BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK HOPPER, Claimant, v. GLANBIA FOODS, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Surety, Defendants.	**IC 2014-025563** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED SEP - 3 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise on January 14, 2021. Taylor Mossman-Fletcher, of Boise, represented Claimant, Mark Hopper, who was present in person. David Gardner, of Pocatello, represented Defendant Employer, Glanbia Foods, and Defendant Surety, American Zurich Insurance Company. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on June 24, 2021.

ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a pre-existing condition.
2. Whether, and to what extent, Claimant is entitled to the following benefits:
    a. Medical care;

b. Temporary Partial and/or Temporary Total Disability (TPD/TTD);

c. Permanent partial impairment; and

d. Permanent partial disability.

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.
4. Whether Claimant's condition resolved following the September 13, 2014 accident.

CONTENTIONS OF THE PARTIES

Claimant alleges that the industrial accident caused him to sustain an acute injury to his right knee that ultimately necessitated a total knee replacement, for which Defendants are responsible. He further alleges that Defendants are responsible for medical benefits and total temporary disability (TTD) benefits until he reached maximum medical improvement (MMI) on March 12, 2019. He further contends that the permanent partial impairment (PPI) rating for his industrial injury is 31% right lower extremity, which equates to a 12% whole person impairment. Finally, Claimant alleges that he is totally and permanently disabled by reason of the odd-lot doctrine.

Defendants admit that Claimant sustained a compensable industrial accident and paid for Claimant's right knee meniscectomy and another surgery to excise a popliteal cyst related to the meniscectomy. They deny, however, that the industrial accident caused Claimant's right total knee replacement, and therefore they assert that it is not compensable. Furthermore, Defendants deny that Claimant is entitled to an award of total and permanent disability, nor is he entitled to any award of partial disability. Finally, Defendants claim that any award of partial disability should be apportioned due to Claimant's preexisting disease in the right knee.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The transcript of the January 14, 2021 hearing;
3. Joint Exhibits 1 through 17, admitted at the hearing.
4. The post hearing deposition testimony of K. Cheri Wiggins, MD, taken on March 5, 2021, by Claimant.
5. The post hearing deposition testimony of Tom G. Faciszewski, MD, taken on March 5, 2021, by Defendants.
6. The post hearing deposition testimony of Roman Schwartsman, MD, taken March 12, 2021, by Claimant.

All unresolved objections 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 & Work History**. At the time of hearing and for fourteen years prior, Claimant resided on a small farm in Shoshone, Idaho, together with his wife. Tr., 19:17-20:4.

2. Claimant was seventy years old at the time of hearing. He was born on September 4, 1950 in Weiser, Idaho. *Id.* at 20:5-12.

3. Claimant's family moved to the Tri-Cities area of Washington when he was five years old. He attended Kennewick High School and graduated from Pasco High School in 1968.

He did well in high school and received a basketball scholarship to Walla Walla Community College, which he attended for one year. *Id* at 20:12-21:15.

4. After his year of college, Claimant moved to Alaska and worked in maintenance as a teamster mechanic in construction (roads and pipelines) for eight seasons. During the offseason, he learned how to weld and also took a community college course on welding at Columbia Basin College in Pasco, where he obtained a welding certification in 1975. Thereafter, he began his career of being a welder. Tr., 21:17-23:25; Ex. 1:33-36.

5. Claimant worked as a welder in shipyards for the boilermakers, at Grand Coulee Dam for the millwrights, and at the Hanford Nuclear Reservation as a journeyman wire welder. He held the latter job for seven to eight years. After his job at Hanford ended, he moved back to Idaho in approximately 1984. Tr., 24:1-12; Ex. 1:33-36.

6. In Idaho, Claimant held various jobs including autobody technician, welder, maintenance supervisor/mechanic, and paint supervisor. In 1992 he opened his own autobody shop located in Hailey, Idaho. He operated that shop until 1997. The majority of his work through 2008 was a welder, both as an employee and independent contractor, for various enterprises in the Wood River Valley. Tr., 24:23-27:8; Ex. 1:33-36.

7. **Prior Injuries and Significant Medical Events**. Claimant had bilateral knee surgeries sometime in the 1980s. He was working for Dan Nee Welding located in Ketchum at the time. Claimant recalls in pertinent part as follows:

> And I had one of them [meniscus surgeries] and they were just learning how to do those arthroscopic meniscus repairs and they actually were giving instructions for the rest of the nation up there [in Ketchum] and I was lucky it happened there, so I believe Dr. Sorenson fixed one. I went back to work within a week and a half and something happened. I went back too soon and the other one goofed up and they fixed that one and, then, I was in physical therapy with the person that was the physical therapist with the US ski team and my knees were so strong I was jumping -- I was jumping with two feet straight up. In all my basketball years I've never

> jumped over 6 inches. My coaches used to yell at me to "get off the ground" and I was hitting my head on 6 -- or 8 foot ceilings. I could jump up and hit my head and actually turn my head. I was jumping straight up. They [his knees] were so strong. It was incredible.

Tr., 68:9-25.

8. There are no medical records available concerning Claimant's bilateral meniscus repair surgeries from the 1980s. Claimant recalls that his knees did "just fine" in the decades following these surgeries. *Id.* at 69:12. Furthermore, he did not seek any treatment for either of his knees prior to the industrial accident of September 13, 2014. *Id.* at 69:14-16. Claimant did not limit his activities in any way due to his knees during this period and continued working while he participated in waterskiing, running, and managing his home farm with care of livestock, among other physical activities. *Id.* at 69:23-71:3.

9. On or about August 10, 2006, Claimant sustained an injury to his right wrist while he was working as a welder for Intermountain Construction in Jackson Hole, Wyoming. The injury required arthroscopic surgery. *Id.* at 73:14-74:9. A workers' compensation settlement of his claim for the injury, entered into on November 8, 2007, included payments for permanent partial impairment in the amount of 10%, upper extremity, and a lump sum settlement in the amount of $75,000 that was at least in part in consideration of any permanent disability Claimant might be owed. Ex. 16:585-594.

10. Claimant was out of work for an entire year due to his right wrist injury. Tr., 28:19-20.

11. John W. Howar, M.D., Claimant's treating orthopedic surgeon for his right wrist injury, wrote to Claimant's attorneys on July 31, 2007, that he had "recommended a vocational change for Mr. Hopper, because the welding work he has been doing will place excessive demands upon his right wrist." Ex. 16:632.

12. Claimant recalled in pertinent part as follows: "… I welded until about 2006. I hurt my hand and I was doing high steel at that time and it was too dangerous for me to do high steel without the strength of my whole hand and so then … so I quit and took a job at Glanbia [Employer]." Tr., 27:8-12. Claimant further recalled as follows: "And then I couldn't go back to welding, because I was doing high steel, and I couldn't depend on that hand, if I fell, to grab and save me or anything. So pretty much that steel career was toast." Claimant's Dep., 28:25-29:4.

13. **Subject Employment**. Employer hired Claimant on September 17, 2008, following his year of being off work due to the right wrist injury. Tr., 28:14-17; Ex. 1:39. His job title was Maintenance Mechanic. *Id.*

14. At all relevant times, Employer operated a dairy-products manufacturing business, making cheese and lactose powder. It employed approximately 170 persons at the plant where Claimant worked. Tr., 29:3-12.

15. Claimant described his work duties and activities in pertinent part as follows:

> Repairing stuff that breaks down and, then, doing preventative maintenance. When I first started we did a lot of firefighting. They – they didn't really have a good preventative maintenance program and there was just a lot of breakdowns and so you are working on pumps that break down. You are working on different types of separating equipment that breaks down, different types of powder processing equipment that takes the powder from wet to actual powder, like baby formula, like that. You are fixing all types of equipment.

Id. at 29:22-30:7.

16. Claimant's starting wage was $16.50 per hour. Ex. 1:44. With raises, Claimant earned $23 per hour towards the end of his career with Employer. *Id.* at 31:17-24.

17. **Industrial Accident**. On September 13, 2014, at approximately 3:00 p.m., Claimant was working at Employer's plant. He walked through a gate opening to access the north-side of a dolly picker machine. The area had a metal grating system that was elevated two feet

from the floor. Claimant stepped on the black mat used to cushion cheese carts that was covering up a hole in the grating. Part of the grating had broken, and one end of the grating was still attached, but it was on a slant hitting the floor underneath. Someone had placed a black mat covering over this broken area. Upon stepping on the mat, Claimant fell forward and to the right. Claimant was able to correct his fall enough to avoid falling into a dangerous piece of equipment and extract himself from the hole, but he ended up hitting a railing with his shoulder. He was briefly knocked out. Claimant had used his right arm to shield his face and his head when he fell. The right side of Claimant's body fell into the grate while the left side of his body stayed above ground-level. Claimant felt pain in his right shoulder, right knee, and head. Tr., 33:24-36:20; Ex. 3: 60; Ex. 15:548.

