BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GAYLEN DOWNS, Claimant, v. OLD CASTLE PRECAST, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2016-002297** **2016-007327** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** **Filed 12/14/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced consolidated[1] matter to Referee Michael E. Powers, who conducted a hearing in Boise on May 2, 2018. Claimant was present with his attorney Bruce Skaug of Nampa. David Farney, of Meridian, represented Defendant Employer Oldcastle Precast, Inc., and its surety, Liberty Insurance Corporation. Judith Atkinson, also of Meridian, undertook the representation of Defendants and submitted Defendants' post-hearing brief. The parties submitted oral and documentary evidence and took two post-hearing depositions. This matter came under advisement on September 17, 2018 and is now ready for decision. 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.

[1] By Order dated May 13, 2016, the Commission consolidated IC # 2016-002297 (date of injury 7/29/15) involving Claimant's left shoulder with IC # 2016-007327 (date of injury 2/19/16) involving Claimant's right knee. Claimant indicated in his opening statement that Claimant's right knee injury has resolved and is no longer a part of this claim. See HT., p. 12.

ISSUE

The sole issue to be decided is whether Claimant had suffered permanent partial disability above his permanent partial impairment.[2]

CONTENTION OF THE PARTIES

Claimant contends that he has incurred disability above his impairment of at least 69% according to his vocational expert. Defendants contend that Claimant has not incurred disability above impairment of 49.5% according to their vocational expert.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Debbie, taken at the hearing.

2. Joint Exhibits (JE) A-S admitted at the hearing.

3. The post-hearing depositions of Mary Barros-Bailey, Ph.D., taken by Claimant on May 22, 2018 and that of Nancy Collins, Ph.D., taken by Defendants on July 6, 2018.

FINDINGS OF FACT

1. Claimant was 53 years of age and has resided in Nampa his whole life. He completed the 11th grade at Nampa High School and has not obtained a GED. "The only things I got good grades in was auto mechanic [sic] and math. The rest of my grades were lousy." HT., p. 16.

2. During and post-high school, Claimant worked as a laborer, welder,[3] millwright worker, fabricator, pre-cast concrete worker, and welder/fabricator at Motive Power.[4] Claimant began his employment with Employer in 2007 or 2008 as a maintenance tech but was doing mechanical work

[2] Additional issues were identified at hearing, such as the payment of certain medical bills and whether Claimant is an odd-lot worker. Since neither party argued for or against these issues in their briefing, they are deemed waived.

[3] Claimant has been certified in certain aspects of welding, but does not believe any such certifications are current.

[4] Claimant had to obtain a certification in welding for this job, which he held for seven years.

and welding at the time of his 2015 industrial accident. Claimant described the vast majority of his pre-injury work as heavy/very heavy.

3. On July 29, 2015, Claimant injured his left shoulder when a ladder slipped out from underneath him and he reached out with his left arm to catch himself from falling further. Claimant continued working as he was already on light duty due to a previous right shoulder injury.

4. Claimant was fired by Employer in March 2016 for reasons unrelated to his left shoulder injury.

5. Claimant underwent left shoulder surgery on August 9, 2016. Surety paid for the surgery as well as providing time loss benefits and physical therapy. Claimant's left shoulder failed to improve so in January 2017, Claimant underwent a "re-do" left shoulder surgery followed by more physical therapy. At hearing, Claimant testified that his left shoulder did not improve after this surgery and "[i]f anything it felt worse." HT., p. 38.

6. Claimant's treating physician, Miers Johnson, M.D., and Surety's independent medical examiner, Rodde Cox, M.D., assigned Claimant a 10-pound lifting restriction with no repetitive overhead lifting and Claimant agrees that such restrictions are appropriate. With the current condition of Claimant's left arm/shoulder, he does not believe he could perform any of his previous jobs. He can still weld, but cannot perform the many activities associated with welding.

