

CONTENTIONS OF THE PARTIES

Claimant asserts Defendants should be estopped from raising the statute of limitations as a defense because they had knowledge of Claimant's alleged injuries and were not prejudiced by her eventual filing of a Complaint. Alternatively, Claimant argues she was misled by her prior attorney and otherwise would have filed a timely Complaint.

Defendants contend Idaho Code § 72-706 precludes Claimant from recovering any further income benefits for her August 25, 1992, and March 29, 1995 claims. Regarding Claimant's bilateral shoulder claim allegedly arising sometime in August 1996, Claimant did not provide proper notice and her claim for benefits is barred in its entirety under Idaho Code § 72-701. Defendants' conduct did not induce Claimant's delay in filing and they are entitled to rely on the applicable statutes of limitation.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. The hearing testimony of Claimant and her husband, Robert Parkinson; and,
2. Claimant's Exhibits 1 through 7 and Defendants' Exhibits A through U admitted at hearing.

After having considered all of the 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 began working for Employer as an operator helper in a potato processing plant in 1984. Her job involved repetitive lifting, gripping, pushing, and pulling.
2. **August 25, 1992 claim ("1992 claim").** On August 25, 1992, Claimant sustained a left hand crush injury when her hand was pulled into a packaging line machine. Surety

accepted the claim and paid medical benefits. Claimant was returned to light duty work right away and Surety paid no income benefits. She continued to have left hand symptoms.

3. In late 1993, Claimant began to experience right hand symptoms, including pain and numbness. She also experienced diffuse pains in her bilateral upper extremities to the shoulder areas.

4. **March 29, 1995¹ claim (“1995 claim”)**. On March 29, 1995, Claimant saw Rheim Jones, M.D., with left shoulder pain, aching, and discomfort since her August 1992 injury. Dr. Jones wrote:

She was seen back in 1992 with pain and numbness of her hand following a crush injury. Her hand was caught at work and crushed nearly to the elbow. She has been having some increasing pain and numbness in her hand. It is also in her shoulder. She has difficulty rotating her shoulder or moving it. There is nearly constant pain, stiffness and aching in the region of the shoulder. This persists throughout the day and oftentimes awakens the patient at night time. The pain, aching, and stiffness is persisting and interfering with the activities of daily living. Ordinary tasks are becoming very difficult to perform. It is difficult hold on to anything very heavy. Overhead activities are nearly impossible to perform. The arm cannot be maintained above shoulder height. There is pain with certain arcs of motion of the shoulder. There is tenderness and weakness of the shoulder. There are repeated episodes of dropping things, because the pain is often sudden and unexpected. There is no strength in the shoulder.

Exhibit M. Dr. Jones noted the problem had become so severe that medical attention was necessary. He assessed subacromial impingement of the shoulder and also recommended ruling out carpal tunnel syndrome (CTS). Claimant underwent physical therapy, at the conclusion of which (April 1995) she still had pain in all motions of the left shoulder.

5. On April 10, 1995, Dr. Jones noted Claimant “has continued to have pain and difficulty in both hands. She has numbness. It is becoming quite incapacitating and she has

¹ This date comes from the Notice of Injury and Claim for Benefits form prepared by Employer on May 2, 1995, and thereafter filed with the Industrial Commission.

difficulty doing her work.” He described nerve conduction studies consistent with bilateral CTS and also indicated she was having a “little bit of a problem in her opposite shoulder.” *Id.* He recommended CTS surgery. On April 21, Surety redirected Claimant’s care to Stan Griffiths, M.D., noting that “we are the ones that decide which dr she is authorized w/.” Exhibit Q.

6. On May 1, 1995, Claimant saw Dr. Griffiths and described the following history:

I have had spasms in my left hand ever since the accident happened 8-25-92. Day and night. Cannot grip, no strength in hand. Cannot make complete fist. Have had tingling & numb sensation for at least 1 ½ years & have had severe pain in both arms, both hands, both elbows, and both shoulders constantly.

