KATHY L. LIEDKIE, Claimant,

v.

SODEXO, INC., Employer,

and

NEW HAMPSHIRE INSURANCE, CO., Surety, Defendants.

No. IC 2009-013462

Idaho Workers Compensation

Before the Industrial Commission of the State of Idaho

July 19, 2012

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Thomas E. Limbaugh, Chairman

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston, Idaho on September 16, 2011. Claimant, Kathy Liedkie, was present in person and represented by Michael Kessinger, of Lewiston. Defendant Employer, Sodexo, Inc., and Defendant Surety, New Hampshire Insurance, Co., were represented by W. Scott Wigle, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 27, 2012.

ISSUES

The issues to be decided by the Commission were narrowed at hearing and are:

1. The extent of Claimant's permanent partial impairment;

2. The extent of Claimant's permanent disability in excess of impairment; and

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffers permanent disability of 62% due to left shoulder limitations from her industrial accident. She denied any disability attributable to any pre-existing condition. Defendants acknowledge that Claimant suffers permanent disability in excess of impairment, but allege that she has sustained a permanent disability of between 18 and 32%, inclusive of permanent impairment. Defendants assert some portion of Claimant's disability should be apportioned to her alleged pre-existing shoulder condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Defendants' Exhibits A-E, admitted at hearing, excepting: Exhibit A-8, p. 3 the penultimate sentence; Exhibit A-13, p. 3 (all entries under "Other Problems"); Exhibit A-13, p. 8; Exhibit A-13, p. 10 (all entries under "CC 1"); Exhibit A-13, p. 11 (all entries under the first Diagnosis); and Exhibit A-13, p. 24;

3. The testimony of Claimant and Tim Wheeler, taken at the September 16, 2011 hearing;

4. The post-hearing deposition of Shannon Purvis, M.Ed., CRC, taken by Claimant on November 14, 2011; and

5. The post-hearing deposition of William Jordan, MA, CRC, CDMS, taken by Defendants on November 14, 2011.

All objections posed during the depositions are overruled.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 53 years old and resided in Lewiston at the time of the hearing. She is right-handed. Claimant graduated from high school in Tennessee in 1976 and thereafter worked as a nurse's aide. She moved to Idaho and from 1976 until 1982, was a production worker at an ammunition manufacturer in Lewiston. She also cleaned houses and performed various odd jobs off and on over the years.

2. In 1985, Claimant began working in food services at Lewis & Clark State College (LCSC). She worked at a hospital from 1985-1987, where she was a central service processor, sterilizing and preparing instruments for use in surgery. In 1989, Claimant attended cosmetology school and received her certificate and license in cosmetology. From 1990 through approximately 2002, Claimant cashiered and catered for a food services business at LCSC. She also catered private dinners for the university president and his wife.

3. In 2002, Claimant applied her cosmetology training and went to work for Supercuts in Lewiston as a hairstylist. Thereafter she rented a seat at Shear Pros and was self-employed as a hairstylist for approximately one year. In 2006, Claimant worked for six months at a clothing rental and sales business.

4. In approximately 2006, Claimant moved to Coeur d'Alene where she worked as a central service processor at Kootenai Medical Center for two years. She trained in multiple areas from decontamination to requisitions and restocking. She stocked all supplies from toothbrushes to IV machines. Her duties required lifting 30-40 pounds and entering data on a computer with a wand or a mouse.

5. Claimant moved back to Lewiston and in 2009 returned to food services work at LCSC as an employee of Sodexo. She supervised from two to six student workers. She managed catering and concessions for sporting events, concerts, and any event conducted in the LCSC activity center. In a typical day she prepared food, transferred food, counted money, counted inventory, projected food needed for coming events, and oversaw cleaning. The physical demands of her position included standing for six hours or more each shift, serving customers, pushing supply carts, and repeatedly lifting five gallon containers weighing up to 50 pounds. She earned $9.50 per hour and worked 34 to 36 hours per week. Claimant enjoyed her job at Sodexo and felt good about her performance.

6. Prior to April 30, 2009, Claimant had never injured her left shoulder and had never experienced any significant left shoulder pain or limitation.