7. Claimant conducted a job search[5] with the help of ICRD consultant Diana Contreras. Ms. Contreras assisted Claimant in creating a resume. She also found some specific jobs Claimant could apply for; he followed up on some of them. Claimant also registered with the Job Service and has applied for some jobs online. Claimant testified that he would tell prospective employers up-front about his restrictions because he did not want to waste their time. His job search has been

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He was also required to perform strenuous overhead work while at Motive Power.

[5] See JE Q for a list of potential employers Claimant contacted since August 2017.

unproductive; of the places he has contacted he has only had "maybe five" interviews. HT., p. 43. Claimant testified that he wants to work: "I want to get the hell out of my house. I'm going crazy." HT., p. 45.

8. Claimant has prior injuries; some were industrial, some were not. He has had three operations on his right knee, the first of which was nonindustrial and the last of which was 21 years ago. Claimant testified that he, at least as of the time of the hearing, has no difficulties with either knee. Prior to his injury of July 29, 2015, Claimant did not have any physical problems in performing his heavy/very heavy work.

9. Claimant has expressed interest in setting up a business for home health care to be able to continue to care for his 82-year-old mother-in-law who suffers from dementia and recently moved in with Claimant and his wife. Whether it be Claimant or someone else, she needs constant supervision which he could provide within his restrictions. Claimant deferred to his wife regarding the status of that endeavor paperwork-wise.

10. Claimant admitted under cross-examination that he tells prospective employers that he is injured and quite limited in the work he can perform. He has not applied for Social Security Disability because "I want to go back to work." HT., p. 68.

11. Regarding Claimant becoming a home care attendant for his mother-in-law, Claimant's wife, Debbie, testified that she is still working with the Idaho Department of Health and Welfare as well as the VA to complete the process. Debbie did not know the dollar amount Claimant would receive for his caretaking duties should the same be approved.

Vocational evidence

ICRD

12. Employer[6] referred Claimant to ICRD on September 16, 2016 and consultant Diana Contreras was assigned to his case (JE D). She noted that 14 days post-left shoulder surgery Claimant was given restrictions of no overhead work, no power gripping, no pulling/pushing motions of the left arm, no use of vibrating tools, and no lifting over 20 pounds with the left arm.

13. Ms. Contreras completed a Job Site Evaluation (JSE) with Employer's assistance (even though Claimant no longer worked for Employer) and sent the same to Claimant's treating left shoulder surgeon, who indicated Claimant could return to modified duties effective October 20, 2016. His restrictions included rarely reaching above shoulder level and frequently lifting and pulling and pushing five pounds.

14. Unfortunately, Claimant developed adhesive capsulitis in his left shoulder requiring an additional left shoulder surgery that was accomplished on January 27, 2017. Post-surgery, he was still restricted to lifting less than five pounds with his left biceps.

15. In August 2017, Rodde Cox, M.D., reviewed the JSE and assigned permanent work restrictions of lifting no more than ten pounds, push/pull 20 pounds, and rarely lifting above shoulder level.

16. After Dr. Cox's assigned restrictions, Claimant was ready to pursue job development; he was interested in maintenance work. Ms. Contreras helped him with a resume tailored to that interest; however, Claimant was having difficulty securing maintenance-type work due to his restrictions and lack of education. Ms. Contreras referred Claimant to Idaho Department of Labor to

[6] In a Previous Injury Report, the referral source was listed as Employer (JE D., p. 147). In Ms. Contreras' September 16, 2016 Case Notes, she indicated that Claimant was self-referred.

help with his job search by attending workshops focusing on interviewing techniques and the "hidden labor market." She also supplied Claimant with job leads and helped him apply for jobs online.

17. On April 2, 2018, Ms. Contreras reported that Claimant was interested in setting up a home care business to take care of his mother-in-law.

18. Claimant's work restrictions place him in the sedentary work category; however, Claimant "…does not want to pursue sedentary work because it will require working in an office setting or additional training or education." JE D., p. 171.

