

3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
4. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) temporary disability;
 - (b) permanent partial impairment (PPI);
 - (c) permanent disability in excess of impairment (PPD);
 - (d) retraining;
 - (e) medical care; and
 - (f) attorney fees.

As Claimant admitted in her brief that she “probably is not a candidate for retraining,” that issue is deemed withdrawn.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her right shoulder at work on or about April 22, 1993. She suffered two accidents at work, perhaps within a few days or weeks of each other. These are referred to as the “lifting accident” and the “box falling accident.” She timely notified her supervisors of both accidents. A Notice of Injury and Claim for Benefits (Form 1) shows she reported the lifting accident. She has since developed neck and left shoulder problems as well. The accident(s) caused an injury which, in turn, caused her current problems and symptoms. Even if her neck problems are found unrelated to work, the shoulder problems should be deemed compensable. She is entitled to all benefits, including significant permanent disability which is likely total. Despite her injuries she continued to work. In 1998, she took a one-year medical leave of absence. In 1999, she was terminated.

Defendants contend Claimant failed to notify Employer of the box falling accident. She did not file a Complaint for either accident until November 24, 1999. Although the lifting accident involved a brief injury to her right shoulder which resolved and for which timely notice was received, Claimant failed to timely notify Defendants of her neck and left shoulder

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complaints. Her claim is defective both for untimely notice as well as an untimely-filed Complaint. Claimant has a history of neck and arm problems which precede the accidents. She strained her neck in a non-industrial fall on Christmas Day 1993. She did not seek neck treatment between that date and 1997. Her neck and left shoulder problems are unrelated to the accidents. She is a poor historian and her testimony lacks credibility. She has received all benefits due her for her right shoulder and is entitled to no other benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant;
2. Claimant's exhibits 1, 3-29, 31-37;
3. Defendants' exhibits 1-14; and
4. Posthearing depositions of Benjamin Blair, M.D., and Gail E. Fields, D.O.

A ruling on Defendants' objection to the admission of Claimant's exhibit 30 was reserved at the time of hearing. Defendants' objection is sustained.

FINDINGS OF FACT

Introduction and Accidents

1. Claimant worked for Employer for almost 20 years. She managed the lunch room including supervising workers as well as all aspects of ordering and preparing food. The job included lifting heavy supplies and cooking pots. When terminated on July 28, 1999, she earned \$9.38 per hour. Born September 1, 1939, Claimant was 53 on the date of the lifting accident.

2. Sometime before June 4, 1993, when Surety received the Form 1, Claimant reported an industrial accident which occurred on April 22, 1993. In it Claimant reported she

was “putting away a truck load of food that was being unloaded lifted box up over head and strained arm/right shoulder.” Her wage at the time was \$8.39 per hour. This accident is referred to as the lifting accident.

3. A second accident, referred to as the box falling accident, was identified by Claimant. She testified a stack of boxes became unbalanced and a box fell striking her on the back, neck and right shoulder. Although Claimant testified that the box falling accident occurred the same day or within a few days of the lifting accident, no Form 1 appears in evidence. The first recorded reference to the box falling accident appears in the records of Gail E. Fields, D.O., dated May 26, 1998. It states, “All of this as far as I am concerned in looking back at her records was a result of her industrial accident when she was working with some boxes and fell from a shelf down on her neck in a freezer.” Dr. Fields did not contemporaneously note that this description was inconsistent with the lifting accident which Claimant had been describing in 1993 and early 1994.

4. Surety last paid any benefits to Claimant on January 24, 1999. This payment represents some additional PPI assigned to Claimant for treatment received in or after 1997.

5. The Complaint in this matter was filed December 2, 1999.

6. The following findings relating to medical care do not represent an exhaustive recapitulation of complaints and treatment. Rather, only particularly salient details are presented.

Prior Medical Care and History

7. Claimant has suffered longstanding difficulties as a result of degenerative disease in her spine. She underwent a lumbar fusion about 1965. In 1987, she underwent an electromyogram and nerve conduction velocity study for complaints relating to her right arm

and shoulder. An X-ray of her cervical spine in February 1988 demonstrated degenerative disc disease at C5-6. Peter G. Reedy, M.D. performed a C5-6 laminectomy and C6 foraminotomy in March 1988. Following a pair of accidents in 1988 – the one in October was work related – she reported pain between her shoulder blades radiating into her left neck. Diagnosed as a mid-thoracic sprain, she reported persistent thoracic spine symptoms also involving her shoulders, arms, neck, and face through March 15, 1990. In an IME in January 1990, James M. Lanshe, M.D., diagnosed her neck complaints as coming from degenerative disc disease and myofascial pain syndrome. He rated her PPI at 9% based upon Dr. Reedy’s neck surgery.

