

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment; and
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident.

The remaining issues were reserved at hearing.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered an industrial accident on September 5, 2004, while working at Employer's convenience store. Claimant alleges that while she was lifting a large coffee thermos onto a serving rack she felt a sharp pain in her right shoulder. Claimant argues that she suffered a rotator cuff tear in her right shoulder caused by the accident she suffered on September 5, 2004.

Defendants contend that Claimant failed to prove she sustained an industrial accident on September 5, 2004 or September 6, 2004. Defendants argue that Claimant's testimony and written statements from the day of the injury, as well as the written statement of the witness to the accident, are conflicting and are not valid proof of an accident. Defendants also aver that Claimant's MRI results show a pre-existing degenerative condition and are inconsistent with a traumatic event in her right shoulder. Additionally, Defendants note that Claimant has received medical attention in the past for right shoulder complaints, concluding that Claimant's right shoulder injury was not caused by an industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Oral testimony at hearing by Claimant and Tami Kerr;
2. Claimant's Exhibits 1-16 admitted at hearing;
3. Defendants' Exhibits A-N admitted at hearing; and
4. The post-hearing deposition of J. Craig Stevens, M.D., taken by Defendants on August 23, 2005.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions, and order.

FINDINGS OF FACT

1. Claimant was 51 years old at the time of hearing and had been involved in several car accidents. She was in a motor vehicle accident in 1978 and suffered facial injuries. In 1996 Claimant was involved in a rear-end accident and the records state that Claimant complained of pain in her neck, mid-shoulders, and mid-back. Defendants' Exhibit H. Claimant was involved in another accident in 2000 in which she suffered a laceration to the top of her head and cervical strain. Defendants' Exhibit I. The radiologist's report from Claimant's 2000 accident states Claimant has a mild superior position of the distal clavicle which may represent a subtle strain injury of the left shoulder, but the report states that there is no evidence of fracture, dislocation, or foreign body in the right shoulder. *Id.* Claimant also injured her left arm while assisting a disabled client who fell in 2001.

2. Employer, Kerr Oil Company, Inc. is the parent company to the Jifi Stop store where Claimant was employed at all times pertinent to this decision. The company

was founded in 1960 by Del Kerr. Tami Kerr, Del Kerr's daughter, handles all the retail operations for the company's six stores and has an ownership interest in the stores. Tami Kerr's office was located in the Jifi Stop store where Claimant worked. The employees and management at the Jifi Stop store communicated problems and daily events with each other through a communication log kept at the front counter.

3. Claimant began working for Employer at the Jifi Stop convenience store in Coeur d'Alene, Idaho, in June 2003. Claimant was responsible for such tasks as stocking products, cleaning, and operating the cash register.

4. Claimant was scheduled to work the graveyard shift beginning at 11:00 p.m. on September 4, 2004, and finishing at 7:00 a.m. on September 5, 2004. Claimant was the only employee scheduled to work during that time.

5. Claimant began work at 11:00 p.m. on September 4, 2004. Around 4:00 a.m. on September 5, 2004, Claimant lifted a large coffee thermos, weighing approximately 7 pounds, slightly above her shoulder onto a serving rack when she felt a sharp pain in her right shoulder.

6. Darlene Rush, a customer, entered the store shortly after Claimant felt the pain in her shoulder. Claimant left the coffee area, took her position at the podium, and spoke with Darlene Rush about what had just happened. Tr., p. 49.

7. Claimant then wrote in the communication log, which was kept behind the front counter, that she hurt her right shoulder and upper arm while putting a coffee pot on the back rack. Claimant's entry also states that Darlene Rush came up behind Claimant to help. The note is dated "09/06/04." Claimant's Exhibit 15.

8. At Claimant's request, Darlene Rush also made a notation in the

communication log. Darlene Rush wrote that she “was present at 3:50 a.m. at the Shell on 9-6-04 when Julie the store attendant (sic) reached to put a coffee pot in place when she felt a sudden sharp pain from her shoulder.” *Id.* Claimant testified at hearing that Darlene Rush was, in fact, not present when Claimant injured herself but that Darlene Rush entered the store shortly after the occurrence. Tr., p. 48. Claimant also testified that she lifted the thermos and was hurt on Sunday, September 5, 2004, not September 6 as noted by both she and Darlene Rush in the communication log. Tr., p. 161.