19. On September 11, 2017, Ms. Contreras summed up her involvement vocationally with Claimant as follows:

> In conclusion, my recommendations are for the claimant to continue working closely with ICRD for job development. As shown in the case notes initially there were several months of unsuccessful attempts to work with the claimant for job development. The claimant recently attended his first job development appointment and the claimant is pursuing employment as a maintenance worker. The claimant feels he can work around his restrictions with employer's support. We discussed that his restrictions only allow sedentary work but he may be able to find light duty work that can be within his restrictions. We have discussed options of seeking work where he is either a lead person or a trainer. I also suggested other options for employment such as a driver like a van driver/Uber driver. In my opinion, in order to replace his wage he will need to find an occupation that may require on-the-job training or a short term training program. The claimant has to consider if he pursues retraining he has to begin with pursuing his GED. Then he may be able to attend a short term course that will give him the skills needed to find work that he can physically perform. I have listed some occupations[7] that he may be able to find with his existing skills and physical abilities.

JE D., p. 175.

Mary Barros-Bailey, Ph.D.

20. Claimant retained Dr. Mary Barros-Bailey to assess Claimant's employability. Dr. Barros-Bailey's credentials are well known to the Commission and she is qualified to give expert vocational opinions in this matter.

21. Dr. Barros-Bailey met with and tested[8] Claimant for over three hours on October 5, 2017 and prepared a Disability Evaluation on November 15, 2017. She reviewed Claimant's education, work and social history, and medical and vocational records. She noted Claimant's subjective limitations[9] as well as the permanent restrictions assigned by Dr. Johnson on May 4, 2017 of working up to four hours a day, avoiding over-the-shoulder lifting, heavy vibrating tools, and pushing/pulling type movements with the left hand (Claimant is right hand dominant), and lifting up to five pounds using the biceps. Dr. Barros-Bailey also noted the permanent restrictions assigned by Dr. Cox on August 4, 2017 of lifting up to 10 pounds, pushing/pulling up to 20 pounds, and rarely lifting above the shoulder.

22. Dr. Barros-Bailey testified in her deposition that Defendant's expert, Dr. Nancy Collins, had an updated report from Dr. Johnson that increased somewhat the range of light-duty work available to Claimant; however, it did not change the classification of light-duty work.

23. Dr. Barros-Bailey testified that Claimant obtained employment pre-injury because he knew somebody at the workplace or had prior exposure to the prospective employer. Claimant was eligible for both ICRD and IDVR assistance. She characterized Claimant's post-injury job search as

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[7] These occupations include parts clerk, machine shop production lead, and machine tender, although she concluded that such jobs are in low demand without at least a high school education.

[8] Dr. Barros-Bailey administered reading (98% of the population reads better than Claimant), aptitude (mechanical reasoning) that with Claimant's work history she thought would be higher, and spatial relations (average). Dr. Barros-Bailey was unable to give other tests because of Claimant's trouble reading which is below kindergarten level.

[9] Dr. Barros-Bailey only considers objective restrictions and merely notes what subjective limitations Claimant alleges he has.

"reasonable," although his lack of reading and computer skills has hindered him in obtaining employment. Claimant cannot perform managerial duties due to, again, his lack of reading, education, knowledge, and computer skills.

24. Dr. Barros-Bailey opined that, based solely on Dr. Cox's restrictions Claimant has lost access to 83% of his pre-injury labor market (Ada and Canyon counties). Claimant's loss of access percentage would be closer to 100% when considering Dr. Johnson's restrictions. Attempting to explain the difference between her 83% labor market access loss and the 65% (or 68%) figure favored by Dr. Collins, Dr. Barros-Bailey testified that she believed Dr. Collins erroneously assumed that Claimant is capable of performing work in the medium category of jobs. Dr. Barros-Bailey Dep., p 29. In fact, like Dr. Barrios-Bailey, Dr. Collins concluded that Claimant's restrictions foreclose the ability to perform medium work. As explained *infra*, the real explanation for the difference in labor market access loss opinions rendered by the experts lies in the starting point for their respective assessments.

