

2. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-448.

3. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.

4. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.

5. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition.

6. Whether Claimant is entitled to the following benefits:

a. Medical care; and,

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

7. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends she complied with applicable notice requirements by providing timely written notice to Employer and/or by providing actual, verbal notice to Employer. Moreover, if there was any failure to comply, Defendants were not prejudiced thereby. Claimant's right shoulder condition is related to the accident of May 22, 2004, and she is entitled to appropriate workers' compensation benefits and attorney fees.

Defendants assert Claimant failed to comply with required notice limitations and they were prejudiced thereby. As such, Claimant's claim is barred and she is not entitled to workers' compensation benefits. Even if her claim were found to be compensable, she is not entitled to attorney fees because Defendants acted reasonably in denying her claim.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. The hearing testimony of Claimant and Tom Hughes; and,
2. Claimant's Exhibits 1 through 10 and Defendants' Exhibits A through L admitted at hearing.

After considering the record and 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 53 years of age. She began working as a cashier for Employer, a grocery store, in 1994.

2. On February 8, 2000, Claimant sustained a right shoulder rotator cuff tear while working for Employer. She picked up a 24-pack of soda, turned to put it in the cart behind her, and felt tearing in her right shoulder. She went straight to the emergency room after work that night and subsequently began treating with orthopedic surgeon, Gregory Biddulph, M.D. In June 2000, Dr. Biddulph performed arthroscopic surgery on the shoulder and Claimant returned to work in August 2000. Her right shoulder condition improved considerably with surgery and she was able to perform her work duties, but she continued to have occasional symptoms. Her corresponding workers' compensation claim was accepted, paid, and later settled.

3. On May 22, 2004, Claimant was involved in an incident at work. She picked up a 24-pack of soda with her right hand, went to put it away, and the box broke. She continued to hold the box in her right hand and tried to catch cans with her left hand. On May 24, 2004, Claimant wrote the following on Employer's incident report form and provided it to Employer:

A month or so ago I was moving cans with my left hand – when I over extended it or something. I have been wearing a brace since then to support it.

Saturday [May 22, 2004] I picked up a 24 pk. of Pepsi & it broke. There were cans that fell all over the floor & the bagger began picking them up, when the carton began to tear more. I caught it with my left hand to keep it from falling on the bagger. My hand was swollen that night and the next day and very painful. This was reported to Tom at that time.

Claimant's Exhibit 1. In addition, Claimant and her supervisor, Tom Hughes (Tom) discussed the incident during the following week at work.

4. Whether Claimant mentioned her right shoulder in reference to the May 22, 2004 incident is disputed. Claimant testified that, sometime the following week, she spoke with Tom and “simply reiterated, basically, what this [the incident report] says.” Hearing Transcript, p. 22. When asked by her attorney at hearing whether she said her right shoulder was hurting, Claimant responded, “Yes, I did.” Her attorney then asked whether she told Tom any other parts of her body were hurting and she replied, “I just told him I hurt all over.” *Id.* Tom testified that there was not a discussion about shoulder pain and that “the major concern was the hand, the incident with the hand that happened this previous Saturday.” *Id.* at 44. Claimant did not miss any work due to the May 22, 2004 incident. She sought no medical treatment for her left hand, right shoulder, or any other part of her body while she continued to work for Employer, and for several months after her employment with Employer ended.

5. Claimant terminated her employment with Employer in July 2004. She testified at hearing she stopped working for Employer because she needed out of a check stand, did not want to be hurt any longer, and already had a job lined up as a head cashier (with less check stand work and less lifting) at another store. Her resignation letter provided no explanation as to why she was resigning. In general, the testimony of her supervisor, Tom, establishes that he knew Claimant has had some ongoing problems with her right shoulder since the 2000 accident.

6. On November 1, 2004, Claimant saw Dr. Biddulph with right shoulder complaints. Dr. Biddulph recorded the following history:

She underwent arthroscopy of her shoulder four years ago and has done very well up until the past six months. She reports that she was at work lifting some heavy cans. The cans started to fall. She jerked her shoulder to try to grab them and ever since that time, she has had significant pain.

Claimant's Exhibit 7. Dr. Biddulph described her examination as "classical" for a rotator cuff injury. *Id.*

7. On November 23, 2004, Claimant, with the assistance of counsel, filed a First Report of Injury describing an incident in "Approx 4/2004" in which she moved a 24-pack of soda from the check stand to the basket and injured her right shoulder. On or about December 8, 2004, Surety denied the claim indicating that Employer had not been notified of a right shoulder injury. On February 9, 2005, Claimant, with the assistance of counsel, filed another First Report of Injury revising the date of injury to May 22, 2004. Defendants have still denied the claim based on a lack of proper notice of a right shoulder injury.

DISCUSSION AND FURTHER FINDINGS

1. Notice Limitations

A. Written Notice. An employee injured on the job must give his employer written notice of an accident as soon as practicable but not later than 60 days after the happening thereof, or the employee will be barred from pursuing a workers' compensation claim. Such notice shall state in ordinary language the time, place, nature and cause of the injury. Idaho Code §§ 72-701 and 702. Idaho Code § 72-704 provides, in pertinent part, that notice given under the provisions of §72-701 (written notice) shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury unless it is shown by the employer that it was in fact prejudiced thereby.

