BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERESSA ERICKSON, Claimant, v. CABLE ONE, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2014-023643** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** January 13, 2020

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 Pocatello on April 17, 2019. James D. Ruchti represented Claimant, Teressa Erickson, who was present in person. W. Scott Wigle represented Defendant Employer, Cable One, and Defendant Surety, Travelers Property Casualty Company of America. The parties presented oral and documentary evidence at the hearing, took one post-hearing deposition, and submitted briefs. The matter came under advisement on November 18, 2019.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to Permanent Partial Disability (PPD); and

2. Whether Defendants are entitled to a credit against any future benefits owed to Claimant due to Claimant's third party recovery.

CONTENTIONS OF THE PARTIES

An automobile accident involving a third party injured Claimant on August 12, 2014, while she was driving a vehicle for Employer. There is no dispute whether Claimant was acting within the course and scope of her employment at that time. Her injuries included trauma to her left knee that resulted in surgery, and damage to her lower back that resulted in epidural steroid injections and other medical treatment. Surety paid for Claimant's medical benefits for her lower back and left knee injuries, temporary disability benefits, and permanent partial impairment benefits of a 4% whole person impairment (WPI) for her back and her left knee.

Meanwhile, Claimant settled with the third party tortfeasor and her insurance company in the amount of $82,500. Claimant also entered into a partial settlement agreement with Employer and Surety whereby Surety received a subrogation amount based upon the benefits already paid and in exchange gave Claimant a credit for Surety's proportionate share of attorney fees and litigation costs.

Claimant asks the Commission to award her PPD benefits in the amount of 37.3%, inclusive of impairment, which amounts to $59,251.50. She further alleges that Surety's subrogation claim on those additional benefits is subject to a reduction for both attorney fees and litigation costs pursuant to Idaho Code § 72-223(4), thereby leaving a net award of PPD in the amount of $41,806.86.

Defendants deny that Claimant has incurred any PPD in excess of her impairment as a result of the industrial accident. They argue, however, that if the Commission determines that Claimant is entitled to PPD, it should be minimal. Defendants further argue that if the Commission awards PPD benefits, their subrogation interest must be enforced, but that they have already "paid" their share of litigation costs incurred in producing the third-party recovery, thus Claimant is not entitled to any additional litigation cost credit, only a credit for attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1 through 26 and 28 through 35, admitted at the hearing;[1]
2. Exhibit 36 admitted as a demonstrative exhibit at the hearing;
3. The testimony of Claimant, taken at the hearing; and
4. The post-hearing deposition testimony of Delyn Porter.

All unresolved objections from the hearing or post-hearing deposition are overruled.

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; Education**. Claimant resided in Pocatello at the time of hearing and had had done so for approximately the past 20 years. Tr., 56:22-25.

2. Claimant was born on June 16, 1966 in Logan, Utah, and was 52 years of age at the time of hearing. She grew up in Smithfield, Utah. *Id*. at 57:24-58:6.

[1] Defendant's counsel objected to the admission of Exhibit 27, the vocational report of Delyn Porter, at the hearing. Tr., 10:9-15:3. An agreement was reached that a ruling would be reserved on Exhibit 27 until after the deposition of Mr. Porter. Defendants apparently waived any objection to the admission of Exhibit 27 because there was no argument concerning it in Defendant's post-hearing brief or in the deposition. Accordingly, Exhibit 27 is admitted to the record.

3. Claimant graduated from Sky View High School in Smithfield in 1984. Thereafter she attended Utah State University, later switching to Idaho State University in Pocatello, where she took business and computer classes. Tr., 58:10-14. She did not receive a degree from either university. *Id*. at 59:14-23.

4. **Work History**. After graduating from high school and while she still lived in Utah, Claimant performed the jobs of waitress, bakery staff member, and home interior salesperson. *Id*. at 60:4-6.

5. For her job at the bakery, which lasted approximately a year, Claimant described what services she performed as follows: "All I did was counter sales, put donuts in bags for people." Ex. 8:116 (35:5-6) (Claimant Dep. 2/11/2019). At hearing, she described her bakery work in pertinent part as follows:

> Q. Okay. You worked in a bakery 20-some years ago.
> Do you remember that?
> A. Probably closer to 30 years ago.
> Q. 30 years ago?
> A. Yes.
> Q. What did you do at the bakery?
> A. I just worked at the cash register. People would come in and order a doughnut and I'd put it in a sack and give it to them.
> Q. Okay. Was that something you had in mind as a career goal?
> A. No.
> Q. Was it a heavy labor job, working in a bakery?
> A. No.

Tr., 106:7-21.

6. After moving to Idaho, Claimant trained horses "for a little bit" while living in Blackfoot. *Id*. at 60:7-9. This work occurred during 1994 to 1995. Ex. 8:116 (33:7-12). Claimant stated that she has no intention of returning to horse training as a career. Tr., 106:4-6.

7. After moving to Pocatello, Claimant worked for a small grocery store, then for Naco Industries assembling PVC pipe. *Id*. at 60:10-13.

8. After being laid off from Naco Industries, Claimant attended the Success Institute to learn computer technology and office skills. Tr., 60:19-21.

9. Following her attendance at the Success Institute, Claimant went to work for Channel 3 Television (Idaho Falls/Pocatello) as a sales assistant. She worked there for approximately a year. *Id*. at 60:22-61:1.

