BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA ROTHMAN, Claimant, v. YOUR VALET FINE DRY CLEANING, Employer, and CHARTER OAK FIRE INSURANCE CO., Surety, Defendants.	**IC 2015-010244** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed August 31, 2017

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 Pocatello, Idaho, on November 14, 2016. Fred Lewis and Patrick George of Pocatello 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 June 9, 2017.

ISSUES

At hearing, the parties agreed the following issues were ripe for adjudication:

1. Whether and to what extent Claimant is entitled to medical care, temporary disability, and permanent partial disability benefits; and

2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406, or a subsequent condition is appropriate. However, in briefing, both parties acknowledged the issue for resolution was limited to a determination of Claimant's right to permanent partial disability benefits in excess of her impairment. No evidence was produced, nor argument advanced, for medical care or temporary disability benefits, or Idaho Code § 72-406 apportionment. There was no showing that a subsequent injury, disease, or cause accounted for any of Claimant's permanent disability. In short, as noted in Claimant's initial briefing, "[t]his is a PPD case." *Claimant's Post-Hearing Brief, p. 1.*

CONTENTIONS OF THE PARTIES

Claimant asserts that she suffered a 40.3% permanent partial disability (PPD) as a result of her subject industrial injury, inclusive of disability previously paid in the amount of 4% of the whole person, representing Claimant's 4% impairment rating. Claimant is entitled to PPD benefits calculated at 36.3% in addition to the 4% disability payments previously made.

Defendants argue that Claimant's PPD benefit calculations are woefully inflated, and in reality her permanent disability is minimal, if not subsumed into the previously-paid disability payments corresponding to her PPI rating.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Sheila Chandler taken at hearing;

2. Joint exhibits (JE) A through X admitted at hearing;[1] and

[1]One medical record was generated too late to be included in the joint exhibits and was therefore made an exhibit to Dr. Wathne's deposition. Additionally, JE "N" contains records which are improperly categorized as personnel records when in fact they are duplicate copies of records contained in JE I and J, as pointed out by Defendants in their briefing.

3. The post-hearing deposition transcripts of Richard Wathne, M.D., and Delyn Porter, which were both taken on January 31, 2017.

Defendants' objection at page 45 of Mr. Porter's depositions is overruled.

FINDINGS OF FACT

1. On April 11, 2015, Claimant injured her dominant right shoulder when she tripped and fell while in the course and scope of her employment with Employer. Her claim was accepted, and medical treatment ensued.

2. Ultimately Claimant came under the care of Richard Wathne, M.D. a Pocatello orthopedic surgeon, on May 5, 2015.

3. After diagnosing an acute rotator cuff injury, Dr. Wathne performed an arthroscopic rotator cuff repair and decompression with a biceps tenotomy surgery on Claimant's right shoulder on June 1, 2015.

4. Post-surgery Claimant recovered well, and by mid-October was medically stable. Dr. Wathne released Claimant back to her time-of-injury work and rated her as having a seven percent (7%) upper-extremity impairment. The doctor also imposed permanent restrictions. His written restrictions included limited lifting of 20 pounds above shoulder level, while avoiding any repetitive lifting above the shoulder.

5. In response to an ICRD questionnaire, Dr. Wathne restricted Claimant's sitting, standing, twisting, reaching below shoulder, and repetitive hand/arm activities to "frequently;" kneeling, bending/stooping, lifting up to 20 pounds, and pushing/pulling up to 20 pounds to "occasionally;" and climbing and reaching above shoulder to "rarely." Dr. Wathne's restrictions were for Claimant's right arm where applicable. While the ICRD form had a category for "continuous," meaning greater than 66% of a worker's day, Dr. Wathne did not

utilize that category for any of the proposed body movements on the form.

6. Dr. Wathne's restrictions were the focus of his deposition, wherein he clarified his opinions on Claimant's restrictions and the rationale for his responses to the ICRD limitation evaluation form.

7. In his deposition, Dr. Wathne clarified that he rarely checks the box "continuously" when filling out the ICRD form. Generally, he sees little difference between "frequently" and "continuously," and pondered who could "continuously" do any of the listed activities, including sitting, which he felt would not be "the best thing for you, either." *Wathne depo. p. 15.* Dr. Wathne explained that when he checks the "frequently" box it is an indication he does not see any limitation with that activity. In this particular case, that would include Claimant's ability to engage in repetitive right arm and hand activity at a workbench height level.

