

ISSUES

By agreement of the parties, the issues to be decided are as follows:

1. Whether Claimant's condition is due in whole or in part to a subsequent injury/condition.
2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care; and
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD).
3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that Defendants are responsible for medical costs and benefits associated with a full thickness tear of her left rotator cuff. Claimant maintains that the full thickness tear is a progression of a partial tear she sustained in a January 2005 industrial accident. Because of the progression of that tear, Claimant contends that she has not reached maximum medical improvement and is eligible for benefits. She further maintains that her medical history is void of any pertinent pre-existing medical condition or treatment and thus, apportionment is not appropriate. Further, Claimant alleges the right to attorney fees for the unreasonable denial of medical costs and benefits associated with this claim.

Defendants contend that Claimant has not met her burden of proof in relating the full thickness tear to the January 2005 industrial accident. They maintain that Claimant's shoulder

problems are related to various other, non-industrial causes or from a post operation physical therapy session. Regardless of the tear, Defendants allege that Claimant is not presently a good surgical candidate because her pain complaints are not related to the rotator cuff and she has unrealistic expectations of pain relief following surgery. Because Claimant has not properly shown causation, Defendants assert she is not owed any additional benefits. In the alternative, Defendants allege that Claimant suffered no wage loss because multiple, higher paying positions were available to Claimant within her work restrictions but she chose to work for less. Lastly, Defendants maintain that attorney fees are unwarranted since there is conflicting medical evidence regarding causation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's deposition, taken May 8, 2007;
2. Claimant's Exhibits A-N;
3. Defendants' Exhibit 1; and
4. The depositions of William F. Sims, M.D., taken by Claimant on June 12, 2007, and Warren Adams, M.D., taken by Defendants on August 22, 2007.

After considering the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. At the time of deposition, Claimant was a 43 year old single woman living in Post Falls, Idaho. She has no dependants.
2. **North American Sales Duties.** On October 9, 2000, North American

Sales (Scotts), hired Claimant as a merchandising manager earning \$15.00/hour. Claimant's work included, but was not limited to, placing orders and servicing regional stores. Servicing stores was labor intensive, requiring her to climb ladders and restock upper shelves and racks with heavy merchandise, setting up displays and moving pallets of fertilizer. Claimant was required to lift, push and pull 60 lbs. on a routine basis. The position also required frequent regional travel. Claimant described the position as being "seasonal" in regards to her duties, with periods demanding great physical exertion followed by periods of more sedentary administrative tasks.

3. On June 23, 2005, nearly 6 months after the industrial accident, Claimant was let go by Scotts for poor sales performance. She remained unemployed until May 5, 2006, when she was hired by Ziggys.

4. **Current Employment.** Claimant began working for Ziggys on May 5, 2006 as a full time sales associate. Her starting wage was \$9/hour. At the time of deposition, Claimant received compensation of \$10.50/hour. Claimant testified that she enjoys her position, however she feels that there is little to no upward mobility except through attrition.

5. **Prior Medical History.** Claimant has represented past injuries to her upper extremities. In August 1997, Claimant suffered from carpal tunnel syndrome in her left hand and underwent surgery to correct the problem. Claimant made a full recovery. On August 9, 2001, Claimant fell off of a ladder while working for Scotts and broke her right elbow and injured her right shoulder. In January 2004, Claimant underwent surgery to repair her elbow. Defendants accepted this claim and paid benefits in full. Claimant did not receive TPD/TTDs during this time because, according to her testimony, she was in a down time at Scotts requiring little physical exertion and she was still on salary and receiving wages. Regardless of the surgery,

Claimant has residual pain and instigated self-imposed work restrictions by reducing the amount of lifting at her job. Driving also aggravates Claimant's shoulder, requiring her to rotate her arms while holding the steering wheel. Claimant does not recall receiving an impairment rating for either of these injuries and the record is silent. Claimant testified that she had no prior injuries to her left shoulder.

