

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VALERIE WALTMAN (now "Waite"),)
)
 Claimant,)
 v.)
)
 HIGH COUNTRY PLASTICS, Employer,)
 and ADVANTAGE WORKER'S)
 COMPENSATION INSURANCE COMPANY,)
 Surety,)
)
 and)
)
 KELLY SERVICES, Employer, and)
 AMERICAN CASUALTY COMPANY, Surety,)
)
 Defendants.)
 _____)

IC 03-008014
IC 03-013877

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

FILED SEPT 23 2005

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise, Idaho, on December 21, 2004. J. Brent Gunnell represented Claimant. Alan K. Hull represented High Country Plastics and Advantage Worker's Compensation Insurance Company (collectively, "Advantage"). Damon L. Vickers represented Kelly Services and American Casualty Company (collectively, "American"). The parties scheduled and later vacated the taking of posthearing depositions. They submitted briefs. The case came under advisement on June 2, 2005, and is now ready for decision.

ISSUES

After due notice and by agreement of the parties, the following issues are to be decided:

1. Whether Claimant suffers from a compensable occupational disease;
2. Causation;
3. Whether and to what extent either or both employers are liable;

4. Whether Idaho Code § 72-439 bars Claimant's claim;
5. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) temporary partial or temporary total disability benefits (TTD/TPD),
 - (b) permanent partial impairment (PPI),
 - (c) disability in excess of impairment,
 - (d) medical care, and
 - (e) attorney fees; and
6. Whether and to what extent High Country Plastics is entitled to reimbursement from Kelly Services for benefits paid on this claim.

CONTENTIONS OF THE PARTIES

Claimant contends she incurred an occupational disease in her right wrist as a result of repetitive motions required on the job. Later, because she compensated while her wrist was sore, she developed right shoulder problems. She is entitled to temporary disability and medical care benefits. She is entitled to 3% PPI for her shoulder condition and to permanent disability. Defendants unreasonably denied her claims.

Claimant further contends her shoulder problem was an acute condition not subject to Idaho Code § 72-439(2). Regardless, Claimant was actually exposed to the hazard which caused her shoulder condition for 61 days while employed by High Country Plastics. Her wrist was so exposed for 27 days working for Kelly Services and for 41 days working for High Country Plastics, and these days should be combined because she worked at the same job site and did the same job, regardless of which entity was nominally her employer.

American contends Claimant was not exposed to the hazard of the job for the required 60 days while employed by Kelly Services. Claimant only worked on 57 calendar days and was exposed to the hazard for only 34 days. Even if American were found to bear some liability, it is not liable for anything related to Claimant's right shoulder, which did not become symptomatic until after High Country Plastics became her employer.

Advantage contends Claimant was not exposed to the hazard of the job for the required 60 days while employed by High Country Plastics. Claimant reported wrist symptoms only 2 days after starting work. During her entire employment, her wrist was actually exposed for only 27 days while working for Kelly Services and another 27 days while working for High Country Plastics. Doctor's restrictions prevented her from being exposed to the hazard which Claimant asserts caused her wrist condition. Neither wrist and shoulder exposures, nor exposures involving the two Employers, can be combined according to Idaho Code § 72-439(2).

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, her mother, co-worker Sarah Coombs, production manager for High Country Plastics Lloyd Zenick, and subsequent employer Jennifer Burton;
2. Claimant's exhibits 1 – 12, 22, 24 – 26;
3. Defendant Advantage's exhibits 101 – 120;
4. Defendant American's exhibits 1 –87.

FINDINGS OF FACT

1. Claimant began working for Kelly Services on February 10, 2003. Kelly Services hired her to work for High Country Plastics on a "temp-to-hire" basis. She was assigned to High Country Plastics on that date and worked at no other assignment until she was formally hired by High Country Plastics on May 26, 2003.

2. Claimant trimmed excess plastic known as "flash" from High Country Plastics' products. This activity required specific wrist motions. She also performed other, lighter, duties, particularly after medical restrictions were imposed upon her use of her right wrist.

3. On May 28, 2003, Claimant notified her supervisor of right wrist pain. On June 30, 2003, she completed a Form 1 which identified May 28, 2003, as the date of onset and of reporting.