7. On April 30, 2009, Claimant was at work carrying five gallon containers of liquid from the cafeteria to the conference center. Upon lifting one of the containers onto the table with her left hand, she felt a pop, followed by pain and spasm in her left shoulder. She timely reported her accident and later sought medical treatment. An MRI revealed a full thickness tear of the left supraspinatus with approximately 2.3 cm. of retraction. Claimant came under the care of orthopedic surgeon, Adam Jelinek, M.D. Surgery was recommended, but delayed several months due to a persisting staph infection not related to her industrial injury. While awaiting surgery, Claimant had virtually no use of her left arm.

8. On October 5, 2009, Dr. Jelinek performed left shoulder open distal clavicle excision, subacromial decompression, partial acromioplasty, manipulation of the shoulder, and rotator cuff repair. Thereafter Claimant underwent physical therapy but noted persisting left shoulder pain and limitations.

9. Approximately six months after surgery, Claimant returned to work at Sodexo on several occasions. She handed out drinks and helped count money at several sporting events. She worked only three or four hours each shift. Sodexo attempted to arrange for student workers to assist Claimant with heavy lifting. Claimant was significantly limited by left shoulder discomfort and considered herself an unproductive worker. Thereafter, Sodexo made additional efforts to contact Claimant about work, but was unsuccessful in reaching her.

10. Claimant met with Industrial Commission rehabilitation consultant Cris Puckett who helped Claimant look for work. She discussed her résumé with Puckett, but did not actually complete a résumé. Claimant sent applications to five or six businesses. She also telephoned approximately 50 businesses that she located in the telephone directory but found no employment. Prior to hearing, Claimant applied for Social Security benefits; however, her application was denied.

11. At hearing Claimant testified that she is not aware of any job with Sodexo that she could perform. Her

prior positions as a central processor at the hospital required too much lifting due to the weight of the instruments. Claimant has a current cosmetology license. However, she believes that cosmetology requires bilateral manual dexterity at or above shoulder level.

12. Except for limited data entry with a wand or mouse, Claimant is not familiar with computers. She does not have a computer and is a "hunt and peck" typist. She has no experience with QuickBooks or accounting, no experience with patient care, no understanding of anatomy, and no retail management leadership experience.

13. At the time of hearing, Claimant attended physical therapy weekly; however, her left shoulder continued to be highly symptomatic. She gestured only with her right arm at hearing and testified that her left shoulder aches constantly and worsens with any activity. At the time of hearing Claimant continued taking multiple medications for her left shoulder condition as prescribed by Ryan Web, M.D., including morphine morning and night, hydrocodone three times daily, zolpidem at bedtime as a sleeping aid, and naproxen twice daily.

14. Prior to the accident, Claimant had no pain and no functional limitations of her left shoulder or arm. Since the accident she has been largely unable to use her left arm and cannot lift her left arm over her head. She avoids extensive walking because swinging the left arm aggravates her shoulder pain. She avoids using her left arm in her activities of daily living. She does not use her left hand to bathe, shampoo, or arrange her hair. She drives, but closes the driver's door and fastens her seat belt only with her right hand. She does not pick up her grandchildren and is cautious when playing with them to avoid hurting her left shoulder. She spreads her house cleaning out over the week and mops her floors by placing a cloth under her foot and sliding it back and forth across the floor, rather than by pushing a standard mop handle with her arms. She is unable to lift a gallon of milk with her left hand. Claimant's sleep is disturbed by left shoulder pain. Each morning she arises and takes morphine at 5:00 a.m. She then lies down until 6:00 a.m. when she takes hydrocodone. At 7:00 a.m. she gets up for the day.

15. Having observed Claimant at hearing, and compared her testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

16. 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).

17. **Impairment**. The first issue is the extent of Claimant's permanent impairment. "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. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

18. Claimant herein alleges permanent impairment to her left shoulder. In May 2010, orthopedist Michael Gillespie, M.D., examined Claimant at Defendants' request and rated the permanent impairment of her left shoulder at 7% of the upper extremity, which equates to 4% of the whole person. In July 2010, John McNulty, M.D., examined Claimant at her request. Dr. McNulty ordered an MRI that confirmed Claimant's left rotator cuff repair was still intact, but also revealed atrophy of the supraspinatus and infraspinatus muscles and tendons, with fatty infiltration of the infraspinatus muscle. Dr. McNulty rated the permanent impairment of Claimant's left shoulder at 17% of the upper extremity, which equates to 10% of the whole person. Dr. McNulty's rating is founded upon the most recent and thorough assessment of Claimant's shoulder condition. The Referee finds that Claimant suffers permanent impairment of her left shoulder of 10% of the whole person due to her industrial accident.