8. With regard to pulling and pushing, Dr. Wathne testified Claimant's upper right extremity 20 pound limit was "almost an arbitrary number" because if she was using both arms she could "obviously, probably, do much more, pulling a cart." He further explained that she would be limited in her ability using only her right arm. *Wathne depo. pp. 15, 16.*

9. Dr. Wathne also felt that Claimant's 20 pound overhead lifting restriction was solely applicable if she was using just her right arm. When asked what she could lift overhead using both arms, he testified "I would say she could do 50 pounds no problem." *Wathne depo. p. 16.* He did acknowledge that regardless of the poundage, Claimant should not be lifting overhead more than on a rare occasion, which he defined as from one to ten percent of the time.

10. Dr. Wathne testified that Claimant should not be lifting, even to waist level,

boxes weighing 75 pounds on more than a rare occasion, and certainly not on a repetitive basis, or it could cause a "flare up" in her shoulder.

11. When asked if Claimant could return to her seasonal potato sorting job, where she would be continuously moving her arms below shoulder level, Dr. Wathne felt that it would not be a good thing for Claimant's shoulder to be engaged in such activity for a full eight hours. If she got breaks, so that her actual reaching activity was limited to five or six hours per day, she could probably do that job.

12. When asked specifically if Claimant could lift 50 pounds from floor to her waist up to two-and-a-half hours per eight hour workday, Dr. Wathne answered "to the waist level, yeah, for sure." *Wathne depo. p. 25.*

13. Throughout his deposition, Dr. Wathne used terms such as "occasionally" "rarely," or "repetitively" with little regard for their term of art usage in ICRD forms. In fact, he testified that in his opinion, the form was flawed in its rigid use of terms which may have different common parlance meanings. He testified that he used the terms solely with an eye toward helping ICRD in its effort to find a suitable job position for Claimant post-surgery.

14. Claimant hired Blackfoot vocational rehabilitation counselor Delyn Porter to prepare a vocational assessment and disability evaluation report on her behalf. Along with his written report, he also provided deposition testimony.

15. As part of his assignment, Mr. Porter interviewed Claimant and reviewed medical records. He also reviewed records associated with Claimant's worker's compensation claim, financial information, employment and potential employment (job search) records, and labor and occupational data.

16. Using the information provided him, coupled with his experience and

labor market guides, Mr. Porter determined that Claimant, by virtue of her industrial accident in question and resultant injury, sustained a 53.7% loss of labor market access. In forming this opinion, Mr. Porter relied on and analyzed data contained in the Idaho Occupational Employment and Wage Survey for the southeastern Idaho labor market area.

17. Mr. Porter's analysis started with his conclusion that Claimant had access to and was competitive for approximately 10.25% of the total jobs in her Pocatello labor market prior to her industrial accident. Using the "same factors" (not clearly specified in his report), but including Mr. Porter's understanding of Dr. Wathne's permanent work restrictions, Mr. Porter concluded Claimant had access to just 4.75% of the total jobs in her job market, or a 53.7% loss of labor market access. [2]

18. Mr. Porter conceded that Claimant had no loss of wage earning capacity, as her employment had traditionally been at or very near minimum wage. However, he felt it would be inequitable to simply average Claimant's loss of labor market access (53.7%) and her loss of wage earning capacity (0%), so he weighted the average to arrive at his conclusion that Claimant suffered permanent partial disability of 40.3%, inclusive of her 4% whole person PPI rating (7% right upper extremity) given by Dr. Wathne.

19. Defendants did not utilize an expert. Instead, they rely on arguments tending to undermine Claimant's veracity and the validity of Mr. Porter's report, and call upon the expertise of the Commission in determining a true value for Claimant's permanent partial disability based upon a review of the entire record.

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[2] At the time of his report and deposition, Mr. Porter did not have the benefit of Dr. Wathne's clarification of his restrictions imposed on Claimant, as the doctor had not yet been deposed.