8. After a January 1991 motor vehicle accident, Claimant again reported pain in her left leg, neck, right arm, and mid back. Dr. Grant D. Finn, D.C., diagnosed a strain. Claimant continued to complain and wore a cervical collar for a time. Eventually, Dr. Finn diagnosed chronic fatigue syndrome, possible polymyalgia and possible polyarthralgia in April 1992.

9. Claimant’s right acromion is shaped in an anatomical variant described as a “beaked type III.” Acromioplasties were performed in 1993 and 1997, at least in part, because of this variant. Dr. Reedy has indicated the surgeries have not sufficiently relieved this condition.

10. Claimant’s symptoms have included perceived pain and weakness in her upper body as well as sensory disturbances in her neck and face which sometimes are accompanied by dizziness. These have been recurrent at least since the mid 1980s.

Medical Care: 1993

11. After the April 22, 1993, accident, Claimant first sought medical attention on May 7, 1993. Dr. Finn recorded she described straining her right shoulder unloading high boxes. He diagnosed a strain of a right rotator cuff muscle and right bicipital tendonitis. She

was better but still sore one week later, and by June 8, 1993, Dr. Finn recorded she suffered no disability from the event.

12. Meanwhile, he had referred Claimant to Gail E. Fields, D.O., who first visited Claimant on May 25, 1993. Dr. Fields diagnosed brachial neuralgia and a possible rotator cuff injury. An X-ray showed “mild” degenerative disease in Claimant’s cervical spine and “some” degenerative disease in her acromioclavicular (AC) joint. A June 4, 1993, MRI of Claimant’s right shoulder confirmed “moderate” degenerative changes and reported a moderate posterior disc protrusion at C6-7. A June 6, 1993, MRI of Claimant’s cervical spine showed degenerative disease and bulging discs at C6-7, less so at C5-6, without evidence of herniation of the discs.

13. On July 6, 1993, Dr. Fields performed surgery, an acromioplasty on Claimant’s right shoulder. The postoperative diagnosis was rotator cuff impingement without a tear. One week later, Claimant’s only complaint was itching at the wound site. Two weeks later, Claimant described some soreness in her shoulder.

14. A September 27, 1993, neurological examination by Scott S. Petty, M.D., found “absolutely no abnormalities” to explain Claimant’s continuing symptoms. He ruled out brain stem and other neurological possibilities as likely causes.

15. On September 20, 1993, Dr. Fields recorded, “As far as this being work related, I cannot say it is or it isn’t until a correct diagnosis is made.” On October 5, 1993, Dr. Fields recorded, “Originally I felt that until the results were back I was unable to make a decision either way whether work comp or not. However nothing was found of this sort in the proper work up and I feel they should be liable for this bill.” On November 29, 1993, Dr. Fields opined Claimant’s PPI at 4%.

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16. A medical record dated December 13, 1993, diagnosed right shoulder bursitis tendonitis.

17. After a fall on Christmas Day 1993, Claimant reported to her doctor (probably Dr. Finn) complaints of pain in her neck, mid back, and lower back. Dr. Finn diagnosed a musculoligamentous strain on December 30, 1993, after an X-ray of her thoracic spine showed no relevant findings.

18. Claimant returned to Dr. Fields on January 10, 1994. Dr. Fields recorded, "We discussed that in the future she may need to have another surgery on the shoulder but I do not anticipate it in the very near future or even within the next year." On follow-up visits of February 7, and May 9, 1994, Dr. Fields noted "a little bit of grinding but not excessive pain although there is limited motion of the shoulder."

Medical Care: 1994 – 1997

19. Claimant received no relevant treatment between May 9, 1994, and May 18, 1997. A June 1995 note by Dr. Finn describes a right hand injury after a fall at Anderson Lumber, but is silent about any symptoms relevant to the case presently before the Industrial Commission.