19. The record establishes that subsequent to her industrial accident Claimant was diagnosed with Raynaud's phenomenon in her upper extremities bilaterally, more pronounced on the left. However, she does not allege, and the record does not indicate, any permanent impairment or limitations due to this condition.

20. **Permanent disability**. The next issue is the extent of Claimant's permanent 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. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

21. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairment and her potential employment opportunities—particularly as identified by vocational rehabilitation experts.

22. *Work restrictions.* Claimant's activities are restricted due to her left shoulder condition. Two physicians have provided work restrictions. On May 18, 2010, Dr. Gillespie examined Claimant and indicated: "The patient may LIFT up to 15 lbs. on a [frequent] basis." Exhibit A-9, p. 15. Dr. Gillespie also indicated Claimant could perform no overhead activities. He expressly indicated that these restrictions were permanent. There is no indication that Dr. Gillespie intended the restrictions to apply only to Claimant's injured left shoulder or left upper extremity.

23. Dr. McNulty examined Claimant on July 27, 2010, and found her "capable of sedentary work only at this point. She is unable to perform any work overhead." Exhibit A-11, p. 6. Sedentary work is defined as work requiring lifting no more than 10 pounds. There is no indication that Dr. McNulty intended the restrictions to apply only to Claimant's injured left shoulder or left upper extremity. Dr. McNulty's restrictions were later finalized after an MRI of Claimant's left shoulder confirmed that her rotator cuff repair was intact, but also revealed atrophy of the supraspinatus and infraspinatus muscles and tendons. The restrictions imposed by Dr. Gillespie and Dr. McNulty are very similar. Dr. McNulty's restrictions are adopted as they are based upon the most recent and thorough assessment of Claimant's left shoulder condition.

24. Claimant testified at hearing that she drops things with both hands. Aside from her left shoulder condition, the record does not contain any indication from a medical expert that Claimant suffers any medical condition due to her industrial accident that impairs her ability to grasp or hold things. Claimant has no grasping restrictions which would hinder her employability.

25. *William Jordan.* William Jordan, MA, CRC, CDMS, a vocational rehabilitation expert retained by Defendants, prepared a report assessing Claimant's disability. Jordan considered both the 15-pound weight limit and no overhead lifting restrictions assigned by Dr. Gillespie, and the sedentary work and no overhead lifting restrictions assigned by Dr. McNulty.

26. Jordan noted that Claimant's prior occupations included: concession manager, catering/cafeteria worker, central supply/sterilization tech, hair stylist, retail sales clerk, cashier, bullet production line worker, nurse's aide, child care worker, and house cleaner. He acknowledged that none of these prior occupations were classified as sedentary; all were classified as requiring lifting at least 20 pounds. Jordan opined that in spite of Claimant's physical restrictions she would still be able to perform most of the jobs at which she had worked pre-injury. Jordan testified that Claimant could return to her time-of-injury job as concessions manager at Sodexo without accommodation. Jordan acknowledged that Claimant was lifting a five gallon container which weighed approximately 50 pounds at the time of her injury. Jordan testified that Claimant had not sustained any loss of wage earning capacity and that she could obtain employment in the Lewiston labor market that would replace her time-of-injury wage.

27. Jordan specifically identified the following occupations that he believed Claimant could pursue given the physical restrictions imposed by Dr. Gillespie: first line supervisor/manager of food prep workers, counter attendant-cafeteria/concessions, hostess, hairdresser/cosmetologist, child care worker, home care aide, cashier, counter/rental clerk, retail sales, general office clerk, and small products assembler. Jordan acknowledged that all of these positions are categorized as light work, thus requiring lifting up to 20 pounds. Jordan readily admitted that all of the above-listed positions would exceed the restrictions imposed by Dr. McNulty. Jordan identified three sedentary occupations he opined Claimant could perform: switchboard operator, customer service representative, and receptionist.