DISCUSSION AND FURTHER FINDINGS

PERMANENT PARTIAL DISABILITY (PPD)

20. 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.*

21. 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 his claim for permanent disability benefits.

22. As mandated by Idaho Code § 72-430(1), to determine the extent of Claimant's PPD benefits due and owing, it is necessary to examine Claimant's medical and relevant non-medical factors, including her age, past education, work history, pre-existing conditions and experiences affecting her employability, any disfigurement, and personal factors making it more difficult for Claimant to find or hold employment post-accident.

23. Claimant was age 65 at the time of hearing.

24. Claimant graduated high school and attended college for two years thereafter. She obtained a Certified Nursing Associate certificate, which she has not maintained. She also has a Hotel/Motel Management and Culinary Arts license, which she acquired in 1998 but has not used and which has since expired. Claimant also has had flagger training. Since this accident Claimant has taken classes in basic computer use with programs such as Word and Excel, and assistant administration tasks such as bookkeeping, business math, and other business skills in an effort to obtain "office work." She also is enrolled in a government-sponsored program known as Experience Works, which assists older individuals in obtaining on-the-job work training to re-integrate them into the workforce.

25. For 23 years, from 1970 to 1993, Claimant worked for Emerson Electric in Missouri. According to her deposition, she did shipping and receiving, manual (non-computerized) bookkeeping, and parts ordering. At hearing she testified she was on a production line. Thereafter, Claimant did various odd-jobs in fast food, nursing, flagging, and working in home health care. Since 2009 and up to the time of the accident in question, Claimant worked seasonally for Wada Farms in eastern Idaho, sorting and boxing potatoes during the harvest. Pre-accident, Claimant worked as a receptionist, and for South Eastern Idaho Community Action Agency (SEICAA) stuffing boxes. She worked for a time at

St. Vincent DePaul thrift store and ReStore. Several of her more recent jobs (receptionist, SEICAA, thrift store, ReStore) have been through Experience Works, which pays Claimant minimum wage and places her in various community-enriching businesses, where she works part time at no cost to the business. At the time of hearing she was working at the Pocatello animal shelter as a receptionist through this program.

26. Since the mid-1990s, Claimant has received Social Security Disability benefits for either anxiety issues or a stroke leading to the loss of vision in her left eye.[3] She also receives widow benefits since her ex-husband's death in 2014. Claimant is limited in the income she can make before she has to reimburse Social Security. She has intentionally sought out and worked part-time jobs at minimum wage for some time so as not to jeopardize her benefits.

27. At the time of her industrial accident, Claimant was working part time for Employer. Her duties were primarily to open and mind the store on Saturdays. She also drove clothes to and from a Blackfoot Your Valet store twice a week.

28. As noted previously, Claimant has no sight in her left eye. She consistently testified this condition has not impacted her ability to gain or hold employment. Claimant, over twenty years ago, was twice convicted of fraud felonies and sent to prison. She has served her time for these crimes. The medical records provided also contain entries documenting Claimant's complaints of pre-existing bilateral knee pain, although she testified she has had no knee surgeries. Claimant has high blood pressure, high cholesterol, GERD, a history of cardiac disease, including an MI, bipolar and depression issues, and alcohol abuse by history. The record does not support the notion that any of these conditions have adversely impacted Claimant in her ability to gain or hold the part time employment jobs she seeks.

[3] The record is not consistent on why she receives the benefits, and Claimant's testimony on the subject has varied.

29. Claimant's shoulder injury and subsequent surgery caused no disfigurement. While Claimant is obese, she has been losing considerable weight in preparation for breast-reduction surgery needed to relieve the painful pressure her bra strap exerts on her right shoulder. She is seeking this surgery outside of worker's compensation.

30. Due to Claimant's desire to not jeopardize her Social Security benefits, she has self-limited her job prospects to part time and at or near minimum wage.

Permanent Partial Disability Analysis

31. Analysis of PPD in this case must start with a mistaken assertion raised in Claimant's briefing. She argues that because Mr. Porter's testimony, including his opinions, are unrebutted they must be accepted as true. However, expert opinions do not need to be accepted even if uncontradicted. "The opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted." *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). Furthermore, "[t]he opinions of an expert are not binding upon the trier of fact, but are advisory only." *Clark v. Truss,* 142 Idaho 404, 408, 128 P.3d 941, 945 (2006). Finally, specifically with regard to PPD analysis, the Commission considers all relevant medical and nonmedical factors and evaluates the *purely advisory opinions of vocational experts*. *See, e.g., Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). (Emphasis added.)

