BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANNETTE L. TIPTON, Claimant, v. BOYKIN HOTEL PROPERTIES, Employer, and LIBERTY MUTUAL FIRE INSURANCE CORPORATION, Surety, Defendants.	)	**IC 03-523543** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed June 24, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on January 4, 2005. Claimant was present and represented by Bradford S. Eidam of Boise. Monte R. Whittier, also of Boise, represented Employer, Boykin Hotel Properties, and its Surety, Liberty Mutual Fire Insurance Corporation. Oral and documentary evidence was presented and the record was held open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on May 3, 2005.

ISSUES

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

1. Whether Claimant suffered a personal injury arising out of and in the course of her employment;

2. Whether Claimant's condition is due in whole or in part to a non-work-related pre-existing or subsequent injury or disease;

3. Whether and to what extent Claimant is entitled to the following benefits:

a. medical care;

b. temporary total and/or temporary partial disability (TTD/TPD);

c. permanent partial impairment (PPI);

d. permanent partial or permanent total disability above impairment (PPD/PTD);

4. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate; and,

5. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant worked as a banquet server at the Double Tree Inn – Riverside in Boise. She contends that she injured her neck while lifting an "oval" - a large tray containing up to 10 entrees - sometime in mid-September 2003. She is entitled to all benefits naturally flowing from that injury including the cost of her cervical surgery as well as attorney fees for Defendants' unreasonable denial of her claim.

Defendants contend that Claimant's failure to immediately report her accident and her inability to more specifically pinpoint the date of its occurrence undermines her claim and gave them a reasonable basis for denying the same. Further, it was not until Claimant returned from a trip to Las Vegas where she got "drunk and stupid" and rode roller coasters that she first reported her accident as industrial and ever missed any work due to her neck injury.

Claimant responds that within 10 or so days after her accident, she told her chiropractor how and approximately when she hurt her neck, and her recitations of her accident to other medical providers as well as Surety's own investigator have been consistent, and Defendants have no reasonable medical evidence upon which to base a denial; thus, attorney fees should be awarded.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;

2. Claimant's Exhibits 1-13 admitted at the hearing;

3. Defendants' Exhibits A-J admitted at the hearing;

4. The pre-hearing depositions of: Julie Osler with 13 exhibits, Sharon Ingram with 8 exhibits, Carrie Hibbard, Cassey Brandon, Nancy Mausling, David Pratt, Brian Hess with 8 exhibits, and Eric Hansen with 1 exhibit, all taken by Claimant on December 14, 2002; and,

5. The post-hearing depositions of Timothy E. Doerr, M.D., with 1 exhibit, taken by Claimant on February 10, 2005, and Michael P. Gibson, M.D., taken by Defendants on February 16, 2005.

Claimant's objections at page 38 of Dr. Doerr's deposition and at page 31 of Dr. Gibson's deposition are overruled.

After having considered all the above evidence and the briefs 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 40 years of age at the time of the hearing and resided in Boise. In September 2002, she began working for Employer as a banquet server. Among other duties as a

banquet server, Claimant was required to lift large trays called ovals that carry up to 10 different entrees weighing up to 25 pounds total depending on the number of entrees being carried. Claimant testified as follows regarding how an oval is lifted and carried:

> Q. (By Mr. Eidam): When you're serving an oval that has ten plates on it with food, how would you typically pick that up and carry it and set it down?
>
> A. It's probably on a table a little lower than that. And you just go to a squatting position on your knee and slide it from the table onto your arm and your shoulder. And you come up and stand straight up. And then you just pack it where most of the weight's sitting on your shoulder. And you balance it with your hand. And you walk to where you're going. And you have a tray that you just do the exact opposite. You bend down on one knee. And you slide it back off.

Hearing Transcript, p. 40.

2. Claimant testified regarding the unspecified day in September 2003:

> Q. (By Mr. Eidam): Let's talk about the accident. Okay? Why don't you, if you could, describe what happened.
>
> A. As soon as I went up, I knew because I felt a pinch. And it shot down my arm. And my finger and my thumb went to sleep. I won't say it went directly numb. But it's like your foot or your hand goes to sleep. You know it's there. And it was like pins and needles. And as soon as I released it, that didn't ever go away. It stayed like that and increasingly got worse. The more I lift, the more –

Hearing Transcript, p. 41.

