and assigned restrictions," including Dr. Schwartsman's permanent work restrictions, Mr. Porter concluded Claimant had access, post accident, to just 2.75% of the total jobs in her job market, for an 81.0% loss of labor market access. Clt. Exh., pp. 60, 61.

24. Mr. Porter next analyzed Claimant's loss of wage earning capacity, including the value of her "benefits" package. When combining his understanding of Claimant's

hourly wage at the time of her industrial accident and the presumed value of her benefits package with Employer, Mr. Porter determined Claimant's hourly wage, including benefits, at $12.51. He then looked at the wages for lines of work he felt would still be available to Claimant and calculated those jobs' average hourly rate at $10.08. Mr. Porter stated the types of jobs available to Claimant post accident typically do not offer benefits. As a result of her industrial injury and permanent restrictions flowing therefrom, Mr. Porter opined that Claimant suffered a loss of earning capacity of 19.4%.

25. Mr. Porter chose not to "straight average" Claimant's loss of market access and loss of wage earning capacity (which would result in a permanent disability of approximately 50%); he felt to do so would undervalue her loss. Instead he weighted the average (1.5 loss of labor market to 1.0 loss of wages) to arrive at his conclusion that Claimant suffered permanent partial disability of 70.5%, inclusive of her 16% PPI.

26. Mr. Porter was deposed on May 25, 2017. His direct examination testimony focused on fleshing out the opinions given in his report. He did, however, find out for the first time that Claimant had undergone hip and knee replacement surgeries prior to her industrial accident. He also confirmed that Claimant was recovering from shoulder surgery at the time she suffered a work injury to that same shoulder.

27. On cross examination Mr. Porter was asked to, but could not, justify a reason for weighting Claimant's loss of job access more heavily than loss of income in his calculations. The best he could do was to note the Commission has on occasion weighted the averages, particularly when there is a large discrepancy between the loss of access and the loss of wage earning capacity.

Nancy Collins, Ph.D

28. As noted above, Defendants hired Dr. Collins to analyze Claimant's disability. She conducted a similar analysis to that utilized by Mr. Porter. After reviewing Claimant's medical, vocational, and educational history, Dr. Collins discussed Claimant's subjective complaints, limitations, and abilities. She then listed representative job categories for which Claimant historically had the requisite skills to perform, including cashier/checker, payroll clerk, sales clerk, office manager, telephone operator, preschool teacher, and central supply worker or technician. Dr. Collins felt that most of Claimant's past employment had been in the sedentary (up to 10 pounds lifting, pushing, etc.) to light (up to 20 pounds occasionally, with more standing and walking than sedentary jobs) categories. However, in the more remote past, Claimant performed some jobs falling in the medium and heavy duty categories.

29. Dr. Collins then looked at Claimant's pre- and post-injury job market access in the Idaho Falls area. As did Mr. Porter, Dr. Collins did not assume that Claimant had any pre-injury limitations/restrictions vis-à-vis her left knee and right hip arthroplasties. Further, she assumed that Claimant would not have had any right shoulder limitations/restrictions following the surgery performed by Dr. Webb, if not for the July 29, 2013 accident. With that assumption, Dr. Collins determined that on a pre-injury basis, Claimant had access to a total of 7,318 jobs in the Idaho Falls labor market. This included 1,969 sedentary jobs, 4,812 light-duty jobs, and 604 medium/heavy jobs. Def. Exh. 18, p. 465. Post-injury, she reasoned that Claimant can still perform all of the sedentary jobs in her pre-injury labor market, but none of the medium/heavy jobs. Concerning the 4,812 light-duty jobs in Claimant's pre-injury labor market, Dr. Collins proposed that approximately 50% of child care worker, cashiering, and retail sales jobs would be beyond Claimant's current limitations/restrictions. Therefore, Dr. Collins concluded that in light

of Dr. Schwartzman's limitations/restrictions Claimant could still perform 67% of the jobs in her pre-injury labor market, resulting in a loss of labor market access of approximately 33%. As noted in her deposition, Dr. Collins' report contains a typographic or arithmetic error relating to these conclusions; her report erroneously reflects that Claimant suffered a 67% loss of labor market access as the result of the subject accident when her analysis in fact reflects that Claimant retains access to 67% of her pre-injury labor market. Claimant's objection, based on her assertion that Dr. Collins' correction constitutes a new undisclosed opinion is overruled; Dr. Collins has explained the arithmetic error and her opinion that Claimant has suffered a 33% loss of labor market access can be derived from her report.