32. Although the undersigned is not bound by Mr. Porter's opinions, his report and deposition testimony demands careful consideration. Mr. Porter acknowledges a level of subjectivity in his opinions, and that subjectivity is subject to scrutiny.

33. Mr. Porter begins his substantive analysis by figuring Claimant, in her pre-accident condition, had access to 10.25% of the total jobs in her Pocatello labor market. In his deposition, he clarified that he factored in all of Claimant's pre-existing conditions affecting her labor market access prior to reaching his conclusion. He did not detail which pre-existing conditions he considered, and to what extent each of those conditions reduced Claimant's job access.[4]

34. In analyzing the percentage of job categories Claimant lost due to her permanent right upper extremity limitations, Mr. Porter and Claimant overstated Dr. Wathne's work restrictions. This is understandable, since Dr. Wathne was the last person deposed in this matter, and it was not until he clarified his records and opinions that the true extent of Claimant's restrictions was made clear. Claimant, in looking for work, did not consider jobs wherein lifting over 20 pounds was required. Mr. Porter likewise emphasized Claimant's inability to lift. Also, he noted Dr. Wathne limited Claimant in all her movements to a "frequent" category, and did not allow for "continuous" movements of any nature. Dr. Wathne later clarified his reason for doing so, and in the process downplayed Claimant's limitations, noting she could lift 50 pounds frequently. This opinion is at odds with the tenor of Mr. Porter's analysis. If Mr. Porter had available to him Dr. Wathne's deposition, his analysis of Claimant's disability may well have been less severe.

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[4] The subjectivity of vocational rehabilitation analysis is brought into focus when looking at two cases the undersigned has recently reviewed. In the first, *Oliveros v. Rule Steel Tanks, Inc.et al*, ____IIC____, (2017), a vocational rehabilitation expert found a strapping 19 year old male high-school graduate with no pre-existing conditions, who lifted weights, played sports, and was bi-lingual, would have had 7.3% of the jobs in his Caldwell labor market available to him, whereas in the present case Mr. Porter figured Claimant, at age 64, with one blind eye, very overweight with cardiac disease, prior knee problems, periodic depression, and two felony convictions for fraud, had access to 10.25% of her Pocatello job market. It is difficult to explain the difference solely due to the locales, both of which are in southern Idaho.

35. Since her industrial accident, Claimant has been advancing her education in an attempt to expand her job opportunities. She has proven capable of receptionist positions, and by gaining computer skills, has made herself more marketable. While she claims to have "applied" at nearly 300 jobs, many of those jobs were full time, for which she is not interested. Also, she self-eliminated jobs requiring lifting more than 20 pounds.

36. Claimant testified she lost her opportunity to work harvest at Wada Farms, which was a reliable, but brief, source of income for her in years past. At the same time, she has been employed through Experience Works for the past several years, although that program by its terms ends after Claimant puts in about another 1000 hours of employment. The experience gained within the program should allow Claimant to seek similar employment opportunities. Now that she understands Dr. Wathne's limitations better, which allow for far more lifting than she may have previously understood, Claimant should be able to re-examine many of the part-time jobs she felt were beyond her restrictions. Driving jobs, part-time sales clerk jobs, and jobs in food service are some of the areas where Claimant has considered post-accident and should be re-considered in light of her lifting ability, and gained computer skills.

37. As previously noted Defendants did not utilize a vocational rehabilitation expert. Instead Defendants rely on the record to support their theory that Claimant has suffered no PPD in excess of her PPI rating. They note that Claimant was released to her time-of-injury job, although for whatever reason, it does not appear that job is currently available to her.

38. Defendants are also critical of Mr. Porter's opinions. They note that he inflated Claimant's potential job market by including jobs in the "heavy" category; lifting up to 100 pounds. By including jobs in the "heavy" category, Defendants argue Mr. Porter

inflated the number of jobs available to Claimant pre-injury. By then taking this job category off the table post-accident, Mr. Porter skewed Claimant's job market access loss beyond reality.

