BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ADAM BOEHLER, Claimant, v. HEGLAR CREEK ELECTRIC, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2017-011793** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED NOV 17 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Pocatello on November 22, 2022. Reed Larsen represented Claimant. Lyle Fuller represented Employer and Surety. Bren Mollerup represented ISIF. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on July 5, 2023. This matter is now ready for decision.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

3. Whether and to what extent Claimant is entitled to:

   a) Temporary disability,
   b) Permanent partial impairment,
   c) Permanent disability in excess of impairment, including 100% total permanent disability, and
   d) Medical care;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

5. Whether apportionment is appropriate under Idaho Code § 72-406;

6. Whether ISIF is liable under Idaho Code § 72-332; and

7. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends that the subject accident occurred on April 3, 2017. After digging a trench, he knelt and injured his left knee. He has worked as an electrician throughout his adult life. He opened and closed his own electrical business, and he returned to working as an electrician for successive employers. Low back and right knee pain preexisted the subject accident. Other injuries and conditions also preexisted the subject accident. An MRI in July 2017 showed a left knee meniscus tear. He tried to work, but incurred time loss and required medical care. He suffered 31% permanent impairment. He qualifies as an odd-lot worker. Where only one of three prongs is necessary Claimant has satisfied all three. First, Claimant unsuccessfully tried other work when he drove beet truck during the harvest. Second, Claimant looked for work. Defendants' implications that Claimant's job search was inadequate are illusory; Claimant correctly was honest about limitations when he contacted potential employers. Third, attempts to find work are futile. Ms. Eby has opined that a job search for Claimant is "a waste of time." The

combination of this injury and preexisting injuries has left him totally and permanently disabled. *Carey* apportionment should be based upon 5% permanent partial impairment for the subject accident and 26% for the qualifying preexisting conditions.

Employer and Surety contend Claimant has failed to establish odd-lot status. He is not 100% totally and permanently disabled. Thus, apportionment for preexisting conditions is appropriate under Idaho Code § 72-406. Claimant has elected to retire on Social Security, PERSI, and/or other income sources despite his ability to work specific, suitable, and available jobs. His intention is shown by his belated, half-hearted, and unmotivated job search. Physicians have not issued specific restrictions. Claimant golfs frequently and cares for his farm and rental properties. He is physically capable of work and activity he wants to do. Alternately, if the Commission finds Claimant totally and permanently disabled, despite the totality of the evidence, *Carey* apportionment of the nonmedical 69% permanent partial disability would assign 11% permanent partial disability to Employer and 58% to ISIF.

ISIF contends Claimant failed to carry his burden of proof to establish total and permanent disability by either method. Claimant suffered an industrially related 5% permanent partial impairment in his left knee, and another 5% permanent partial impairment in his left knee was preexisting. Claimant's right knee and low back were rated at 14% and 7% respectively from prior conditions. He is not 100% disabled. Odd-lot prerequisites have not been satisfied, so he does not qualify that way. Even if he is deemed to have so qualified, actual jobs are present which he could work if he wanted to. Dr. Tallerico opined Claimant could not return to work as a journeyman electrician, but he did not opine against other jobs. Moreover, Dr. Tallerico opined Claimant's *right* knee, not his left, is the primary reason he cannot return to work as an electrician. He golfs

and attends high school sporting events which appear to require more sitting and walking than Claimant represents he is capable of doing. Lee Barton has identified many jobs Claimant can do. Cali Eby offered only superficial conclusions which she could not defend in post-hearing deposition.

ISIF further contends that the four factors required to determine ISIF liability have not been established. Claimant fails the *Bybee* "but-for" test and cannot show the prior and accident-related conditions combined to cause total and permanent disability. Moreover, Claimant's right knee condition had not recovered to maximum medical improvement before the date of the subject accident and should not be rated as a manifest, hindering, preexisting condition. Claimant testified that the preexisting condition of his left knee was not manifest nor a hindrance before the subject accident. What degeneration is seen after years since the subject accident is not relevant.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and of his wife Tamara Boehler;
2. Joint exhibits 1 through 69; and
3. Post-hearing depositions of Brian Tallerico, M.D., and of vocational experts Leroy "Lee" Barton III and Cali Eby.

Objections on page 23 of Ms. Eby's deposition are SUSTAINED. All other objections and motions to strike raised in post-hearing depositions are OVERRULED and DENIED.