Medical Care: 1997 – 1999

20. Claimant continued to complain of sensory abnormalities in her face. Electrodiagnostic testing did not indicate a likely cause.

21. On May 17, 1997, an MRI of Claimant's cervical spine again showed degenerative changes and a recurrent disc herniation at C6-7.

22. On June 25, 1997, Dr. Reedy recommended surgery although, he noted, "I'm not certain about its relationship to her symptoms." On June 26, 1997, he performed a fusion at C6-7 and reduced the disc herniation at that level. He also reported finding a small osteophyte.

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23. On November 10, 1997, Dr. Fields noted marked tenderness in Claimant's right shoulder. Dr. Fields noted a lot of degenerative joint disease in the AC joint and stated, "I am concerned she may have re-injured the rotator cuff with her type of work." An MRI four days later showed right shoulder impingement, but no rotator cuff tear. On November 17, 1997, Dr. Fields described examination findings and noted, "This is a result of accumulative trauma from her lifting heavy pans and ect [sic] in her work as a cook in the school system."

24. On January 26, 1998, Dr. Fields performed another surgery, a rotator cuff repair and acromioplasty. Operative notes demonstrated no rotator cuff tear. Follow-up in March and April 1998 showed some suture granuloma and keloid formation as well as "a lot of DJD with posterior osteophyte formation."

25. Dr. Fields' previously described opinion which referenced the box falling accident was recorded May 26, 1998.

26. In June 1998, Dr. Reedy noted a miscommunication with Claimant about whether medical care should be billed to the health insurer or Surety. Previously, Claimant had expedited surgery by obtaining approval from her health insurer and later charging it to Surety. Dr. Reedy's note shows Claimant was doing it again.

27. A panel consisting of Richard W. Wilson, M.D., and Joseph G. Daines, Jr., M.D., evaluated Claimant on July 15, 1998. After specific queries by the panel, Claimant described the box falling accident but not the lifting accident. The panel opined:

We do not feel that her incident of April 22, 1993 contributed significantly to her need for surgery on June 28, 1997. The description of her injury as indicated on the Notice of Injury and Claim for Benefit filled out and signed by the patient as well as Dr. Fields' description of her injury in his orthopedic examination note of May 25, 1993 would not be expected to cause any injury to the cervical spine. Her version of the nature of the injuries she sustained at that time as given to us today is incompatible with that previously described.

The panel opined her medically stable and assigned PPI of 3% of the whole person to her right shoulder motion limitations and 11% whole person based upon her two neck surgeries. It opined the neck surgeries were unrelated to her work accident. It recommended restrictions of no overhead lifting, 10 pounds frequently, 30-35 pounds maximum, and allowed she could work within those restrictions. In September 1998, Dr. Wilson recalculated PPI and allowed 5% for shoulder range of motion and considered it equivalent to Dr. Fields' evaluation of 4% PPI.

28. In July and August 1998, Claimant again visited Dr. Finn. Another round of MRIs of her neck and right shoulder again showed bulging discs, degenerative changes and osteophytes in her neck and degenerative changes in her AC joint as well as a possible partial tear of the rotator cuff or a possible tendinosis or other degenerative change. He opined her unable to work "especially because of her right shoulder problem secondary to her cervical intervertebral disc syndrome."

Medical Care: 2000 and After

29. On July 29, 1998, Claimant requested and was granted a one-year leave of absence based upon her medical conditions. After correspondence near the end of her leave, Employer terminated Claimant on July 28, 1999, and asserted it could make no "reasonable accommodations" to allow her to continue to work.

30. The Public Employee Retirement System of Idaho (PERSI) requested an IME which was performed by William B. Goodman, M.D., on January 14, 2000. Claimant did not mention the box falling accident to him. He found a problem with her C6-7 fusion and degenerative changes, a probable partial right rotator cuff tear with suspected persistent impingement, a disproportionate reaction to pain, chronic pain syndrome, and a suspected histrionic personality. He opined she was able to perform only the lightest and most sedentary

work. He rated her neck at 15% PPI and her right shoulder at “5% of the upper extremity” and combined these for a 20% whole person PPI.