Exhibit L. Dr. Griffiths reported:

The patient has clinical and historical signs and symptoms of carpal tunnel syndrome on both sides. I think that much of her left hand symptoms are related to carpal tunnel syndrome that has actually been present for quite some time. She has modified how she works. She has done less and less lifting, grasping and carrying with the left side. She is using more and more elbow and shoulder function and she is using the left knee to help lift and carry heavier objects to compensate for her left hand trouble. It is difficult for me to know how much of her left hand symptoms are related to her injury in 1992 but it seems that at least a large percentage of her current problems are related to carpal tunnel syndrome. I think basically her right hand symptoms are more clearly related to carpal tunnel syndrome completely.

Id.

7. Dr. Griffiths performed a left carpal tunnel release on May 12, 1995, and a right carpal tunnel release and left index trigger finger release on July 25, 1995. Surety accepted the related workers’ compensation claim and paid medical and income benefits. Claimant continued to have bilateral arm pain.

8. When he provided his impairment rating on November 16, 1995, Dr. Griffiths described Claimant’s CTS and associated surgeries and found she had mild residual problems on the right side, equating to a 6% whole person PPI, and moderate residual problems on the left side, equating to a 12% whole person PPI, for a total of 18%. He felt Claimant’s emotional and

psychological problems contributed to her perception of disability, but concluded the impairment rating was reasonable. He also noted, “She continues to have intermittent symptoms of tendinitis of the wrist and elbow and bursitis of the shoulder. I think this is treatable and I don’t anticipate that requiring any surgical intervention.” Exhibit L.

9. At Surety’s request, Dr. Griffiths revisited his impairment rating and, on December 8, 1995, he assessed Claimant’s PPI at 6% of the whole person. He noted: “Other problems that she has including the numbness, weakness, incoordination of flexion and extension of her lesser fingers of her left hand, pain radiating into the elbow, shoulder pain, etc. are by her count related to a prior injury which I now understand, was not to be addressed with this impairment rating.” *Id.*

10. In mid-December 1995, Claimant returned to work full time. Dr. Griffiths’ release indicated that, although the CTS surgeries were healed, residual problems from the prior injury to her left hand required weight (15 pounds maximum lift) and lack of grip restrictions.

11. Employer wanted Claimant to work the trim line and upon returning to full-time work, her symptoms increased. She told Dr. Griffiths the only work available to her required frequent lifting of materials up to 50 pounds or jobs requiring repetitive motion such as trimming and sorting. She felt she could not do the repetitive motion because of her hand and wrist problems and could not do the heavy lifting because of her “hand problems, elbow problems, shoulder problems, etc.” *Id.* On December 30, she sought treatment at BMH for bilateral arm pain (hands, wrists, elbows, and shoulders). She then took a leave of absence from work.²

12. On January 3, 1996, a panel of IME physicians (orthopedic – Dr. Richard

² Claimant did not return to work for Employer after the end of December 1995. Employer terminated her employment at the end of 1996 because she had been off work for a year.

Knoebel; psychiatric – Dr. Robert Burgoyne; and, neurologic – Dr. Gerald Moress) evaluated Claimant with respect to her 1992 and 1995 claims. They concluded Claimant sustained no neurologic or orthopedic impairment and she suffered from a non-industrial pain disorder. According to the panel, Claimant’s current symptoms “all relate to pain disorder.” Exhibit J.

13. In February 1996, Surety ceased paying workers’ compensation benefits based on the IME panel report.

14. On February 23, 1996, Claimant saw Dr. Griffiths complaining of severe right shoulder and elbow pain bothering her for the past couple months and stating she had been unable to work since the end of December. Dr. Griffiths assessed bursitis of the shoulders and tendinitis of the elbow.

15. In March 1996, Attorney Stephen Blaser (Blaser) sent Surety a letter indicating he was assisting Claimant with her workers’ compensation claims. Subsequently, he undertook representation of Claimant.

16. On March 15, Dr. Griffiths wrote to Surety’s adjuster (Adjuster) and indicated the right shoulder and elbow pain, while not related to Claimant’s carpal tunnel syndrome, did relate to overuse from repetitive activities at her work. Adjuster responded to Dr. Griffiths stating it was Claimant’s responsibility to notify them of any alleged new conditions she related to her employment so they could investigate. She noted, “[Claimant] is now represented by an attorney so I am sure they will follow up on this.” Exhibit Q. Adjuster also noted Claimant had complained of bilateral elbow and shoulder pain to the IME panel, which found nothing objective to substantiate her complaints.