39. Defendants are also critical of the fact that Mr. Porter discounts the fact that Claimant lost no earning capacity with her injury. They note that Claimant was nearing retirement age, already on Social Security disability, and looking for a part-time job to supplement her other income. Defendants argue that in this case it is not appropriate to heavily weight market access, as opposed to averaging earning access with loss of market. They note that Claimant was not in or approaching her prime earning years, where loss of access could be devastating. As Defendants note "[i]t probably makes little or no difference to Claimant whether this additional income is earned in a dry-cleaning store, a fast food restaurant or a potato warehouse." *Def.'s Brief, p. 17.*

40. Defendants also caution against believing Claimant's testimony without question. They note her convictions were for crimes of dishonesty. Also, her testimony was not consistent from deposition to hearing. Finally, there were discrepancies between her testimony and that of Employer. Defendants urge the Commission to approach Claimant's testimony with a healthy skepticism.

Summation

41. Claimant's credibility has been questioned. The Referee finds Claimant to be generally credible, although he questions the seriousness of her "job search." While numerous job listings were compiled, it is inherently improbable that Claimant actually made a good-faith effort to find employment with each employer listed therein. In fact by her own admission, some jobs had lifting and pulling requirements which Claimant felt disqualified her. Also, not every employer was hiring. Many of the job search notes Claimant made appear to suggest

she simply dropped off a resume at a large number of businesses. A significant number of jobs contain the note "no lifting" as a reason for not getting further in the job search. Claimant certainly does not have a "no lifting" restriction.

42. Likewise, Mr. Porter's report overstates Claimant's disability. He assumed Dr. Wathne's limitations were more severe than the doctor intended them to be, and eliminated job categories based on the enhanced limitations. He admitted in deposition that if Claimant's lifting restrictions were not as severe as he understood them to be, it would open up job opportunities for Claimant.

43. By the time of hearing, Dr. Wathne's limitations had been fleshed out. Claimant had undertaken computer classes and was working in an office job. She was looking for part-time minimum wage jobs to supplement her income. The limitations and inaccuracies in Mr. Porter's analysis had been exposed by cross-examination in his deposition testimony and Dr. Wathne's subsequent clarifying deposition testimony.

44. While permanent disability from both industrial and non-industrial causes is properly determined first, after which disability from non-industrial causes is subtracted leaving only work-related disability, Mr. Porter did not clearly address disability from all causes, but rather only disability related to the subject accident. Since Claimant is only entitled to recover for disability attributable to the industrial accident, and since there is no evidence, or argument from either party as to the extent of her non-industrial disability, an analysis of Claimant's non-industrial disability will not be undertaken herein, and no apportionment will be calculated. Instead, only Claimant's work-related disability will be determined.

45. After reviewing the record as a whole, and considering the competing arguments of the parties, including the advisory opinions of Mr. Porter, Claimant did suffer

permanent partial impairment as a result of her industrial accident. She was given permanent restrictions which she did not have prior to her injury. These restrictions will impact the number of jobs available to her, including many if not all jobs at Wada Farms, which had been a reliable source of income for Claimant each autumn.

46. Additional education and office work experience since her accident partially offsets Claimant's permanent restrictions.

47. When considering the totality of the evidence, Claimant has proven a permanent partial disability of 10%, inclusive of her 4% whole person permanent impairment, previously paid as disability, from her industrial accident of April 11, 2015.

CONCLUSION OF LAW

Claimant has proven she is entitled to additional permanent partial disability benefits of 10%, inclusive of the 4% disability previously paid.

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 16th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

FRED LEWIS
PO BOX 1391
POCATELLO ID 83204

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83707

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA ROTHMAN, Claimant, v. YOUR VALET FINE DRY CLEANING, Employer, and CHARTER OAK FIRE INSURANCE CO., Surety, Defendants.	**IC 2015-010244** **ORDER** Filed August 31, 2017

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 proven she is entitled to additional permanent partial disability benefits of 10%, inclusive of the 4% whole person impairment benefits previously paid.

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

DATED this 31st day of August, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

___/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

FRED LEWIS
PO BOX 1391
POCATELLO ID 83204

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83707

___/s/_____