The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

FINDINGS OF FACT

Introduction and Accident

1. On April 3, 2017, Claimant was digging trenches to lay conduit. Hearing

Transcript ("Tr.") 47-48. As he knelt to connect conduit he "felt [a] pop" under his kneecap. *Id.* He finished working that day. A "couple of days later" it swelled and required medical attention. *Id.*

2. On April 12, 2017, Claimant visited James Retmier, M.D. for left knee pain. Claimant's Exhibit ("Ex.") 33:730. Dr. Retmier had been treating Claimant for various conditions for several years. Claimant generally described a "popping sensation" at work on April 3 and again at work one week later. Ex. 33:730, 740. X-rays showed chondrocalcinosis but were unrevealing for acute injury. Ex. 33:730, 737. In deposition Brian Tallerico, D.O. explained that chondrocalcinosis is a crystal calcification of the meniscus which makes the meniscus brittle and more subject to tearing. Deposition of Dr. Brian Tallerico ("Tallerico Dep."), 15. An MRI was ordered then, but not approved and performed until July 21. Ex. 33:737, 759.

3. On July 21, 2017, the MRI showed a torn medial meniscus. Ex. 33:757, 759, 761. Dr. Retmier released Claimant from work. Ex. 33:763. Claimant continued to work for Employer.

4. On July 22, 2017, Dr. Tallerico conducted a forensic examination as he had done in November 2012 for Claimant's *right* knee. Ex. 34:804, 808. He reviewed additional, more recent records and examined Claimant. Ex. 34:802-805. Dr. Tallerico expressed confusion about which knee he was asked to evaluate, having evaluated the right knee so long ago and having no instructions regarding a left knee evaluation. Ex. 34:804. Claimant complained of right knee symptoms greater than left knee symptoms. Ex. 35:812; Ex. 38:840; Ex. 52:1180. The examination showed mild deficits, greater on right, consistent with Claimant's reports. Dr. Tallerico opined that Claimant's right knee was not at MMI, that Claimant's right knee replacement had failed, and that it needed revision. Ex. 34:808. Dr. Tallerico opined that Claimant did not require restrictions at

that time but might after the revision surgery. Ex. 34:809. Claimant continued to work for Employer.

5. On August 31, 2017, Aaron Altenburg, M.D. evaluated the need for a right knee revision. Ex. 35:817. Upon examination, Dr. Altenburg also noted that Claimant's right knee appeared worse than his left. Ex. 35:816. He opined that Claimant exacerbated underlying degeneration in his left knee at the time of the April 2017 industrial accident. Ex. 35:817. He recommended conservative treatment and a possible left TKR when Claimant's left knee got bad enough. Ex. 35:817, 820-21.

6. At some point Employer began informally accommodating Claimant's knee issues with lighter work. In deposition, Claimant described it thusly: "Well, I got demoted to shop boy." Deposition of Adam Boehler October 30, 2020, ("Third Boehler Dep."), 19-20. This was perhaps about December 2017 or January 2018 when Claimant began considering right knee surgery to be performed sooner rather than indefinitely later. *Id.*

7. On January 30, 2018, after Claimant's condition had not significantly improved, Dr. Altenburg that Claimant reported specific work difficulties with his right knee. Ex. 38:838. Claimant expressed willingness to undergo a right knee revision surgery. Ex. 38:840.

8. On June 7, 2018, Claimant reported to Dr. Altenburg that his left knee was becoming more symptomatic. Ex. 38:843. Dr. Altenburg repeated his opinion that Claimant's left knee condition represented an industrial exacerbation of a preexisting degenerative condition. Ex. 38:845. Claimant expressed willingness to undergo left knee surgery. *Id.*

9. On July 21, 2018, Dr. Tallerico again performed a forensic examination, this time focusing on Claimant's left knee. Ex. 40:878-887. He opined Claimant suffered a sprain or strain

of his left knee in the industrial accident. Ex. 40:884. The accident "more than likely resulted in a meniscal tear, as well as aggravation of the underlying arthritis." *Id.* It permanently aggravated the preexisting nonindustrial degeneration and chondrocalcinosis present there. *Id.* He opined Claimant was not at MMI and needed surgery. Ex. 40:885. He opined that it was one year too late for arthroscopic surgery and that a probable TKR was required. *Id.*

10. On December 19, 2020, Dr. Tallerico issued an opinion stating that the accident resulted in a left knee sprain with aggravation of underlying knee arthritis and degenerative joint disease, requiring a total knee arthroplasty. Ex. 52:1183. In his supporting reasoning, he summarized his July 21, 2018, opinion, stating that Claimant had a "left knee sprain/strain related to the April 3, 2017, injury, on a more-probable-than-not basis, a medical meniscus tear with significant preexisting osteoarthritis and chondrocalcinosis that was unrelated, but permanently aggravated." Ex. 52:1176.

11. On October 11, 2018, Claimant visited Dr. Altenburg for hip pain. Ex. 38:846. X-rays were nondiagnostic. Dr. Altenburg suspected this pain more likely was related to Claimant's low back or SI joints secondary to Claimant's chronic antalgic gait arising from his knee conditions. Ex. 38:847.