10. The advertising division of Cable One then hired Claimant in approximately 2001 and she worked there for approximately 13 years. *Id*. at 61:1-8.

11. Claimant next went to work for the *Idaho State Journal*, a daily newspaper in the Pocatello area. She took a position as the newspaper's retail sales manager, however the newspaper laid her off after approximately a year due to an economic downturn. *Id*. at 61:12-16.

12. Claimant then returned to Employer (Cable One) in telephone sales. She remained there for a couple of years before receiving a promotion to management, however Cable One then eliminated her management position and Claimant returned to sales. *Id*. at 61:17-62:6.

13. Claimant's time of injury position with Employer was that of Business Sales Manager. The job description for this position describes the physical demands in pertinent part as follows: "While performing the duties of this job, the associate is frequently required to use hands to finger, handle, and feel; and talk and hear. The associate is regularly required to stand, sit, and reach with hands and arms. The associate is occasionally required to walk. *The associate is occasionally required to lift up to 10 pounds*. Specific vision abilities required by the job include close vision and distance vision." Ex:26:1356 (emphasis added). The company would also provide a reasonable accommodation to an employee requiring one to perform the job. *Id*.

14. Claimant's insurance company, Brandon Brown – Allstate, then offered her a sales position at a comparable wage selling Allstate insurance benefits. Claimant was in that

position for a year before the company decided to turn it into a straight commission-based position. Claimant could not afford that transition. Tr., 62:7-17.

15. The next position that Claimant took was with Advantage Business Systems. While working there, however, Claimant was diagnosed with breast cancer and underwent treatment. *Id*. at 62:18-23. Claimant commented in pertinent part as follows: "And so, I kind of worked there a little bit when I was going through all my treatments, but it just wasn't enough to try to get me back on my feet." *Id*. at 62:20-23.

16. Claimant next worked in sales for Rich Broadcasting, which operated a radio station in Idaho Falls. *Id*. at 62:24-25. This was approximately in 2016. Claimant remained there for a year but struggled to make sales and also she did not have any insurance. *Id*. at 63:1-9.

17. Having received an offer to return to Channel 3 Television, Claimant returned to a sales position there because it had a salary guarantee plus insurance. Again, however, after a year she lost her salary guarantee and was transferred to a straight commission-based position. *Id*. at 63:10-16.

18. Of all the sales positions that Claimant has held, none of them have involved heavy labor or lifting heavy objects. For example, when Claimant worked for Cable One, if she set up a booth at a fair or similar venue, she always went with her sales representatives who would pack the "heavy stuff" for her. Ex. 8:117 (37:15-38:4).

19. Claimant estimated that her highest salary year in the last ten years of work preceding the hearing was $56,000. Typical years she earned $45,000 to $47,000. Tr., 64:16-25.

20. Claimant's tax documents show the following information:

Year	**Gross Income**	**Employer(s)**
2012	$67,772	Cable One
2013	$59,247	Cable One
2014	$67,258	Cable One

Year	Gross Income	Employer(s)
2015	$57,069	Cable One; Brown Insurance Agency
2016	$48,080	Brown Insurance Agency; Advantage Business Communications; BNY Mellon Disbursement Agent (1099)
2017	$24,815	Barrett Business Service; Advantage Business Communications; NPG of Idaho; (business loss reported with Pure Romance)

Ex.s 20-25.

21. Due to the stress of advertising sales and other sales and marketing positions that did not have salary guarantees or lacked insurance, and also due to changes in these industries as a result of the competition of the internet and other economic factors, Claimant decided to open up her own sole proprietorship business affiliated with Pure Romance, for whom she is a senior consultant. Pure Romance is an in-home party sales business that markets bedroom accessories to women. Claimant was an independent contractor who received a commission based upon a percentage of her sales. She conducted the majority of the sales parties in her own home. She engaged in some travel and put on some of the sales parties in other persons' homes. Claimant was engaged in this business at the time of hearing. Tr., 63:20-64:15; Ex. 8:110-111 (12:12-13:3).[2]

[2] Claimant explained the impact of the internet on the advertising/marketing business in her deposition as follows:

> And it's very tough to sell advertising anymore. That's advertising and marketing is what I've done for a lot of years and just the way everything has changed, it's not easy to sell television advertising anymore. You've got so much competition with Facebook. You know, businesses can do that for free.
>
> So it's a lot easier to get a referral or, you know, they can go and look for recommendations on Facebook and the businesses, and "Oh, go here for, you know, a doctor," or, you know, just the word of mouth and the power of social media is so much stronger anymore. And now that people have Hulu and Netflix and they can record programs, they fast-forward through the commercials. So it's very difficult to sell a lot of advertising. Yeah, it's just changed in the last seven to ten years.

Ex. 8:110-111 (12:12-13:3).

22. Claimant's work for Pure Romance did not involve heavy labor; at most, Claimant might be called upon to set up a six-foot table and set out business cards; "No big deal." Ex. 8:117 (38:4-7). If Claimant traveled to other houses to conduct sales parties, her boyfriend packed the product into the car and the guests helped her transfer them from the car into the home. Claimant was careful not to reinjure her back. If Claimant attended a trade show for Pure Romance, the table that she took is just "one of those little folding tables" that was not heavy. "I've always got somebody that's helping me load up or unload stuff if I need to." Ex. 8:121 (53:15-54:16).