18. **Work History After Industrial Accident**. Claimant continued to work for Employer after the industrial accident up to October 6, 2014, when he resigned. Tr., 85:9-19. A week later, Claimant became employed with Chobani where he worked full-time in a similar position to that for which he worked for Employer. *Id.* at 85:24-86:12. Claimant continued to work full-time at Chobani, with time off for his meniscus surgery and recovery and hematoma/cyst surgery and recovery, until his total knee replacement surgery occurred on March 12, 2018. Claimant formally resigned from Chobani on April 1, 2019. He has not worked since then. *Id.* at 88:21-89:24.

19. **Medical Care**. Approximately a week after the accident, on September 19, 2014, Claimant sought his first medical care for his injuries at Saint Luke's Clinic – Occupational Medicine in Twin Falls, Idaho. Ex. 4:81. Brian Johns, M.D. examined him. *Id.* at 87. Claimant reported as follows: "'I stepped on a piece of grating that wasn't there. We have a grating area that's about (2 feet high).' A chunk of this had fallen down, covered with a black mat. He tucked

and rolled and landed on the right side. 'I think I was out for a couple of seconds, because I saw my coworker yelling.' He was dazed. His hard hat stayed on." Claimant further reported that the condition of his right knee worsened over the next two days at work. Claimant had four days off, but the condition did not improve. It hurt to press on the gas pedal and felt like "knives" under the right knee. Ex. 4 at 81. Claimant rated his pain as 8 out of 10. *Id.* at 82. The physical exam by Dr. Johns was normal. He assessed a knee sprain as a diagnosis and recommended liberal use of ice with anti-inflammatories, and a knee sleeve for compression. *Id.* at 82.

20. Claimant returned to the Saint Luke's Clinic again on September 26, 2014. Michael Hennek, CMA, noted that the "knee is feeling better, and he is able to do quite a bit of walking without significant limping." *Id.* at 85. On October 6, 2014, Claimant denied having any pain in the right knee. Dr. John cleared Claimant for "normal work" and was hopeful that at the next office visit Claimant would be at maximum medical improvement (MMI). *Id.* at 92-93.

21. On January 23, 2015, Claimant reported a worsening of symptoms in his right knee. Claimant reported that he could not sleep on his right side because he couldn't have his knee down. The knee "hurts, swells, pops." Dr. Johns noted that the knee pain "persists" and required "further workup." He anticipated following up with Claimant after an MRI. *Id.* at 4:94-95.

22. Dr. Johns ordered an MRI, which took place on February 13, 2015. *Id.* at 96-99; 103-106. The MRI showed chondromalacia (softening of cartilage) and a medial meniscus tear in Claimant's right knee. *Id.* at 107. Dr. Johns' plan was to send Claimant to orthopedics for "definitive treatment." *Id.* at 108.

23. Claimant returned to the Saint Luke's Clinic on March 17, 2015. Tyler McKee, DO, examined him. Dr. McKee ordered bilateral knee X-rays which disclosed that Claimant had "bone on bone articulation of the medial compartment of both knees with varus deformity

bilaterally." *Id.* at 113. His assessment was degenerative joint disease, bilateral. He noted that Claimant had end-stage degeneration of both knees, with symptoms worse on the right. "This degeneration is not from his fall, however the fall aggravated his osteoarthritis." Ex. 4 at 111. Dr. McKee administered a steroid injection into Claimant's right knee. *Id.* at 111-112.

24. In an office visit with Dr. Johns on August 11, 2015, Dr. Johns noted that Dr. McKee was recommending a total knee replacement, but Claimant was seeking a second opinion. Dr. Johns recommended that Claimant limit walking and refilled his nighttime pain medication. *Id.* at 114-115.

25. On August 20, 2015, Claimant consulted Roman Schwartsman, M.D., an orthopedic surgeon with offices for practice in Boise. The purpose of the consultation was to obtain a second opinion concerning Claimant's right knee. Dr. Schwartsman reviewed both the bilateral X-rays and right-knee MRI that had been obtained previously. He noted that there were symmetrical arthritic changes in both knees, left and right. The left knee, however, was asymptomatic. The right knee, as viewed on the MRI, had a tear "through the anterior horn and midbody, which is consistent with the patient's described mechanism of injury and the location of the patient's pain… The patient is advised that he does have arthritic changes which are deemed to be age appropriate. These do appear to be symmetrical based on X-ray. The acute finding in this case is the tear through the anterior horn and body of the medial meniscus." Ex. 7:402-403. Dr. Schwartsman opined as follows:

> Recommendation at this point in light of the fact that the patient is symptomatic with a meniscal tear and is not symptomatic with the contralateral knee which is equally arthritic would be for arthroscopy and meniscectomy with possible subchondroplasty of the medial tibial plateau, where the edema is seen. The need for the meniscectomy is industrially related and consistent with the mechanism of injury described by the patient. I would not recommend a total knee arthroplasty at this point since the patient was relatively asymptomatic previously and symptoms are localized and consistent with a meniscal tear.

Id. at 403.

26. Dr. Schwartsman performed surgery on Claimant at Saint Alphonsus Regional Medical Center in Boise on September 23, 2015. The preoperative diagnosis was medial meniscal tear, right knee. The postoperative diagnosis was as follows: 1.) acute on chronic medial meniscal tear, right knee (complex tear); 2.) grade 4 chondral loss medial compartment; lateral compartment; patellofemoral joint, right knee; and 3.) synovitis, right knee. The surgical procedures performed were as follows: 1.) right knee arthroscopy with posterior horn medial meniscectomy; and 2.) synovectomy 3 compartments, right knee. Claimant tolerated the procedure well. Ex. 7 at 406-407.[1]

27. In an office visit on September 24, 2015, Dr. Schwartsman noted that Claimant was "neurovascular and motor intact in his lower extremity." X-rays taken on that date showed essentially bone-on-bone in the medial compartment of the knee, but otherwise no pathology was noted. Claimant was to begin physical therapy (PT) with CPR Rehabilitation in Twin Falls. *Id.* at 408.

28. Upon referral from Dr. Schwartsman, Claimant began PT with CPR Rehabilitation on September 28, 2015. Therapy with CPR continued through December 9, 2015. Ex. 5.

29. Dr. Schwartsman continued Claimant in his care and met with him in office visits on October 1, October 29, November 12, and December 10, 2015. On December 10, 2015, Dr. Schwartsman noted that Claimant was "doing much improved. He only has some discomfort with twisting motions." Dr. Schwartsman was going to release Claimant to full duty. Ex. 7:409-414.

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[1] Surety covered this surgery.

30. At the next visit, January 14, 2016, Dr. Schwartsman had anticipated declaring Claimant at maximum medical improvement (MMI) and giving him a permanent partial impairment (PPI) rating, however Claimant presented with a new development, a popliteal cyst on his upper right calf. Dr. Schwartsman ordered an MRI and noted in pertinent part as follows: "To a reasonable degree of certainty, the need for further diagnostic workup in this case is directly causally related. I suspect this leaking popliteal cyst is directly related to the meniscal tear and subsequent meniscectomy. Further decision-making pending results of the MRI." Ex. 7 at 415.

31. On January 21, 2016, Dr. Schwartsman reviewed the results of the MRI with Claimant. He noted in pertinent part as follows: "The patient's pain is not in the knee joint itself. He has full flexion and extension. No instability in the knee. Meniscal signs in the knee are negative. The patient's pain is in the calf, specifically, in the medial head of gastroc. An MRI of the calf is reviewed. The MRI shows a large hematoma in the medial head of the gastroc. This does correlate with the patient's pain location." Dr. Schwartsman recommended several days of bedrest to see if the hematoma would resolve; if not, surgery would be undertaken to excise it. *Id.* at 416.

32. Following up with Claimant on January 26, 2016, Dr. Schwartsman noted that the "cyst is directly causally related to the meniscal tear… Ultrasound of the right calf obtained today shows the cyst with partially calcified hematoma in the cyst. It is pressing on the medial head of the gastroc and causing the patient significant discomfort." Dr. Schwartsman recommended excision of the calcified hematoma/cyst. *Id.* at 417. On the same date, Dr. Schwartsman communicated with Surety to state that the proposed surgery was causally connected to the industrial injury. *Id.* at 418-419.

33. Claimant underwent excision surgery on his right calf on January 27, 2016.[2] There is no record of the surgery in the exhibits, however documentation of Claimant's follow-up office visit on January 28, 2016 is in the record. Dr. Schwartsman noted in pertinent part as follows: "Wounds are clean. Drain is discontinued. Compartments are soft. Minimal drainage noted in the drain. The patient is advised and reassured." Claimant was restricted from working in the meantime. Ex. 7 at 420.

34. Claimant returned to Dr. Schwartsman on February 4, 2016. Dr. Schwartsman recorded that Claimant was "doing excellently. He states that he no longer has the severe pain in the right calf while ambulating or walking up and downstairs." Claimant was released to return to work with no walking greater than 15 minutes per hour. Meanwhile, Claimant was scheduled to attend PT. Ex. 7:421.

35. Claimant attended PT at Body Balance Physical Therapy in Gooding, Idaho from February 5, 2016 through September 4, 2020. Ex. 6.