28. Jordan also provided a list of recent job openings in the Lewiston area which he opined Claimant could

pursue given her knowledge, skills, abilities, and physical capacity pursuant to the restrictions imposed by both Dr. Gillespie and Dr. McNulty. The recent openings included: fuel station attendant at Safeway, part-time patient coordinator at Alliance Healthcare, customer service cashier at Gateway Materials, customer service at K-Mart pharmacy, administrative assistant at Sylvan Furniture, customer service clerk at Nez Perce Tribal Enterprises, part-time retail sales at Shopko, daycare worker at Hop Scotch Learning Center, caregiver at Care Connections Homecare, quality inspector/packager at Howell Machine, in-home care provider at Home Care of Washington, facility assistant manager at Goodwill Industries, and food service clerk at Nez Perce Tribe Enterprises.

29. Jordan concluded that Claimant suffers a permanent disability of 18%, inclusive of permanent impairment if evaluated based upon the 15-pound lifting restriction imposed by Dr. Gillespie. Utilizing the sedentary work restriction with no overhead lifting assigned by Dr. McNulty, Jordan concluded that Claimant suffers a permanent disability of 32%, inclusive of permanent impairment. Jordan opined that, based upon the restrictions of Dr. Gillespie and Dr. McNulty, Claimant retained 86% and 78%, respectively, of her pre-injury labor market.

30. Critically, Jordan testified in his deposition that his disability assessments assumed that Claimant had no restriction on the use of her non-injured dominant right arm. Defendants acknowledge that the physical restrictions imposed by Drs. Gillespie and McNulty apply overall—not solely to Claimant's injured left arm—and suggest that Jordan properly applied Claimant's lifting restrictions as overall limitations. While some portions of Jordan's testimony may be unclear, a full review of his deposition testimony, including his deposition change sheet, establishes that Jordan actually assessed Claimant's disability assuming she had no limitations on the use of her right arm. Mr. Jordan expressly testified regarding his assumption:

> Q. [by Mr. Kessinger] In your prior assessment with Mr. Wigle it was my understanding that you were testifying that your vocational analysis had assumed she couldn't lift more than 15 pounds with either arm. Did I misunderstand you?
>
> A. [by Mr. Jordan] If you go strictly by what the doctors are saying, it would be 15 pounds, and they are taking [sic] about—it looks like they're talking about the one injured arm. But there's no statement about her lifting anything with the right uninjured arm, and I don't know if that came out right.
>
> Q. Well, what I'm trying to understand, in your disability report did you assume that she had an unlimited—an arm without restrictions, and an arm with either a sedentary restriction or a 15-pound restriction?
>
> A. Yes.
>
> Q. So your assessment was made with the assumption that she has an unlimited arm?
>
> A. Yes.
>
> Q. No restrictions?
>
> A. No restrictions on the right dominant arm. Jordan Deposition, p. 37, l. 16 through p. 38, l. 12.

Jordan's report lists over a dozen light work positions—each by definition requiring lifting up to 20 pounds—illustrating his application of this assumption. When questioned about these positions, his testimony further illustrated the application of his assumption:

> Q. [by Mr. Kessinger] .... Are you aware of any restrictions by any doctor that say that Ms. Liedkie can exert up to 20 pounds of force occasionally?
>
> A. [by Mr. Jordan] None of them say 20 pounds occasionally. However, again, if you apply that to the one arm, then you have the right dominant arm that has no restrictions. So if you look at her ability to do both, it appears that these types of jobs would be feasible for her to use both arms.

Jordan Deposition, p. 41, ll. 12-20.

31. Defendants maintain that Jordan's deposition change sheet purports to rectify an ambiguity about Jordan's application of the physical restrictions imposed by Drs. Gillespie and McNulty. The final question and answer of Jordan's deposition are as follows:

> Q. [by Mr. Kessinger] And the same would go for the 32 percent? Basically, she can still do roughly, seven of the ten jobs, based on Dr. McNulty's restrictions?
>
> A. [by Mr. Jordan] Right. He has more significant restrictions, as far as I read them, so that [SIC] that's why the numbers go up, yes.

Jordan Deposition, p. 75, ll. 16-21.