6. **The Accident.** On January 6, 2005, Claimant sustained a partial tear to her left rotator cuff while performing a reset of merchandise at the Lowes Store in Missoula, Montana. The reset lasted three days and included lifting up to 50 lbs. of merchandise from shelves, racks, and uprights. After completing the job and returning home, Claimant noticed significant pain in her left shoulder and was unable to move her arm. She notified her district manager of the injury. On January 8, Claimant sought medical care at North Idaho Immediate Care Center (Care Center). She was diagnosed with a left rotator cuff sprain and given pain medication and work restrictions.

7. After continued pain and numerous visits to the Care Center, Claimant underwent a MRI on April 9, which showed a partial thickness tear to her left rotator cuff. The radiologist interpreted the scan as a partial thickness tear located on the undersurface of the mid-distal portion of the supraspinatus tendon. After two months of physical therapy, an orthopedic consult with William F. Sims, M.D., was recommended by her physical therapist.

8. **Dr. Sims Deposition.** Dr. Sims is Claimant's attending physician. Dr. Sims is a board certified orthopedic surgeon, duly licensed to practice in Idaho. His practice is solely devoted to patient treatment.

9. Claimant began treatment with Dr. Sims on May 13, 2005. Up to this point, Claimant

had continued with physical therapy sessions and anti-inflammatory injections. At the initial visit, Claimant represented continued pain in her left shoulder. In an attempt to locate the site of Claimant's pain, Dr. Sims gave her an anti-inflammatory injection.

10. Defendants sent a Notice of Claim Status to Claimant notifying her that her PPI benefits from the January 6, 2005 accident were stopped, effective May 30, 2005, because the PPI award was paid in full.

11. On July 8, Claimant returned to Dr. Sims and stated she was benefiting from the injection. At that time, Dr. Sims indicated that he had successfully located a source of her pain and the anti-inflammatory relieved her pain. After performing motion tests on Claimant's shoulder, Dr. Sims diagnosed the following conditions in Claimant's left arm: subacromial bursitis, a partial thickness rotator cuff tear, AC joint degenerative change, and bicep tendon pathology. Dr. Sims continued to recommend conservative treatment.

12. Claimant's pain complaints continued. On July 29, 2005, Dr. Sims performed arthroscopic surgery on Claimant's left shoulder to locate a pathology and attempt to treat it. During surgery Dr. Sims repaired the biceps tendon, decompressed the subacromial space, removed a bone spur, and exercised a distal clavicle. He also confirmed the MRI and diagnosed a partial thickness tear of the rotator cuff and debrided some nonviable tissue. Because the tear was not over 50%, debridement of the tissue only and not fixing the tear was a common and accepted practice. The claim was submitted and accepted by Surety.

13. Claimant continued to see Dr. Sims for check-ups at approximately 3 week intervals. On August 15, 2005, Dr. Sims gave Claimant a work release with lifting and right hand only use restrictions. In his medical notes, Dr. Sims indicated that Claimant was making slow improvement. He also recommended a specific rehabilitation course, which included the use of

the pulley. Dr. Sims testified that this course was more conservative than many other orthopedic surgeons would recommend.

14. **Hydrant.** On September 5, 2005, Claimant and her friend noticed a leaking bury hydrant in her barn. Claimant stated that her friend twisted the pipe in an attempt to stop the leak. The pipe burst underground. Claimant testified that her friend dug the hole down to the break and a neighbor fixed the pipe. Written statements by the friend and neighbor corroborate Claimant's testimony.

15. **Physical Therapy Pulley.** Claimant testified that the only relevant event that may have caused her shoulder pain to increase was the pulley. On September 18, 2005, Claimant's physical therapy included a pulley machine exercise. The exercise consists of a wall mounted pulley. Both hands grasp the end of a rope attached to the pulley. The non-surgical arm pulls down on the rope, forcing the surgical arm to elevate. The purpose of the pulley is to gradually increase the surgical arm's range of motion. Claimant testified that she attempted to do the exercise but felt great discomfort in her shoulder that made her eyes water. Claimant told the physical therapist that it hurt and she discontinued using the pulley. She did not report the incident to Dr. Sims. Both Dr. Sims and Dr. Adams agree that, if performed correctly, the pulley would not cause a progression of the tear.