36. On March 3, 2016, Dr. Schwartsman noted that Claimant was "doing better. He is not ready to return to full duty." Claimant was released with restrictions of no climbing ladders, no work on uneven surfaces, and no lifting greater than 10 pounds. Ex. 7 at 422. Claimant had a similar exam on March 31, 2016, and Dr. Schwartsman continued the same restrictions. *Id.* At 423.

37. On April 28, 2016, Dr. Schwartsman released Claimant to full duty, noting that Claimant "has done very well." *Id.* at 424.

38. In an office visit on May 24, 2016, Dr. Schwartsman observed that Claimant "has had some difficulty with full duty return. I believe most of this is attributable to his arthritic

[2] Surety covered this surgery.

changes." Claimant was able to function at full duty but had significant pain towards the end of the day. Dr. Schwartsman further observed in pertinent part as follows:

> He may be rapidly reaching maximum medical improvement here from the standpoint of his work-related condition, which is the meniscal tear and the calf hematoma… There is a need for a total knee arthroplasty here; however, the patient did have grade 4 chronic chondral changes prior to the surgery. *As such, the need for total knee arthroplasty here would be nonindustrial and pre-existing.*

Ex. 7 at 425 (emphasis added).

39. On June 21, 2016, Dr. Schwartsman noted that "the patient and I reviewed the fact that he has pre-existing grade 4 chondral changes in the medial compartment. *This does point to the need for total knee arthroplasty on a nonindustrial pre-existing basis.*" *Id.* at 426 (emphasis added).

40. Dr. Schwartsman placed Claimant at MMI and assigned him 2% lower extremity PPI with no apportionment on August 2, 2016. He noted further in pertinent part as follows: "On a nonindustrial basis, the patient can follow-up for total knee arthroplasty anytime at his convenience should symptoms become sufficiently activity limiting. Otherwise, the patient is released to full duty." *Id.* at 427.

41. Ten months elapsed until Claimant's next office visit with Dr. Schwartsman on June 1, 2017. At this point, Claimant reported that his symptoms had become "substantially worse. He has experienced increased pain and instability in the right knee." Dr. Schwartzman noted further in pertinent part as follows:

> *Authorization is going to be requested from the patient's industrial carrier.* Even though the patient did have grade 4 chronic chondral changes at the time of his arthroscopy, he has had a rather rapid progression and collapse of the medial compartment suggesting that to a reasonable degree of certainty *at least a portion of the need for total knee arthroplasty in this case is related to accelerated progression of degenerative changes following his industrial accident.*

Id. at 428 (emphasis added).

42. Another six months elapsed when Claimant met again with Dr. Schwartsman. Dr. Schwartsman noted that Surety had denied authorization for a total right knee arthroplasty and that Claimant was "here today under his private insurance." Dr. Schwartsman's recommendation for a total right knee arthroplasty was unchanged and he noted that authorization would be sought from Claimant's private insurance carrier. Ex. 7 at 429.

43. Claimant underwent total right knee arthroplasty surgery performed by Dr. Schwartsman at Saint Alphonsus Regional Medical Center on March 12, 2018. Claimant tolerated the procedure well. *Id.* at 430-431.

44. Dr. Schwartsman provided Claimant with post-operative care during the period March 13, 2018 through February 19, 2019 with biweekly and monthly office visits. *Id.* at 432-448. He prescribed Claimant a course of PT. *Id.* at 432. X-rays of Claimant's right knee consistently showed the prosthetic components to be in good position. *See, e.g., Id.* at 436. At various times, Claimant reported significant discomfort with increased activity, pain with prolonged standing, and an inability to climb ladders, kneel, and squat. *See. e.g.. Id.* at 442, Dr. Schwartsman gave Claimant temporary restrictions of no squatting, no kneeling, no prolonged walking or standing, and no work on ladders. On November 8, 2018, Dr. Schwartsman stated that "[h]e is likely to take a full year to reach maximum medical improvement" and "I will… declare him to be at maximum medical improvement when he is a full year out from surgery." *Id* at 446. On February 19, 2019, Dr. Schwartsman released Claimant from his care, stating that he would see Claimant back in two years, and also stating that other than using a snowblower for extended periods of time,[3] Claimant had "*no restrictions from my standpoint.*" *Id.* at 448 (emphasis added).

[3] Claimant had reported to Dr. Schwartsman having pain [unspecified in the chart note] after using a snowblower on a 250-yard driveway to clear snow. Ex. 7:448.

45. **Schwartsman Deposition**. Claimant took the deposition of Dr. Schwartsman on March 12, 2021. Schwartsman Dep., 2:1-3. The Commission is familiar with Dr. Schwartsman's credentials.

46. Dr. Schwartsman observed of Claimant's right knee in pertinent part as follows:

> So in lay terms, when I'm saying here is despite the arthritis that I'm seeing, the patient was getting along well and did not appear to have any complaints related to this knee prior to his date of injury. He had a specific mechanism which was consistent with known mechanisms for sustaining a meniscal tear, the meniscus being the gristle pad between the thigh bone and the shin bone inside the knee that provides cushion and some mechanical support.
> The way that the patient fell at work indicated the patient would have sustained that tear that I saw on the MRI. In other words, the position that the knee was in when the patient fell and the way the patient describes his fall was consistent with known mechanisms for sustaining a meniscal tear.
>
> Therefore, it was my opinion that the meniscal tear related to the fall and should be treated as an industrial injury.

Schwartsman Dep. at 12:17-13:9.

47. In commenting on whether a meniscal tear contributes, in any way, to arthritic changes in the knee, Dr. Schwartsman stated in pertinent part as follows: "The timing of that acceleration was variable and the extent of that acceleration was variable, but there was – there's general consensus in orthopedics that there is accelerated change after loss of the meniscus." *Id.* at 17:18-22.

48. Dr. Schwartsman explained how performing a meniscus surgery on Claimant accelerated his degenerative changes, as follows: "Well, again, Mr. Hopper had both degenerative changes in the meniscus, which are to be expected, but he had an intact meniscal rim. He did sustain a relatively large [meniscus] flap tear, and in the process of excising that flap, I have to take a certain percentage or certain portion of the meniscus out, which does weaken it beyond what it would normally be weakened with degenerative change." *Id.* at 20:3-10.

49. Dr. Schwartsman explained further as follows: "[B]ecause once the meniscus is torn, it no longer provides that stability. So removing the meniscus, the surgical act of removing the meniscus, isn't necessarily what creates it [instability]. It's the actual injury that creates it." Schwartsman Dep., at 20:18-22.

50. Dr. Schwartsman responded as follows when asked whether the September 2014 workplace injury contributed to or accelerated in any way the need for the total knee replacement in March 2018:

> You know, that's a hard question to answer, because as I stated and as the MRI showed, Mr. Hopper had full thickness cartilage loss. So I guess it depends upon how you ask the question.
> If you're asking me objectively did the patient meet criteria for a total knee replacement based on the amount of cartilage loss you saw on the MRI and at the time of surgery, I would tell you that, yes, objectively, that kind of cartilage loss is what I expect to see in a patient I recommend a knee replacement to.
> Now, I did nuance on my answer in my initial note. When I saw the patient, I said that because the patient was functioning well up to the point of his injury, I didn't feel that any replacement would be indicated at this point.
> A knee replacement is an irreversible step, so my practice philosophy is not to commit to an irreversible step like that, because it does have the consequences to the patient. Once you put an artificial joint in, you're subjected to all kinds of things that you don't deal with a native joint, arthritic or otherwise.
> So it's a step that I take very seriously and I'm not in a hurry to do that. I do plenty of knee replacements and hip replacements but when I do them, patients are at the end of their line, so to speak. There's nothing further than I can offer them that would make any tangible difference.
> In Mr. Hopper's case I felt that an arthroscopy and a simple clean up would make a tangible difference in him since he had stated to me that he was functioning well prior to this injury.
> So that's a conversation that I have with the patients. I tell them that "I can't make you have 21 again, but theoretically, the best you're going to be is the way you were the day before he got injured." And he said that was good enough; So we went ahead with this Arthroscopy.

Id. at 21:17-23:5.

51. Claimant's counsel asked Dr. Schwartsman this follow-up question:

Q. Okay. So you would not dispute the statement that the injury at least contributed in part to the need for the total knee replacement, is that what you're saying?
A. I think we're getting into hair splitting territory, and as far as I understand the laws of Idaho, the laws of Idaho allow for hair splitting. So, you know, if you're asking me can I tell you with 100 percent certainty that the industrial injury did not contribute to the need for a knee replacement, I could not tell you that.
I'm sorry; I don't mean to, you know, give a double negative answer here, but, no, I cannot say that with 100 percent certainty.
If you phrase the question in terms of would Mr. Hopper eventually have required a knee replacement, the answer is absolutely yes if he had – you know, in the foreseeable future, he would have required a knee replacement. When that is, I could not predict.

Schwartsman Dep., 24:7-25.

52. Counsel further asked as follows:

Q. And is having a meniscal injury an aggravating factor that can contribute to the total knee?
A. The simple answer to that question is yes.