31. In January 2002, Benjamin Blair, M.D., examined her. She described the box falling accident and reported marked symptoms continuing since April 22, 1993. He diagnosed degenerative cervical spondylosis. He ordered another cervical spine MRI which was consistent with prior MRIs although it described the bulge previously reported at C5-6 as a herniation. In April 2002, Claimant told Dr. Blair her neck pain began while loading freight on April 23 [sic], 1993. He performed a surgical fusion of C5-6.

32. On January 10, 2002, Richard A. Wathne, M.D., examined Claimant for bilateral shoulder pain. He found degenerative changes on both sides and a type II acromion on her left. He diagnosed bilateral shoulder impingement syndrome, worse on left. At hearing, Claimant attributed her left shoulder condition to overuse as a result of her right shoulder problems.

33. Claimant was in another motor vehicle accident on August 16, 2002. The record does not indicate what treatment she received beyond her telephone call to Dr. Blair’s office.

34. On February 10, 2003, Dr. Blair rated Claimant at 10% PPI for her spinal fusion and added 2% for multiple levels and multiple surgeries, resulting in a 12% whole person PPI rating. On March 19, 2003, Dr. Blair again performed surgery, this time at her low back. He found degenerative changes from L2 through L5.

35. An April 1, 2003, note among Dr. Blair’s records initialed by “LCD” recorded that Claimant questioned whether her left shoulder complaints were related to the recent motor vehicle accident, and that she was told Dr. Wathne opined they were not.

36. On July 28, 2003, Dr. Wathne performed left shoulder surgery. He diagnosed left shoulder impingement syndrome with AC joint arthrosis, bursal side supraspinatus rotator cuff

tear, and grade IV chondromalacia. By the end of October, he opined her left shoulder was better than her right. He opined, "At this point, I believe Peggy can return back to her normal activities without restrictions."

Discussion and Further Findings

37. **Credibility.** Claimant has been a good and hard worker for most of her adult life. Her testimony demonstrated she sincerely believes her problems were caused by the work accidents she described. However, she is a poor historian. As a result, her memory is often inconsistent with the medical and other records in evidence.

38. **Notice and Statutes of Limitation.** Idaho Code § 72-701 requires notice of an accident to be given to an employer "as soon as practicable but not later than sixty (60) days after the happening thereof." There is no evidence to credibly fix the date of the box falling accident Claimant described. Claimant's testimony demonstrated she cannot reasonably locate it in time. She testified it did not occur on the date of the lifting accident. Her memory is muddled and confused, but ultimately consistent with the Form 1 which describes only the lifting accident occurring on April 22, 1993. No evidence supports any finding as to what date, or even in what year, the box falling accident did occur. First reported to physicians in 1998, the Employer was not notified timely of the box falling accident. To allow it to be considered at this late date would prejudice Employer.

39. A second question arises. Idaho Code § 72-706 generally provides a five-year window for Complaints to be filed. Where payments for income benefits have been made and discontinued more than four years from the date of the accident, a claimant has one year from the last payment to file a Complaint. Idaho Code § 72-706(3). The Idaho Supreme Court has held that the income payments must begin before the fourth anniversary of the accident date and

continue across it to invoke subsection three's extension to the five-year statute of limitation. Salas v. J. R. Simplot Co., 138 Idaho 212, 61 P.3d 569 (2002); *also see*, Walters v. Blincoe's Magic Valley Packing Co., 117 Idaho 239, 787 P.2d 225 (1989).

40. The record does not show how much or when Surety paid income benefits, except for the January 24, 1999, payment. The fourth anniversary was April 22, 1997. On that date, Claimant had not sought relevant medical attention for almost three years. By no stretch of the imagination would benefits for the PPI assigned by Drs. Finn or Fields in 1993 and 1994 have been continuing on that date or have further continued to January 24, 1999. Rather, that payment probably represented a part of the benefit for the additional PPI assigned by Dr. Reedy after the subsequent surgeries. Even if it represented part of the original PPI, the (extremely) late payment would not invoke Idaho Code § 72-706(3) to extend the time for filing a Complaint. *See, Salas, supra.*

41. The Referee finds no statutory guidance or case law to support a proposition that a voluntary resumption of payment of additional income benefits by a surety renews or extends a statute of limitation to allow later filing of a Complaint. However, the parties' briefs appear to accept that the Complaint was filed timely because it was filed within one year of the January 1999 PPI payment. Absent a more thorough record, no decision about whether Claimant is barred from further income benefits can be made. Moreover, findings and conclusions set forth below show this issue to be moot.