30. Dr. Collins calculated Claimant's pre-accident hourly wage at $12.20, and $13.50 at the time of her retirement. Dr. Collins felt that, with Claimant's transferable skills, she had the ability to earn at least as much (if she could land a payroll clerk job, for example) in Idaho Falls as she was making when she retired from her part-time job with Employer, and thus suffered no loss of wage earning capacity.

31. Based on Dr. Collins' opinion that Claimant suffered a 33% loss of access to her pre-injury labor market, and no loss of earning capacity, Claimant's disability is in the range of 16.75% of the whole person, inclusive of her 16% whole person impairment rating.

32. Much of the rest of Dr. Collins' deposition was spent explaining her methodology and contrasting it with that of Mr. Porter. A point-by-point comparison is unnecessary. It is sufficient to note that Dr. Collins was critical of Mr. Porter's methodology for determining wage earning capacity and his failure to include clerical jobs in Claimant's post-injury job market. She also noted that using different reference materials will allow for different figures concerning jobs in a particular market. She noted the differences between

Mr. Porter's preferred reference, the "Idaho Occupational Employment and Wage Survey," and her preferred reference, the "Occupational Employment Quarterly." Dr. Collins asserted her reference breaks down job categories into more precise subcategories and thus allows for more accurate calculation of pre-and post-injury job markets.

33. Cross examination focused on detailing the difficulty a woman in her mid-60s with the use of one arm would have in finding employment in a competitive labor market where Claimant would be competing with younger, more able-bodied applicants. Dr. Collins acknowledged those difficulties, even with jobs that on paper fit within Claimant's post-accident ability and skill set. Additionally, there was discussion on how the actual jobs within any job description might contain work elements which would eliminate Claimant from considering them. Dr. Collins attempted to recognize this in her analysis by excluding certain light-duty jobs from Claimant's post-accident labor market. However, she conceded that Claimant's actual access to those light-duty jobs may be lesser or greater than she proposed. Her decision to reduce Claimant's post-injury access to child care worker, cashier, and retail sales jobs was based on her experience as a vocational rehabilitation expert, not on an actual review of child care worker, cashiering, and retail sales jobs in Idaho Falls.

34. Dr. Collins used the term "wage earning capacity" as being the highest wage Claimant was capable of obtaining in any of the jobs within her restrictions for which she was qualified. Using that definition, there were a few jobs which paid over $13 per hour and a very few which paid over $14 per hour. Numerous other jobs within Claimant's restrictions paid less than $12 per hour, and some considerably less. However, as Dr. Collins testified, she defines earning capacity as "the highest wage you can earn with your education and work experience." Collins' Depo., p. 49. Its calculation is independent of

the starting wage for any job Claimant actually obtains; it is simply the highest wage Claimant is capable of obtaining with her qualifications, limitations, and restrictions. Dr. Collins' definition acknowledges that Claimant's wage earning "capacity" could include jobs which account for only a minuscule fraction of the total jobs for which Claimant is qualified.

VOCATIONAL EXPERTS ANALYSIS

35. As Claimant argued in briefing, both experts' reports and deposition testimony contains flaws. While it is not necessary to critique the experts in depth, a sampling of the more significant issues are discussed below. These flaws diminish the weight these advisory opinions receive when figuring Claimant's PPD.

36. As noted above, Mr. Porter included heavy and medium labor jobs in calculating Claimant's pre-injury access to the Idaho Falls labor market. Based on Claimant's work history as a retail stock clerk, a heavy-duty job, Mr. Porter concluded that Claimant had access to approximately 700 heavy jobs in the Idaho Falls labor market on a pre-injury basis. He further concluded that Claimant had access to approximately 1,500 medium-duty jobs on a pre-injury basis. Porter Depo., pp. 37:5-42:12. Porter assumed that these jobs were appropriate constituents of Claimant's pre-injury labor market because Claimant's time-of-injury job required that she stock shelves and set up displays as well as running a cash register. To the suggestion that Claimant's pre-injury conditions, age, and body habitus made medium and heavy work unrealistic for her on a pre-injury basis, Mr. Porter could only say that such work was realistic based on his understanding of Claimant's time-of-injury job:

> Q: [By Mr. Wigle]: In the case of Ms. Peyton, you are including in your analysis, as part of the pre-injury labor market, some heavy labor jobs; correct?
>
> A: Yes.

> Q: We have a woman in her mid sixties who is 5'1'' and 220 pounds, with a total knee, total hip, and a bum shoulder prior to the accident; and you have got her in a strength category up to 100 pounds lifting. Why?
>
> A: For that particular job, the stock clerk position only, again, it is based upon what she told me she was doing in her time-of-injury job.