16. During the September 20, 2005 visit, Dr. Sims noted continued pain in Claimant's left AC joint. He continued to recommend rehabilitation and restricted her from any work with her left arm away from her body and any type of overhead work. He expected her period of disability to be approximately 12 to 16 weeks.

17. At an October 11, 2005 visit, Claimant's pain continued. Dr. Sims administered an

injection into her AC joint. According to his notes, Dr. Sims indicates Claimant was given great relief 10 minutes after the injection.

18. Claimant's pain had not subsided by her October 28, 2005 visit. Dr. Sims recommended a more sensitive MRI arthrogram. The procedure was completed on November 7 and showed a full thickness tear. According to the radiologist's report, the tear was located on the anterior aspect, (rather than mid-distal on the 1st MRI) of the supraspinatus tendon near the humeral insertion.

19. At Claimant's November 14, 2005 visit, Dr. Sims personally reviewed the MRI scan. Dr. Sims testified that he disagreed with the radiologists' interpretation of the tear location and felt that this tear was at the same location as the partial tear. Subsequently, he discussed treatment options including repeat surgery with Claimant. Dr. Sims felt that Claimant's situation would improve with surgery. It was Dr. Sims' opinion that the full thickness tear was a progression of the partial thickness tear and thus related to the industrial accident. Claimant agreed to the surgery and that same day, Dr. Sims submitted the request for surgery to Defendants. Surety denied the request until completion of the December 7 independent medical examination (IME). It is Dr. Sims' opinion that Claimant has not reached maximum medical improvement because she is still in pain and in need of surgery.

20. In a January 6, 2006 letter to Defendants faxed on February 16, 2006, Dr. Sims appealed Surety's denial, reiterating his opinion that the full thickness tear was related to the previous partial thickness tear, a claim that Surety had already accepted. Surety again denied the claim stating they had doctors who did not agree with causation and further, that Claimant had increased pain in mid-September. In support of his opinion, Dr. Sims testified that Claimant had not stated any new or repeat injury that would cause the tear. Dr. Sims stated he had no reason

not to believe Claimant. Further, Dr. Sims stated enough literature exists to show that a partial thickness tear can progress into a full thickness tear. Defendants' IME doctor does not dispute this. For these reasons, Dr. Sims opines, based on reasonable medical probability, that the full thickness tear is a progression of the partial thickness tear and thus, is related to the January 2005 industrial accident.

21. **Warren Adams, M.D., Deposition.** Dr. Adams was requested by Defendants to perform an IME on Claimant on December 7, 2005. Dr. Adams received his medical degree from Harvard and is a board certified orthopedic surgeon. Prior to the exam, Dr. Adams reviewed Claimant's available medical records. During the examination, he performed a detailed shoulder exam. X-rays found no calcifications of the rotator cuff and no massive rotator cuff tear. Dr. Adams also testified that Claimant disclosed that her pain had plateaued two weeks after her left shoulder surgery. Upon conclusion of the exam, Dr. Adams found that Claimant had a good range of motion, which he stated was unexpected with a rotator cuff injury. He also ruled out rotator cuff tendonitis. The etiology of her shoulder pain could not be determined. After reviewing Dr. Sims' post op notes, Dr. Adams opined that the pain was not from the rotator cuff, but more likely from an AC distal clavicle region.

22. Dr. Adams relied upon the radiologists' report of the MRIs. He disagreed with Dr. Sims' opinion that the tear is causally related to the industrial accident. Based on the difference of location between the tears and Claimant's significant decrease in pain with the conservative treatment, Dr. Adams found the full thickness tear is either a new tear and/or due to aging.

23. Even if the surgery was recommended, Dr. Adams testified that Claimant is not a good candidate. According to Dr. Adams, Claimant has an unrealistic expectation that the surgery will cure her entirely. Further, the IME did not identify the pain generator of her

subjective complaints. Dr. Adams believes a surgeon should know the etiology of the pain before performing surgery. In addition, Dr. Adams stated should Claimant not have the surgery, her pain would likely not increase because the tear was likely at its worst. He noted that if the tear were to increase, it would have done so already.