Id. at 27:2-4.

53. On cross examination, Dr. Schwartzman admitted that the meniscectomies that Claimant had performed in the 1980s could accelerate arthritic changes in the knee over time. *Id.* at 30:24-31:10.

54. Further on cross examination, Dr. Schwartsman explained about the apportionment of preexisting arthritis and the industrial injury as causal factors, in pertinent part as follows:

Q. Well, let me ask you this way. Maybe this is the best way to ask you. How would you apportion it? What portion would you say was preexisting and what portion would you say would be due to the industrial accident?
A. I am 90 percent certain that Mr. Hopper would have required a total knee arthroplasty sometime in the next year.
Does that answer your question?
Q. Well, I don't know. So you're saying 90 percent of his problem would be preexisting?
A. I would say that comfortably, yes. The extent of arthritis that I saw in that knee and the extent of arthritis that was there on the MRI strongly argues that sometime in the next 5 years this man is going to need a knee replacement.
Q. And that's fair enough. I appreciate that.

So you would say 90 percent of his problem was preexisting, 10 percent was related to the industrial accident.

A. I think that's a fair assessment.

Id. at 41:21-42:16.

55. **Faciszewski IME.** At the request of Defendants, Tom G. Facizewski, M.D., performed an independent medical examination (IME) of Claimant on July 21, 2017. Ex. 10:460. Dr. Facizewski took a medical history from Claimant, performed a records review (including imaging reports), and undertook a physical examination of Claimant. *Id.* at 460-466.

56. Dr. Faciszewski diagnosed Claimant as follows:

1. Bilateral knee degenerative disease with varus deformities pre-existing and unrelated to the injury.
2. Status post bilateral knee arthroscopies pre-existing and unrelated to the injury.
3. Status post right knee arthroscopy with partial medial meniscectomy secondary to work related injury of September 13, 2014.
4. Right knee severe degeneration with deformity, and pain – nonindustrially related, pre-existing.

Id. at 10:466.

57. Dr. Faciszewski opined that the "singular diagnosis associated with the claimant's industrial injury is his right knee medial meniscus tear." *Id.* at 467.

58. Dr. Faciszewski disagreed with Dr. Schwartsman's request to proceed with a total right arthroplasty on an industrial basis. "On a more probable than not basis, given the severe degeneration the claimant has in both knees, the likelihood of him developing symptoms at any point in time is extremely high. The medial meniscus tear was injury-related, the joint degeneration and subsequent symptoms are pre-existing." *Id.*

59. As to the need for total right knee arthroplasty, Dr. Faciszewski opined in pertinent part as follows: "On a medically more probable than not basis, the need for total knee arthroplasty is nonindustrial." *Id.*

60. Dr. Faciszewski opined that Claimant was at MMI in regard to the subject injury/right knee medial meniscus tear. *Id.* at 468.

61. **Faciszewski Deposition**. Defendants took the deposition of Dr. Faciszewski on March 5, 2021. Faciszewski Dep. at 2:1-3. Dr. Faciszewski is an orthopedic surgeon. *Id.* at 5:16-17. He is currently self-employed in his own orthopedic practice, Independent Orthopedic Services. *Id.* at 18-20. He earned his medical doctorate from the University of Colorado Medical School and then an internship in general and orthopedic surgery at the University of Utah, followed by a fellowship at the Minnesota Spine Center. *Id.* at 5:21-6:5. He spent the next twenty years in the department of orthopedic spine surgery at the Marshfield Clinic in Marshfield, Wisconsin. Faciszewski Dep., 6:10-11; Dep. Ex. A. In 2015, Dr. Faciszewski moved to Boise and opened his private orthopedic practice. Faciszewski Dep., 6:12-13. He is board certified in orthopedic surgery. *Id.* at 6:14-17; Dep. Ex. A.

62. Dr. Faciszewski opined about the effect of Claimant's 1980-era arthroscopic bilateral knee surgeries, as follows: "Well, that could have a very damaging effect. The studies are very clear that back in that time frame of the mid '80s to early '90s, we didn't really know the impact of – the full impact of removing a larger component of the meniscus. And we now know that meniscectomies, especially large meniscectomies, can lead to really progressive degeneration of the knee. And especially with large medial meniscectomies, you can end up with varus deformities such as this gentleman has had. So that impact is not insignificant." Faciszewski Dep., 22:14-24.

63. Dr. Faciszewski concluded that the work accident caused a meniscus injury in Claimant's right knee. *Id.* at 24:6-11.

64. When asked whether the meniscus tear in any way accelerated or caused the need for Claimant's right total knee replacement surgery, Dr. Faciszewski stated as in pertinent part as follows; "The meniscectomy that caused the need for that occurred in the mid '80s... It's all preexisting." Faciszewski Dep., 29:10-11; 13.

65. Dr. Faciszewski admitted that he did not review any medical records related to Claimant's bilateral meniscectomies in the 1980s, nor did he have any actual knowledge of the extent to which Claimant's menisci were repaired at that time. *Id.* at 35:10-20.

66. When asked to comment on whether a "meniscus insult or injury," can accelerate the arthritic conditions of the knee, Dr. Faciszewski opined as follows: "Again, like I said before, in a normal knee, a significant injury to the meniscus can accelerate that. When you have end-stage degenerative changes in a knee with 15 degrees of varus, a meniscal injury is inconsequential." *Id.* at 39:25-40:4.

67. Dr. Facizewski admitted that although Claimant had bilateral symmetrical degeneration in both knees, the symptomatic one was the right knee. *Id.* at 47:12-21.

68. **Wiggins IME**. Claimant, through counsel, arranged for him to be examined by K. Cheri Wiggins, M.D., CLCP, in an IME on July 8, 2020. Ex. 11:471. Dr. Wiggins took a medical history from Claimant, performed a records review (including imaging reports), and undertook a physical examination of Claimant. *Id.*

69. Dr. Wiggins noted in pertinent part as follows: "After the total knee arthroplasty, he [Claimant] continued to be limited by pain and weakness." *Id.* at 477. She characterized Claimant's prognosis as "poor for functional improvement at this time." *Id.*

70. As to causation, Dr. Wiggins opined in pertinent part as follows:

> Based upon the available information, to a reasonable degree of medical certainty, there is a causal relationship between Mr. Hopper's current complaints and the

> reported injury. Although Mr. Hopper had evidence of preexisting arthritis in both knees at the time of the injury, he only developed right knee pain after the fall on September 13, 2014. Dr. Schwartsman initially opined that the need for a right knee arthroplasty would not be industrially related, but he revised this opinion after reviewing Mr. Hopper's imaging studies in June 2017 due to the rapid progression of the arthritis in the knee. I agree with this assessment.
>
> The treatment outlined in the reviewed medical records, including the total knee arthroplasty, has all been causally related to his industrial injury.

Ex. 11:477-478.

71. For a permanent impairment evaluation of Claimant, Dr. Wiggins consulted the sixth edition of the *AMA Guides to the Evaluation of Permanent Impairment*. She assigned Claimant a 31% lower extremity impairment, which translates to a 12% whole person impairment. *Id.* at 478.

72. Dr. Wiggins stated her disagreement with Dr. Faciszewski's causation opinion, in pertinent as follows: "It is now almost six years from the injury and Mr. Hopper still has no complaints of pain in his left knee. If the degeneration was not industrially related, I would expect that his left knee would be causing significant pain and functional limitations by now, especially since the knees were quite similar at the time of injury. In my opinion, that is the strongest evidence that the injury of September 2014 led to Mr. Hopper's ongoing problems." *Id.*

73. For restrictions, Dr. Wiggins opined that Claimant should not climb ladders, stoop, squat, bend, crawl, or walk for more than 30 minutes in a two-hour period. *Id.* at 479.

74. In response to a question about MMI, Dr. Wiggins stated as follows: "I do believe Mr. Hopper is at MMI with regard to the knee injury of September 13, 2014. He has likely been at MMI since sometime between September 2018 and March 2019 [six to twelve months from the total arthroplasty surgery]." *Id.*

75. **Wiggins Deposition**. Claimant, through counsel, took the deposition of Dr. Wiggins on March 5, 2021. Wiggins Dep., 2:1-3.

76. Dr. Wiggins is a "locum tenens" physician, so she practices "all over." She is licensed in several states, including Idaho. At the time of her deposition, she had been working in Arizona. Wiggins Dep., 6:13-17.

77. Dr. Wiggins earned her medical doctorate from the University of Alabama School of Medicine; she stayed in Birmingham, Alabama for her internship and residency, training in physical medicine and rehabilitation. She is board certified (2005) in physical medicine and rehabilitation (physiatrist) and practices in that discipline. *Id.* at 7:8-24; Dep. Ex. A. In her practice she has routinely cared for patients with orthopedic injuries and conditions. Wiggins Dep., at 8:8-18. Dr. Wiggins also performs forensic medicolegal work, including IMEs. *Id.* at 9:4-6.

78. Dr. Wiggins opined that the industrial injury accelerated the progression of arthritis in Claimant's right knee, and thus the need for a total right knee arthroplasty was industrially related ("it appears that the injury accelerated the rate of degeneration significantly"). *Id.* at 22:20-23:24.