Porter Depo., p. 39:13-23. However, Claimant testified that her cashiering position did not require of her that she stock shelves:

> Q: [By Mr. Wigle]: Were you required to stock the shelves of the store?
>
> A: No.

Clt. Depo., p. 38:24-1. Moreover, Claimant's actual time-of-injury job was the sedentary PBX room position. Also, notwithstanding Claimant's self-report of a good outcome from her first shoulder surgery, the medical record does not reflect that she had yet reached medical stability or enjoyed a return of full right shoulder function as of July 29, 2013. In summary, the record does not provide much support for the proposition that immediately prior to the subject accident Claimant was physically capable of performing all aspects of heavy employment even though jobs having some heavy duty components may be in Claimant's work history.

37. Dr. Collins, too, included some heavy and medium-duty jobs in Claimant's pre-injury labor market based on her work history. Collins Depo., pp. 14:20-16:2. However, Dr. Collins was more selective in identifying the types of medium and heavy work in Claimant's pre-injury labor market.

38. Both Dr. Collins and Mr. Porter assumed that Claimant had no limitations/restrictions on a pre-injury basis from either her left knee, right hip, or right shoulder conditions. Mr. Porter understood, based on his long experience as a vocational rehabilitation specialist that total knee and hip replacement surgeries typically come with certain permanent limitations/restrictions, even with good outcomes. However, he felt constrained by the absence

of such physician-imposed limitations/restrictions in this case to assume that Claimant had no physical restrictions prior to the subject accident. Neither did Dr. Collins consider Claimant's right hip and left knee surgeries in defining the scope of Claimant's pre-injury labor market. Further, she assumed that Claimant would have gone to a full recovery following her first right shoulder surgery had the accident not occurred.

39. That both experts chose to ignore what might have been the likely medical opinion that Claimant had significant pre-injury limitations, had any physician been asked, can be explained by their reluctance to wade into medical questions outside the area of their professional competence.

40. Dr. Collins' hypertechnical definition and use of "wage earning capacity" is troubling for several reasons. First, she used Claimant's actual wages pre-injury, not her "potential maximum wage" Claimant might have been able to make had she found a job which maximized her qualifications. Dr. Collins testified that retail wages are notoriously low, suggesting Claimant was working below her "capacity" prior to the accident. Dr. Collins did not provide Claimant's "wage capacity" pre-accident, which would have allowed for an "apple to apple" wage capacity comparison.

41. Dr. Collins' definition of wage earning capacity, while a legitimate definition, runs contrary to numerous decisions from the Commission. Defendants do not cite to any other decision by the Commission where PPD was analyzed using such a definition. Historically, loss of wage earning capacity has been considered as the wages paid for the post-accident jobs which a claimant is reasonably likely to obtain. If the vast majority of the jobs for which a claimant is qualified post accident pay minimum wage, typically the minimum wage is considered since it is the most likely wage Claimant can expect to receive if she finds

employment, even if there is a slight chance she could land a particular job paying more than she was making at the time of the accident. A hypertechnical definition of wage earning capacity such as employed in this case by Dr. Collins runs contrary to the adage that [t]he 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). In the present case, there is only a small fraction of the jobs available to Claimant which would meet or exceed her time-of-injury wages. If Claimant is able to find work, it is far more likely she will do so at a significant negative wage differential compared to her pre-accident earnings.

42. Finally, Claimant established at Dr. Collins' deposition that many of the jobs which on paper would seem to fit within Claimant's restrictions and physical abilities would be difficult for Claimant to actually obtain in a competitive market, and several others actually exceeded Claimant's physical capacity in real world application.

43. The labor market to be considered in evaluating a claimant's disability is ordinarily the labor market in which the claimant resides as of the date of hearing, except where claimant's residence at the time of hearing offers fewer opportunities for employment than her time of injury labor market. In such cases, it may be appropriate to consider both labor markets in evaluating disability. *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012); *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994). Claimant's time-of-injury labor market was the Treasure Valley, and she continued in her time-of-injury position, albeit at half-time instead of three-quarters time, until her retirement, at which point she moved to Idaho Falls. Claimant candidly admitted that had she so desired, she could have continued to work at her

time-of-injury position. While the Commission does not conclude that Claimant's retirement and resettlement in Idaho Falls was pursued in an effort to increase Employer's exposure for disability, per *Davaz*, it would be appropriate to consider both the Idaho Falls and Boise labor markets in evaluating Claimant's disability, assuming that the Idaho Falls labor market offers Claimant fewer opportunities for employment then the Treasure Valley. It may, but the distinction seems to be academic; is Claimant's employability realistically different if she can compete for 8000 jobs in the Treasure Valley versus 3000 in Idaho Falls? At any rate, the parties did not make this an issue, and only put on proof of Claimant's employability in Idaho Falls. The Commission concludes that evaluation of Claimant's disability by consideration of the Idaho Falls labor market alone is appropriate.

