BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERICK BULLOCK, Claimant, v. MANCINI & GROESBECK, INC., Employer, and TWIN CITY FIRE INSURANCE CO., Surety, Defendants.	))	**IC 02-010549** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: March 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Rinda Just, who conducted a hearing in Pocatello, Idaho, on September 14, 2005. James C. Arnold represented Claimant and Thomas V. Munson represented Defendants. The parties submitted oral and documentary evidence at hearing and took one post-hearing deposition. They submitted briefs and the matter came under advisement on December 14, 2005.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant is currently seeking medical benefits was caused by the industrial accident.

2. Whether and to what extent Claimant is entitled to medical care.

CONTENTIONS OF THE PARTIES

Claimant contends he sustained a right shoulder impingement injury due to a January 19,

2000 industrial accident. He argues entitlement to medical benefits including a right shoulder surgery that was initially discussed within six months of the accident.

Defendants contend Claimant has failed to prove his current need for surgery is causally related to the industrial accident. They assert his condition is due to an underlying degenerative process and there is no evidence he sustained an acute, permanent injury on January 19, 2000. Moreover, Defendants question the credibility of Claimant's alleged ongoing symptoms given that he did not seek medical attention for several years and participated in strenuous work.

Claimant replies that Defendants have focused on a few solitary facts in isolation, overstated the frequency of Claimant's physical activities, and ignored pertinent law and facts in their analysis. Significantly, but for the accident there is no evidence Claimant would otherwise have ongoing complaints of pain, and but for the pain, Claimant would not be seeking surgery.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. The Industrial Commission legal file in this case;
2. The hearing testimony of Claimant;
3. Joint Exhibits A through M, O, and Q[1]; and
4. The post-hearing deposition of Michael Phillips, M.D., taken September 28, 2005.

On September 21, 2005, Defendants filed a Motion to Augment Record, with Affidavit, requesting that the Commission admit post-hearing a report authored by Eric Roberts, M.D. Claimant objected to Defendants' motion on September 22, 2005, and the Referee denied

[1] At hearing, Claimant's attorney questioned the relevance of Joint Exhibits M through Q, but did not specifically object to their admittance. The Referee provisionally admitted the exhibits, noted Claimant's reservation, and agreed to address the matter in her decision. Upon review, the Referee finds Exhibits M, O, and Q relevant to the issues at hand. Often, these exhibits supplemented and supported other evidence admitted in this matter. The Referee hereby admits Exhibits M, O, and Q without reservation. Exhibits N and P were not presently relevant, were not considered by the Referee, and are not admitted as evidence in this proceeding.

Defendants' motion by written order filed September 27, 2005. Claimant's standing objection during Dr. Phillips' post-hearing deposition to references made to Dr. Roberts' report is sustained; all others are overruled. After considering the record and written arguments of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 48 years old. He initially worked for Employer, a food broker, in the mid-1980's as a territory manager or, as he described it, "a traveling salesman." He made sales calls to major retailers to arrange for product ads and displays. He serviced 120 stores in four states. In 1987, he went to work for Nalley's doing essentially the same type of work. He remained at Nalley's for 12 years.

2. On June 29, 1998, Claimant presented to M.R. Mickelson, M.D., complaining of a right shoulder injury that had occurred two years earlier while going up for a block during a basketball game. Dr. Mickelson noted, "[Claimant] had immediate pain and tenderness in the shoulder and has had popping, catching and occasional snapping pain with tenderness at night since that time." Exhibit C. Radiographic testing ruled out a tear and Claimant received a corticosteroid injection on August 5, 1998. On September 21, 1998, he reported to Dr. Mickelson that his shoulder pain "is now gone." *Id*. Dr. Mickelson instructed Claimant to notify him of any worsening; however, Claimant did not return with any further complaints.

3. In May 1999, after a lay off at Nalley's, Claimant began working for Employer again as a territory manager. As before, he traveled extensively. He also worked out of his home, keeping supplies and materials in a home office. Around this same time, Claimant and a partner started a carpet and upholstery cleaning business with the arrangement that Claimant

provided the start-up money through a home equity loan and the partner performed the work.