23. At the time of hearing, Claimant also operated a subsidiary, part-time business with a partner in addition to Pure Romance, a dog training/obedience class that took place on Monday nights under the trade name Canine Companions of Pocatello. In each class Claimant trained five to six dogs. *Id*. at 113 (22:12-24:11).

24. **Industrial Accident**. Claimant was working for Employer (Cable One) on August 12, 2014 when she was involved in an automobile collision with a third party. Tr., 57:8-12; Ex. 1 (Idaho Vehicle Collision Report). At the time she held the position of regional sales manager and her duties included driving between Twin Falls, Idaho Falls, and Pocatello to work with sales representatives, which is why she had a company vehicle. The sales team sold phone, internet and TV services for businesses. *Id*. at 13-23.

25. Claimant was driving a company vehicle home from Employer's offices at approximately 5:00 p.m. Tr., 70:2-3; 71:17-72:3. The collision took place at an intersection on city streets in or near downtown Pocatello. *Id*. at 70:4-5. A young woman driving a vehicle "t-boned" Claimant's vehicle when she tried to make an unauthorized left turn in front of

Claimant's vehicle. Tr., 72:11-16. The other driver hit the front driver's side of Claimant's work vehicle near the axle, which the collision broke. Ex. 8:117 (39:17-23).

26. During the collision, Claimant was thrown right to left. The dashboard of the car slammed against her knees from the impact of the collision and she felt immediate pain in her knees. When Claimant was thrown back to the left, she also hit her head on the window. Ex. 7:76-77 (55:17-57:24) (Claimant Dep.) (9/15/2017). Claimant felt pain in her knees and her neck. Tr., 73:16-17.

27. Paramedics assisted Claimant out of her vehicle, affixed a brace collar to her neck, and transported her to Portneuf Medical Center in Pocatello. Ex. 12; Tr., 74:13-22.

28. **Medical Care and Opinions.** The emergency department of Portneuf Medical Center admitted Claimant for treatment on August 12, 2014. Ex. 13:145. Her primary admitting diagnosis was neck strain and sprain with other unspecified injuries. *Id*. Her attending physician, Willise E. Parmley, M.D., ordered CT spine, left shoulder, chest, right ankle, and right knee X-rays. *Id*. at 149-154. No fractures or dislocations were shown by X-ray in Claimant's right ankle, no abnormalities were shown in Claimant's chest X-ray, no fractures or subluxations were shown on Claimant's CT scan of the cervical spine without contrast, no fractures or dislocations were shown in Claimant's right knee X-ray, and no fractures or dislocations were shown in Claimant's left shoulder X-ray. Ex. 13:159-163. Dr. Parmley discharged Claimant with instructions to use an ace wrap on her right knee and ankle, use a left arm sling, ice her bruises, and follow-up in three days. *Id*. at 155. The final discharge diagnosis was acute cervical strain. Ex. 14:1039.

29. On December 22, 2014, Derek B. Eddie, P.A., ordered an MRI of Claimant's left knee without contrast. The conclusion of the study, conducted at Portneuf Medical Center, was that that there was a horizontal free edge tear of the lateral meniscus body of the knee. Claimant

also had Grade 4 chondromalacia patella. P.A. Eddie noted that Claimant should be referred for further care. Ex. 14:1060. He referred Claimant to Dr. Chris Johnson at Idaho Sports & Spine. Meanwhile, he released Claimant to work with no restrictions. *Id*. at 1065.

30. Rather than Dr. Johnson, Claimant ultimately received a referral to Richard Wathne, M.D., with Pocatello Orthopaedics & Sports Medicine Institute. Claimant consulted with Dr. Wathne on January 22, 2015 concerning her left knee. He noted that conservative measures had failed and that Claimant continued to have pain in her knee. He also noted that an MRI scan obtained in December 2014 revealed a lateral meniscal tear. Dr. Wathne recommended arthroscopic surgery to further evaluate Claimant's left knee and to perform an arthroscopic partial lateral meniscectomy together with a chronoplasty of the patella and possible lateral retinacular release. Claimant wished to proceed with the surgery. Ex. 14:1067-1069.

31. Dr. Wathne performed the left knee operation on Claimant on February 11, 2015. There were no complications. Ex. 16:1135-1137.

32. A follow-up consultation with Dr. Wathne's clinic on February 19, 2015 showed that Claimant was recovering well from surgery. Claimant was released to return to work at light duty effective February 26, 2015. *Id*. at 1142-1144.

33. On March 12, 2015, Dr. Wathne noted in a follow-up visit that Claimant had "made excellent progress." He continued her on physical therapy (PT) and noted that she could return to full-time duties as of March 16, 2015. *Id*. at 1147-1149.

34. On March 12, 2015, Physical Therapist, Randy Sidwell, of Advanced Performance Physical Therapy reported to Dr. Wathne that Claimant's progress in PT was going well but that she was still having problems secondary to low back pain which was aggravated by her knee surgery. *Id*. at 1151.

35. Claimant began treating with Benjamin Blair, M.D., a partner of Dr. Wathne, to address her complaints of low back pain on July 16, 2015. Ex. 16:1159. Dr. Blair scheduled Claimant for an MRI of her lumbar spine. *Id*. at 1162.

36. The MRI, as read by Dr. Blair on August 5, 2015, showed degenerative disc disease, a disc bulge at L4-5, and a smaller disc bulge at L5-S1. He planned to refer Claimant to Anthony E. Joseph, M.D., Dr. Blair's partner, for epidural steroid injections. Ex. 16:1169.