4. On June 6, 2003, Claimant first sought medical attention for her right wrist. She was restricted from repetitive wrist motions at work. High Country Plastics accommodated her restrictions and provided her with light-duty work. On June 13, 2003, her second visit, Kevin Chicoine, M.D., noted, "I think her pain paresthesias are related to work activities." By history, he noted her right wrist pain "worsened" two or three weeks ago, but "actually [had] been going on for about three or four months."

5. Claimant's wrist symptoms improved significantly in the following weeks.

6. Claimant's upper arm and shoulder symptoms began in July 2003. X-rays of her neck and clavicle were negative. An EMG and nerve conduction study were negative. Dr. Chicoine addressed her evolving shoulder symptoms and considered the possibility of thoracic outlet syndrome.

7. On August 27, 2003, Dr. Chicoine allowed Claimant to return to her trimming duties gradually, starting at 2 hours per day. On August 29, 2003, Claimant returned to Dr. Chicoine and reported increased wrist pain. Dr. Chicoine recommended she continue her gradual return to trimming duties.

8. On September 4, 2003, Mark C. Clawson, M.D., examined Claimant and diagnosed right thoracic outlet syndrome. He recommended shoulder strengthening.

9. On September 5, 2003, Claimant reported continuing shoulder symptoms to Dr. Chicoine.

10. On September 18, 2003, Nancy E. Greenwald, M.D., examined Claimant. Contrary to prior representations, Claimant told Dr. Greenwald that “there was definitive trauma” to the insidious start of her wrist pain. Claimant told Dr. Greenwald that the paresthesias in her fingers had resolved but that her shoulder now hurt. Claimant described headaches which she linked to her right arm position.

11. On October 9, 2003, a right shoulder MRI suggested mild inflammation, tendinitis or bursitis, but no rotator cuff tear.

12. On October 16, 2003, Dr. Greenwald diagnosed a “probable overuse syndrome.” Dr. Greenwald expected a full recovery with no PPI. On October 24, 2003, Dr. Greenwald checked “yes” to the question, “Do you agree this diagnosis of overuse syndrome is a diagnosis of non-acute syndrome-occupational disease?” On November 18, 2003, Dr. Greenwald expounded upon and clarified her opinions in response to correspondence from Claimant’s attorney. Claimant was MMI on November 13, 2003.

13. On December 4, 2003, Dr. Greenwald evaluated Claimant and opined she suffered no PPI from her wrist and 3% PPI from her shoulder, with no permanent work restrictions.

14. On March 2, 2004, Claimant sought out Stanley W. Moss, M.D. Dr. Moss examined her and discussed possible shoulder surgery. On May 5, 2004, Dr. Moss performed a diagnostic arthroscopy on her right shoulder. He found a congenital variation which did not account for her symptoms, but found no other traumatic or degenerative abnormality. He did shave some bursal tissue and performed an acromioplasty. On August 24, 2004, Dr. Moss examined Claimant, found her medically stable and opined she had no PPI over the 3% previously rated. He imposed no work restrictions, but suggested she avoid overhead work

if possible.

15. Claimant was 20 years old at the time she started with Employer. She graduated from high school in May 2001 and attended one year of college before she began working for Kelly Services. Both before and after working for Employers, she worked caring for disabled children. Except for a period of disabled child and adult care lasting about 3 months, Claimant had never worked a permanent, full-time job before she began working for High Country Plastics. All prior work had been part time, temporary, or seasonal.

Discussion and Further Findings

16. At hearing, Claimant was not persuasive. Claimant did not appear to be intentionally dissembling, but inconsistencies arose in her testimony. Moreover, when compared to her deposition testimony and the medical records, additional inconsistencies arose.

17. Claimant first reported potentially compensable symptoms two days after her job became permanent. As Dr. Chicoine's note indicates, Claimant was aware of her symptoms very early in her employment with Kelly Services, well before her job became permanent. Claimant's lack of explanation for the timing of her report to her supervisor is not credible.