79. Dr. Wiggins compared Claimant's left knee to his right knee as follows:

> And from my perspective, that left knee serves as somewhat of a control; it's the normal knee. And the normal knee for him has some arthritis in it. So it's – from my perspective, it shows that the only difference is the injury to the right knee. And he has had significant progression of the arthritis, he has had significant changes, and he's had to undergo the total knee arthroplasty. And the only difference between the two knees has been the injury to the right one.

Id. at 28:13-21.

80. Dr. Wiggins explained the progression of arthritis in Claimant's right knee following his meniscus surgery as follows:

> Q. Okay. And so in layman's terms, can you explain what the rapid progression of the meniscus injury following his 2015 surgery was in Mr. Hopper's case?
>
> A. So the meniscus basically went from being a fully functional pad to a less functional pad when they clean it up. And then, essentially, he had nothing there. I

mean, they said it was stage four chondral lesion, which means that it's bone on bone.

So you'll hear people talk about bone on bone, and that's what happened in his case, was the fact that the meniscus had essentially worn away to the point that the two bony surfaces were contacting. And that's irritating to the bone and causes inflammation, causes pain, and so the meniscus essentially, was non-functional at that point.

Wiggins Dep., 31:3-18.

81. Dr. Wiggins testified as follows regarding the work restrictions she specified for Claimant:

Q. Okay. And in terms of work restrictions, you indicated that Mr. Hopper should not climb ladders, stoop, squat, bend, crawl, or walk more than 30 minutes in a 2-hour period. Would you impose any restrictions with respect to the amount of weight that he should lift or carry?

A. He shouldn't be caring more than about 30 pounds, maybe 50 pounds occasionally. He says that sometimes he tries to carry more if he holds his legs stiff and tries to walk, but it does put him at risk for falling. I think physically he's probably capable of carrying a little bit more, but the risks associated with that is high; so he shouldn't be doing it.

Q. Okay. And what about sitting? I know subjectively he talked to you about problems with sitting. Would you have any limitations there?

A. If he were to do something that required sitting for long periods of time, he would require the ability to stand every 15 to 30 minutes for 30 seconds to a minute just to stretch the leg out.

Id. at 34:9-35:3.

82. Dr. Wiggins summarized her opinion on causality as follows:

Q. Okay. Doctor, I want you – I mean, I've asked you several questions today, but I'd like you just to put in your own words why you feel the total knee replacement was necessitated by the September 2014 injury.

A. Okay. So Mr. Hopper had mild arthritis/moderate arthritis in both knees at the time of the injury in 2014.

After that, he sustained a meniscal injury, which was surgically repaired. It was complicated by the popliteal leak, and we were – and his orthopedic surgeon was aware that he had some degenerative changes at that time, but when he came back a year later, he had progressed significantly, which shows that the right knee

was progressing at a much more rapid rate than the left, and he developed severe arthritis that required the total knee arthroplasty.

And that's not an unusual pattern, in my experience. So that someone is injured, they developed some damage to the joint, and then the joint deteriorates rapidly. So he had a total knee arthroplasty, which gave him a new knee joint, but it's not as functional as his original knee joint, obviously, and he has some limitations. And he, also, still has some limitations as a result of the damage from the popliteal cyst with the muscle and nerve loss.

So the whole picture makes sense in a trajectory -- as when I look at the big picture. You know, meniscal injury, worsening of arthritis, total knee arthroplasty, functional limitations, it all fits.

Wiggins Dep., 35:10-14; 10:16-36:15.

83. Dr. Wiggins admitted that she does not have surgical training and that she is not an orthopedic surgeon. *Id.* at 39:17-21.

84. Defendant's counsel challenged Dr. Wiggins on her assertion that Claimant had mild arthritis in the knee, as follows:

Q. Now, you said that he had mild arthritis in the knee, but according to the MRI that was taken on February 13th, 2015, he had tricompartmental osteoarthritis in the right knee.

Would you characterize tricompartmental osteoarthritis as mild arthritis?

A. Tricompartmental refers to the anatomy; so it doesn't refer to the severity. the knee has three compartments, so he had arthritis in all three compartments, but that was referring more to the anatomy than to the severity.

Q. Right. But I guess what I'm saying is you can't state how severe it was based on your review because you never reviewed the study.

A. That is correct, yes.

Id. at 43:6-16; 44:6-9.

85. Defendant's counsel also challenged Dr. Wiggins on her credentials to make an opinion on causation, as follows:

Q. Yeah. And where your focus [as a physiatrist] is more on the function, it really is, I guess, a little outside of your area of expertise to be making statements about causation, correct?

A. Absolutely not.

A. I do this all the time.

Q. I mean, you're not an orthopedic surgeon, correct?

A. That's correct.
Q. And your focus, you just said, is more on function. So, I mean, isn't it a little outside of your area of expertise to be stating opinions on whether this knee replacement surgery was caused by an industrial accident.
A. Absolutely not. That's totally within what I do. It's what I do all the time. I don't have to be an orthopedic surgeon in order to know that an injury resulted in arthritis. We do non-operative orthopedics.

Wiggins Dep., *52:24-53:3; 53:5; 5310-17; 53:19-23.*

86. **Porter Vocational Evaluation Report**. Claimant, through counsel, hired Delyn D. Porter, M.A., CRC, CIWCS, to prepare a vocational evaluation report concerning Claimant. He delivered the report on December 30, 2020. Ex. 12:482.

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

88. To prepare his report, Mr. Porter interviewed Claimant on December 17, 2020. *Id.* He also reviewed the following materials and evidence: Idaho Industrial Commission records; Surety records; AMA *Guides*, 6th Ed.; Idaho Department of Labor vocational information; *Dictionary of Occupational Titles*; O*NET; Idaho Career Information Systems (eCIS); *Selected Characteristics 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 483. He further reviewed all relevant medical records pertaining to Claimant's injury. *Id.* at 482-483.

89. Mr. Porter recounted Claimant's family and social history, noting that Claimant had spent the majority of his working life in welding. *Id.* at 494. In the section entitled "Work History,"

Mr. Porter noted that Claimant had 40 years of experience working as a certified welder and fabricator. *Id.* at 495.

90. Based upon his review of Industrial Commission records, Mr. Porter determined that Claimant had been referred to the Industrial Commission Rehabilitation Division (ICRD) following his 2006 industrial right wrist injury, but he was not referred to the ICRD following the 2014 industrial accident. Ex. 12:494. Claimant did not apply for services through the Idaho Division of Vocational Rehabilitation. *Id.* at 495.

91. Mr. Porter consulted the Dictionary of Occupational Titles to select the job occupations relevant to Claimant's working career. He identified the following: maintenance mechanic; welder, combination; structural steel worker; construction equipment mechanic; diesel mechanic; and automobile body repairer. *Id.* at 496-498.

92. For a transferable skills analysis, Mr. Porter first analyzed Claimant's specific vocational preparation (SVP). He determined that Claimant's work history demonstrated a level 7 (skilled) SVP, which requires 2 to 4 years of training/preparation. He thus concluded that Claimant was capable of working in SVP categories of 1 (unskilled) to 7 (skilled). *Id.* at 499.

93. Mr. Porter observed that the work restrictions assigned by Dr. Schwartsman on February 19, 2019, which included no squatting, no kneeling, and no work on ladders or uneven surfaces, together with no lifting over 30 pounds, placed Mr. Hopper in a limited light physical demand work capacity post-injury. *Id.* at 500-501.[4]

94. The permanent work restrictions assigned by Dr. Wiggins, which consisted of no climbing ladders, no stooping, no squatting, no bending, no crawling, and no walking for more

[4] These restrictions, however, were temporary and were issued before February 19, 2019, because when Dr. Schwartsman released Claimant from his care on February 19, 2019, he stated that Claimant had "no restrictions."

than 30 minutes in a 2-hour period, in Mr. Porter's opinion, placed Claimant in a sedentary physical demand work capacity post-injury. Ex. 12:501.

95. Based upon these restrictions, Mr. Porter concluded as follows:

> The permanent restrictions identified by Dr. Schwartsman, and Dr. Wiggins would not be compatible with the time of injury job or with his similar employment with Glanbia.
> The assigned restrictions would also preclude Mr. Hopper from returning to his past jobs in welding/fabrication, auto body repair, and heavy equipment mechanical work.
> Using the medical opinions of Dr. Schwartsman and Dr. Wiggins, Mr. Hopper has sustained a very significant labor market loss and has suffered disability in excess of impairment.

Ex. 12:501.