37. Dr. Joseph administered two epidural steroid injections on Claimant on October 20, 2015 and November 19, 2015. *Id*. at 1176-1182. Claimant received significant immediate relief from the injections. Ex. 16:1183. Nevertheless, Claimant returned to Dr. Blair on January 6, 2016 with worsening symptoms. *Id*. at 1184. Claimant was considering options for surgery in the form of a discectomy at L4-5. Dr. Blair stated that if Claimant wished to continue with conservative care (no surgery), he would consider her at maximum medical improvement (MMI). *Id*.

38. While Claimant initially decided to pursue surgical treatment on January 13, 2016, *Id*. at 1185, she apparently changed her mind. Dr. Blair read a CT myelogram of Claimant's lumbar spine to show no significant neurologic impingement on February 10, 2016. He declared Claimant at MMI. *Id*. at 1191. Dr. Blair, however, believed further PT was warranted on February 29, 2016. *Id*. at 1198.

39. A PT report to Dr. Blair on March 28, 2016 indicated that Claimant was "making great improvement." She had reduced her pain levels to a 2/3 out of 10. *Id*. at 1203.

40. In response to an inquiry from Surety to provide an impairment rating for Claimant's lower back injury, Dr. Blair opined that Claimant had sustained a 5% WPI, based upon the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Ed., and an intervertebral

disc herniation(s) with non-verifiable radicular complaints at clinically appropriate levels. He apportioned 100% of the impairment to the industrial injury of August 12, 2014. Dr. Blair assigned no permanent restrictions to Claimant based upon her lower back injury. Ex:16:1202.

41. Dr. Wathne also responded to an inquiry from Surety concerning an impairment rating for Claimant's knee injury. Dr. Wathne opined that, according to the *Guides*, Claimant had sustained a 2% left lower extremity impairment, based upon her left knee injury from August 12, 2014 and subsequent surgery. He determined that none of the impairment was due to any preexisting conditions. He also released Claimant to return to full duty work without restrictions from the standpoint of her left knee. Ex. 16:1204. Dr. Wathne later specifically opined on June 21, 2017 in letter to Claimant's counsel that Claimant had reached MMI with respect to her left knee. *Id*. at 1219.

42. Without stating the reasons for the change, Dr. Blair, in a letter to Claimant's counsel, later changed his impairment rating for Claimant's lower back on August 31, 2017 to a 3% WPI, of which 100% was apportioned to the industrial accident. *Id*. at 1224. Dr. Blair also opined that Claimant had "significant physical restrictions due to her lumbar spine injury," including "no lifting greater that 50 pounds rarely, 35 pounds frequently, and 25 pounds constantly." He also limited Claimant to limited bending, squatting, and no repetitive twisting. *Id*.

43. In response to an inquiry from Claimant's counsel, Dr. Blair stated that the combined WPI for Claimant's back and knee injuries was 4% on September 18, 2017. *Id*. at 1230.

44. **Vocational Assessment**. Claimant's counsel requested that Delyn M. Porter, M.A., CRC, CIWCS, prepare a vocational assessment report regarding Claimant. Mr. Porter delivered his report on January 9, 2018. Ex. 27:1358.

45. The Commission is familiar with Mr. Porter's credentials. He has testified in numerous cases before the Commission. He is qualified to provide expert testimony and evidence in this matter.

46. To prepare his report, Mr. Porter interviewed Claimant on November 27, 2017. *Id*. He also reviewed the following materials and evidence: Claimant's deposition transcript dated 9/15/17; AMA *Guides*, 6th Ed.; Idaho Department of Labor vocational information; *Dictionary of Occupational Titles*; O*NET; Idaho Career Information Systems (eCIS); *Selected Charateristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (SCODRDOT); *New Guide for Occupational Exploration*; *The Revised Handbook for Analyzing Jobs*; *Rehabilitation Consultant's Handbook*, 4th Ed.; The Henry J. Kaiser Family Foundation; *Occupational Outlook Handbook*; SkillTRAN; and U.S. Department of Labor Bureau of Labor Statistics. *Id*. at 1359. He further reviewed all relevant medical records pertaining to Claimant's injury. *Id*. at 1359-1361.

47. Mr. Porter noted Claimant's educational level as having completed high school and approximately one year of college. He further noted that Claimant completed business and computer courses, including office skills. *Id*. at 1361.

48. Claimant's pre-injury hobbies included exercising, gardening, hiking, and playing with her dogs. *Id*. at 1362.

49. Claimant provided a post-injury work history that included sales/account executive positions with Allstate Benefits, Advantage Business Communications, Brown's Allstate, Rich Broadcasting, and KIDK Channel 3. Ex. 27:1363.

50. Claimant reported the following post-injury residual functional capacity restrictions/abilities to Mr. Porter:

- Difficulty standing on cement and other hard surfaces; able to stand for a maximum of one hour;
- Able to walk her dogs but has difficulty if they pull on the leash; no difference between flat and uneven surfaces;
- Capacity to sit varies by chair; generally able to sit for a maximum of 20 to 30 minutes in most chairs;
- Can lift/carry 15-20 pounds comfortably; can lift a maximum of 40-50 pounds but with difficulty;
- Has deficits in the ability to push/pull with the left lower extremity and has increased low back pain with pushing and pulling;
- Able to kneel independently, but is unable to perform repetitive kneeling;
- Has increased pain and discomfort when bending at the waist; avoids doing so by stooping or squatting to reach towards ground level;
- Has limited range of motion in her back, and increased pain/discomfort with twisting; will generally turn her entire body rather than twist her upper torso;
- Has no restrictions on forward reaching;
- Has difficulties with overhead reaching, such as removing and placing items at or above head level;
- Has some difficulties with stairs;
- No gripping problems;
- No fine finger handling problems;
- Has daily chronic pain of 5-6/10; chronic pain is localized in lower back and radiates into her right hip and right leg; has occasional pain in left knee;
- Has poor sleep patterns since the injury; constantly fatigued; and
- Has anxiety/depression and fear of re-injury; has to take frequent breaks when performing household tasks.