25. Dr. Barros-Bailey identified some limited driving jobs Claimant may be able to perform such as delivering pharmaceuticals, pizza, etc., or basic messenger services at about $10.50 per hour, which would represent a 40% loss of wage earning capacity (versus 31-33% as found by Dr. Collins).[10]

26. Dr. Barros-Bailey concluded that Claimant has incurred PPD from his work-related injury between 69% on the low end and odd-lot on the high end. "The odd-lot was based more on the restrictions that I had at the time from Dr. Johnson that, according to Dr. Collins' report, have been updated. His restrictions seem to be closer to Dr. Cox. I would say that, within that range, it's probably closer to the 69 percent as opposed to the odd-lot." Dr. Barros-Bailey Dep., p. 36.

[10] According to Dr. Barros-Bailey, Claimant would not be able to perform some of the higher paying jobs identified by Dr. Collins so Dr. Collins' loss of wage earning capacity is too low.

27. On cross-examination, Dr. Barros-Bailey testified that she needed to "spend more time" on Claimant's interest in caring for his mother-in-law as she "briefly" remembers Claimant mentioning it, but she "skimmed through that aspect of it." *Id.*, p. 39. She would "have to spend more time on it" to answer questions regarding whether Claimant could perform the duties associated with attendant care. *Id*.

28. Dr. Barros-Bailey recommended a "job developer" or "job coach" to assist Claimant in his job search because before his last injury, he had always been able to find work through "word of mouth," and that approach would not work when looking for a different occupation. IDVR could provide such a service.

29. Dr. Barros-Bailey testified as follows regarding Claimant's practice of informing prospective employers about his physical restrictions/limitations:

> I think that, generally, if somebody has restrictions, unless they – if somebody knows what the activities of the job are and they believe they can do those, with or without limitation, there is no reason to bring it up. I know that certain individuals feel that this is dishonest, but that is the law.
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> So sometimes that is part of the training that goes into job placement. I think that is, frankly, one of the areas that he is not sophisticated about; and he needs to have greater attendance [sic], in search of his job search skills.

Dr. Barros-Bailey Dep., p. 45.

30. Dr. Barros-Bailey testified that if the Commission finds that Claimant had a pre-existing right knee restriction of no lifting over 50 pounds, it would not change her disability assessment, but her apportionment of disability would be less for his last injury. In other words, she would look at Claimant's total present disability, then determine how much would be apportionable to Claimant's pre-existing right knee restriction. However, Dr. Barros-Bailey saw no evidence that Claimant was having trouble with, or was accommodated for, his right knee in the very heavy work he was performing for Employer pre-last injury.

Nancy J. Collins, Ph.D.

31. Defendants retained Dr. Collins to assess Claimant's employability "… considering the effect of this injury on the capacity to obtain and sustain competitive work and future earning capacity." JE M., p. 484. Her credentials are well known to the Commission and need not be repeated here. She is qualified to give expert vocational opinions.

32. In preparation of her vocational report dated March 30, 2018, Dr. Collins interviewed Claimant[11] and reviewed medical and vocational records, including Dr. Barros-Bailey's deposition testimony and report, ICRD records, and the hearing transcript. Dr. Collins noted that Claimant's physician-imposed restrictions for his left shoulder were "fairly consistent." She understood that restrictions are imposed to prevent further injury. Dr. Johnson imposed a 10-pound left shoulder lifting restriction and no over-the-left-shoulder lifting. Dr. Cox agreed with the 10-pound restriction and no over-the-shoulder repetitive lifting. The medical records support Claimant's subjective limitations.

33. Dr. Collins reported that Claimant had a number of pre-existing conditions that may affect his overall disability:

> He'd had a number of industrial injuries and nonindustrial injuries. One that was recent was he had injured his right shoulder, was recovering from that when he injured his left shoulder. So that was a concern.
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> But he also had a right hand injury that he talked about. Actually, and is in the record, that left him with about 50 percent of the strength in his right dominant hand. So that was something. And the employer, where that particular injury happened, had moved him from a physical job into a position as a safety manager because of that restriction that was provided at the time.