17. On March 29, Claimant presented again to BMH with bilateral arm pain so severe she could not lift her arms above her head. The diagnosis was bilateral carpal tunnel pain.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 6

18. In April 1996, Claimant's family physician, Paul Johns, M.D., ordered cervical x-rays, an MRI, and EMG testing to evaluate Claimant's continuing bilateral arm pain and numbness. On April 17, he provided Claimant with a full release from work stating, "[Claimant] is still having tests done and should not return to work until the problems are resolved." Exhibit I. Following these tests, Dr. Johns felt the problem did not stem from Claimant's neck and, at the recommendation of a local neurosurgeon, he had Claimant's shoulders evaluated.

19. **August 1, 1996³ claim ("1996 claim")**. An August 8, 1996 right shoulder MRI showed a rotator cuff tear and atrophy. On August 20, 1996, Dr. Johns noted in his records:

I called [Claimant] today and gave her the report on her MRI scan of her shoulder. Her shoulder has a supraspinatus tendon tear, creating a rotator cuff tear, and a lot of degeneration of the AC joint and long-standing inflammation. We discussed this at some length and feel that she needs to see an orthopedic surgeon. I called Carol Miller, the Workman's Comp lady for Basic American Foods, at 785-3200 and gave her this information. She will call their Workman's Comp carrier and see if they can reopen the case and says that both Diane and her husband are covered by insurance. It should be just a matter of finding out what we need to do, picking an orthopedic surgeon, and having this repaired.

Exhibit J.

20. On September 5, Dr. Johns noted he spoke with "Gwen at GAB in Boise" and he asked that she "expedite, please, a decision by the Workman's *[sic]* Comp people as to what they will do for Ms. Parkinson." Exhibit S. On September 12, Dr. Johns spoke again with Gwen indicating Claimant was "in a lot of pain, had been waiting for quite sometime, *[sic]* now approximately four years and was becoming impatient." *Id.* Dr. Johns then wrote a three-page letter to GAB describing Claimant's history and the MRI results and recommending treatment

³ Neither Employer nor Claimant filed claim documentation (i.e., Form 1, First Report, Notice of Injury, etc.) with the Industrial Commission regarding this claim during this time period. It arises from Claimant's Complaint filed in 2006, which referenced an August 1996 bilateral shoulder claim. The Commission selected the date "August 1" by default since Claimant did not identify a particular date in August.

with an orthopedic surgeon. He indicated Claimant wanted to see Dr. Jones and “feels that Workman’s Comp should be responsible for assisting her through this evaluation and treatment financially.” Exhibit J. He explained:

Mrs. Parkinson felt that there were no injuries since the incident with her hand caught in the machine in 1992 and therefore, there would be no other time where this injury could have occurred. She states that she’s had shoulder and arm pain since that time and that the pain in the left shoulder and arm has increased dramatically. She reports that she unable to use her right arm for very long (if she tries to carry things, she drops them) and she’s very frustrated.

Id.

21. A September 19, 1996 left shoulder MRI showed acromioclavicular (AC) joint problems with impingement on the supraspinatus muscle and tendon. Also, the anterior portion of the supraspinatus tendon was torn from its insertion into the greater tuberosity and retracted.

22. On September 24, Adjuster documented receipt of a letter from Dr. Johns advising Claimant had left shoulder, as well as right shoulder, tears. The notes indicated Adjuster would pull the 1992 file to evaluate responsibility.

23. On October 22, Adjuster’s notes indicated Claimant “is still waiting for our decision.” On October 28, after a phone call from Carol at Employer’s, Adjuster noted “they want us to deny, but was agreed to call Dr. Johns & advise that we were awaiting the results of a 2nd opinion.” Exhibit Q.