Id. at 1364-1365.

51. Mr. Porter found the following occupational titles relevant to Claimant's work history: account executive (business services); sales representative, advertising (print & pub.);

manager, sales; sales agent, insurance; baker's helper; cashier-checker; and horse trainer (agriculture; amuse. & rec.). Ex. 27:1365-1368.

52. For a transferable skills analysis, Mr. Porter observed that Claimant had worked in occupations ranging from unskilled (SVP level 2) to highly skilled (SVP level 8). Her highest level of Specific Vocational Preparation (SVP) was Level 8, over 4 years up to 10 years of preparation. She was capable of working in any level of SVP from 1 through 8. *Id*. at 1368-1369.

53. Mr. Porter noted that Dr. Wathne opined that Claimant had sustained a 2% left lower extremity partial impairment without restrictions related to her left lower extremity. He further noted that Dr. Blair assigned a 3% WPI rating to Claimant's lumbar spine with attendant physical restrictions of no lifting greater than 50 pounds rarely, 35 pounds frequently, and 25 pounds constantly, with limited (occasional) bending and squatting; and no repetitive twisting. *Id*. at 1370.

54. Mr. Porter noted that the work restrictions specified by Dr. Blair limited her to a "limited medium" category of work strength. *Id*. at 1372.

55. Based upon her high school diploma with additional college level courses, Mr. Porter placed Claimant at GED Level 4, high school graduation – with more demanding curriculum, successful work experience in an organized technology. *Id*. at 1370.

56. Mr. Porter noted that Claimant was working successfully as a sales manager for Employer at the time of her August 12, 2014 industrial accident, a job she had worked at for several years. Her time of injury wage was $56,000 per year, equating to an hourly income of $26.92 per hour. *Id*. at 1371. She then left that employment in September 2015 and held sales

and/or account executive positions with Brown's Allstate Insurance, Advantage Business Communications, Rich Broadcasting, and KIDK Channel 3.[3] Ex. 27:1371-1372.

57. For a labor market access analysis, Mr. Porter found that prior to her industrial accident on August 12, 2014, Claimant had access to and was competitive for approximately 15.5% of the total jobs in her labor market, consisting of a 50 mile radius around Pocatello. He further determined that based upon Dr. Blair's assigned restrictions, there were jobs classified in the heavy and medium work categories that Claimant was no longer able to perform. Claimant, post-injury, would have access to 7% of the total jobs in her assigned labor market, resulting in a 54.8% reduction in labor market access post injury. *Id*. at 1372-1373.

58. For a wage earning capacity analysis, Mr. Porter used Claimant's time-of-injury wage of $56,000 annual/$26.92 per hour. He then compared this to the median wage in her job market of $21.59, which he opined was Claimant's post-injury earning capacity. Based upon these figures, Mr. Porter determined that Claimant had sustained a 19.8% wage earning capacity loss. *Id*. at 1373-1374.

59. Adding Claimant's labor market loss and wage earning capacity loss and dividing by two, Mr. Porter determined that Claimant had sustained a PPD of 37.3%, inclusive of impairment. *Id*. at 1374.

60. *Porter Deposition*. Claimant's counsel took the deposition of Mr. Porter on May 24, 2019. Porter Dep., 2:1-4.

61. This section will not repeat details of Mr. Porter's report but rather will detail the highlights of his deposition testimony.

[3] Claimant had not yet begun her sole proprietorship business with Pure Romance at the time of Mr. Porter's evaluation.

62. Mr. Porter noted that Claimant's chosen career field of marketing/advertising/sales had once been a "booming field," but not anymore. Five years prior, there had been 500 such jobs in the Pocatello area, but now, for all of southeastern Idaho, there are less than 200 such jobs. Porter Dep., 9:12-10:2.

63. Mr. Porter's review of the hearing transcript did not change any of his opinions. *Id*. at 10:25-11:2.

64. Mr. Porter noted that the majority of Claimant's work had been in advertising/marketing/sales arena, "but she's also done other work." *Id.* at 11:9-12.

65. After applying Dr. Blair's exertional restrictions, Claimant would still be capable of performing medium strength employment, according to Mr. Porter. *Id*. at 12:6-10. But when one adds the positional restrictions assigned by Dr. Blair, Claimant is no longer capable of performing heavy and medium work categories. *Id*. at 12:11-14.

66. On cross examination, Mr. Porter admitted that Claimant had worked primarily as an account executive/salesperson for the past twenty years, that changes in that industry were unrelated to her injury, and that Claimant was not seeking to be re-employed as a bakery helper or horse trainer, as follows:

> Q. All right. Did she [Claimant] give you any indication during the course of your conversation with her, your interview, that she had intentions to change her field of employment?
> A. Our discussion centered around the changes in the marketing industry itself.
> Q. Those changes in the industry were not brought about by her injury?
> A. No.
> Q. That's something that was happening in the world.
> A. Correct.
> Q. And did she tell you in her – and I'm going to be catty again here a little bit – but did she tell you in your interview that what she really wanted to do is to pursue an occupation as a baker helper?
> A. No.
> Q. Or a horse trainer?