[11] Dr. Collins found Claimant to be a "very nice" man with good communication skills and who presented well. She found nothing in his personality or physical presentation that would present an obstacle in securing re-employment.

> And then he also had a right knee injury, and he was given a 50-pound lifting restriction. And so I assumed, when I did my analysis, that that's where I was starting from, is that he had realistically had restrictions for lifting to 50 pounds and not above; so I eliminated the heavy and very heavy in my analysis.

Dr. Collins' Dep., p. 12.

34. According to Dr. Collins, Claimant is not a functional reader and she agreed with Dr. Barros-Bailey's testing regarding his reading skill level. Dr. Collins testified that Claimant is a bright man who has worked in skilled jobs; however, he learned through demonstration rather than by reading or writing.

35. Dr. Collins had this comment regarding Claimant's vocational history and transferrable skills:

> Well, primarily to see what his transferrable skills might be as it relates to his restrictions. It also shows that he was the type of man who worked kind of long periods of time. He had good longevity in jobs. He promoted overtime in jobs. He had some supervisory kinds of responsibilities, was able to learn not only all the welding skills, but a lot of maintenance skills on the job. So, you know, he had a really good work history. A lot of work he had done was heavy; medium, heavy, or very heavy.

Id., pp. 19-20.

36. Although "very limited" by his left arm restrictions, Dr. Collins opined that Claimant continues to have the ability to perform light bench welding tasks as well as forklift driving and some maintenance work.

37. Dr. Collins considered Claimant's right knee to be a pre-existing condition regarding heavy work:

> . . . [I]f we are going to consider that his current restrictions are to prevent further harm, then I need to consider what his past restrictions are as well.
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> So he was not supposed to be doing heavy and very heavy work. He was limited to 50 pounds back in 1998. So I eliminated heavy and very heavy work in my analysis because that was a restriction that was in place for him and what I assumed was permanent.

Id.., p. 24.

38. Dr. Collins opined that Claimant could perform sedentary and light electrical, industrial equipment repair, metal fabrication, welder, and industrial truck operator. She did not include medium work.

39. Dr. Collins testified that Claimant has lost 65% of his pre-injury labor market consisting of Boise, Nampa, Caldwell, Kuna, and Meridian. She attributed this loss of access solely to Claimant's left shoulder injury.

40. Regarding Claimant's employability, Dr. Collins testified:

> Yes, he does have some employability limitations. First one is his literacy levels. You know, if you had a gentleman who had actually graduated from high school and had average reading levels, you could consider jobs like safety manager. He had done that in the past, but realistically, he can't do that job with his reading level.
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> Another example might be working as a service writer. They need to be able to read and write. He has great customer service skills, he presents really well, it would be a good job for him, but he really probably can't functionally do it because of his reading level.
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> So that makes a difference for him as far as what he can still do now. But he still has a lot of mechanical skills and the welding skills that he could use in a lighter environment where there wasn't a lot of overhead work.

Id., pp. 32-33.

41. As with employability, Dr. Collins testified that Claimant is also limited in placeability, but there are light duty jobs that exist in significant numbers for him; therefore, his placeability is limited, but not severely.

42. Dr. Collins identified actual jobs within Claimant's labor market and fit within his functional capabilities:

> Well, one, in particular, in one area, I think, and I'm not sure he applied for any of these, is the forklift operation. When we were talking

> about driving, he did - - does have some kind of arm fatigue when he drives a lot.
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> But he was talking about as a forklift operator, they always have suicide knobs on them; so it's a lot easier to maneuver, and a lot of it is done with the right hand. So if he had a forklift operating job, he really wouldn't be lifting with his left arm, wouldn't be reaching above shoulder level, and he has those skills and abilities.
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> Another one would be bench welding. And one particular job that I saw was for Meridian Fence; so it's doing the decorative gates, it's welding in the shop to put these gates and fences - - kind of to manufacture them. So there wouldn't be overhead work and not a lot of heavy lifting.