3. Claimant first sought medical attention on September 24, 2003, when she presented to Jennifer L. Anacker, D.C. Prior to meeting with Dr. Anacker, Claimant completed a "Patient Health Record" wherein she indicated the purpose of her appointment was related to chronic discomfort from a car accident in 1992.[1] In response to the following question, "If job related, have you make [*sic*] a report of your accident to your employer?" Claimant checked the box marked "No." Claimant further indicated that the condition began in 1992 and "comes and

[1] Claimant was run over by a motor vehicle in 1992 and subsequently underwent an anterior C5-6 discectomy and fusion on October 30, 1992.

goes." She also indicated that the condition had occurred before. Claimant's Exhibit 1, p. 17. Dr. Anacker's office note for September 24 indicates Claimant's primary concern was cervicalgia with numbness in digits 1 and 2 in her left hand. Further, "This condition first occurred **in early to mid September** upon lifting a heavy banquet tray while at work at the Double Tree Riverside in Boise, Idaho. Her body position when it occurred was that the tray was being placed on her left shoulder in a one [*sic*] kneeling position." *Id*., p. 16. (Emphasis added).

4. Claimant saw Michael P. Gibson, M.D., an occupational health specialist, at Employer's request on November 6, 2003. On that date, Dr. Gibson noted:

> Annette works at Doubletree. She is a banquet server. She has been doing this work since September 16, 2002. **Towards the end of September of 2003** she noted the onset of a pinching sensation on the left side of her neck. This would occur at first only with lifting heavy items. She does frequently lift oval trays with 10 servings on each tray. She noted that if she lifted the oval trays she would get a pinching sensation, but if she then put the tray down the pinching sensation would improve. This would come and go and was related to lifting each time. This seemed to come on gradually and did not come on suddenly with a slip or fall injury. Claimant's Exhibit 2, p. 10. (Emphasis added). Further, "Annette is not sure whether a claim has been filed in her behalf with the workers insurance to date." *Id*.

Dr. Gibson diagnosed cervical radiculitis, prescribed medication, and took Claimant off work.

5. Claimant returned to Dr. Gibson on November 11, 2003, with a 50% reduction in her neck pain without any arm pain. He kept her off work and prescribed daily physical therapy.

6. Claimant reported to Saint Alphonsus Rehabilitation Services on November 11. The initial evaluation indicated, "The patient is a 39-year-old female reporting that while at work at the Double Tree Riverside she was lifting a tray and heard a pop and a pinch in the left trapezius with immediate radicular symptoms **on 09-25-03**." Claimant's Exhibit 2, p. 11. (Emphasis added).

7. By December 1, 2003, Claimant had gotten worse so Dr. Gibson ordered an MRI and referred her to Timothy E. Doerr, M.D., an orthopedic surgeon.

8. Claimant first saw Dr. Doerr on December 29, 2003, at which time Dr. Doerr noted, "Annette is a 38-year-old female who injured her neck lifting a tray **in September** at work." Exhibit 1 to Dr. Doerr's Deposition. (Emphasis added). On February 10, 2004, Dr. Doerr performed a left C5-6 revision decompression and fusion and a left C6-7 anterior cervical decompression and fusion.

9. At hearing, Claimant testified that the lifting incident occurred a week to ten days before she went to see Dr. Anacker on September 24, 2003, but she did not know the exact date. If so, that would have her accident occurring **between September 14 and 17, 2003**.

10. It is undisputed that Claimant did not tell any of her co-workers that the neck and arm problems she was experiencing arose out of an industrial accident, or that Defendants did not have notice of the industrial nature of her neck/arm problem until November 6, 2003.

DISCUSSION AND FURTHER FINDINGS

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and **which can be reasonably located as to time when** and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). (Emphasis added). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was 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 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). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

The pivotal question to be answered here is whether under the totality of the circumstances presented Claimant has satisfied the "reasonable location as to time" requirement of Idaho Code § 72-102(17)(b). Idaho Code § 72-701 refines the reasonable time location requirement by requiring notice to an employer of an accident as soon as practicable but not later than 60 days from the happening thereof. Here, Employer had timely notice of Claimant's injury; however, even though Employer had notice of Claimant's "accident" within 60 days, the question remains whether Claimant has reasonably located that accident in time.