24. Dr. Adams was supportive of Dr. Sims' surgical tactics made on the partial thickness tear. Dr. Adams further agreed with Dr. Sims representation that a partial thickness tear could progress into a full thickness tear, even though Dr. Adams feels there is a small probability of its occurrence.

25. At the time of his report, Dr. Adams found Claimant medically stable and gave her a 10% PPI upper extremity rating.

26. **Industrial Commission Rehabilitation Division (ICRD).** Claimant utilized ICRD twice during her injury. Claimant's case was opened in April of 2005; however this claim was closed several weeks later because Claimant was still working for Scotts with medical restrictions. In August 2005, following Claimant's partial tear surgery, the case was reopened. Over a year since the initial application was made, ICRD records show Claimant applied for over 15 positions with salaries varying between \$8.21/hour to \$10.09/hour. ICRD's services were no longer needed following Claimant's procurement of employment at Ziggys.

DISCUSSION

Pre-existing/Subsequent Condition

1. **Causation.** 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, 751, 918 P.2d 1192, 1196 (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." Soto v. Simplot, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

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).

2. Though not singled out as a specific issue, causation is a prerequisite for many of the subsidiary issues in this case. Claimant has successfully carried her burden of establishing sufficient causation between the full thickness tear and the January 6, 2005 industrial accident. Dr. Sims' medical testimony was thorough and persuasive. As Claimant's treating physician, Dr. Sims provided constant medical care to Claimant for nearly 7 months, performed surgery on Claimant's left shoulder and provided closely monitored check-ups and conservative care every three weeks following surgery. Dr. Sims reviewed all the medical records, was in regular communication with Claimant, and personally reviewed both MRI scans. Claimant never represented to Dr. Sims an event that reinjured her shoulder. Dr. Sims clearly articulated a logical basis, founded on reasonable medical probability, that the full thickness tear was a progression of the partial thickness tear, which resulted from the January 6, 2005 industrial accident.

3. Dr. Adams' testimony is less persuasive and lacks a complete analysis. While Dr.

Adams is a board certified orthopedic surgeon, his practice currently consists primarily of IME work. When asked when he performed his last rotator cuff tear surgery, Dr. Adams was very vague stating “It’s been quite some time. That’s all I can say. I don’t recall.” Adams Dep. 24:8-9. (August 27, 2007). After reviewing Claimant’s available medical records and performing a single physical examination, Dr. Adams failed to provide a reasonable basis for the full thickness tear. He merely speculates, at best, as to the cause. Aging was the only alternative cause stated by Dr. Adams, testifying that a significant fraction of people who are 55 or older have full thickness rotator cuff tears and have had no symptoms. Claimant is 43. Dr. Adams testified that he was aware of Claimant’s age.

4. Even though Dr. Adams failed to provide a cause, he opined that the tear was not a progression of the partial tear. He suggested that the full thickness tear was a different tear than shown on the first MRI. Basing his opinion on the radiologists’ reports only, Dr. Adams believed that the different locations of the tear broke the casual link between the industrial accident and the full thickness tear. However, Dr. Adams failed to personally review the MRI scans himself. Dr. Sims noted the radiologists’ opinion of the locations, but upon reviewing the scans, concluded differently and found only one tear. Further, Dr. Adams acknowledged that only one tear was visible on both MRIs. One can conclude that if the second tear were new, then the first tear would likely also be visible on the scan.

5. In addition, Dr. Adams believed Claimant’s pain significantly decreased with conservative treatment. Extensive foundation exists in Claimant’s medical records to support otherwise. Her pain has persisted, with little relief, since the January 6, 2005 injury.

6. Furthermore, Dr. Adams does not refute Dr. Sims’ belief that a partial thickness tear

can progress into a full thickness tear. Dr. Adams also agreed with Dr. Sims' surgical procedure and decision to not fix the partial tear during the initial surgery. Perplexingly, Dr. Adams stated that the full thickness tear was not a progression of the partial tear, but gave no possible alternative cause for the tear outside of making unsupported conclusions. Yet at the same time, he agreed with Dr. Sims that a partial tear could progress into a full tear.