44. Pursuant to *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), where apportionment is at issue a less-than-total case, a two-step process must be employed to evaluate Defendant's exposure for the payment of disability. First, Claimant's disability must be evaluated in light of all physical impairments resulting from the industrial accident and any pre-existing conditions. Thereafter, the amount of permanent disability attributable to the industrial accident must be apportioned.

45. Turning first to the evaluation of Claimant's disability from all causes, the Commission must necessarily consider the combined effects of any pre-existing impairments and the industrial injury in causing disability. Claimant does not appear to have received a rating from Dr. Kristensen for her left knee or right hip arthroplasties. However, the Commission may take notice that even with an excellent outcome, total knee replacement and total hip replacement result in ratable impairments. Finally, Claimant has received an impairment rating for her pre-existing right shoulder condition.

46. Though we conclude that Claimant does have ratable pre-existing impairments for her right hip, left knee, and right shoulder, this conclusion, standing alone, is not particularly helpful in understanding Claimant's disability from all causes. To understand whether Claimant's pre-existing conditions add to the disability caused by the July 29, 2013 accident, it is necessary to understand something of the nature of the limitations/restrictions connected to Claimant's pre-existing conditions. For example, if Claimant's knee and hip replacement procedures left her with limitations against standing or walking for more than two hours during an eight-hour workday, this might increase Claimant's disability over and above that disability related to use of her right upper extremity.

47. Unfortunately, there is a dearth of information available to the Commission on the question of the impact of the hip and knee replacement surgeries on Claimant's functional capacity. The last note from Dr. Kristensen reflects that Claimant was doing well with her knee, but was having some intermittent pain in her hip. Against this note, however, is Claimant's unrebutted testimony that she has done very well with her hip and knee, and that she was able to return to her cashiering job, a job that required her to stand, with no difficulty. Probably, Claimant's knee and hip replacement would have made certain high impact activities inadvisable for Claimant. However, such work was not reasonably in the time-of-injury labor market of a 60-plus year-old woman. At any rate, from the evidence of record, the Commission is unable to conclude that Claimant did have vocationally significant limitations relating to her left knee and right hip on a pre-injury basis.

48. This leaves for consideration whether Claimant had limitations/restrictions relating to the right shoulder prior to July 29, 2013. The answer to this question is complicated by the fact that Claimant was still in a period of recovery following her first right shoulder

surgery at the time of the subject accident. Dr. Schwartzman rated Claimant for her right shoulder condition, and gave her certain permanent limitations/restrictions to avoid lifting more than 5 pounds with the right arm and to avoid all work above chest level. However, Dr. Schwartzman did not speak to Claimant's likely limitations/restrictions relating to the right shoulder absent the July 29, 2013 accident. Again, while it seems likely that Claimant would have had some permanent functional loss following repair of her "massive" rotator cuff repair by Dr. Webb, the Commission would be veering into the realm of speculation with any attempt to quantify the extent and degree of that loss.

49. Based on the foregoing, we are unable to identify any permanent limitations/restrictions relating to Claimant's pre-existing impairments. Therefore, Claimant's disability from "all causes" is equivalent to her disability from the limitations/restrictions identified by Dr. Schwartzman for the work-related right shoulder injury.

50. Claimant's right upper extremity limitations are significant. Although she is not one-handed, her access to employment requiring bilateral use of her upper extremities is significantly limited. As noted, the Commission concludes that Dr. Collins over-estimated Claimant's ability to perform certain of the child care, cashiering, and retail sales jobs in her residual labor market. The Commission is also critical of Dr. Collins' hyper technical definition of wage earning capacity. Notwithstanding that Claimant may, indeed, have a highest and best use at a payroll clerk job paying $14.59 per hour, there is nothing in the record to support the conclusion that she is more likely to obtain such employment rather than a cashiering job paying only $8.81 per hour.

51. Considering the record as a whole, including Claimant's testimony on her unsuccessful job search, the limitations relating to her right arm, her age and physical attributes

and other non-medical factors, Claimant has proven permanent partial disability of 40% of the whole person, inclusive of her 16% impairment rating. Defendants have failed to adduce evidence that some part of this disability should be apportioned to Claimant's documented pre-existing impairments.

CONCLUSION OF LAW AND ORDER

1. Claimant has proven she is entitled to additional permanent partial disability benefits of 40%, inclusive of the 16% whole person impairment benefits previously paid.

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

DATED this __15th__ 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 _15th_ day of March, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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