96. Mr. Porter observed as follows with regard to Claimant's general education development (GED) level: "Based upon Mr. Hopper's formal educational history, I would place his Formal Education GED at Level (3) High School Graduate – with less demanding curriculum." *Id.* at 502. For the "experience" component of GED, Mr. Porter, based upon Claimant's extensive skilled work history, placed him at GED Level (4), successful work experience in organized technology. *Id.*

97. Mr. Porter identified Claimant's labor market area as a 50-mile radius from his residence in Shoshone, which is included in the South-Central Idaho labor market as defined by the Idaho Department of Labor. *Id.*

98. For a pre and post labor market access analysis, Mr. Porter determined, first, that prior to the industrial injury, Claimant had access to 4,500 jobs in his labor market, including 530 jobs in the category of "welders, cutters, soldiers, and brazers." Using the work restrictions assigned by Dr. Schwartsman, Mr. Porter determined that Claimant had access, post-injury, to 1,285 total jobs. This results in a 71.4% loss of labor market access. *Id.* at 506. Using the work

restrictions assigned by Dr. Wiggins, Mr. Porter determined that Claimant had access, post-injury, to 225 jobs in his labor market area. This results in a 95% labor market loss, post-injury. Ex. 12:507.

99. For a pre and post wage capacity analysis, Mr. Porter concluded, first, that prior to the industrial injury Claimant had an average wage of $24.88, inclusive of benefits. Using the restrictions from Dr. Schwartsman and the 2019 Occupational Employment and Wage Report for Southeast-Central Idaho labor market, Claimant had an average wage-earning capacity, post-injury, of $16.69 per hour. This would result in a wage-earning capacity loss of 32.9%. Using the restrictions from Dr. Wiggins, Claimant would have a post-injury average wage of $20.19. Because the restrictions from Dr. Wiggins would essentially limit Claimant to part-time work, Claimant would sustain wage earning capacity loss of 59.4% using those restrictions. *Id.* at 508-509.

100. Mr. Porter calculated the permanent partial disability (PPD) of Claimant using Dr. Schwartsman's restrictions as follows: "Using the opinions of Dr. Schwartsman and weighing labor market loss heavier than wage-loss in this case (due to the fact that he lost access to more than 7 out of 10 jobs he was qualified to pursue pre-injury), Mr. Hopper has sustained calculated permanent partial disability (PPD) of 70.0% inclusive of impairment." *Id.* at 510.

101. Using the restrictions assigned by Dr. Wiggins, Mr. Porter noted that this would result in at least a 95% labor market loss post-injury. Based upon all the medical and non-medical factors, Mr. Porter determined in this scenario that a viable competitive labor market no longer exists for Claimant. He opined that it would take a sympathetic employer or super-human efforts on Claimant's part to secure competitive employment, within these work restrictions. Thus, he

concluded that Claimant met the criteria for total and permanent disability under the Odd-Lot Doctrine. Ex. 12:510-511.

102. **Credibility**. Claimant generally testified credibly.

103. **Claimant's Condition and Job Status After Total Knee Surgery**. Claimant quit his job with Chobani fourteen months after his total right knee arthroplasty in April 2019. He did so because he did not feel capable of performing the job anymore. Tr., 89:17-22. Since that time he has not applied for any jobs. *Id.* at 89:25-90:2.

104. After the knee replacement, Claimant used a walker for about a week, then he switched to using walking sticks. *Id.* at 97:1-8. In terms of walking, Claimant stated as follows: "Like I said earlier, there is sometimes when I can walk 50 feet, 100 feet, sometimes 200 feet." *Id.* at 98:7-9. For chores around his farm, Claimant stated as follows: "I'm real slow. I'm real slow. A lot of it I just can't do. I'm lucky that I have friends that come over and help me." *Id.* at 71:14-16.

DISCUSSION AND FURTHER FINDINGS

105. 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).

106. **Causation**. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this

burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

107. Claimant carries the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (*quoting Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (*quoting Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put another way, the "claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (*quoting Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995)). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (*quoting Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting *Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

108. If an industrial accident causes aggravation, exacerbation, or acceleration of a preexisting condition, the condition is compensable. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 596 (1994). Thus, a preexisting disease or infirmity

does not preclude causation if the employment aggravated, accelerated or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P2d 629, 631 (1983).

109. There is no dispute that Claimant had preexisting osteoarthritis in both knees, that was likely exacerbated by the meniscus surgeries that Claimant had in the 1980s, as Dr. Faciszewski suggested. Faciszewski Dep., 22:14-24. Defendants argue, therefore, that the need for Claimant's right knee total arthroplasty was due entirely to this preexisting condition and the industrial accident did not contribute to the need for surgery. Nevertheless, the preponderance of the evidence supports a finding that the 2014 industrial accident, at least in part, aggravated, accelerated or combined with Claimant's preexisting osteoarthritis to create the need for the right knee total arthroplasty performed in 2018.

110. Both Claimant's knees were asymptomatic for decades following his original meniscus arthroscopic surgeries in the 1980s. From the time of those surgeries in the 1980s until his industrial accident on September 13, 2014, Claimant sought no medical treatment for either of his knees during this time period. Furthermore, during this time period he engaged in heavy physical activities, including performing his various jobs like welding, as well as physical pastimes such as playing basketball, running, waterskiing, and managing his home farm with care of livestock. Tr., 69:14-16; 69:23-71:3.

111. This history belies Dr. Faciszewski's opinion that the acceleration and/or exacerbation of Claimant's preexisting arthritis was due solely to the meniscus arthroscopic surgeries from the 1980s. The lack of pain or other symptomatology in Claimant's knees during this time period contradicts the argument that Claimant's right knee problem necessitating total arthroplasty was all due to a preexisting condition. Rather, as Dr. McKee observed, "This

degeneration is not from his fall, however the fall aggravated his osteoarthritis." Ex. 4 at 111. As Dr. Wiggins observed in her IME, "Although Mr. Hopper had evidence of preexisting arthritis in both knees at the time of injury, he only developed right knee pain after the fall on September 13, 2014." Ex. 11:477-478.

112. Moreover, the meniscectomy surgery itself, which Defendants concede was industrially related, likely had a role in accelerating or exacerbating Claimant's osteoarthritis in his right knee. On May 24, 2016, Dr. Schwartsman noted:

> He may be rapidly reaching maximum medical improvement here from the standpoint of his work-related condition, which is the meniscal tear and the calf hematoma… There is a need for a total knee arthroplasty here; however, the patient did have grade 4 chronic chondral changes prior to the surgery. As such, the need for total knee arthroplasty here would be nonindustrial and pre-existing.

Ex. 7 at 425. On June 21, 2016 Dr. Schwartsman reiterated, "the patient and I reviewed the fact that he has pre-existing grade 4 chondral changes in the medial compartment. This does point to the need for total knee arthroplasty on a nonindustrial pre-existing basis." *Id.* at 426. However, by June 1, 2017, almost a year later, Claimant's physical findings had evolved, causing Dr. Schwartsman to offer a slightly different opinion on the contribution of the accident/meniscus surgery to the need for the total knee replacement; "[e]ven though the patient did have grade 4 chronic chondral changes at the time of his arthroscopy, he has had a rather rapid progression and collapse of the medial compartment suggesting that to a reasonable degree of certainty at least a portion of the need for total knee arthroplasty in this case is related to accelerated progression of degenerative changes following his industrial accident." Ex. 7 at 428.[5] Dr. Schwartsman further

[5] Here it must be acknowledged that Dr. Schwartsman changed his opinion on whether the total arthroplasty was industrially related, earlier stating that "the need for total knee arthroplasty here would be nonindustrial and pre-existing." Ex. 7 at 425. Nevertheless, Dr. Schwartsman had a valid reason for changing his opinion, namely the rapid progression of osteoarthritis in Claimant's right knee following the meniscectomy, as demonstrated in imaging studies in June 2017, that was not mirrored in Claimant's left knee. *See*, Ex. 11:477-478 (Wiggins IME).

noted that "there's general consensus in orthopedics that there is accelerated change after loss of the meniscus." Schwartsman Dep., 17:18-22.

113. Furthermore, while both of Claimant's knees had osteoarthritis, only the right knee became severely symptomatic and only after the industrial accident, in which the physical structure of Claimant's right knee was altered through the meniscus tear. As Dr. Wiggins observed, "the left knee serves as somewhat of a control; it's the normal knee. And the normal knee has some arthritis in it. So it's – from my perspective, it shows the only difference is the injury to the right knee." Wiggins Dep., 28:13-21.

114. Finally, the majority of medical authorities in this case – Dr. McKee, Dr. Schwartsman, and Dr. Wiggins have opined that the industrial accident aggravated Claimant's preexisting osteoarthritis in his right knee, compared to one physician, Dr. Faciszewski, who did not. Additionally, two of those physicians, Dr. Schwartsman and Dr. Wiggins, specifically related the industrial accident to the need for the total right knee arthroplasty, again compared to Dr. Faciszewski, who alone did not.

115. For all these foregoing reasons, the preponderance of the evidence supports a finding that the industrial accident aggravated or accelerated, at least in part, the need for Claimant's right knee total arthroplasty, despite his preexisting osteoarthritis in the knee. Claimant's right knee total arthroplasty, therefore, is compensable.

116. **Medical Treatment**. An employer shall provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). A "reasonable time" includes the period of recovery before medical stability but may include a longer period. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Reasonable medical treatment benefits may continue

for life; there is no statute of limitation on the duration of medical benefits under Idaho Workers' Compensation Law.