11. The Referee finds that Claimant squandered many opportunities to clarify the alleged work-related nature of her cervical condition and, perhaps, avoided Surety's denial of her claim. The first lost opportunity was when she informed her supervisor that she was having neck pain and requested accommodations. Her supervisor, Brian Hess, testified that on October 11, 2003, he had a conversation with Claimant about restrictions recommended by Dr. Anacker and Claimant did not mention to him how she injured her neck; Claimant does not deny this. Mr. Hess also had a conversation with Dr. Anacker regarding light duty and Dr. Anacker did not inform him how Claimant got hurt. Claimant informed Dr. Anacker that she was injured in early to mid September 2003, although she failed to mention any precipitating event on Dr. Anacker's intake form. Claimant told Dr. Gibson that she developed neck and arm pain towards the end of

September 2003 and the pain came on gradually. Dr. Gibson dictated his office note containing that information in Claimant's presence and she had the opportunity to correct him had she chosen to do so. Claimant told her physical therapist that she was injured on September 25, 2003.[2] Claimant told Dr. Doerr she was injured a week or ten days before she saw Dr. Anacker on September 24, 2003. Claimant told an investigator for Surety on November 24, 2003, that her injury occurred in the middle to the end of September 2003.

12. The Referee is aware that the provisions of the Workers' Compensation Law are to be construed liberally in favor of the employee, *Haldiman v. American Fine* Foods, 117 Idaho 955, 793 P.2d 187 (1990), and that the humane purposes for which it serves leaves no room for narrow, technical construction, *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). While the Referee is also aware that Claimant need not pinpoint the exact date and time of an accident causing injury, nonetheless, notice of such accident should be sufficient to allow for a meaningful investigation,[3] especially where the accident is unwitnessed, there are no means by which to independently corroborate the accident, Claimant initially denies the injury was work-related, and then gives inconsistent dates or ranges of dates when the accident allegedly occurred. Claimant testified that she was aware of Employer's policy of immediately reporting accidents and their policy regarding submitting to a urinalysis upon learning of any job-related injury. Claimant further testified that around Halloween 2003 she took a trip to Las Vegas with her roommate where she got "drunk and stupid" and rode on two roller coasters, an activity that common sense suggests was likely to aggravate to some extent her already painful cervical condition. Besides being drunk, Claimant volunteered to the Surety investigator that she also smoked marijuana while there. Claimant had only been released from a local community work

[2] It is noted that September 25th is the day **after** Claimant first saw Dr. Anacker.
[3] As an example, if a claimant alleges a date certain for an alleged accident that, for whatever reason, an employer questions, time cards could be reviewed to determine whether the claimant even worked on that date. Such would not have been possible here due to the uncertainty of the date of Claimant's alleged accident.

center after having served about seven years of a ten-year sentence for felony possession/delivery of marijuana about a month before her alleged accident and she testified that she did not accurately report the accident on Dr. Anacker's intake sheet or accept a light duty job with Employer for less pay because she "needed her job" and the money it provided. It is interesting that here, it was not Claimant herself who first reported the accident; it was her roommate. After returning from Las Vegas, Claimant could "hardly move my neck." Hearing Transcript, p. 68. On November 6, 2003, Claimant's roommate called Employer and related that Claimant was hurt at work and needed to see a doctor. This call was presumably made without Claimant's knowledge as Claimant was in the shower at the time of the call. It could be that Claimant never intended to report her injury as work related because she knew she would fail the urinalysis and get fired, and, that is exactly what happened; she tested positive for marijuana and was fired.

13. Under the rather peculiar circumstances of this case, the Referee finds that Claimant has failed to prove she suffered an accident pursuant to Idaho Code § 72-102(17)(b) as she has failed to reasonably locate her alleged accident in time. There were no periods of especially hard work or any other markers whereby Claimant would have any reason to remember a specific event. She was merely lifting an oval, an activity she had done on a regular basis for at least a year prior to her alleged accident. Claimant's explanation that she intended to place Dr. Ackerman's bill on her private insurance rather than filing a workers' compensation claim (even though she testified she at the time knew it was a work injury) because it "[j]ust didn't cross my mind" is not persuasive.

14. In light of the foregoing finding, all remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove she suffered an accident pursuant to Idaho Code § 72-102(17)(b).

2. All other issues are moot.

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 __17th __ day of ___June___, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th __ day of ___June___, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

MONTE R WHITTIER
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BOISE ID 83707-6358

____/s/_____

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ANNETTE L. TIPTON, Claimant, v. BOYKIN HOTEL PROPERTIES, Employer, and LIBERTY MUTUAL FIRE INSURANCE CORPORATION, Surety, Defendants.	)	**IC 03-523543** **ORDER** Filed June 24, 2005

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed 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 failed to prove she suffered an accident pursuant to Idaho Code § 72-102(17)(b).

2. All other issues are moot.

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

DATED this __24th ___ day of ___June___, 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 the __24th ___ day of ____June____, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

BRADFORD S EIDAM
PO BOX 1677
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MONTE R WHITTIER
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____/s/_____

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