9. Kelly Dolence, another Jifi Stop employee, placed an entry in the communication log stating that Claimant called her around 6:00 a.m. on September 5, 2004 and asked if she could come into work early. Claimant’s Exhibit 14. Kelly Dolence arrived at the Jifi Stop at 6:30 a.m. to relieve Claimant.

10. One month earlier, on August 2, 2004, Claimant left a note in the communication log stating that she could not lift things over her head anymore because it hurt her back and shoulders. Defendants’ Exhibit D.

11. The Jifi Stop store was equipped with a video surveillance camera. Tami Kerr reviewed the videotape for September 6, 2004 after learning about an alleged accident. However, the tape was routinely erased 30-60 days after the date. Therefore, the tape was not preserved for inspection at the hearing. Although the videotapes for September 4 and 5, 2004 were also reviewed by Ms. Kerr, none of these tapes were produced at the hearing.

12. Claimant continued to work at the Jifi Stop store, but on October 1, 2004, Claimant presented at the Kootenai Medical Center and was seen by Mark E. Manteuffel, M.D. Claimant reported a right shoulder injury with pain. Dr. Manteuffel restricted

Claimant to no lifting with her right arm and recommended physical therapy. Claimant attended four sessions of physical therapy with some improvement near the end of the sessions.

13. The First Report of Injury was signed by Employer's payroll clerk on October 6, 2004.

14. Claimant was then seen by Lloyd E. Witham, M.D., on November 16, 2004. Dr. Witham recommended an MRI for further evaluation of Claimant's shoulder. Claimant scheduled an MRI but later canceled the appointment when Surety would not authorize the treatment.

15. J. Craig Stevens, M.D., performed an independent medical examination (IME) of Claimant on January 4, 2005, at the request of Surety. Claimant stated she injured her shoulder lifting a 7 pound coffee pot at work. Dr. Stevens opined that Claimant suffers from right C-7 radiculopathy, which was causing secondary frozen shoulder syndrome, but the condition was not caused by lifting a coffee pot. Defendants' Exhibit N. Dr. Stevens stated that an MRI of Claimant's neck was medically indicated but he felt the cost should not be borne by the workers' compensation carrier. J. Craig Stevens, M.D., Depo., p. 41.

16. On January 27, 2005, Claimant returned to Dr. Witham and he continued to recommend an MRI scan.

17. Claimant obtained funds from her family and had an MRI scan done on May 20, 2005. Dr. Witham and Dr. Stevens reviewed the results and reached varied opinions.

18. Dr. Witham opined in a letter dated June 29, 2005 that Claimant has at

least a partial upper surface rotator cuff tear that is more likely than not related to Claimant's September 2004 injury caused by lifting a coffee container. Defendants' Exhibit M. Dr. Witham recommended arthroscopic surgery for evaluation and treatment of Claimant's rotator cuff. *Id.*

19. After reviewing the MRI, Dr. Stevens opined that Claimant's features represented an accumulation of damage rather than an acute tear, that her condition was chronic, and was not due to lifting a coffee pot. J. Craig Stevens, M.D., Depo., p. 41. Dr. Stevens agreed with Dr. Witham's diagnosis of a rotator cuff tear and the treatment plan for arthroscopic repair, but Dr. Stevens did not agree that the lifting of a coffee pot could have caused the injury. *Id.* at p. 57-58. Dr. Stevens found that while it was possible that lifting a coffee pot could have caused Claimant's injury, on a more probable than not basis, lifting a coffee pot did not cause Claimant's injury. *Id.* at p. 61.

20. At the time of hearing, Claimant was working, though not for Employer, and using her right arm in a limited fashion. The arthroscopic surgery recommended by Dr. Witham had neither been performed nor scheduled.

DISCUSSION AND CONCLUSIONS

21. The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. Idaho Code § 72-102(17)(a). 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 injury. Idaho Code § 72-102(17)(b).

22. The burden of proof in an industrial accident is on the claimant. *Neufeld*

v. Browning Ferris Industries, 109 Idaho 899, 902, 712 P.2d 500, 503 (1985). 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, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

23. Defendants first argue that Claimant is not a credible witness and that she was not at work on September 6, 2004. Defendants are correct in pointing out that there are inconsistencies in Claimant’s factual evidence. The first issue is with the date of the accident. The statements written by Claimant and Darlene Rush are dated September 6, 2004. The initial report from the Kootenai Medical Center states the injury date as September 16, 2004. Dr. Witham’s letter written on November 16, 2004, states that the lifting accident occurred on September 4, 2004. The payroll sheet reports that Claimant worked for 8.5 hours starting on September 4, 2004, and another 2.5 hours on September 5, 2004, even though Claimant was not scheduled to work additional hours on September 5, 2004. Even Claimant’s testimony on rebuttal is a bit garbled when she is trying to correct and clarify the date of her injury.