Dr. Collins' Dep., pp. 34-35.

43. Claimant was earning $21.00 per hour at his time-of-injury job. He was also receiving certain Employer-provided benefits generally valued at about 20% above his hourly salary. Dr. Collins opined that forklift operator, machine operator, and some welding jobs pay between $13.00 and $16.00 an hour, which makes Claimant's loss of earning capacity at 31%.

44. Dr. Collins was critical of Claimant for informing prospective employers up front about his restrictions and testified that he only needs to do so if he would require accommodations.

45. Dr. Collins concluded that, in her professional opinion, Claimant has suffered permanent disability of 49.5% inclusive off his impairment as the result of his left shoulder injury. *See,* Dr. Collins' Dep., p. 39.

46. On cross-examination, Dr. Collins admitted that Claimant would not be amenable to retraining "in the formal sense" due to his lack of reading, writing, and spelling skills. Even so, she found him to be "…very pleasant, very agreeable, good communication skills." Dr. Collins' Dep., p. 47.

47. Regarding Dr. Collins' 65% loss of labor market access, she testified that she limited Claimant's pre-injury labor market to exclude heavy and very heavy work even though his time of injury job was "heavy" in nature. Dr. Collins did this because Claimant's permanent restrictions pre-

existing his left shoulder injury took him out of the heavy work category and just because he performed heavy work for eight years pre-left shoulder injury does not mean he should have done so.

DISCUSSION AND FURTHER FINDINGS

Permanent partial disability

48. "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 impairment and by pertinent non-medical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

49. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the 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 the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

50. A two-step analysis is appropriate when apportionment is at issue and requires "(1) evaluating the claimant's permanent disability in light of all his physical requirements, resulting from the industrial accident and any pre-existing conditions existing at the time of the evaluation; and (2) apportioning the amount of permanent disability attributable to the industrial accident." *See, Horton v Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989) and *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309, 179 P.3d 265, 272 (2008).

51. A claimant's disability is to be determined, in most cases, as of the date of the hearing. *See, Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

52. Turning first to the evaluation of Claimant's disability from all accident-produced and pre-existing impairments, only Dr. Barros-Bailey appears to have made this assessment. Claimant's time-of-injury job was "very heavy" in nature. Per the restrictions imposed by Dr. Cox, Claimant is now only capable of performing work in the light and sedentary categories, and not even all of those jobs, per Dr. Barros-Bailey. In conducting her analysis, Dr. Barros-Bailey did <u>not</u> assume that Claimant had any pre-existing restrictions, even though she was aware that Claimant had subjective complaints relating to his prior knee condition. Dr. Barros-Bailey testified that if one were to assume the existence of a 50 pound lifting restriction for Claimant's pre-existing right knee condition, some part of the 69% disability she assessed for Claimant would be assigned to such pre-existing condition. Barros-Bailey Dep., pp. 13, 48-49. From this, we conclude that Dr. Barros-Bailey's opinion that Claimant currently suffers disability in the range of 69% of the whole person represents her opinion on Claimant's disability from all causes, including the less onerous restriction against lifting more than 50 pounds.

53. From Dr. Collins' testimony, it is clear that in assessing Claimant's disability, her starting point was different than the starting point employed by Dr. Barros-Bailey. Dr. Collins was aware of physician-imposed restrictions stemming from Claimant's pre-existing right knee injury. These restrictions limited Claimant from heavy and very heavy work, notwithstanding that he evidently performed such work in the years immediately prior to the subject accident. Per Dr. Collins, physician-imposed restrictions do not represent functional capacity. Rather, restrictions represent a guideline imposed by a physician to avoid further injury. That Claimant was able to work at his time-of-injury job is in no wise inconsistent with a physician-imposed restriction cautioning him against certain aspects of that job. Indeed, as noted by Dr. Barros-Bailey, Claimant acknowledged right knee symptoms in performing certain activities.