12. On December 7, 2018, Claimant reported to Dr. Altenburg's partner, Benjamin Blair, M.D., worsening low back symptoms. Ex. 38:848. A lumbar CT showed convex left lumbar spine curvature with multiple aspects of degeneration surrounding the prior surgery and throughout Claimant's lumbar spine. Ex. 38:854-55.

13. Dr. Blair recommended an MRI and an FCE to assist in providing restrictions. Ex. 38:850. The FCE was performed on December 18 and 19, 2018. Ex. 43:891. Claimant gave valid

effort and was cooperative. *Id.* The therapist recommended no crawling or kneeling, limited climbing of ladders and stairs, no sitting longer than 20 minutes, and limited walking. *Id.* at 901-902. Dr. Blair opined the restrictions from the functional capacity evaluation would be permanent. Ex. 38:857.

14. Claimant stopped working for Employer in December 2018. Third Boehler Dep. 46-47. He testified in deposition that he had expected to check with social security after his unemployment and surgery, but was going to try to go back to work if he could not get on disability. Third Boehler Dep. 48-49, 93-94. He found out later that his "position was no longer available." *Id.* at 49.

15. On February 6, 2019, Claimant underwent a left total knee replacement surgery. Dr. Altenburg performed it. Ex. 44:919. After about three weeks convalescence, post-surgical physical therapy visits comprised about 12 weeks. Ex. 46:1057-1105.

16. At four weeks after surgery Claimant reported to Dr. Altenburg's PA that good recovery was continuing in his left knee but that his right knee was worsening as his post-surgical function increased. Ex. 47:1108.

17. Claimant testified that since his left total knee replacement surgery he experiences difficulty sitting with his knee in a flexed position for extended periods of time. Tr. 52-53. He described additional positions and motions which he finds difficult. *Id.*

18. On April 22, 2019, Dr. Altenburg performed a revision TKR for Claimant's right knee. Ex. 49:1128.

19. On October 26, 2019, Dr. Tallerico performed another forensic examination. He opined Claimant to be at MMI. Ex. 51:1163. He restricted Claimant considering the left knee only.

Restrictions included no kneeling or squatting, limit ladders and stairs, no work manipulating more than 100 pounds. Ex. 51:1163. He suggested a 50/50 apportionment for preexisting conditions. *Id.* He rated Claimant's left knee permanent partial impairment at 25% of the lower extremity and apportioned this 50/50. Ex. 51:1164.

20. Upon request by ICRD expert Irene Sanchez, Dr. Tallerico completed a job site evaluation. Ex. 51:1167-68. He refused to approve the work. *Id.*

21. On December 19, 2020, Dr. Tallerico performed another forensic examination, this time to perform a comprehensive evaluation of permanent partial impairment. Ex. 52:1169. His left knee rating and opinions remained unchanged; right knee was rated at 34% lower extremity; lumbar spine was rated at 7% whole person; bilateral carpal tunnel showed no impairment. Ex. 52:1184.

22. On May 18, 2021, Dr. Altenburg prescribed a stationary exercise bicycle to assist his bilateral knee function. Ex. 56:1221.

23. In post-hearing deposition Dr. Tallerico opined that the April 2017 accident resulted in a work-related injury to Claimant's left knee which caused the underlying degenerative condition to become symptomatic. Tallerico Dep. 17, 20-21. He would apportion causation 50/50, injury versus preexisting degeneration. *Id.* at 21. Using the *AMA Guides*, 6th edition, he rated Claimant's left knee at 25% of the left lower extremity. *Id.* at 22. Divided by half for apportionment, he found that this translates to a 5% whole person rating. *Id.* at 23.

24. Similarly, Dr. Tallerico rated Claimant's right knee at 14% and Claimant's low back at seven percent, all whole person permanent partial impairment ratings. Ex. 52:1184-1185. He opined a zero rating for Claimant's prior carpal tunnel conditions. *Id.* He held to his opinion

that Claimant should not return to work as an electrician. *Id.* He opined that Claimant's right knee, low back, and left knee—in that order of importance as contributors—prevented Claimant from resuming work as an electrician. Tallerico Dep. 26.

25. Dr. Tallerico opined that a TKR improves an injured and degenerative knee, mostly within six months after surgery but that recovery may continue beyond the one-year mark. Tallerico Dep. 28.

Prior Medical Care and Conditions

26. In his Complaint against ISIF Claimant alleged preexisting conditions of "bladder cancer, left hand carpal tunnel surgery, right knee replacement surgery, heart issues, back issues, and high blood pressure. Ex. 1:1.