32. Mr. Jordan's deposition change sheet takes a different tact and elaborates markedly on his professed approach to evaluating Claimant's permanent disability:

> PAGE 75 LINE 19&20 REASON FOR CHANGE[:] Wrong statement/number/clarification.
>
> READS[:] Right. He has more significant restrictions as far as I read them so that's why the numbers go up, yes.
>
> SHOULD READ[:] Wrong. The Claimant's loss of pre-injury labor market under Dr. McNulty would be 22 percent. He has more significant restrictions, as far as I read them, and higher PPI of 10%, so that is why the numbers go up. Yes. My opinion on PPD numbers was based on the physician's overall restrictions. The PPD numbers suggested were based on sedentary to light restrictions. I took a conservative approach here, even though there is the potential that the right uninjured extremity would not be subject to the restrictions.

Jordan Deposition Change Sheet, p. 2.

33. Jordan's deposition change sheet resolves no ambiguity; rather, it contradicts his express testimony, quoted above, about his assumption that Claimant has unrestricted use of her right arm, as well as his testimony demonstrating that he repeatedly applied this assumption to evaluate Claimant's employability. This assumption applied throughout Jordan's report materially undermines his conclusions. The entirety of Jordan's report and deposition testimony establishes that his opinions were strongly influenced by his expressly stated assumption, and one contradictory final entry in his deposition change sheet does not eliminate the influence of his assumption on his conclusions.

34. *Shannon Purvis*. Shannon Purvis, M.Ed., CRC, a vocational rehabilitation expert retained by Claimant, prepared a report assessing Claimant's disability. Purvis utilized the physical restrictions assigned by Dr. McNulty of sedentary work with no overhead lifting. Purvis noted that Dr. Gillespie allowed Claimant to lift five pounds more than Dr. McNulty, but testified that this was not significant, as it still placed Claimant below the light-duty threshold of lifting 20 pounds. Purvis opined that the extra five pounds did not make a significant difference in Claimant's disability. Purvis concluded that Claimant's restrictions would preclude her from her prior employments. She opined that Claimant's loss of access to viable employment is large. Purvis acknowledged that in spite of Claimant's physical restrictions she could obtain employment in the Lewiston labor market that would likely eventually match her pre-injury wage.

35. Purvis specifically reviewed the positions that William Jordan concluded Claimant could perform, including the current openings, and opined that Claimant could not work as a gas station or convenience store cashier, food line service manager, counter attendant, child care worker, personal home-care aide, general cashier, or patient coordinator because each required lifting in excess of 15 pounds. Purvis opined that Claimant could not work as a hairdresser or cosmetologist because of the overhead work required. She acknowledged that Claimant may be able to work at some counter rental clerk, office clerk, or customer service representative positions. However, Purvis noted that Claimant lacked the computer skills to be competitive for such positions. Purvis opined that Claimant could work as an office assistant, receptionist, information clerk, hostess, or food service cashier, provided no setup, takedown, or stocking work was required.

36. Purvis testified that approximately 25 to 30% of the Lewiston labor market is comprised of light-duty employment, and 50% is comprised of employment heavier than light-duty. By definition, light-duty employment requires lifting up to 20 pounds. Claimant worked in medium-duty employment prior to her accident. Her physical restrictions now place her in the sedentary category, per Dr. McNulty, or between the sedentary and light categories, per Dr. Gillespie, thus precluding access to 75 to 80% of the open labor market in Lewiston. Purvis explained that Claimant had access to over 8,000 jobs according to the *Dictionary of Occupational Titles* based on her physical abilities prior to the accident, and less than 4,000 jobs after her accident. Thus Claimant lost access to 53% of all jobs listed in the *Dictionary of Occupational Titles* due to her physical restrictions. Purvis also testified that the more sedentary the job, the greater the need for semi-skilled or skilled workers. Purvis observed that Claimant lacks transferable skills, education or work experience that would qualify her to access any skilled sedentary positions and most semi-skilled sedentary positions. Purvis acknowledged that Claimant has some transferable skills relevant to entry-level semiskilled occupations such as hotel desk clerk and receptionist.