117. A claimant bears the burden of showing that medical treatment required by a physician is reasonable. Idaho Code § 72-432(1). A claimant must support his or her workers' compensation claim with medical testimony that has a reasonable degree of medical probability. *Hope v. ISIF*, 157 Idaho 567, 572, 338 P.3d 546, 552 (2014), *citing Sykes v. CP Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980). The reasonableness of treatment is dependent upon the totality of the facts and circumstances of the individual being treated. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). Totality of the facts and circumstances is a factual determination, but not a retrospective analysis with the benefit of hindsight. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

118. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

119. All the medical authorities in this case, including Dr. Faciszewski, agreed that the treatment of a total arthroplasty surgery for Claimant's left knee was required. Such treatment, including necessary pre-operative and post-operative care, was not only necessary but reasonable.

As such, these expenses must be reimbursed by Defendants. These expenses are compensable pursuant to Idaho Code § 72-432. Pursuant to *Neal v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred, and that Defendants did not reimburse.

120. **Medical Stability**. Medical stability, or MMI, "essentially means that a worker has achieved the fullest reasonably expected recovery with respect to a work-related injury." *Perkins v. Jayco*, 905 N.E.2d 1085, 1088-1089 (Ind. App. 2009). A claimant attains MMI on the "date after which further recovery from, or lasting improvement to, an injury can no longer reasonably be anticipated, based upon reasonable medical probability." *Lemmer v. Urban Electrical, Inc.*, 947 So.2d 1196, 1198 (Fla. App. 2007). "A finding of MMI is precluded where treatment is being provided with a reasonable expectation that it will bring about some degree of recovery, even if treatment ultimately proves ineffective." *Lemmer*, 947 So.2d at 1198. In determining whether a claimant has reached MMI, the fact finder may consider such factors as a return to work, the extent of the injury, and, most importantly, whether medical evidence or testimony shows that the injury has actually stabilized. *See, Westin Hotel v. Industrial Comm'n of Illinois*, 865 N.E.2d 342, 356 (Ill. App. 2007).

121. Claimant underwent total right knee arthroplasty surgery on March 12, 2018. Ex. 7:430-431. Dr. Schwartsman noted on November 8, 2018 that Claimant "is likely to take a full year [from surgery] to reach maximum medical improvement." *Id.* at 446. Dr. Wiggins, in her IME, opined that Claimant reached MMI sometime "between September 2018 and March 2019," Ex. 11:479, which would be consistent with six months to one year following surgery. On February 19, 2019, Dr. Schwartsman released Claimant from his care, stating that he would see him back in

two years, and declaring that Claimant "has no restriction from my standpoint," other than to avoid using a snowblower for extended periods of time. Ex. 7:448.

122. It is reasonable to find that Claimant reached medical stability from his right knee arthroplasty on or about February 19, 2019, the date that Dr. Schwartsman released Claimant from his care.

123. **Temporary Disability Benefits**. Disability, for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-102(11). Temporary partial and total disability entitlement are evaluated according to statute. Idaho Code § 72-408. It is payable throughout the period of recovery to the date of MMI. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Idaho Code § 72-102 (11) defines "disability" for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

124. Surety paid temporary disability benefits to Claimant during the periods of recovery following his covered arthroscopic meniscus surgery and popliteal cyst removal surgery; Surety paid Claimant a total of $16,082.89 in TTD/TPD benefits for these respective periods. Ex. 2:54.

Nevertheless, Defendants did not pay Claimant TTD/TPD benefits for his period of recovery following his right knee total arthroplasty surgery on March 12, 2018.

125. Because the right knee total arthroplasty is a covered medical benefit, Claimant is entitled to recover total temporary disability benefits for his period of recovery following that surgery. Accordingly, Claimant is entitled to total temporary disability benefits from and on March 12, 2018 through February 19, 2019, the date he reached MMI.

126. **Permanent Partial Impairment (PPI).** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

127. After he determined that Claimant reached MMI, Dr. Schwartsman assigned a 2% impairment of the lower extremity (equates to a 1% whole person PPI) with no apportionment to Claimant following his recovery from arthroscopic meniscus surgery of the right knee on August 2, 2016. Ex. 7:427. Dr. Faciszewski in his IME agreed with Dr. Schwartsman's assignment of PPI. Ex. 10:467. After he performed the total right knee arthroplasty on Claimant, Dr. Schwartsman did not assign any further PPI.

128. The only physician in the record to assign PPI to Claimant *after* he recovered from his right knee total arthroplasty surgery was Dr. Wiggins. *See*, Ex. 11:478. Consulting the 6th Edition of *The Guides*, Dr. Wiggins assigned a 31% lower extremity impairment to Claimant, which equates to a 12% whole person impairment. Because the impairment rating assigned by Dr. Wiggins is the only rating in the record that considered the right knee total arthroplasty surgery, it will be adopted by the Commission.[6]

129. Claimant sustained a 31% lower extremity impairment on account of his industrial injury and right knee total arthroplasty surgery. This impairment equates to a 12% whole person impairment.

130. **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.

131. 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).

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[6] This is despite the fact that all experts agreed that Claimant had preexisting degeneration in the right knee.

132. 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).

133. Total permanent disability may be established using either the 100% method or the Odd-Lot Doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the Odd-Lot Doctrine, Claimant must show he was so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

134. Claimant has the burden of proving Odd-Lot status. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). He may establish total permanent disability under the Odd-Lot Doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

135. *Evaluating the Vocational Evidence*. There is only one vocational expert who has provided a report for the record, Mr. Porter. Unfortunately, there are serious flaws with his vocational analysis that make it unreliable, as explained below.

136. First, although he acknowledged that Claimant suffered a right wrist injury in 2006, Ex. 12:495, nevertheless Mr. Porter inappropriately included 530 welding and similar jobs, which Claimant's right wrist injury excluded, in Claimant's pre-labor market access analysis. *Id.* at 505. This distorted the number of jobs that Claimant had access to in his labor market, bringing it to a total of 4,500 labor positions, when the correct total should have been 3,970. *Id.* at 506.

137. Second, Mr. Porter incorrectly attributed to Dr. Schwartsman certain permanent work restrictions (no squatting, no kneeling, and no work on ladders or uneven surfaces, together with no lifting over 30 pounds)[7] that he did not assign at the conclusion of treatment of the right knee. Rather, Dr. Schwartsman stated on February 19, 2019 that "he [Claimant] has no restrictions from my standpoint." Ex. 7:448. This led to Mr. Porter including Dr. Schwartsman's supposed restrictions in his vocational analysis and determining that they resulted in both a job market and wage capacity loss. What Mr. Porter should have stated is that based upon Dr. Schwartsman's lack of work restrictions, Claimant had no PPD.

138. Third, and more impactful on the accuracy of his analysis, Mr. Porter failed to consider Claimant's permanent and total disability in light of all of his physical impairments, as required by Idaho Code § 72-406 and *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). Specifically, Mr. Porter failed to consider the impact of Claimant's preexisting osteoarthritis on his right knee, despite the fact that Dr. Schwartsman admitted that 90% of Claimant's right knee condition was due to preexisting osteoarthritis and only 10% was attributable

[7] These were earlier, temporary restrictions assigned by Dr. Schwartsman. *See, e.g.*, Ex. 7:442.

to the industrial accident. Schwartsman Dep., 41:21-42:16. Furthermore, although he acknowledged that Claimant suffered the injury, Mr. Porter entirely failed to consider the impact of Claimant's right wrist injury from 2006 on his overall disability, despite the fact that Claimant's physician at the time opined that he could no longer weld because of it.[8]

139. Fourth, Mr. Porter's Odd-Lot analysis was unconvincing. *See*, Ex. 12:509-510. Mr. Porter first contended that Claimant attempted other types of employment by returning to Employer after the industrial accident and then becoming employed with Chobani. Nevertheless, following his right knee total arthroplasty on March 12, 2018, Claimant did not work again and resigned from Chobani (where he had been on leave) on April 1, 2019. The real test of other employment followed Claimant's total knee surgery. He did not attempt other employment. Furthermore, there is no evidence that Claimant consulted the ICRD, Division of Vocational Rehabilitation, or other career/vocational counseling to obtain work, or that he engaged in his own job search. Finally, Mr. Porter opined that it would take a sympathetic employer for Claimant to become employed again and that it would be futile for him to attempt to secure competitive employment, in light of Dr. Wiggins' restrictions. Nevertheless, Mr. Porter identified 95 positions in his job market for "first-line supervisors of mechanics, installers, and repairers," which would be within the restrictions identified by Dr. Wiggins. Ex. 12 at 507. Such a supervisor would not be called upon to engage in heavy physical labor but rather direct and supervise those who do. Thus, it would not be futile for Claimant to seek work and he would not need a sympathetic employer to find employment.