27. In medical records, Claimant is described as stating he first injured his right knee back in high school playing basketball in 1980 or 1981. Ex. 12:139; Ex. 13:176. Claimant testified in deposition that he tore his ACL in 1980 while playing basketball. Third Boehler Dep. 21. In 1981 he underwent right knee surgery. Ex. 8:27.

28. In March 1997 Claimant underwent an L4-5 lumbar fusion. *Id.*

29. In 2000 Claimant underwent a second right knee surgery which ameliorated a meniscal tear, removed osteophytes, and reconstructed his anterior cruciate ligament. Ex. 6:17-18. He also had a foot injury at work which apparently healed as no problems were noted upon medical examination. Ex. 6:14.

30. In 2002 Claimant was treated for sinus bradycardia and hypertension. Ex. 7:20. Subsequent medical notes through the next decade show fair to good control with medication. Ex. 8:25, 18:232.

31. In 2009 a chest CT showed no current pulmonary or orthopedic issues. Ex. 8:31-32. One month later a CT of Claimant's abdomen and pelvis showed atelectasis at the base of the lungs and all other organs normal except for some opacification in the kidneys. Ex. 8:47-48. Oddly, the radiologist's report expressly denies a showing of the prior lumbar laminectomy and fusion but goes on to note slight anterolisthesis of L4 on L5. *Id.* Medical records about this time also report Claimant was considering a future total right knee replacement for chronic aches. Ex 8:49; Ex. 12:155.

32. Later in 2009 Claimant was treated after a car accident for pain between his shoulder blades which arose about 12 hours afterward. Ex. 7:24. X-rays showed old compression fractures in his thoracic spine but no acute injury. *Id.*

33. In 2010 Claimant underwent surgery to remove cancerous tumors in his bladder. Ex. 9:85. A second surgery a few weeks later found no new tumors. Ex. 9:101. Multiple cystoscopic examinations in subsequent years showed no recurrent tumors. Ex. 18:211-296. Long-term treatment included intravesical BCG installations as well. *Id.*

34. In September 2011 Claimant again injured his right knee. Ex. 10:103. Given the injury and significant degenerative issues, Frederick Surbaugh, M.D. proposed conservative measures to be tried first, but expected Claimant would need a total knee replacement (TKR). Ex. 11:122. Claimant underwent a TKR in 2013. Ex. 18:240. He testified that afterward he had difficulty kneeling, crawling, and climbing ladders at work. Tr. 41-43; Third Boehler Dep. 24-25. Claimant's left knee showed meclomen soft calcification in the menisci and was diagnosed with chondrocalcinosis. Ex.11:123.

35. In 2012 treating physician James Retmier, M.D. opined Claimant did "not need

specific restrictions or precautions at this time" for his right knee. Ex. 12:139.

36. Later in 2012 Dr. Retmier diagnosed bilateral carpal tunnel syndrome. Ex. 12:155. He deemed it work related based solely upon Claimant's description of numbness and tingling when running machinery. Ex. 12:154.

37. In November 2012 Brian Tallerico, D.O. reviewed limited records and conducted a forensic medical examination of Claimant's right knee which Surety requested as part of its coverage of an earlier employer. Ex. 13:173. He opined that a TKR of the right knee would be related to his industrial accident in 2011. Ex. 13:179. He opined Claimant was not yet at MMI. Ex. 13:180.

38. Near the end of 2012 Dr. Daniel L. Weese resected an erythematous lesion in Claimant's bladder. Ex. 12:167. Pathology lab showed it not to be recurrent cancer, but rather, nonmalignant cystitis. Ex. 12:166. An episode of atrial fibrillation occurred and required hospitalization during a postoperative complication which included blood clots. Ex. 12:171.

39. Early 2013 medical care included follow-up by a cardiologist. Ex. 15:193-94, 17:205, 209. After workup, conservative treatment of Claimant's cardiac condition was recommended.

40. In May 2013 Dr. Retmier performed the TKR of Claimant's right knee and a carpal tunnel release of Claimant's right median nerve on the same date. Ex. 18:240. A home health nurse provided physical therapy and other care for about six weeks. Ex. 18:255; Ex. 20:314-317. Later additional physical therapy was provided at a clinic. Ex. 22:434-435.

41. In late June 2013 Dr. Retmier performed the left carpal tunnel release. Ex. 21:429; Ex. 18:260, 265.

42. By mid-August he was allowed to return to light-duty work for his knee. Ex. 18:275, 282. Dr. Retmier imposed no restrictions on hand usage. *Id.* One month later Dr. Retmier relaxed knee restrictions to limited ladder climbing and minimal kneeling. Ex. 18:294. Claimant reported he had returned to his usual job. Ex. 18:293. By mid-September Claimant was discharged from physical therapy with a note that he had met all goals and had returned to full duty. Ex. 22:478.