A. No.
Q. When you – when Ms. Erickson was working and had her accident that brought us both into this case, she was working as an account executive salesperson, right?
A. Correct.
Q. When you met her after the fact, she was still working as an account executive salesperson?
A. Correct.
Q. Her ability to continue in that profession had not been ended by her injury. Fair enough?
A. Had not ended, but I think in the hearing transcript she does a good job of describing the difficulties she has had.
Q. Right.
Answer me "yes" or "no."
Had her ability to continue in that profession been ended by the accident?
A. Ended? No.
Q. Did she tell you in your interview that the job changes that she had after the industrial accident were brought about because of the industrial accident?
A. No.

Porter Dep., 21:12-23:4.

67. Claimant stated to Mr. Porter that none of her current job responsibilities or duties were ones that she was unable to perform due to the industrial accident. *Id*. at 23:9-24.

68. Mr. Porter stated that the 15.5% labor market access that Claimant had prior to the injury amounted to approximately 8,000 jobs. *Id*. at 26:9-11. Of those jobs, approximately 2% were heavy labor jobs, thus exclusive of heavy labor jobs, her pre-injury market access was 13.5%. Meanwhile, another 7% were medium labor jobs, leaving a balance of 6.5% if medium jobs were excluded. *Id.* at 27:9-23.

69. Mr. Porter included heavy labor jobs in Claimant's pre-injury labor market profile because she had worked in a bakery. He included medium labor jobs because she had worked as a horse trainer. *Id*. at 28:1-11.

70. When asked to explain what a bakery helper does, Mr. Porter replied in pertinent part as follows:

Q. And what does a bakery helper do?
A. They're the ones that lug the packages of flour around and help prepare the bread and help the baker cook the –
Q. Yeah.
A. Pastries.
Q. So, they're toting big sacks of flour and sugar and such and pushing bakery racks.
A. Correct.
Q. Loaded and unloaded.
A. Correct.
Q. When in the world did she ever do that?
A. Based upon what she shared with me, she said she worked as a baker helper.
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Q. Did she tell you she worked in a bakery?
A. She told me she worked as a bakery helper.
Q. Did you say: "Do you mean carrying around heavy sacks of flower?"
A. I did not elaborate on it.
Q. You read the hearing transcript, right?
A. I did.
Q. She described her bakery work as loading doughnuts into a sack for customers, correct?
A. I didn't see that part of it, but …
Q. Okay. Did you see anything in there that indicated that she was doing heavy work?
A. No, but nothing that said that she wouldn't have been able to either.

Porter Dep., 29:6-19; 30:3-16.

71. Mr. Porter admitted that Claimant had not told him that her industrial injuries had affected her ability to continue in her chosen career, account executive sales. *Id*. at 34:4-7.

72. Claimant did not give Mr. Porter any information that she had worked in a heavy or medium labor occupation in the last 20 years, nor that she had intended to do so. *Id*. at 36:19-24.

73. **Claimant's Condition and Circumstances Post-Accident**. Claimant commented in pertinent part as follows regarding whether the industrial accident has had any effect on her ability to perform account executive sales and marketing positions and her career choices:

Q. Is that accurate, that it [the accident] had nothing to do with your decision to get out of advertising?
A. I think it played a part. Like I said earlier, in sales you've got to be upbeat, you've got to be positive, you've got to be up and going all the time. And being in pain, it was hard to keep doing that.

And then I'd have to be in and out of the car, getting in and out of the car driving all over the place, sitting at my desk doing orders, putting together presentations on the phone. So I was always sitting for long periods of time. And so, it did play a part because it affected my paycheck.

I wasn't – I wasn't who I used to be. I used to be so good in sales. I was president's club winner. I went on trips. I did all this kind of stuff and none of that ever happened.
Q. And after the accident, you started making less money.
A. Making less money.

Tr., 123:6-25.[4]

74. Pre-accident, Claimant's visits to chiropractors generally resolved her low back complaints. After the accident, chiropractic treatment did not resolve her pain. *Id*. at 84:4-10.

[4] Claimant, however, in both depositions testified differently. In her February 2019, deposition, Claimant stated that the accident had not affected her career choices, in pertinent part as follows:

Q: Have your knees prevented you from doing anything that you wanted to do vocationally? Is there some job that you would like to have, but you just can't do it because of your knees?
A. Not that I can think of.
Q. How about the same question with your back?
A. I would – that'd difficult for me to answer because there's – all I've known is advertising sales. So as far as doing anything different – I'm sorry. I guess I don't understand the question.
***
Q. *Okay. What I'm hearing, then, generally is that your back has not prevented you from working in your chosen career; is that accurate?*
A. *Correct*. I have – if I have to travel for very long, if I have to sit for very long, then that does bother me. So, luckily, the sales have all been here in Pocatello and I haven't had to travel long distances like I used to.
Q. Okay. If you had to travel to Boise, would you need to stop a couple of times?
A. Absolutely.

Ex. 8:116-117 (36:23-37:9; 38:8-18) (emphasis added).