4. On January 19, 2000, Claimant fell down the stairs in his home while carrying a box of outdated food product from the office. He fell forward, threw the box in the air to break the fall, and the box came down on the middle of his back. He continued his work and did not immediately report the incident despite what he described as fairly significant pain. When he realized he was not healing, he sought medical care.

5. On January 30, 2000, Claimant presented to the Pocatello Regional Medical Center Emergency Department. The intake notes describe the fall: "off 2 steps and hit right shoulder . . ." Exhibit F. Although the intake document contains further information, the information has been obstructed in the copy provided to the Referee and admitted into evidence. Suffice it to say, Claimant described striking his right shoulder in the fall. Claimant's complaints included chest pain, weakness, fatigue, difficulty sleeping, low back pain, and right shoulder pain. Douglas Dero, D.O., examined Claimant and noted Claimant had seen Dr. Mickelson for right shoulder pain in the past. Dr. Dero prescribed Celebrex to help control the shoulder and back pain and provided a referral for the chest pain and depression.

6. On January 31, 2000, Claimant reported the incident to Employer and completed a Notice of Injury describing the fall on the stairs. He reported that his "back/shoulder/chest" were affected. Exhibit E. On February 1, 2000, Employer terminated Claimant's employment, citing a reduction in force. Thereafter, Defendants accepted the workers' compensation claim and paid medical benefits for Claimant's right shoulder and back.

7. On February 8, 2000, Claimant saw Todd Gillespie, M.D., at Family Practice Group and described ongoing right shoulder and back pain. Dr. Gillespie diagnosed right shoulder impingement and made no assessment related to the back. In follow-up on March 9, the

relevant history noted was: "R[ight] shoulder pain, and low back pain secondary to a fall." Exhibit G. Claimant was referred to Dr. Blair for further evaluation of his shoulder and back.

8. On March 15, 2000, Claimant saw orthopedist Benjamin Blair, M.D., who recorded:

> Patient was in a normal state of good health until 1/19/00 when he was carrying boxes down some stairs and missed the last stair. He fell with a box landing on him. Since that time, he has remained markedly symptomatic.

Exhibit H. Following an examination of Claimant's right shoulder, Dr. Blair described positive impingement signs and requested an MRI.

9. On April 22, 2000, Claimant underwent a right shoulder MRI, which the radiologist, George Stephens, M.D., interpreted as showing a somewhat circuitous subtle tear of the anterior margins of the rotator cuff. Specifically, Dr. Stephens indicated:

> No significant amount of fluid was demonstrated. There is some minimal increased signal demonstrated in the distal portion of the supraspinatus tendon. This signal has a rather circuitous route, but it appears to extend all the way through the rotator cuff somewhat anteriorly to the supraspinatus tendon. There is a type II acromion and some increased signal in both the distal clavicle and acromion. These findings suggest a very small through and through tear of the rotator cuff. There are degenerative changes seen at the AC joint and an inferior spur which does impinge upon the supraspinatus tendon. This prominent spur is off the distal clavicle.

Exhibit F.

10. On May 22, 2000, Dr. Blair reported the right shoulder MRI as significant for a possible rotator cuff tear and referred Claimant to his partner, orthopedist Richard Wathne, M.D., for further shoulder evaluation and treatment. Dr. Blair continued to treat Claimant for his low back.

11. On June 15, 2000, Claimant saw Dr. Wathne, who recorded the January 19, 2000 industrial accident as the instigating event for his right shoulder symptoms. He also made note

of Claimant's prior basketball injury that "gave him problems for a couple of years but then subsequently resolved." Exhibit I. Regarding the current symptoms, Dr. Wathne wrote:

> He continues to complain of anterolateral right shoulder pain with a constant ache … He states that his shoulder actually bothers him more than his back. He cannot lay [*sic*] on his right side. This will wake him up at nighttime. He has difficulty with overhead activities.