24. After a full review of the facts and with an appreciation for the fact that incorrect dates get placed on documents with no harmful intent, the Commission finds

that an accident did occur, and it occurred on September 5, 2004. While there is some confusion and inconsistency, none of the variety of dates go so far as to discredit all the parties involved or negate the evidence supporting Claimant's allegation that she was at work and suffered an industrial accident when she lifted a thermos of coffee. Claimant did arrive at work on the night of September 4, 2004 and worked through the night until approximately 4:00 a.m. on September 5, 2004 when Claimant lifted a coffee thermos and suffered an industrial accident. Additionally, Kelly Dolence, another Jifi Stop employee, placed an entry in the communication log stating that Claimant called her around 6:00 a.m. on September 5, 2004 and asked if she could come into work early to relieve Claimant.

25. Claimant has proven that she suffered an industrial accident while in the course and scope of her employment, and further, that she now has physical injury. The only question left is whether the industrial accident caused the physical injury. Dr. Witham opined, after reviewing Claimant's MRI, that she has at least a partial upper surface rotator cuff tear that is more likely than not related to Claimant's September 2004 injury caused by lifting a coffee container. Defendants' Exhibit M. Dr. Witham recommended arthroscopic surgery for evaluation and treatment of Claimant's rotator cuff.

26. Dr. Stevens evaluated Claimant's MRI and opined that while there are some very slight degenerative features in the adjacent underlying supraspinatus with slight fraying and possible tear, the condition cannot be attributed to an event such as lifting a coffee pot. Defendants' Exhibit N. Although Dr. Stevens agrees with Dr. Witham's diagnosis of a rotator cuff tear and the treatment plan for arthroscopic repair,

Dr. Stevens does not agree that the lifting of a coffee pot could have caused the injury. J. Craig Stevens, M.D., Depo. 57-58.

27. Dr. Witham and Dr. Stevens both agree that Claimant suffered from a right shoulder rotator cuff tear and that the treatment plan is arthroscopic repair, but they disagree as to whether or not the injury was caused by the act of lifting a coffee thermos. In reviewing the medical documents as a whole and evaluating the evidence presented, the Commission finds Dr. Witham's medical reports more persuasive and finds that Claimant suffered from a rotator cuff tear as a result of her industrial accident on September 5, 2004.

28. Defendants argue that Claimant's pre-existing injuries account for her current right shoulder condition. But other than soreness after a car accident, the record does not indicate that Claimant had right shoulder damage that would indicate a rotator cuff tear. Admittedly, Claimant has been involved in several motor vehicle accidents, but none of the accidents resulted in prolonged treatment or permanent injury. Further, both of Claimant's shoulders were examined after her car accident in 2000, and while the left shoulder had a mild superior position of the distal clavicle which may represent a subtle strain injury, the report states that there is no evidence of fracture, dislocation, or foreign body in the right shoulder.

29. Additionally, Claimant's note on the communication log from August 2, 2004, stating that she did not want to lift things over her head anymore because it hurt her back and shoulders, does not appear to be a report of an accident or an injury. In the note Claimant states that the garbage is heavy and hard to lift into the dumpster and she requests and reminds other employees to empty the garbage on their shifts as well. There

is no doubt that it was hard work, but hard work alone does not constitute an accident or injury. There is no convincing evidence that Claimant's current right shoulder injury was present before her industrial accident.

30. Claimant has identified the onset of her shoulder pain as the point when she lifted the thermos of coffee. Shortly thereafter, Darlene Rush entered the store and spoke with Claimant about the accident. Claimant sought medical treatment and through that treatment has proven to a reasonable degree of medical probability that her right shoulder injury was the result of an accident that occurred in the course and scope of her employment.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant suffered an injury caused by an accident arising out of and in the course of employment on September 5, 2004.

2. The condition for which Claimant seeks benefits was caused by the industrial accident she suffered on September 5, 2004.

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

DATED this __29th day of December, 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 ____29th day of December, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

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