In the deposition taken in September 2017 for Claimant's third party civil suit, her legal counsel stepped into answer for her that Claimant was not claiming "lost earning capacity in the future because of the accident." Ex. 7:68 (22:25-23:16).

75. Claimant was involved in a second automobile accident in February 2016. Another driver rear-ended her car in parking lot. Claimant received treatment for her low back related to this accident that was not charged to Surety. Dr. Blair told her that her back had returned to baseline after treatment, meaning the way it was before the accident in the parking lot. Tr., 84:14-86:8.

76. After Claimant was diagnosed with breast cancer and finished her treatments, with Dr. Blair's approval, she started a program of exercise and weight loss at Fit Body Boot Camp which she followed for approximately two years (prior to hearing) and lost close to 40 pounds. The exercises were tailored so as to not exacerbate Claimant's back or risk rupturing her bulging discs. Among other exercises, Claimant used "battle ropes" and medicine balls during her exercise program, however she isolated her back so as to not reinjure it. *Id*. at 90:2-92:22. Claimant worked out three to four times per week. *Id*. at 117:16-18.

77. Based upon Dr. Blair's restrictions, Claimant refrained from heavy lifting and did not engage in any high impact sports like horseback riding, zip lining, or skiing. *Id*. at 87:20-89:25.

78. On a typical day, Claimant experienced low back pain (below her belt) that she described as a burning sensation that would radiate and go down her hips and legs. On a scale of 1 to 10, she rated the pain as a 6 to 7. *Id*. at 94:16-22. Claimant took Tylenol to ameliorate her pain. Also, stretching exercises helped Claimant with her pain. *Id*. at 94:23-95:2.

79. Immediately following the industrial accident, Claimant returned to work after one day off. She continued to work full-time until her knee surgery, at which time she took two weeks off for the surgery and recovery. Thereafter, she returned to work full-time with Employer. *Id*. at 109:4-110:4.

80. When Claimant left Employer's employment post-accident, she did not leave because of the accident. Similarly, she did not leave any of the other positions she has held since leaving the employ of Employer because of the accident, but rather due to what was best for her economically. Tr., 110:5-19. Similarly, her decision to pursue a full-time sole proprietorship with Pure Romance was not due to her industrial accident. Tr., 110:20-24.

81. Claimant had no plans to change occupations at hearing but rather planned to continue with her sole proprietorship business associated with Pure Romance. *Id*. at 120:2-6.

82. **Claimant's Credibility**. Claimant generally testified credibly at the hearing. There was a significant change in testimony by Claimant that occurred between the depositions and hearing. At hearing Claimant's testimony suggested that the industrial accident had a part in her post-accident career choices, whereas in her two prior depositions she did not so testify. This difference in testimony will be analyzed further below.

DISCUSSION AND FURTHER FINDINGS

83. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

84. **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 Idaho Code § 72-430. Idaho Code § 72-425.

85. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to limit the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted 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. Idaho Code § 72-430.

86. 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 Claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

87. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

88. *Evaluating the Vocational Evidence*. After her industrial accident on August 12, 2014, Claimant remained employed with Employer for approximately another year. After her position as sales manager was eliminated, Claimant sought other employment selling insurance for Allstate. Claimant remained in that position for another year until the company decided to eliminate its salary guarantee and convert sales positions to straight commission. Tr., 62:7-17. Claimant next worked for Advantage Business Systems in sales but during that time was diagnosed and treated for breast cancer. *Id*. at 62:18-20. She decided that she was not earning enough income, so she took a position with Rich Broadcasting. In this position she struggled to make enough sales and did not have any insurance, Tr., 63:1-9, thus she returned to Channel 3 Television in a sales position because it had a salary guarantee and health insurance; she then lost her salary guarantee and the company converted the sales position to straight commission. *Id*. at 63:10-16.

89. It was after having had similar experiences at employer after employer, i.e., not being able to make enough sales and/or having the position converted to commission only, that Claimant reevaluated her career and decided to devote herself full-time to her sole proprietorship business of direct marketing in house parties the products of Pure Romance. Claimant was struggling to earn a sufficient income due to the economic factors of the advertising industry, primarily due to the rise of the internet. As the Claimant stated, "And it's very tough to sell advertising anymore. That's advertising and marketing is what I've done for a lot of years and just the way everything has changed. It's not easy to sell television advertising anymore. You've got so much competition from Facebook. You know, businesses can do that for free." Ex 8:110-111 (12:12-18).

90. Furthermore, Mr. Porter, Claimant's vocational expert, admitted that Claimant had worked in the advertising/marketing field for over twenty years, and that none of the economic forces changing the sales professions had anything to do with Claimant's injury, but rather external market forces. He further admitted that the industrial accident did not change or end the ability of Claimant to continue in her chosen profession. Porter Dep., 21:12-23:4.

91. In both of her depositions, Claimant admitted that her industrial accident did not prevent her from pursuing her chosen career, nor was she claiming lost earning capacity as result of the accident. Ex. 8:116-117 (36:23-37:9; 38:8-18); Ex. 7:68 (22:25-23:16). Nevertheless, at hearing, her testimony on this issue changed, with Claimant contending that the accident "played a part" in her change of occupations because of the pain she dealt with due to her back injury. Tr., 123:6-25.

92. There is no dispute that Claimant's annual income decreased following her accident in 2014, most significantly when she began her Pure Romance business. Ex.s 20-25. The majority of the evidence, however, despite Claimant's change of testimony, demonstrates that Claimant's income and employment struggles post-injury had nothing to do with her industrial accident. Rather, they were the result of market forces beyond Claimant's control.