7. **Pulley Machine.** Defendants maintain that Claimant injured her shoulder during a physical therapy session using a pulley machine. Both Dr. Sims and Dr. Adams agreed that the pulley machine, if done correctly, would not cause a full thickness tear. There is no evidence to suggest that Claimant performed the exercise incorrectly. Therefore, there is no indication, outside of Claimant's mere reference, that the pulley machine caused Claimant's full thickness tear.

8. **Hydrant.** Defendants also contend that Claimant injured her shoulder while fixing a broken water pipe. According to Claimant and the written evidence of others, Claimant did not physically exert herself in any way during the ordeal. Claimant's friend dug down to the break and Claimant's neighbor fixed the pipe. There is no indication that the bury hydrant was the cause of Claimant's injury.

9. **Pre-Existing Condition.** The Commission received insufficient evidence that Claimant had a contributing pre-existing condition to her left shoulder. While the record does support conditions and treatments to Claimant's right upper extremity and left hand, Claimant's previous left hand injury was completely resolved in 1997. Claimant testified that she had never injured her left upper arm. There is no evidence that her right upper extremity injuries had any bearing on her left shoulder full thickness tear. Therefore, the Commission finds that Claimant's

partial thickness tear was not due in either whole or in part to a pre-existing injury or subsequent condition.

10. **Apportionment.** Due to the above analysis concerning the lack of any pre-existing condition, the issue as to apportionment is moot.

11. After complete review of the record, the Commission finds that Claimant's full thickness tear is a progression of the partial thickness tear and causally related to the January 6, 2005 industrial accident.

Medical Care

12. 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).

13. Because Claimant has proven that her full thickness tear resulted from an industrial accident, she is entitled to medical care. As previously noted, Dr. Sims believes Claimant could benefit from surgery. He also stated that due to the length of time that has passed since Claimant's last visit, he would want to re-evaluate Claimant's condition to determine if surgery was still the best option. Due to Dr. Sims' persuasive testimony, the Commission finds Dr.

Sims' determination regarding treatment is reasonable, and that Claimant is entitled to medical care deemed appropriate by Dr. Sims.

Temporary Partial and/or Temporary Total Disability

14. Idaho Code § 72-408 provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C. P. Clare and Company, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work *and* that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of a light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

15. Claimant is entitled to TPD/TTDs. According to persuasive medical evidence from Dr. Sims, Claimant has yet to reach medical stability and is still in a period of recovery. As of August 15, 2005, three weeks after Claimant's surgery for the partial tear, Dr. Sims released Claimant to work with lifting and right hand only use restrictions. Claimant's work restrictions continue to be in effect and Claimant follows those restrictions at her current employment.

16. Following the injury, Claimant's "seasonal" job required administrative duties, which she was able to perform. However, as the job shifted to a more laborious period, Claimant was unable to perform her usual lifting duties. Defendants terminated Claimant on June 23, 2005 based on poor job performance. She was unemployed for a year and received help from ICRD to find employment.

17. Temporary total and/or partial disability (TPD/TTD) is granted from the date of the accident until Claimant reaches MMI for her left shoulder full thickness rotator cuff tear. Surety accepted Claimant's claim for the partial thickness tear and paid all PPI benefits awarded. Those payments were complete as of May 30, 2005. Further, Claimant received her full salary following the injury until her position was terminated June 23, 2005. Defendants shall receive credit for any amounts previously paid.

Attorney Fees

18. Idaho Code § 72-804 provides, in pertinent part, that if "the employer or surety contested a claim for compensation made by an injured employee...without reasonable grounds..., the employer shall pay reasonable attorney fees in addition to the compensation provided by this law." Whether or not grounds exist for awarding a claimant attorney fees under the statute is a factual determination that rests with the Industrial Commission. Gooby v. Lake Shore Mgmt. Co., 136 Idaho 79, 29 P.3d 390 (2001).