140. In light of all the problems with Mr. Porter's vocational analysis, the Commission

[8] Welding was the majority of Claimant's career prior to when he began work as a maintenance mechanic for Employer in 2008. Tr., 24:23-27:8; Ex. 1:33-36.

will not rely upon it in determining the extent of Claimant's disability in excess of impairment. The report is not helpful to the finder of fact in resolving disability in this case. Instead, the Commission relies on Dr. Schwartsman's evaluation of Claimant's accident produced restrictions to inform the Commission's assessment of Claimant's disability. Dr. Schwartsman's testimony and records persuasively show that Claimant reasonably has no restrictions referable to the subject accident. Dr. Schwartsman was Claimant's treating physician and surgeon and was better placed than Dr. Wiggins, an IME physician, to assess Claimant's physical capabilities. Despite Claimant's subjective complaints of pain and difficulty ambulating, Dr. Schwartsman assessed and released Claimant without any work restrictions. During Claimant's postoperative treatment, Dr. Schwartsman did take into account the fact that Claimant complained of pain, noting "[h]e does have a slow recovery because of issues with muscle tightness. He is having a lot of pain in his rectus femoris tracking all the way up to the origin. The patient is noted to have some tightness in that." Ex. 7 at 446. On February 19, 2019, Dr. Schwartsman noted "[Claimant] is reporting some pain today," yet he also noted that "[t]he patient is doing well with 0 to 125 degrees of flexion-extension." Ex. 7 at 448. From that same visit, Dr. Schwartsman noted that, "[t]he patient has an otherwise normal gait pattern. Range of motion is well-maintained." *Id.* After following Claimant for nearly a year status post his right total knee arthroplasty, Dr. Schwartsman concluded that no work restrictions were necessary and released Claimant from his care on February 19, 2019, with the plan of seeing him in two years for repeat X-rays of the right knee. *Id.* Without work restrictions which impede his ability to engage in physical activities, Claimant's disability is no greater than his impairment.

141. Further, Claimant was seen again by Dr. Schwartsman on March 19, 2020. During that visit, Dr. Schwarstman noted that Claimant was complaining of pain down the right leg and

pain in the sciatic nerve distribution of the right leg. Ex. 7 at 450. Dr. Schwartsman obtained X-rays of the right knee and determined that, "X-rays showed prosthetic components in excellent position. No evidence of loosening." Ex. 7 at 451. The plan was then "for an MRI of the lumbar spine to look for disc herniation. Assuming that the patient is cleared from the standpoint of his lumbar spine, the recommendation would be to proceed with a right total hip arthroplasty." *Id.* While this note does not indicate what the specific source of Claimant's pain is, it does suggest that it is something other than his right knee, which was determined to be stable. *Id.*

142. Given these considerations, Claimant has no disability in excess of his impairment and is not totally and permanently disabled.

CONCLUSIONS OF LAW

1. Claimant has established a causal link between the industrial accident and his right knee total arthroplasty surgery.

2. Claimant is entitled to recover medical expenses incurred in connection with his right knee total arthroplasty surgery, including preoperative and postoperative care. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred, and that Defendants did not reimburse.

3. Claimant reached medical stability from his right knee arthroplasty on or about February 19, 2019.

4. Claimant is entitled to total temporary disability benefits from and on March 12, 2018 through February 19, 2019,

5. Claimant sustained a 31% lower extremity impairment on account of his industrial injury and right knee total arthroplasty surgery. This impairment equates to a 12% whole person impairment.

6. Claimant is not totally and permanently disabled.

7. Claimant does not have disability in excess of his impairment.

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 3rd day of September, 2021.

INDUSTRIAL COMMISSION

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2021, 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:

TAYLOR MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE ID 83702
taylor@mossmanlaw.us

DAVID P GARDNER
412 W. CENTER, STE. 2000
POCATELLO ID 83204
dgardner@hawleytroxell.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK HOPPER, Claimant, v. GLANBIA FOODS, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Surety, Defendants.	**IC 2014-025563** **ORDER** FILED INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John 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 established a causal link between the industrial accident and his right knee total arthroplasty surgery.
2. Claimant is entitled to recover medical expenses incurred in connection with his right knee total arthroplasty surgery, including preoperative and postoperative care. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred, and that Defendants did not reimburse.

3. Claimant reached medical stability from his right knee arthroplasty on or about February 19, 2019.
4. Claimant is entitled to total temporary disability benefits from and on March 12, 2018 through February 19, 2019,
5. Claimant sustained a 31% lower extremity impairment on account of his industrial injury and right knee total arthroplasty surgery. This impairment equates to a 12% whole person impairment.
6. Claimant is not totally and permanently disabled.
7. Claimant does not have disability in excess of his impairment.
8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 2nd day of September, 2021.

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

For the following reasons, I respectfully dissent.

I respectfully dissent from the majority's decision finding that Claimant has established a causal link between the industrial accident and his right knee total arthroplasty ("TKA") surgery.

First, I would hold that Claimant's need for a right knee total arthroplasty was due to his preexisting osteoarthritis and that this need for the TKA preexisted the industrial accident. Medical care for an injured worker is compensable if competent medical testimony establishes that the accident caused the need for the stated treatment. *Langley v. State of Idaho Industrial Special Indemnity Fund*, 126 Idaho 781,890 P.2d 732 (1995). Dr. McKee, Dr. Faciszewski, and Dr. Schwartsman all opined that there was a need for a right total knee replacement surgery, but that this need was unrelated to the industrial accident of September 13, 2014.

Dr. McKee suggested a need for a total knee replacement after meeting with Claimant on March 17, 2015. *See* Ex. 4 at 114. Dr. McKee stated that Claimant had end-stage degeneration in both knees with symptoms worse on the right. Ex. 4 at 111. Further, Dr. McKee noted that the degeneration was not from the industrial accident, but "the fall aggravated his osteoarthritis." *Id.* Of note is the fact that Dr. McKee did not mention that he reviewed the MRI images, which suggests that he was unaware of Claimant's acute meniscus tear, which would have been the likely cause of Claimant's increased right knee pain at the time. On May 24, 2016, Dr. Schwartsman stated, "There is a need for a total knee arthroplasty here; however, the patient did have grade 4 chronic chondral changes prior to the surgery. As such, the need for total knee arthroplasty here would be nonindustrial and pre-existing." Ex. 7 at 425. Dr. Faciszewski agreed with Dr. Schwartsman and stated:

> I do agree with Dr. Schwartsman's assessments from August 20, 2015, through August 2, 2016, that the need for total knee arthroplasty would be nonindustrial in nature due to the pre-existing grade 4 chondral changes in the medial compartment as well as the additional two compartments of the knee. The

> claimant was able to return to full duty full time following his knee arthroscopy and hematoma debridement surgeries.

Ex. 10 at 467. Here, while it is clear that there was a need for Claimant's TKA, there is not enough competent medical testimony to establish that it was the work accident that caused the need for the stated treatment (the TKA).

On June 1, 2017, Dr. Schwartsman stated that, "to a reasonable degree of certainty at least a portion of the need for total knee arthroplasty in this case is related to accelerated progression of degenerative changes following his industrial accident." Ex. 7 at 428. This statement was made nearly two years after Claimant's initial visit with Dr. Schwartsman on August 20, 2015, where Dr. Schwartsman noted that Claimant had "Pre-existing underlying degenerative joint disease, right and left knee-**nonindustrial**-symmetrical." Ex. 7 at 403 (emphasis added). Over the next 21 months Dr. Schwartsman continued to reiterate that Claimant's need for a right TKA was not industrially related. Then on Claimant's office visit of June 1, 2017, Dr. Schwartsman changed his mind regarding causation. This shift in causation was contradictory to Dr. Schwartsman's earlier opinion that already established there was a need for a right total knee arthroplasty prior to the "accelerated progression of degenerative changes following [Claimant's] industrial accident." Claimant already had the need for a right TKA in 2015. Dr. Schwartsman's statement on June 1, 2017, that "at least a portion" of the need for the right TKA is related to the industrial accident is incongruous.

Second, the treatment that Claimant received from Dr. Schwartsman prior to his right TKA resolved all industrially related issues regarding Claimant's right knee. On August 2, 2016, after Dr. Schwartsman performed the right knee arthroscopy with partial medial meniscectomy, as well as the resection of traumatic calcified hematoma/popliteal cyst of the right leg, Claimant had been working full duty, and was placed at MMI and released to full duty. Ex. 7 at 427. Dr.

Schwartsman notes, "**On a nonindustrial basis**, the patient can follow-up for the total knee arthroplasty anytime at his convenience should symptoms become sufficiently activity limiting." *Id.* (emphasis added). Subsequent to Claimant's right knee arthroscopy and hematoma debridement surgeries, he continued working at Chobani in his same employment capacity without any permanent work restrictions until March 12, 2018, when he had surgery for his right total knee replacement.

Based on the foregoing, I would find that Claimant has failed to prove a causal link between the industrial accident and his right knee total arthroplasty surgery. As a result, he is not entitled to recover medical expenses incurred nor income benefits in connection with this treatment.

DATED this 2nd day of September, 2021.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and email upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE ID 83702
taylor@mossmanlaw.us

DAVID P GARDNER
412 W. CENTER, STE. 2000
POCATELLO ID 83204
dgardner@hawleytroxell.com

sc