24. In November 1996, Claimant’s attorney and Adjuster discussed a “plan of action,” to include an IME. *Id.*

25. In December, Claimant self-referred to the Industrial Commission Rehabilitation Division (ICRD) for vocational assistance. Surety informed ICRD it was denying the shoulder condition and, thereafter, ICRD determined Claimant was not eligible for services.

26. Also in December, Claimant returned to Dr. Jones, who recommended surgery for

her shoulders. He also felt Claimant's cervical spine might be playing a role in her problems.

27. In January 1997, Claimant's attorney sent Adjuster a signed release for medical information. He also wrote, "Diane needs surgery on her shoulders, which are continuing to show signs of atrophy, in order to eliminate substantial pain and return to the work force. You had mentioned an IME. I feel that Dr. Gary Walker in Idaho Falls does a good job and I would recommend him." Exhibit Q. Thereafter, Adjuster sought records from Claimant's physicians. Surety/Adjuster did not schedule a second opinion or IME.

28. On February 21, 1997, Adjuster wrote to Dr. Jones: "This letter will confirm we are continuing to investigate Mrs. Parkinson's shoulder complaints and at this time do not have any medical information to indicate that this claim is compensable under any of the claims Mrs. Parkinson has filed to date with our company." *Id.*

29. On February 25, 1997, Dr. Jones performed a right shoulder rotator cuff repair. His post-operative diagnoses included a complete rotator cuff tear with ruptured supraspinatus and subscapularis tendons; chronic subacromial impingement syndrome with thickening and hypertrophy of the acromion, clavicle and the coracoacromial ligament; significant chronic synovitis of the glenohumeral joint; torn cartilage of the acromioclavicular joint; and, hypertrophic spurring of the acromioclavicular joint. On April 22, 1997, Dr. Jones performed the same procedure on Claimant's left shoulder and made similar findings.

30. The IME panel's conclusion that all of Claimant's symptoms were due to a pain disorder was erroneous.

31. Communications between Adjuster and Blaser ceased sometime in early 1997. Surety paid no benefits relative to Claimant's 1996 bilateral shoulder problems.

32. In April 1997, Blaser sent a letter to Dr. Jones inquiring about the cause of

Claimant's shoulder problems. As discussed in Blaser's November 10, 2006 deposition, Dr. Jones apparently responded to Blaser's letter and opined Claimant's shoulder problems were initially precipitated by her accident at work and more specifically aggravated by the work that she did for Employer.⁴ There is no evidence to suggest that Blaser provided this letter to Surety/Adjuster.

33. Claimant's husband also worked for Employer and his employment terminated in early 1998. Once Claimant's husband stopped working for Employer, neither he nor Claimant had any further contact with Surety or Employer regarding Claimant's claims. They assumed Blaser was handling the matter.

34. Blaser did not file Complaints with the Industrial Commission seeking additional benefits for Claimant and, as discussed in more detail below, the final dates on which Claimant could file for additional workers' compensation income benefits (statute of limitations) passed. Again, Claimant assumed her attorney was handling the matter.

35. Sometime in late 2004, Claimant sought the services of her current attorney (Meikle), who filed a Complaint on her behalf with the Industrial Commission on January 12, 2005, regarding the 1992 claim. On March 27, 2006, Meikle moved to amend the Complaint to include the 1995 (described as CTS and subacromial shoulder impingement syndrome) and 1996 (described as bilateral rotator cuff tears) claims.

DISCUSSION AND FURTHER FINDINGS

Statutes of Limitation. Idaho Code § 72-706(1) provides that when a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless

⁴ The Referee notes that Dr. Jones' letter is not in evidence, only the discussion and citation from the letter as contained in Blaser's deposition. The Referee also notes that the issue of causation is not presently before her and she does not cite to this letter to establish any particular causation finding.

misled to her prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim. Idaho Code § 72-706(2) provides that when payments of compensation have been made and thereafter discontinued, a claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of occupational disease within which to make and file with the Commission an application requesting a hearing for further compensation and award. Under JRP 3(A), the “application for hearing” described in Idaho Code § 72-706 is called a Complaint. In the event an application is not made and filed as provided, relief on such claim shall be forever barred. Idaho Code § 72-706(6).

