

4. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause; and
5. Whether and to what extent Claimant is entitled to medical care benefits.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a shoulder injury at work. The circumstances constitute a compensable accident. He needs surgery.

Defendants contend Claimant did not suffer a compensable accident. Alternatively, if he did, it did not cause the condition for which Claimant seeks benefits. Alternatively, if it did, he is not entitled to surgery.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and shop supervisor John Fuit;
2. Claimant's Exhibits I – IV;
3. Defendants' Exhibits A – I; and
4. Post-hearing depositions (with exhibits) of orthopedic surgeons James T. Malouf, M.D., and Paul Collins, M.D.

All objections raised in depositions are overruled. After considering the record and briefs 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. Claimant worked for Employer as a metal fabricator, welder, and grinder. The work occasionally involves exertion within the category of "heavy" work. Claimant began working for Employer in the summer of 2001. In mid-July 2005, Claimant worked 40-hour weeks and earned \$11.50 per hour.

2. From about July 15 to 19, 2005, Claimant was welding together metal brackets roughly the size and shape of a horse's head. The excess weld on these brackets required significant grinding to smooth the seam. He would lift a bracket from the floor to a waist-high table, weld for five to seven minutes, then grind for 25 to 30 minutes for each bracket. The grinder weighed about 15 pounds and required two hands to operate. Claimant had to push the grinder down onto each bracket, hard.

3. At the end of the first day of welding and grinding these brackets, Claimant felt "a little bit sore." He ignored it as "sore muscles are part of the grinder game." July 15, 2005 was a Friday. Claimant sometimes worked weeks of four 10-hour days, Monday through Thursday; at others, five eight-hour days, Monday through Friday. Thus, this "first day" working with the brackets may have actually occurred on Thursday, July 14.

4. When Claimant returned to work on Monday, he resumed fabricating these brackets. By the end of his shift, his shoulders were sorer, particularly his left shoulder. Working on Tuesday, he became intolerably sore and painful. He became unable to continue working because it was too painful to pick up the grinder. He notified the shop supervisor and went home at least an hour early.

5. The shop supervisor initially thought Claimant had hurt his shoulder on a welding project at home. A few weeks earlier, Claimant had described an incident when a trailer shifted position as he was welding. This was merely a misunderstanding on the part of the shop supervisor. He considers Claimant to be honest and that Claimant was one of Employer's hardest workers.

6. No unusual event occurred while Claimant fabricated these brackets. He did not feel any sudden pain or sudden increase in pain. Rather, it gradually increased during the

three days he worked on the brackets. Claimant had never previously experienced shoulder pain of this magnitude or any painful shoulder condition.

7. On Wednesday morning, Claimant was still unable to work. He notified Employer and sought medical attention.

8. After about one week of conservative treatment, Claimant's family doctor referred Claimant to orthopedic surgeon James T. Malouf, M.D. Dr. Malouf informed Claimant he suffered from a torn labrum.

9. After about 30 days, Claimant returned to light-duty work for Employer, with part-time hours as much as he could tolerate. By Halloween, Claimant was laid off because no more light-duty work was available. He collected unemployment benefits for about 26 weeks, then returned to Employer to weld about May 23, 2006. He worked part-time, light-duty work until July 12, 2006, when he finally ceased working for Employer.

10. While a torn labrum may be caused by working overhead or by a sudden jerk to one's arm, both Drs. Malouf and Collins opined such an injury was inconsistent with normal welding and grinding work at waist level.

DISCUSSION AND FURTHER FINDINGS OF FACT

11. **Accident and Causation.** "'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." Idaho Code § 72-102(18)(b). Two recent, significant Idaho Supreme Court cases help define the contours around what is and is not an accident. *See, Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005)(an accident occurred); *Konvalinka, v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004)(no accident occurred).

12. The facts surrounding Claimant's onset of pain are more like Ms. Konvalinka's. Her pain occurred gradually, without sudden onset or specific event. By contrast, Ms. Page's pain came suddenly and severely in her knee as she stood from a seated position. Claimant identified no event which could constitute an "accident" as defined by the Idaho Legislature.

13. A claimant must prove he was injured as 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). A preexisting condition does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the preexisting condition to produce the disability for which compensation is sought. An employer takes the employee as it finds him. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

14. The medical experts acknowledge that welding can take a toll on a welder's shoulders. However, when the labral tear was compared to Claimant's description of picking a bracket up from the floor and working around waist height, neither doctor would opine it medically probable that the described work caused the labral tear.

15. Upon a finding that no compensable accident occurred, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant failed to show he suffered a compensable accident; and
2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 23RD day of July, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27TH day of JULY , 2007, 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:

Gregory C. May
P.O. Box 370
Pocatello, ID 83205-0370

Tyra H. Stubbs
P.O. Box 519
Boise, ID 83701

db

/S/ _____

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

DATED this 27TH day of JULY, 2007.

INDUSTRIAL COMMISSION

/S/ _____
James F. Kile, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 27TH day of JULY , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Gregory C. May
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Pocatello, ID 83205-0370

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