19. Defendants argue attorney fees are unwarranted because there is conflicting medical evidence as to causation. That may be true, but Defendants miss the focus of the statute. The statute clearly requires reasonable grounds for denying an injured employee's claim for compensation. In Defendants' denial letter to Claimant, they rely on the conflicting medical evidence and Claimant's increase in pain in mid-September as their grounds for denying

compensation. Though Defendants only argue in briefing about the conflicting medical evidence, each of their grounds is discussed herein.

a. Mere conflicting medical evidence alone is insufficient to avoid an award of attorney fees. The statute requires reasonable grounds to support denial of a claim. While “reasonable grounds” are not defined in the statute, the Commission determines that the legislature did not intend for Defendants to circumvent the statute by providing unfounded medical opinions and basing their denial of benefits on such opinions. Beyond the conclusionary opinion that the tear is not causally related to the industrial accident, Dr. Adams provided no factual basis or other reasoning as to the origin of this tear. He merely suspected age, opining a one line statement that people over 55 can have a full thickness tear without symptoms. Claimant is well under this age group, being more than 10 years younger than Dr. Adams’ age group comparison. Not only did Dr. Adams provide a speculative reason for the tear, he dispelled any argument Defendants had regarding the pulley machine as causation and agreed that a full thickness tear can, indeed, progress from a partial thickness tear.

There was also conflicting evidence regarding the location of the tear. Dr. Adams relied solely on the radiologists’ report, never reviewing the actual scans themselves. He still did not provide any medical reason for Claimant’s tear.

In sum, the evidence provided by Dr. Adams is insufficient and without a reasonable basis upon which Defendants could place their reliance and ultimate denial of Claimant’s benefits.

b. The mid-September pain increase from the pulley machine or hydrant, as argued

by Defendants, were clearly dispelled by convincing evidence found in the opinions of both doctors about the pulley and by written statements of those who performed the labor to fix the pipe. The overwhelming evidence negates any reasonable belief by Defendants that these two incidents were a reasonable cause of Claimant's injury.

20. After full review of the record, Dr. Sims' opinion has merit, is persuasive, and provides valid reasons for his medical conclusions. Dr. Adams made unsupportable conclusions as to causation, and his speculations were not well-founded. Therefore, Defendants did not have a reasonable basis for contesting Claimant's claim. As a result, Claimant is awarded attorney fees.

CONCLUSIONS OF LAW

1. Claimant's full thickness tear is a progression of an injury incurred from a January 6, 2005 industrial accident.
2. Claimant is entitled to medical care as deemed appropriate by Dr. Sims.
3. Claimant is granted TPD/TTD benefits accruing from the date of accident, continuing until such time as Claimant is declared MMI from the full thickness tear in her left rotator cuff. Defendants shall be given credit for any prior payments.
4. Claimant's injury is not due to a pre-existing injury or condition.
5. Apportionment for a pre-existing injury or subsequent condition is not appropriate.
6. Attorney fees pursuant to Idaho Code § 72-804 are awarded to Claimant.

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant's full thickness tear is a progression of an injury incurred from a January 6, 2005 industrial accident.

2. Claimant is entitled to medical care as deemed appropriate by Dr. Sims.
3. Claimant is granted TPD/TTD benefits accruing from the date of accident, continuing until such time as Claimant is declared MMI from the full thickness tear in her left rotator cuff. Defendants shall be given credit for any prior payments.
4. Claimant's injury is not due to a pre-existing injury or subsequent condition.
5. Apportionment for a pre-existing injury or condition is not appropriate.
6. Attorney fees pursuant to Idaho Code § 72-804 are awarded to Claimant. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum setting forth the amount and basis for attorney fees requested in this case on either a contingent fee or hourly basis. Counsel shall also provide a copy of the fee agreement executed by Claimant and his attorney, and an affidavit in support of the claim for fees. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced response, Claimant's counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

DATED this __24th_ day of __January_____, 2008.

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 the 24 day of January, 2008 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was served by regular United States Mail upon:

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