However, the applicable version of Idaho Code § 72-706(5) establishes that the above provisions do not bar Claimant’s right to medical benefits.

1992 claim

On August 25, 1992, Claimant sustained a left hand crush injury at work and Surety paid benefits. Claimant has continued to describe symptoms she relates to this accident/injury even as of the date of hearing. However, under Idaho Code § 72-706(2), Claimant had five years from the date of the accident, until August 25, 1997, in which to file a Complaint seeking additional benefits. She did not do so and is precluded from seeking further income benefits for this claim. She is not precluded from seeking further medical benefits.

1995 claim

On March 29, 1995, Claimant sought medical care for complaints of left shoulder pain, aching, and discomfort. She received a diagnosis of subacromial impingement of the shoulder, as well as “rule out carpal tunnel.” Within two weeks, Claimant was diagnosed with bilateral CTS and she received related treatment. Defendants accepted her occupational disease claim and

paid benefits. Under Idaho Code § 72-706(2), Claimant had five years from the date of first manifestation of the disease, until April 10, 2000⁵, in which to file a Complaint. She did not do so and is precluded from seeking further income benefits related to this claim. She is not precluded from seeking further medical benefits.

1996 claim

Prior to the filing of Claimant's March 27, 2006 amended Complaint, no paperwork had been filed with the Industrial Commission describing an August 1996 injury or occupational disease. Moreover, Claimant did not personally file formal written notice with Employer at the time. As such, Defendants argue Claimant failed to provide proper notice of her 1996 bilateral shoulder claim and the claim should be barred in its entirety.

There is substantial evidence in the record that both Employer and Surety had actual knowledge of Claimant's bilateral shoulder problems beginning in August (right shoulder) and September (left shoulder) 1996, and both clearly knew Claimant was seeking workers' compensation benefits therefore. Adjuster made note of the fact that Claimant was awaiting a decision as to compensability in October 1996; she discussed the matter with Employer's representative, who wanted her to deny benefits. Adjuster also received a medical release and had ample opportunity to investigate, and indeed did investigate, the facts related to Claimant's bilateral shoulder problems. Claimant's attorney specifically notified Adjuster that Claimant needed bilateral shoulder surgeries in his January 1997 letter, wherein he also requested an IME be done. Pursuant to Idaho Code § 72-704, the Referee finds proceedings regarding this claim are not barred by any want of notice or delay in giving notice.

⁵ Claimant's CTS manifested on April 10, 1995, when Dr. Jones made the diagnosis resulting in the workers' compensation claim and payment of benefits.

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of June , 2007, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail upon:

STEPHEN A MEIKLE
P O BOX 51137
IDAHO FALLS ID 83405-1137

ERIC S BAILEY
P O BOX 1007
BOISE ID 83701

jkc

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANE PARKINSON,)	
)	
Claimant,)	IC 1992-797421
)	IC 1995-920791
v.)	IC 2006-003503
)	
BASIC AMERICAN FOODS,)	
)	
Employer,)	
)	ORDER
)	
LUMBERMEN'S MUTUAL)	
CASUALTY COMPANY,)	
)	June 8, 2007
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. As to the 1996 claim, pursuant to Idaho Code § 72-704, proceedings are not barred by any want of notice or delay in giving notice.

2. As to all three claims, Claimant did not comply with the provisions set forth in Idaho Code § 72-706 and she is precluded from seeking income benefits. She is not precluded from seeking medical benefits.¹

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

DATED this 8 day of June, 2007.

INDUSTRIAL COMMISSION

James F. Kile, Chairman

/s/
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

¹ Idaho Code § 72-706(5) was amended in 2005. Because Claimant's cause of action arose before then, we have applied the statute as it existed when the injury occurred. See: Frisbie v. Sunshine Mining Co., 93 Idaho 169, 172, 457 P. 2d 408, 411 (1969).

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of June , 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

STEPHEN A MEIKLE
P O BOX 51137
IDAHO FALLS ID 83405-1137

ERIC S BAILEY
P O BOX 1007
BOISE ID 83701

jkc

 /s/ _____