Employer had written notice of the accident Claimant now alleges caused her right shoulder injury within days of the accident. However, Claimant's written notice failed to describe the injury she now alleges; it described only a left hand injury. Defendants assert they have been prejudiced by Claimant's failure to accurately state the nature of her injury based on the passage of nearly six months from the incident date until Claimant finally sought medical care for her right shoulder condition. The Referee agrees. Defendants note Claimant continued to work for Employer, as well as other employers during the lengthy passage of time and may have engaged in any number of activities that worsened her right shoulder condition. Claimant's deposition testimony, taken June 2, 2005, demonstrated that her continuing work for Employer following the May 22, 2004 incident did, in fact, cause her increased pain and her symptoms continued to gradually worsen thereafter. Dr. Biddulph testified that, if Claimant has a full thickness tear, the passage of time worsens the condition because the tendon atrophies and retracts so the hole is larger and the tendon is thinner.

Had Claimant provided adequate written notice of a right shoulder injury in May 2004 (at the time she knew she was suffering increased right shoulder symptoms), Defendants would have been in a better position to determine the validity of the claim; they could have mitigated the detrimental effects of delayed treatment by having her seen by a physician; and, they could have provided her with lighter duty work. The Referee finds Claimant did not provide sufficient notice pursuant to Idaho Code § 72-701 and Defendants were prejudiced thereby.

B. Knowledge of the Injury.

Idaho Code § 72-704 provides, in pertinent part, that want of notice or delay of giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent

or representative had knowledge of the injury or that the employer has not been prejudiced by such delay or want of notice.

Claimant alleges Employer had actual knowledge of her right shoulder injury within the 60-day time frame because she told her supervisor, Tom, her right shoulder hurt in the week following the incident. Tom denies such verbal notice was provided to him and, in general, cannot recollect much except that the primary issue was Claimant's left hand – as written in her incident report. The Referee finds Claimant's testimony regarding her conversation(s) with Tom inconsistent and not particularly reliable. In her deposition, Claimant testified as follows regarding her conversation with Tom on the day of the incident: “You know, I did tell him at that time. You know, ‘Hey, we had a 24-pack that just broke.’ I says, ‘My shoulder and my hand and everything.’ I says, ‘I just hurt. I’m going to go outside and see if I can’t work this off.’” Defendants’ Exhibit H, depo. page 46. However, at hearing in this matter, Claimant said she did not notice her right shoulder beginning to hurt until a couple days after the incident¹. She then testified that, at some point during the following week, she reiterated to Tom the details of her written incident report and “just told him [she] hurt all over.” Hearing Transcript, p. 22. Only in response to the direct question posed by her attorney did Claimant agree she told Tom her right shoulder hurt.

The Referee also finds Claimant's comments to Tom, whenever they were made, too ambiguous to give actual knowledge of an alleged injury to her right shoulder occurring on May 22, 2004. Claimant had complained of occasional right shoulder pain since she returned to work in August 2000, and it has not been adequately shown that her comments to Tom actually tied her complaints of shoulder pain to a new incident. Moreover, her “I hurt all over” comment

¹ Of note, even though Claimant filled out the incident report two days after the incident, she still did not mention right shoulder symptoms.

makes it nearly impossible to discern what injuries she was attempting to describe. Finally, by providing inaccurate written notification of the accident (i.e., failing to describe right shoulder symptoms), it is unlikely Employer would make such a connection absent a clear statement in that regard. Claimant did not provide such a clear statement.

It is Claimant's burden to provide adequate, timely notice of an alleged injury sustained on the job; Claimant did not do so and Defendants were prejudiced as a result. Her failure to comply with the notice limitations set forth in Idaho Code §§ 72-701 through 704 bars her claim against Defendants. Claimant does not argue that the limitations were tolled by Idaho Code § 72-604, and the Referee finds they were not.

2. **Other Issues**. Based on the above, the other issues to be decided in the matter are moot.

CONCLUSIONS OF LAW

1. Claimant did not comply with the notice limitations set forth in Idaho Code §§ 72-701 through 72-706, and the limitations were not tolled by Idaho Code § 72-604. Claimant's claim is barred.

2. All other issues are moot.

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 at Boise, Idaho, this 15th day of September 2006.

INDUSTRIAL COMMISSION

/s/ _____
Lora Rainey Breen, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of September _____ 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:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
PO BOX 7507
BOISE ID 83707-7507

jkc

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHARLENE ELDRIDGE,)	
)	
Claimant,)	IC 05-503904
)	
v.)	
)	
BROULIMS, INC.,)	
)	
Employer,)	
)	ORDER
)	
LIBERTY NORTHWEST)	
INSURANCE CORPORATION,)	
)	September 25, 2006
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen 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 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 did not comply with the notice limitations set forth in Idaho Code §§ 72-701 through 72-706, and the limitations were not tolled by Idaho Code § 72-604. Claimant's claim is barred.
2. All other issues are moot.

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

4. The complaint herein is dismissed with prejudice.

DATED this 25 day of September, 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 25 day of September, 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN
P O BOX 1645
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MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
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BOISE ID 83707

jkc /s/ _____