Id. On review of the April 2000 MRI, Dr. Wathne stated it "is consistent with significant degenerative changes throughout the supraspinatus portion of the rotator cuff tendon. I do not visualize a full thickness rotator cuff tear as Dr. Stephens, of radiology, reports. He has obvious depression on the undersurface of the AC joint." *Id*. Following an examination and review of X-rays taken that day, Dr. Wathne assessed chronic right shoulder impingement syndrome with acromioclavicular joint arthrosis and a possible underlying rotator cuff tear. Given that Claimant continued to test at full strength (5/5), Dr. Wathne recommended a subacromial injection for diagnostic as well as therapeutic purposes. Claimant received the injection and noted improvement in symptoms. Dr. Wathne concluded, "I will see him back in four week's time to see how he is progressing. If he continues to remain symptomatic, then I believe an arthroscopic evaluation would be in order." *Id.*

12. On July 13, 2000, Dr. Wathne noted returning shoulder discomfort. According to Claimant, he had recently had an increase in activities in his cleaning business and felt this had aggravated his shoulder.[2] Claimant's examination was much like his previous ones and Dr. Wathne continued to assess chronic right shoulder impingement syndrome with underlying acromioclavicular joint arthrosis; however, he apparently no longer assessed a possible rotator cuff tear and offered no explanation as to why the assessment had changed. He described Claimant's options at that time as additional conservative management vs. surgical intervention,

[2] Following termination of his employment with Employer, Claimant began to perform some of the work involved in the cleaning business.

i.e., arthroscopic evaluation "in order to perform a probable subacromial decompression, acromioplasty, and distal clavicle resection." Exhibit I. Claimant did not want surgery and opted for a repeat injection, which was administered that day.

13. From September 27, 2000, through February 27, 2001, Claimant received regular care for his shoulder and low back at Lee Chiropractic. Treatment involved a combination of chiropractic adjustments, vitamin therapy, electrical stimulation, intersegmental traction, massage, and acupuncture. The provider noted ongoing symptoms in Claimant's right shoulder.

14. On May 3, 2001, Claimant returned to Dr. Wathne with persistent complaints:

> He states he has ongoing right shoulder pain and has tried extensive chiropractic manipulations, vitamin therapy, and acupuncture; all to no avail. He continues to have discomfort with overhead activities, as well as sleeping, secondary to his ongoing shoulder pain.

Exhibit I. Dr. Wathne described an unchanged physical examination, concluded conservative measures had been exhausted, and recommended surgery. However, Claimant again requested conservative treatment:

> [Claimant] states he just cannot do this [surgery] as he is self-employed and cannot afford to be off work for any extended period of time. He would like to continue working on his strengthening exercises and taking anti-inflammatory medication as needed.

Id. Dr. Wathne explained that he would continue to follow Claimant on an as need basis, but he believed, "at some point that he will require surgical intervention." *Id.*

15. On July 26, 2001, Claimant expressed to Dr. Wathne his desire to schedule surgery around Thanksgiving to allow him time to get his finances and work schedule aligned. Ultimately, however, Claimant did not schedule the surgery.

16. From August 20, 2001, through December 17, 2001, Claimant attended physical therapy at Advanced Performance Physical Therapy. The sessions addressed both his low back

and right shoulder. The final chart notes described ongoing right shoulder pain.

17. On December 18, 2001, Dr. Blair prescribed a TENS unit for Claimant's shoulder and lumbar conditions and noted, "prescribed for chronic and intractable pain." Exhibit H. Claimant also received pain medication from Dr. Blair during this time period.

18. Throughout 2001, Claimant was primarily self-employed and reported approximately $15,000 in net profit from his cleaning business. He also earned about $10,000 working in sales for a cable company. By 2002, Claimant was exclusively self-employed and had obtained a real estate license. He reported approximately $5,000 in net profit from his cleaning business and $23,000 from real estate. It is clear from Claimant's tax returns that he is the primary source of income for his family of four.

19. On July 8, 2002, orthopedist Michael Phillips, M.D., examined Claimant at the request of Defendants. He recorded Claimant's pain levels at 85% of that experienced at the time of injury and noted relief with the local application of modalities, use of a TENS unit, and pain medication. Regarding Claimant's shoulder examination, Dr. Phillips wrote:

> Range of motion of the shoulder is within normal limits in abduction, flexion, rotation, and extension. Appley, impingement and drop signs are negative. Passive motion of the right shoulder produces mild discomfort in the infraspinatus area but no crepitus is detected. Traction elicits no sulcus sign.

Exhibit L.