43. In February 2014 Claimant reported symptoms of trigger finger in multiple digits. Ex. 25:489.

44. In May 2014 Dr. Retmier rated Claimant's knee at 25% whole person permanent partial impairment. Ex.25:522.

45. In November 2014 diagnostic testing revealed a mildly enlarged, fatty liver. Ex. 23:480.

46. A July 2015 MRI of Claimant's thoracic spine showed dextroscoliosis and degeneration but no disc injury following an onset of pain. Ex. 27:544.

47. In August 2015 a colonoscopy revealed colitis. Ex. 28:584, 590.

48. In August 2016 a workup for heart palpitations was nondiagnostic beyond Claimant's hypertension. Ex. 31:693; Ex. 32:697.

49. In September 2016 Claimant underwent diagnostic imaging for right knee issues. Ex. 30:646, 650, 656. It was suspected that the hardware of the TKR might be loosening versus progression of degeneration, but no definitive diagnosis was made. *Id.*

50. In December 2016 neither a right knee MRI nor an MRI of the tibia/fibula could explain his below knee pain. Ex. 30:680.

51. A March 2017 right shoulder X-ray showed degeneration after complaints of intermittent pain. Ex. 33:705.

52. March 2017 imaging of the right knee suggested loosening of the hardware and continuing degeneration of the left knee and bilateral ankles, feet and SI joints. Ex. 33:709.

Vocational Factors

53. Born September 15, 1961, Claimant was 61 years of age on the date of hearing. Tr. 24, 81.

54. Claimant is a high school graduate. Third Boehler Dep. 7.

55. He has been a licensed electrician since 1984, but he let his license lapse about one year before the hearing. Tr. 26.

56. He was a self-employed electrician for about three years. Tr. 27; Third Boehler Dep. 14. That work included interfacing with customers to provide customer service. *Id.* He did offer cost estimates to customers but did not formally and competitively bid commercial jobs. Tr. 86. Nevertheless, he testified he believes he could manually, not using a computer, determine and present bids. Tr. 32-33. He closed his business because he could not keep an apprentice and because he wanted health insurance benefits. Third Boehler Dep. 15.

57. Claimant drove a beet truck for the harvest recently. Tr. 57. He found climbing into the truck to be difficult. Tr. 58. His CDL remains current. Tr. 88.

58. Claimant maintains a 5-acre parcel of land which he rents out for livestock pasture. Tr. 55. He irrigates it and maintains the electric fence. *Id*; Deposition of Adam Boehler April 20, 2020 ("Second Boehler Dep."), 66.

59. He testified he hunts birds, but after a full day of hunting his knees feel "stiff." Tr.

56.

60. Claimant golfs nine holes without a cart "once or twice a week" in season. Third Boehler Dep. 56. He works as a high school golf team coach. Third Boehler Dep. 55; Tr. 84. This part-time, in-season job pays about $1200.00 for the season. *Id.* He also receives a coach's pass which lets him attend high school sports for free. Third Boehler Dep. 61.

61. Claimant testified to five named potential employers which he has contacted about potential work. Tr. 58-59. He testified he was open with them about his knee issues. *Id.* One of these five called him, but Claimant declined to pursue that employment by expressly telling the potential employer that he physically could not do the job. Tr. 59. He testified alternately that he has not conducted any job search since his deposition in 2020 and that after Mr. Barton's report he did conduct a job search in which he applied for 12 to 15 jobs in 2021. Tr. 92-93.

62. Claimant receives Social Security Disability benefits. Tr. 59; Exhibit 69:1371-72. The determination was based on Claimant's low back and bilateral knee conditions, effective December 26, 2018.

63. Claimant also receives PERSI retirement benefits. Tr. 82.

64. Claimant testified he can sit to drive for "two and a half hours maybe." Tr. 60.

65. Claimant has used Excel but does not consider himself proficient. Tr. 97-98.

66. In testimony Claimant denied his right knee was generally a hindrance during the five months in which he worked before the subject accident. Third Boehler Dep. 41; Tr. 69. He did occasionally take a 10-to-15-second timeout to stretch it when working. Tr. 70. He could not ambidextrously shovel. Third Boehler Dep. 100-101. This testimony shows Claimant's right knee was a subjective hindrance before the subject accident despite his general denial. Moreover, at

hearing Claimant repeatedly testified generally and by specific descriptions that his right knee is more problematic than his left knee. Tr. 42, 52.

67. Claimant did not seek treatment for his low back condition in the months prior to the subject accident. Claimant's testimonial description of his efforts to protect his low back and to lift at work shows Claimant's low back was a subjective hindrance before the subject accident. Tr. 73.