18. Manifestation of an occupational disease occurs "when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease." Idaho Code § 72-102(18). Here there is some question about when Claimant knew she had an occupational disease. Her decision to wait to report it until she became a permanent employee is indicative, but by itself not dispositive, that she knew she had an occupational disease before her Employer changed from Kelly Services to High Country Plastics. The date Claimant's occupational disease became manifest is June 13, 2003. On that date Dr. Chicoine opined her wrist symptoms were probably related to work.

19. **Idaho Code § 72-439(2).** “An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.” Defendants correctly identify that the statute requires that only actual working days of exposure to the hazard are to be counted. Bint v. Creative Forest Products, 108 Idaho 116, 697 P.2d 818 (1985). Defendants established by credible evidence that Claimant was not exposed to the hazard for 60 days during her entire employment by Kelly Services.

20. High Country Plastics argued that, under Idaho Code § 72-439(2), Claimant must have been exposed to the hazard for 60 days as a High Country Plastics employee, exclusive of the days she was nominally an employee of Kelly Services. That argument is not persuasive. High Country Plastics benefited from Claimant’s services while she was nominally an employee of Kelly Services – same job, same job site, same hazardous exposure. Any other analysis would allow an employer to form a sister entity and transfer employees between themselves periodically so they could avoid any liability for occupational disease claims. Regardless of which Employer paid her wages, Claimant has failed to establish by credible evidence that she was exposed to the hazard for a total of 60 days. Idaho Code § 72-439(2) applies to preclude either Advantage or American from being liable for any aspect of Claimant’s right wrist claim.

21. The medical evidence shows Claimant’s shoulder symptoms came on gradually after she began changing her wrist position to compensate for wrist pain. Claimant’s shoulder condition is a non-acute occupational disease. Idaho Code § 72-439(2) would apply if this were a separately incurred occupational disease. However, it was not separately incurred, but rather arose after – and as a result of – the manifestation of Claimant’s right wrist condition.

22. **Causation and employer liability for Claimant's shoulder.** Here, Claimant is essentially trying to bootstrap an aggravation of a noncompensable occupational disease into a separately compensable occupational disease. "The basic rule is that a subsequent injury, whether an aggravation of an original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable injury." Larson's Workers' Compensation Law, Vol. 1, § 13.11 (1988). The Commission repeatedly has approved the application of the "compensable consequences" doctrine. *See e.g.*, Fernandez v. Burgemeister, 2004 IIC 0841 (2004)(left shoulder condition not shown to be caused as a consequence of right shoulder injury); Salvator2003, 2003 IIC 0258 (2003)(shoulder injury during physical therapy compensable following compensable low back injury); Quenton2003, 2003 IIC 0244 (2003)(left leg deep vein thrombosis from inactivity was compensable following compensable right leg injury). Larson's recitation of the doctrine refers to "injury." The Commission's application of the doctrine clearly includes an occupational disease such as deep vein thrombosis or shoulder "overuse syndrome." *See*, Quenton2003. Here, all physicians who addressed this aspect of causation agreed in their opinions that Claimant's shoulder claim arose because she altered her upper arm motions to compensate for her wrist pain. Claimant's shoulder pain was caused by a noncompensable occupational disease in her wrist.

23. Claimant failed to prove her shoulder condition was a consequence of a compensable occupational disease. Defendants are not liable for any aspect of Claimant's shoulder condition. All other issues are moot.

CONCLUSION OF LAW

Claimant failed to show she suffered an occupational disease compensable under Idaho Worker's Compensation Law in either her wrist or shoulder.

RECOMMENDATION

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

DATED this 2ND day of September, 2005.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23RD day of SEPTEMBER, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

J. Brent Gunnell
317 Happy Day Blvd., Ste. 120
Caldwell, ID 83607

Alan K. Hull
P.O. Box 7426
Boise, ID 83707

Damon Lee Vickers
P.O. Box 17
McMinnville, OR 97128-0017

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/S/ _____

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ORDER

FILED SEPT 23 2005

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the 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 conclusion of law as its own.

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

1. Claimant failed to show she suffered an occupational disease compensable under Idaho Worker's Compensation Law in either her wrist or shoulder.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the issue adjudicated.

DATED this 23RD day of SEPTEMBER, 2005.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
James F. Kile, Commissioner

/S/ _____
R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

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I hereby certify that on 23RD day of SEPTEMBER, 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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