20. In a report dated July 9, 2002, Dr. Phillips opined Claimant had sustained a contusion to his right shoulder on January 19, 2000, which was presently stable. According to Dr. Phillips, the radiographic studies revealed no acute injury to the right shoulder, Claimant had responded to non-operative treatment, and the continued symptoms were most likely "the result of natural progression of pre-existing disease." Exhibit L. He found it unlikely that further medical treatment or chiropractic modalities would improve his condition. His opinions

regarding Claimant's back condition were essentially the same.

21. Once Defendants ceased providing medical benefits, Claimant no longer made appointments with Drs. Blair and Wathne, but they continued to provide him with prescriptions for and/or samples of pain and anti-inflammatory medications.

22. On December 16, 2002, Claimant filed a Workers' Compensation Complaint in this matter and Defendants' Answer indicated a denial of causation. The Industrial Commission dismissed the Complaint without prejudice on November 26, 2003, despite Claimant's request that the matter remain open while he considered certain options.

23. In 2003, Claimant remained exclusively self-employed and again reported about $28,000 in combined net profits from his two businesses ($16,500 from the cleaning business and $11,500 from real estate). In 2004, he reported combined net profits of approximately $44,000 ($27,000 from the cleaning business and $17,000 from real estate).

24. On August 31, 2004, Claimant returned to Dr. Wathne for his ongoing right shoulder problems. He described some relief with the use of Ultram, but noted overhead activity and cold weather as aggravating factors. Dr. Wathne again diagnosed chronic right shoulder impingement syndrome with underlying acromioclavicular joint arthrosis and wrote:

> [Claimant's] symptoms continue to persist following his industrial injury of 1/19/00. Again, I discussed the options of continued conservative management consisting of anti-inflammatory medications and strengthening exercises versus surgical intervention to include a right shoulder arthroscopic evaluation in order to perform an arthroscopic subacromial decompression, acromioplasty, and possible distal clavicle resection.[3] He is still reluctant to proceed with surgery but wishes to think things over further.

Exhibit I.

25. On November 3, 2004, Dr. Wathne wrote a letter to Claimant's attorney. Of

[3] The Referee notes this is the same surgery discussed by Dr. Wathne as an option in July 2000 and unequivocally recommended by him in May 2001.

significance, Dr. Wathne indicated the following: 1) he found no evidence of further injuries since the industrial injury of January 19, 2000; 2) he reviewed Dr. Mickelson's records from 1998 and it appeared Claimant's shoulder complaints had resolved at that time; and, 3) while there is certainly a pre-existing component to Claimant's right shoulder condition, he would place it at less than 50%. He continued to recommend right shoulder surgery and noted Claimant's reluctance to proceed over the past few years due to his self-employment.

26. Claimant filed a second Complaint in this matter on December 13, 2004, and now seeks adjudication of issues related to his right shoulder. At hearing, when asked why he did not proceed with surgery in 2001, Claimant explained:

> And where I was trying to survive on my carpet-cleaning business, I was afraid to have the surgery because I thought it might worsen the problem; and I not – might not be able to continue to operate my business, which was becoming my main livelihood at that point.

Hearing Transcript, pp. 28-29. He disclosed that he is finally at a point where he can have the surgery and take the necessary time to recover. He has additional employees to run his business and it will no longer cause a financial hardship. Claimant was a credible witness and the record supports that he did just what he testified to doing over the last few years: "decided just to live on painkillers and muscle relaxants and deal with it" in order to continue to operate his business. *Id*. at 29. Claimant's reasoning is understandable and the Referee notes that Dr. Wathne has consistently described continued conservative treatment as one of Claimant's options.

27. Claimant testified that, since July 2000, he has worked 15 to 20 hours per week with his cleaning business:

> I do the bill collections, and I do the estimates. And I show up on a water damage call. I show up at the flood and do the inspection assessment, take photos of the work we're doing for insurance companies and for the owners that I work for.