37. Purvis testified that Claimant had difficulty staying on track during her interview. Dr. Gillespie also commented on Claimant's difficulties with focus in responding to questions during his IME of Claimant. Dr. Gillespie was sufficiently concerned that he diagnosed Claimant with cognitive impairment and noted she was a difficult historian. Purvis opined that Claimant's conversational wandering would be a definite disadvantage as she interviewed with potential employers. Purvis also observed that Claimant was 51 at the time of the accident and 53 at the time of hearing and testified that workers in Claimant's age group

often have significant difficulty finding employment as compared to younger workers with the same skill set.

38. Purvis concluded that Claimant suffers a permanent disability of 62% due to her loss of labor market access. Purvis considered in this figure Claimant's age and her difficulty with staying on task. Purvis did not explain in further detail the approach by which she arrived at her disability estimate. Purvis acknowledged that she intentionally elected not to bring to her deposition additional materials further describing how she rated Claimant's permanent disability.

39. *Cris Puckett.* Industrial Commission rehabilitation consultant Cris Puckett confirmed that light work is defined as work which requires lifting up to 20 pounds and medium work is defined as work which requires lifting up to 50 pounds. Puckett observed that the majority of jobs available in Lewiston, including Claimant's time of injury job at Sodexo, fall within the medium lifting category. Puckett observed that both Drs. Gillespie and McNulty concluded that Claimant could not return to her prior job at Sodexo. Puckett opined that Claimant could replace her time of injury wage.

40. Claimant did not consistently avail herself of the employment leads and job searching assistance offered by Ms. Puckett. Such does not preclude a claim for disability in excess of impairment, but does suggest a lack of motivation to seek employment. Claimant has not diligently pursued return to potential modified employment with Sodexo. However, William Jordan noted that work opportunities at Sodexo were sporadic because of the scheduling of athletic games. Given Claimant's permanent physical restrictions, it is clear she cannot resume her regular-duty position at Sodexo.

41. In spite of Jordan's deposition change sheet, the Referee finds that Jordan's disability evaluation presumes Claimant's lifting restrictions apply only to her left upper extremity, whereas Drs. Gillespie and McNulty provide overall lifting restrictions. Jordan's conclusions assume that Claimant is competitive for a number of actual jobs in the Lewiston labor market. Scrutiny of the requirements of those positions refutes Jordan's assumption in the large majority of instances. Purvis' report is based upon an accurate understanding and application of the physical restrictions imposed by Drs. Gillespie and McNulty and is adequately explained and persuasive.

42. Based on Claimant's impairment of 10% of the whole person, her extensive permanent physical restrictions including her sedentary weight and overhead lifting restrictions, and considering her non-medical factors including her age of 51 at the time of the accident, limited formal education, very minimal computer literacy, limited transferable skills, and inability to return to any of her pre-injury positions, Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has been significantly reduced. The Referee finds that Claimant has suffered a permanent disability of 62%, inclusive of impairment.

43. **Idaho Code § 72-406(1) apportionment.** The final issue is whether apportionment is appropriate. Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

44. In the present case, Dr. Gillespie opined that a rotator cuff tear such as Claimant suffered would not have resulted simply from the lifting accident Claimant described. Dr. Gillespie indicated that Claimant likely had pre-existing left shoulder tendinosis and impingement. However, neither Dr. Gillespie nor any other medical expert has opined that Claimant suffered permanent impairment prior to her industrial accident and no medical expert has quantified any alleged impairment. Defendants appropriately acknowledge that there is no medical record indicating Claimant ever suffered any left shoulder problems prior to her accident. Claimant consistently testified that she had no left shoulder pain or limitations prior to her industrial accident. No apportionment pursuant to Idaho Code **§** 72-406 is appropriate. *See Harmon v. Idaho Custom Wood Products*, 2011 IIC 0059, 0059.6 (2011).

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent impairment to her left shoulder of 10% of the whole person due to her industrial accident.

2. Claimant has proven she suffers permanent disability of 62%, inclusive of impairment.

3. No apportionment pursuant to Idaho Code **§** 72-406 is appropriate.

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 6th day of July, 2012.

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee

ORDER

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven she suffers permanent impairment to her left shoulder of 10% of the whole person due to her industrial accident.

2. Claimant has proven she suffers permanent disability of 62%, inclusive of impairment.

3. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

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

INDUSTRIAL COMMISSION

Participated but did not sign

Thomas P. Baskin, Commissioner, R.D. Maynard, Commissioner