68. Claimant testified that his wrists and shoulders did not constitute a subjective hindrance before the subject accident. Third Boehler Dep. 40.

69. Claimant erroneously denied that any physician had imposed restrictions. Tr. 79-80.

70. On April 7, 2021, Cali Eby provided her vocational report. Ex. 53:1188. She reviewed records and interviewed Claimant at Claimant's request. *Id.* at 1189, 1194. Her recitation of Claimant's history and restrictions is accurate. She separately sets forth both physician-imposed restrictions and Claimant's self-described limitations. *Id.* at 1192-93. She opined that while a few jobs might be available, Claimant was not competitive for any regularly available openings. *Id.* at 1203-04. She opined Claimant had lost all earning capacity. *Id.* She opined Claimant was totally and permanently disabled as a result of the combination of his bilateral knee and low back conditions. *Id.*

71. On May 3, 2021, Lee Barton provided his vocational report. Ex. 54:1206. He reviewed records and interviewed Claimant at Surety's request. *Id.* His recitation of Claimant's history and restrictions is accurate. He opined a 53% loss of labor market access and a 13% loss of wage-earning capacity, for a slightly weighted average of 35% PPD from all industrial and

preexisting causes. *Id.* at 1214-15. He identified jobs from among those involving clerks, dispatchers, and construction inspectors as suitable employment. *Id.* He opined Claimant *not* to be totally and permanently disabled. *Id.* He opined that Claimant had not conducted a job search and speculated that had he done so, he would have found employment. *Id.* In June 2021 Mr. Barton confirmed he used the 2018 FCE for restrictions. Ex. 58:1224. He further explained his opinions to say that left knee disability alone represented 6% whole person inclusive of 5% permanent partial impairment and that all additional disability represented the combination of all conditions. *Id.*

72. On May 13, 2021, Ms. Eby responded to Mr. Barton's report. Ex. 55:1217. Among other things, she criticized Mr. Barton's listing of suitable employment. *Id.* at 1218. She reiterated her comments from her earlier report that Claimant's personality and interests would make him nonviable in customer service. *Id.* at 1217. She maintained her opinion that Claimant is totally and permanently disabled. In November 2022 she criticized Mr. Barton's apportionment by noting that Claimant's "good" left knee before the accident allowed him to do things at work despite his right knee condition and that Mr. Barton had therefore assigned a disproportionate disability to the right knee rather than the left. Ex. 59:1225-26.

73. In deposition Mr. Barton confirmed his opinions which were stated in his reports. He opined Claimant had failed to make a credible job search. Deposition of Leroy Barton (Barton Dep.), 20-21. Rather, Claimant had made minimal efforts and emphasized to potential employers that he could not fully perform the jobs under consideration. *Id.* He opined Claimant did not show he was motivated to seek work outside the role of electrician. *Id.* He acknowledged that Claimant was earning $28.00 per hour at the time the accident, but that a five-year weighted average of

Claimant's earning capacity was $20.00 per hour, which latter figure Mr. Barton used as his basis for determining loss of wage-earning capacity. *Id.* at 28-29.

74. In deposition Ms. Eby confirmed the opinions which she expressed in her reports. Eby Dep. 61. She opined that Claimant's return to work after prior injuries was an indicator of his motivation to work. *Id.* at 10, 12. She opined that Claimant's prior injuries constituted a hindrance in his work as an electrician. *Id.* at 12-13. She opined that Claimant's life circumstances, other than his age (*Id.* at 14-15), did not hinder his employability. *Id.* at 22. She testified that she considered Claimant's customer service which he provided as a self-employed electrician to be a transferable skill. *Id.* at 25-26. She did not explain why she wrote earlier that Claimant's demeanor made him not a candidate for clerk and customer service jobs. She well explained why she criticized Mr. Barton's wage-earning capacity analysis. *Id.* at 29-32. Ms. Eby confirmed that she was not asked to provide an apportionment analysis. *Id.* at 44-45.

75. Ms. Eby and Mr. Barton have differing methods and emphasize different details. However, both provided excellent analysis.

DISCUSSION AND FURTHER FINDINGS OF FACT

76. 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).

77. 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). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v.*

Hara's, Inc., 123 Idaho 472, 89 P.2d 934 (1993).

78. Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

79. The referee in this matter found Claimant's demeanor appeared credible in an understated, stoic way. He was articulate, telling his own story without being led by his attorney. At hearing and in his deposition transcripts he presented as a worker who focused on the job and not on his pains over the years. Just one example: In deposition he refused to use the word "intolerable" (used by Dr. Altenburg and paraphrased by Surety's attorney) to describe his left knee condition just prior to surgery. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

Accident and Causation

80. 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). Aggravation, exacerbation, or acceleration of a preexisting condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

81. The parties did not argue against the proposition that Claimant's left knee injury arose out of and in the course of employment. This issue is deemed waived.