93. Claimant was caught up in an economic upheaval affecting advertising sales, which was in the process of happening before her industrial accident. If Claimant had her druthers, she would likely still be ably performing her sales manager position with Employer. She was prevented from doing so, not because of the industrial accident, but rather due to market forces that coincided with her industrial accident. As Mr. Porter testified, marketing/advertising/sales had once been a "booming field," but not anymore. He further testified that five years prior, there had been 500 such jobs in Pocatello alone, but at the time of

his testimony, for all of southeastern Idaho, there were less than 200 such jobs. Porter Dep., 9:12-10:3.

94. Under these circumstances, described above, it is reasonable to find that Claimant had no wage loss attributable to her industrial accident. There is no causal link between Claimant's job changes and her industrial accident. Claimant, therefore, has failed to prove her claim for loss of earning capacity connected to her industrial accident.

95. The other aspect of Claimant's claim for disability in excess of impairment is based upon an alleged loss of labor market access. The evidence shows that Claimant was a sales and marketing professional with a 20 year career, particularly in media sales marketing, with her longest tenure being 13 years for Employer. Her claim for loss of labor market access rests upon the evidence and testimony of her vocational expert, Mr. Porter, who opined that Claimant had sustained a 54.8% total loss of labor market access. Ex. 27:1373.

96. In order to arrive at that figure, however, Mr. Porter identified a heavy labor occupation, bakery helper, in Claimant's employment history that her back restrictions precluded. Mr. Porter considered the position in a heavy labor category because such employees are required to lift big sacks of flour and sugar. Porter Dep., 29:7-9. Claimant, however, testified both in her deposition and at hearing that her bakery job consisted of considerably less than heavy duty tasks. Tr., 106:7-21; Ex. 8:116 (35:5-76) ("All I did was counter sales, put doughnuts in bags for people.")

97. Similarly, Mr. Porter identified Claimant's time spent training horses as a medium strength category job that her back restrictions would preclude. Ex. 27:1367-1368. This employment, however, was limited to a short time, many years ago, and not a career path that Claimant would choose now. Tr., 105:24-106:6.

98. It is reasonable, therefore, to find that the positions of bakery helper and horse trainer do not belong in the analysis of whether Claimant has sustained a job market access loss. Once the strength categories of heavy and medium jobs are removed from the analysis, the jobs that remain are in the medium light (limited medium) or less strength categories, well within the work restrictions assigned by Dr. Blair.

99. Claimant did not lose access to any of the advertising/sales/marketing positions she had performed pre-accident. In fact, she held four different marketing jobs (as well as her time of injury job for over a year) following her industrial accident in 2014. Furthermore, she is still employed, albeit in a sole proprietorship, in marketing and sales, this time for Pure Romance.

100. To the extent that Claimant experienced vagaries of employment circumstances, it was not due to the industrial accident, but rather market forces. As Claimant's counsel admitted in his closing brief, "Opposing counsel correctly states that Claimant's job choices following the 2014 accident were dictated by market circumstances." Claimant's Closing Brief at 10.

101. Claimant is an accomplished sales and marketing professional who can still compete for whatever jobs remain in that field. The evidence further shows that she maintained a vigorous lifestyle, including frequent workouts as well as dog training, and therefore will be likely to maintain her physical condition into the future, despite the injuries she sustained in the industrial accident.

102. The record does not reveal that Claimant had any pre-injury restrictions. Therefore, it might be argued that Claimant could have performed both medium and heavy work immediately prior to the accident. However, that Claimant may have had no medical restrictions against performing such work is not the equivalent of saying that such work must therefore be

included in defining her pre-injury labor market. In addition, it must be considered whether Claimant might reasonably have entertained or competed for such work at the time of the industrial accident. The evidence fails to establish that in the years immediately preceding the work accident Claimant considered such work as suitable. Claimant's work history and skill set suggest that she did not consider heavy and medium work to be part of her labor market by the time of the accident. Therefore, her current restrictions against performing anything more onerous than "limited medium" work per Dr. Blair does not suggest a loss of labor market access as a result of the subject accident; Claimant has lost no access to that section of the labor market that represents her highest vocational potential. Under these circumstances, it is reasonable to find that Claimant has not sustained any labor market loss.

103. Because the evidence shows that Claimant sustained neither a wage loss nor a job market access loss attributable to her industrial accident, Claimant has not sustained any PPD in excess of her impairment.

104. **Subrogation**. Because this decision has found that Claimant has not sustained PPD in excess of her impairment, it is unnecessary to analyze the subrogation issue presented by the parties. Without PPD, there are no further workers' compensation benefits upon which it would be necessary to determine subrogation. The subrogation issue, therefore, is moot.

CONCLUSIONS OF LAW

1. Claimant has no PPD in excess of her impairment.

2. The subrogation issue is moot.

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 __17th____ day of December, 2019.

INDUSTRIAL COMMISSION

_/s/_____
John C. Hummel, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13th____ day of __January_____, 2020, 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:

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sjw

_/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERESSA ERICKSON, Claimant, v. CABLE ONE, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2014-023643** **ORDER** January 13, 2020

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 has no PPD in excess of her impairment.

2. The subrogation issue is moot.

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

DATED this __13th____ day of __January_____, 2020.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
Aaron White, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _13th__ day of ___January_____, 2020, 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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