Exhibit O (Claimant's Depo.), p. 74. In addition, he indicated that operating the cleaning equipment (*i.e.*, the "wand," which weighs about 30-35 pounds) is only about 50% of a job and that he generally did the grooming, preconditioning, and supervising while other employees ran the equipment. He has, however, helped with the physical work, including setting up and/or running equipment, when necessary. He conceded that such activities "make him pay" by the end of the day through back and shoulder pain. Claimant is left-handed. The Referee agrees with Claimant's contention that Defendants have overstated the "strenuousness" of Claimant's work and the role it has played in his current right shoulder condition.

28. In his post-hearing deposition, Dr. Phillips again opined Claimant sustained a soft tissue injury (contusion) to his right shoulder on January 19, 2000, which had healed by July 2002. He agreed with the reasonableness of the surgery recommended by Dr. Wathne, but did not agree the need for surgery related to the industrial accident. He indicated, "This procedure is directed mainly at the treatment of the degenerative disease of the acromioclavicular joint, which by history was well established prior to the injury in question." Phillips Depo., p. 15.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

29. An "accident" means 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. 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 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, 901 P.2d 511 (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, 890 P.2d 732 (1995).

The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

For the following reasons, the Referee finds that the right shoulder condition for which Claimant is currently seeking benefits was caused by the industrial accident.

The weight of the medical evidence supports that Claimant suffered a right shoulder impingement injury as a result of the January 19, 2000 accident. Drs. Gillespie, Blair, and Wathne all assessed this condition in conjunction with Claimant's treatment for his industrial accident. The diagnosis and the symptoms have continued to this day.

In addition, Dr. Phillips' opinions are less than persuasive in that they fail to explain why, if all aspects of injury from the accident had resolved by July 2002, Claimant was still at 85% of the pain level experienced at the time of the accident. Simply stated, Dr. Phillips' opinions fail to address the reality of this case: that Claimant experienced a significant and acute onset of symptoms (assessed by Drs. Gillespie, Blair, and Wathne as shoulder impingement) on January 19, 2000, that have not since subsided despite extensive attempts at conservative treatment.

On the other hand, Dr. Wathne's opinions are realistic and in sync with the record and facts of this case. Prior to the industrial accident, Claimant had not sought medical treatment for

right shoulder problems since 1998, and the medical records support that his symptoms from 1996-1998 had resolved. There is also no evidence of a subsequent injury to Claimant's right shoulder. Claimant may have performed some work with his cleaning business that at times increased his pain, but his baseline symptoms and examinations have remained the same since the accident. Lastly, while Dr. Wathne acknowledged a pre-existing component to Claimant's right shoulder condition, his assessment regarding the extent of that involvement (less than 50%) is consistent with Claimant's lack of symptoms just prior to the accident, the acute onset of symptoms at the time of the accident, and the persistence of symptoms thereafter.

MEDICAL BENEFITS

30. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

Claimant is primarily seeking right shoulder surgery as suggested and/or recommended by Dr. Wathne since July 2000. Medical opinion on the reasonableness of the requested treatment is not conflicting and the Referee finds it reasonable. Moreover, in light of the causation determination above, the Referee finds Claimant is presently entitled to such treatment.

CONCLUSIONS OF LAW

1. The right shoulder condition for which Claimant is currently seeking medical benefits was caused by the industrial accident.

2. Claimant is entitled to reasonable and necessary medical care related to his right shoulder, to include the surgery recommended by Dr. Wathne.

RECOMMENDATION

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

DATED this 23 day of February, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of March, 2006 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 persons:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

THOMAS V MUNSON
PO BOX 199
BOISE ID 83701-0199

djb /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERICK BULLOCK,	)	
	)	
Claimant,	)	
	)	
v.	)	**IC 02-010549**
	)	
MANCINI & GROESBECK, INC.,	)	**ORDER**
	)	
Employer,	)	
	)	
and	)	Filed: March 7, 2006
	)	
TWIN CITY FIRE INSURANCE CO.,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
	)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her 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 recommendation of the Referee. The Commission concurs with this recommendation. 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. The right shoulder condition for which Claimant is currently seeking medical benefits was caused by the industrial accident.

2. Claimant is entitled to reasonable and necessary medical care related to his right shoulder, to include the surgery recommended by Dr. Wathne.

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

DATED this 7 day of March, 2006.

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 7day of March, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

THOMAS V MUNSON
PO BOX 199
BOISE ID 83701-0199

djb /s/_____