82. As to causation, here, the preponderance of medical opinion shows Claimant possessed an unknown, asymptomatic, degenerative left knee. The subject accident caused it to become symptomatic and exacerbated and accelerated the degenerative process. Dr. Tallerico's opinions on this point are specific, determinative, and consistent with the more general comments expressed in medical records by Claimant's treating physicians.

Temporary Disability and Medical Care Benefits

83. These issues were not addressed by the parties as a point of dispute. These issues are deemed waived or became moot before hearing.

Permanent Impairment

84. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975). Impairment is an inclusive factor of permanent disability. Idaho Code § 72-422.

85. According to Dr. Tallerico Claimant suffered a 25% lower extremity permanent partial impairment to his left knee with a 50/50 apportionment, leaving 5% whole personal

permanent partial impairment apportioned to the injury. This opinion is supported, as Claimant had the metabolic disease chondrocalcinosis, causing calcium pyrophosphate to render the meniscus brittle and "very, very prone to tearing." Deposition of Dr. Brian David Tallerico, 15. His left knee had significant underlying degenerative changes. Ex. 40:884. There is no medical opinion to the contrary. While Claimant's left knee was asymptomatic, pre-existing impairment need not have been a hindrance to be apportioned under I.C.§ 72-406(1). *Henderson v. McCain Foods, Inc.* 142 Idaho 559, 130 P.3d 1097 (2006). Dr. Tallerico's opinion that Claimant suffered 5% whole person impairment for his left knee apportioned to the injury is persuasive.

Permanent Disability

86. "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 as provided by Idaho Code § 72-430.

87. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

88. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423

and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon the claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986

89. Here, as in many cases brought before the Commission for determination, is where the crux of the case is found. Claimant seeks total and permanent disability. Defendants seek a partial disability determination. Both have a vocational expert to support their positions. But these facts include details that have caused an unusual amount of extra deliberation back and forth. Claimant's stoicism and understating of the effects of his injuries enhance his credibility but make the impact harder to analyze. Claimant's forthright expressions of an intention to retire carry weight, but these are inconsistent with Claimant's continuing to work from April 2017 until December 2018. It was Dr. Tallerico's refusal to approve a job site evaluation as an electrician and his opinion that Claimant's positional and movement restrictions prevented him from returning to work as an electrician, not expressions of retirement, which provide an objective basis for not returning to that occupation.

90. A salient consideration here is that Claimant testified that his right knee is symptomatically much worse than his left. Moreover, Claimant worked for about 20 months after the left knee injury without significant time loss. Yet after his total knee replacement surgery, he did not attempt to work. According to Dr. Tallerico, surgery improves a knee condition. At deposition, he stated it was his belief that Claimant was able to work after the surgery, although not as an electrician and being on disability was reasonable. Tallerico Dep. 31-33. It seems

inconsistent that Claimant functioned at work before surgery but has not attempted it afterward.

91. Ms. Eby emphasized in deposition that while Claimant could compensate for his prior right knee condition with a good left knee before this accident, it was the restriction in use of this *second* knee that turned proposed restrictions into true limitations. Her analysis is well taken. What a worker may be able to do with one bad knee may be unreasonable to expect from a worker with two bad knees. Still, this analysis fails to address the fact that he continued to work for about 20 months.

92. Mr. Barton's opinion that there are jobs generally available within Claimant's skill set and physical restrictions is persuasive. Ms. Eby persuasively dismissed some but not all of the identified positions.

93. However, Mr. Barton's disability figures are under-representative of the true picture. First, his choices in assessing wage-earning capacity are less persuasive. Both his pre-accident figure and the inclusion of some of the higher paying potential jobs are problematic. Second, he overemphasizes the impact of Claimant's preexisting left knee condition as it relates to disability in excess of impairment. Understanding that the degenerative left knee condition made the injury more severe and impactful on Claimant's function, it did not become symptomatic until and because of the work accident.

94. In part because Claimant has been a tough and a hard worker throughout his work life, he now can do and does physical things like golfing and property management. While these do not completely translate as indicators of an ability to work a full-time job, they add weight to Claimant's statements that he would rather be retired than to the proposition that he might be totally and permanently unable to work.

95. Lastly, Social Security Disability is determined under an approach which does not translate to Idaho workers' compensation disability. It does not carry significant weight in attempting to establish for or against compensability or amount of permanent disability.

96. The record shows that the impact of the left knee injury is greater because it represents Claimant's second knee. He cannot return to work as an electrician. However, it has not been shown that a reasonable market of suitable jobs does not exist in the Burley area.