42. **Accidents and Causation.** The absence of notice precludes consideration of the box falling accident as a cause of Claimant's conditions. Thus, unless linked by a reasonable medical probability to the lifting accident of April 22, 1993, her conditions are not compensable.

43. In deposition, Dr. Fields opined that both Claimant's neck and shoulder problems

were related to the April 22, 1993, lifting accident. He opined that despite the hiatus in medical treatment from 1994 into 1997, a recurrence of her shoulder problem was expected which would require surgery, specifically the surgery performed on January 26, 1998. Dr. Fields opined Claimant's left shoulder problems "could have" been caused by overuse as a result of Claimant's right shoulder problems and noted that the left shoulder surgery in 2003 was "very similar" to Dr. Fields' findings when operating on Claimant's right shoulder. Dr. Fields opined that Claimant should not perform secretarial work. He based this opinion upon her neck condition; her shoulder condition did not contribute to that opinion.

44. In deposition, Dr. Blair testified his opinions are based in part upon Claimant's history of the box falling accident and that she did not describe the lifting accident to him. Moreover he stated, "I don't know" whether the 2003 neck surgery related to the April 22, 1993, accident. He did link that surgery to the 1997 surgery at C6-7. He opined Claimant suffered a "significant" neck sprain as a result of the 2002 motor vehicle accident. He opined he would not recommend restrictions based upon Claimant's neck condition, but would consider restricting her from lifting above 10 pounds continuously, 25 pounds occasionally, and to only minimal overhead lifting. He might add restrictions based upon her low back as well.

45. Although Dr. Fields has opined that "they [Surety] should be liable for this bill," he does not well explain the bases for his opinions, whether expressed in 1994, 1997, 1998, or in deposition. Indeed, some appear inconsistent with each other. Dr. Fields makes no attempt to sort out Claimant's lifting accident from her other accidents or from her longstanding degenerative condition. Dr. Blair never opined the required causal link exists between the lifting accident and any of the medical treatment from 1997 to the present. Some doctors have been equivocal in opining some or all of Claimant's condition was caused by the lifting accident.

Others have opined no causal relationship existed when they evaluated her in 1997 or later.

46. Although there does not appear to be any dispute on this point and Surety paid the 1993 and 1994 medical treatment and PPI, the record does show Claimant suffered a right shoulder injury which required medical treatment as a result of the April 22, 1993, lifting accident. Dr. Finn rated her as having “no disability” on June 8, 1993. Dr. Fields rated her at 4% PPI in November 1993 and did not see Claimant between May 9, 1994, and April 1997.

47. Factors which support the absence of a causal link between Claimant’s conditions after 1994 and the April 22, 1993, accident include: her longstanding history of upper back, bilateral shoulder, and neck complaints; her demonstrated degenerative conditions which preceded the lifting accident; the three-year hiatus of medical treatment; the anatomical variant in Claimant’s AC joint; the occurrence of other accidents which were not work related; and the differences of opinion among multiple doctors about the question of causation. Claimant failed to show her right shoulder condition after May 9, 1994, was related to the April 22, 1993, lifting accident.

48. Claimant also failed to show her neck or left shoulder conditions were related to the April 22, 1993, lifting accident. Thus, questions of benefits for medical care and temporary and permanent disability after 1994 are moot, as is the issue of attorney fees.

CONCLUSIONS OF LAW

1. Claimant failed to give timely notice of the box falling accident as required by Idaho Workers’ Compensation Law;

2. Claimant suffered a right shoulder injury as a result of the April 22, 1993, lifting accident;

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3. Claimant failed to show she was entitled to any benefits after May 9, 1994; and
4. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED in Boise, Idaho, on this 18TH day of February, 2005.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28TH day of FEBRUARY, 2005, 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:

Paul T. Curtis
598 North Capital Avenue
Idaho Falls, ID 83402

R. Todd Garbett
P.O. Box 191
Preston, ID 83263

db

/S/ _____

4. All other issues are moot.

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

DATED this 28TH day of FEBRUARY, 2005.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
James F. Kile, Commissioner

/S/ _____
R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 28TH day of FEBRUARY, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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/S/ _____

ORDER - 2