54. Based on her conclusion that Claimant was precluded from heavy and very heavy work activity on a pre-injury basis, Dr. Collins excluded these portions of Claimant's labor market in conducting her evaluation of the impact of the work accident on Claimant. In essence, she evaluated Claimant's disability from the work accident alone, as opposed to Claimant's disability resulting from the work accident and his pre-existing impairments. Referring to Page 10 of her report, Claimant's labor market consisted of approximately 7,848 jobs. 1,932 of these jobs fell into the heavy and very heavy category, while 3,809 of these jobs fell into the medium category. Excluding heavy and very heavy jobs left Claimant with a labor market consisting of 5,916 jobs (7,848 - 1,932). Per Dr. Collins' report, the medium-duty jobs Claimant is no longer able to perform as a result of the subject accident constitute approximately 65% of his 5,916 job labor market.[12]

55. Although Dr. Collins did not offer testimony on this point, from her report it is possible to deduce Claimant's labor market loss from both the work accident and his pre-existing impairments.

[12] Inexplicably, while Dr. Collins report reflects that she initially proposed labor market access loss of 65%, she later stated that Claimant has suffered labor market access loss of 68%. See JE M., pp.

Claimant's labor market of 7,848 jobs is comprised of 5,741 jobs which fall into the medium, heavy, and very heavy categories. (3,809 + 1,932). These jobs constitute approximately 73% of Claimant's total labor market, a figure within striking distance of Dr. Barros-Bailey's conclusion that Claimant has suffered 83% loss of labor market access from all causes. The difference between these assessments may be explained by Dr. Barros-Bailey's belief that Claimant is foreclosed from accessing all medium, and some light duty work. Dr. Collins believed Claimant is capable of all light duty work. Further, she believed that because Claimant's upper extremity restrictions are unilateral only, there were probably some medium-duty jobs that fall into his residual labor market. Dr. Collins' Dep., p. 25.

56. Dr. Barros-Bailey and Dr. Collins also differ in their evaluation of Claimant's wage loss. Both Dr. Barros-Bailey and Dr. Collins acknowledged that in addition to his time-of-injury wage of $21 per hour, Claimant received other benefits from his Employer which could be reduced to a monetary value of something in the range of 20% of his hourly wage, or an additional $4 per hour. Both experts acknowledged that it is unknown whether, or to what extent, jobs in Claimant's residual labor market will afford Claimant a similar benefit structure. This uncertainty makes it more practical to evaluate wage loss by comparing hourly wages alone.

57. Dr. Collins assumed that Claimant can earn anywhere from $13 to $16 per hour in his residual labor market, and identified specific welding and forklift operation jobs which support this assessment. Compared to his time-of-injury wage of $21 per hour, she believed Claimant has suffered wage loss of 31%. (14.5 ÷ 21). Dr. Collins' Dep., pp. 35-36. Dr. Collins did not base her wage loss analysis on entry level wages for forklift operation and bench welding since Claimant has skills that are directly transferable to these positions. Dr. Collins' Dep., pp. 36-37. Inexplicably, she later concluded that Claimant's wage loss is more in the range of 33%. Dr. Collins' Dep., p. 39. Assuming

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31% wage loss and 73% labor market access loss from all causes, would yield, according to the convention employed by Dr. Collins, disability in the range of 52%. (31 + 73 = 104 ÷ 2).

58. Dr. Barros-Bailey concluded that Claimant has suffered wage loss of approximately 40%. To reach this figure, she assumed that although Claimant's time of injury wage was $21 per hour, his annual income in the years immediately preceding the subject accident suggested an earring capacity of $17-$18/hour when prorated to a 2080 hour year. JE N, p. 506. In his residual labor market, Dr. Barros-Bailey believed Claimant can expect to earn a starting salary in the range of $10.50 per hour. She believed that Dr. Collins overstated Claimant's wage earning capacity in his residual labor market, and felt that it was more accurate to base a wage loss assessment on what Claimant might be expected to earn as an employee starting in a new position. Dr. Barros-Bailey concluded that in view of Dr. Cox's restrictions, Claimant has disability in the range of 69% (83 + 40 ÷ 2).