97. Considering all medical and nonmedical factors, Claimant's permanent disability is less than 100%. He is not totally and permanently disabled. The combination of bilateral knee, low back and other physical conditions, loss of wage-earning capacity, and nonmedical circumstances do produce a permanent disability significantly higher than that offered by Mr. Barton's opinions. Loss of job market access is higher because some of the jobs are not suitable. Wage-earning capacity requires a higher denominator because Claimant was earning about $28.00 per hour at the time of this accident. It requires a lower numerator because fewer jobs qualify as suitable and the nonqualifying ones represent higher wage opportunities. Adjusting Mr. Barton's disability rating for these differences, the record supports a permanent disability from all causes of 80% whole person, inclusive of permanent partial impairment. Claimant is not 100% disabled.

Odd Lot Analysis

98. Even though Claimant is shown to be less than 100% disabled, he may yet qualify for total and permanent disability as an "odd-lot" worker. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition

of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

99. Upon establishing the presumption, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

100. As described above Claimant is not 100% totally and permanently disabled. Examining the factors for qualifying for odd-lot status the evidence shows first that Claimant worked for 20 months after the accident until just before the surgery which ameliorated the left knee condition. He worked hauling beets for a season and works a little as a golf coach. He has not established a failed attempt to work. Second, Mr. Barton identified potential job types suitable for Claimant's skill set and restrictions. Claimant has not seriously attempted to seek these out nor to conduct his own meaningful job search. He has rejected offers or inquiries about his performing some jobs although the record does not demonstrate to what extent these were or were not suitable. Third, Claimant has not demonstrated that such a job search would be futile. Mr. Barton expressly opined to the contrary.

101. Claimant has failed to establish that he is an odd-lot worker. He has therefore failed to prove that he is totally and permanently disabled.

ISIF Liability

102. Idaho Code § 72-332(1) provides the criteria upon which ISIF liability is predicated. Absent a finding of total permanent disability, ISIF liability does not arise.

Apportionment Under I.C. § 72-406

103. The remaining consideration is whether Claimant's less than total disability should be apportioned pursuant to Idaho Code § 72-406. If the degree of disability resulting from an industrial injury is increased because of a preexisting physical impairment, the employer is liable only for the disability from the industrial injury. I.C. § 72-406(1). The statute does not require a pre-existing disability; it requires a pre-existing physical impairment. Such pre-existing impairment need not have been a hindrance to be apportioned under I.C.§ 72-406(1). *Henderson v. McCain Foods, Inc.* 142 Idaho 559, 130 P.3d 1097 (2006). There are two steps to making such an apportionment: (1) evaluating claimant's permanent disability in light of all his physical impairments resulting from the industrial accident and any preexisting conditions existing at the time of evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

104. Dr. Tallerico gave permanent partial impairment ratings of 7% for the low back, 14% for the right knee, and 10% for the left knee – of which 5% is attributable to the work accident. Subtracting impairment from Claimant's total disability of 80%, the remaining disability to be apportioned between this accident and Claimant's preexisting conditions consists of 49%. Under I.C. § 72-406, even a pro rata apportionment must be explained. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006). Here, pro rata apportionment is inappropriate. It is the impact of the injury occurring to Claimant's second knee that makes the difference between

returning to the physical demands of electrical work with adjustments for one bad knee and not being able to return at all. A greater share of the disability arises from the work accident. This is true despite the fact that Claimant testified repeatedly that his right knee is more painful and less functional than his left.

105. The Commission has considered all evidence and facts of record including those emphasized above. It is persuaded that a five-to-two ratio is most appropriate. Thus, 14% of the disability in excess of impairment is apportioned to the prior conditions and 35% to this accident.

106. Apportioned to the work accident, Claimant's total permanent disability arising from the left knee injury is 40% (35%+5%) of the whole person, inclusive of impairment.

CONCLUSIONS

1. Claimant suffered a work related accident/injury causing permanent injury to his left knee on about April 3, 2017.

2. Claimant suffers impairment of 10% of the whole person for his right knee, 5% pre-existing, and 5% related to the subject accident/injury.

3. Claimant is not totally and permanently disabled.

4. ISIF is not liable for any portion of Claimant's disability.

5. Claimant suffers less than total disability of 80% of the whole person.

6. Claimant's less than total disability is apportioned 40% to the subject accident, inclusive of the 5% impairment attributable to the subject accident. Defendants are entitled to credit for impairment paid to date.

7. All other raised issues are deemed waived or moot.

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

matters adjudicated.

DATED this 17th day of November, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Attest:

Kamerron Slay
Commissioner Secretary

Aaron White, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November 2023, a true and correct copy of the **FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER** was served by regular United States Mail and Electronic Mail upon the following:

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