59. In evaluating these opinions, we are mindful that Dr. Collins did not give explicit testimony concerning Claimant's disability from the combined effects of his accident-produced and pre-existing impairments. However, as explained above, we believe her opinion in this regard can be inferred from her report, particularly the table at JE M at 493. Only Dr. Barros-Bailey has rendered an opinion explicitly based on Claimant's disability from all causes. In evaluating these opinions, we believe that Dr. Barros-Bailey has failed to fully consider the fact that Claimant's upper extremity limitations are unilateral only, and that he has no established restrictions for his right upper extremity. From this, we conclude that Dr. Collins was correct in concluding that the possibility exists that Claimant can yet perform some work classified as medium-duty. Further, we conclude that it is not entirely appropriate to evaluate Claimant's wage loss based only on what he will earn in his residual labor market as a new employee; Claimant will not always be a new employee, and it is therefore inappropriate to evaluate his present "and probable future" ability to engage in gainful activity by reference to his starting wage alone. Further, we do not fully accept Dr. Barros-Bailey's criticism of

the specific jobs identified by Dr. Collins for which it was felt Claimant had directly transferable skills. For these reasons, we believe that Dr. Barros-Bailey has slightly overstated the extent of Claimant's disability from the combined effects of the subject accident and Claimant's pre-existing impairments. We conclude that Claimant has present disability of 65% from accident-produced and pre-existing causes.

60. Having determined that Claimant suffers disability of 65%, inclusive of his 7% impairment rating, we must next consider the second step of the *Horton* analysis, i.e. identifying what portion of Claimant's disability from all causes is referable to the industrial accident. Both Dr. Collins and Dr. Barros-Bailey acknowledge that some part of Claimant's current disability must be assigned to a pre-existing condition upon demonstration that Claimant actually has physician-imposed restrictions referable to his pre-existing right knee conditions. Though such restrictions exist, Dr. Barros-Bailey was evidently unaware of them, and therefore, did not make an effort to apportion Claimant's disability. Dr. Collins was aware of pre-existing restrictions which would prohibit Claimant from engaging in heavy and very heavy labor. She addressed these pre-existing restrictions by simply choosing to state Claimant's disability in terms of what it would be after first excluding heavy and very heavy components of his labor market. Based on the assumption that Claimant's time-of-injury labor market included only sedentary, light and medium work categories, she concluded that Claimant suffered accident-caused labor market access loss of 65% and wage loss of 31%, yielding disability of 48%. (65 + 31 ÷ 2). Though we have criticized Dr. Barros-Bailey for slightly overstating Claimant's wage loss, we believe that Dr. Collins can be criticized for slightly understating Claimant's wage loss. Even she may have intuited this when she increased Claimant's wage loss from 31% to 33%.

61. We can infer nothing from Dr. Barros-Bailey's testimony that would allow us to hazard a guess as to what her opinion might be on Claimant's accident-produced disability. We know only that she was in agreement with the proposition that if Claimant had demonstrable pre-injury

restrictions, it would be appropriate to assign some part of his current disability to a pre-existing cause. However, she was not asked to quantify an opinion on apportionment.

62. Having considered the testimony of both vocational experts, the testimony of Claimant and other relevant non-medical factors, we conclude that Claimant has accident-produced disability of 55%, inclusive of his 7% PPI rating. We depart from Dr. Collins' opinion because of the significance we attach to Claimant's functional illiteracy, a non-medical factor that will have a much greater impact on Claimant as he competes for the sedentary, light, and medium jobs that remain in his residual labor market.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to permanent partial disability of 55% inclusive of his 7% whole person permanent partial impairment.

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

DATED this __14th__ day of __December__, 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 ___14th___ day of ___December___, 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:

J BRENT GUNNELL
1226 E KARCHER RD
NAMPA ID 83687

JUDITH ATKINSON
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BOISE ID 83707-6358

_____/s/_____