



3. Claimant's current shoulder condition was likely caused by progression of a pre-existing degenerative condition.

4. Claimant failed to seek reasonable medical treatment within a reasonable time.

5. Claimant failed to show he suffered permanent disability in excess of PPI.

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

DATED this 15TH day of DECEMBER, 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 15TH day of DECEMBER, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Emil F. Pike  
P.O. Box 302  
Twin Falls, ID 83303

Neil D. McFeeley  
P.O. Box 1368  
Boise, ID 83701

db

/S/ \_\_\_\_\_

ORDER - 2



5. Whether and to what extent Claimant is entitled to benefits for:
  - a) Permanent partial impairment (PPI),
  - b) Permanent disability, and
  - c) Medical care.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he injured his low back and right shoulder in an accident on August 10, 1998. He is entitled to further medical care for his right shoulder, including arthroscopic surgery. Claimant admits his lifestyle prevented him from obtaining prompt medical care. If found stable, disability should be awarded. PPI was rated at 1% of the upper extremity by his treating physician on May 28, 1999. An IME doctor rated Claimant's low back at 5% PPI of the whole person. Claimant asserts no residual symptoms relate to his low back injury. Claimant suffers permanent disability as a result of these ratings and suggests 20% disability, inclusive of PPI, would be appropriate.

Employer and Surety contend they have paid all they are required by law. Claimant elected in 1999 to forgo the arthroscopic surgery which was authorized by Surety. Instead, he obtained a PPI from his treating physician. Claimant has been unavailable by choice or by consequences of his choices for essentially 10 years. A "reasonable time" for medical care has passed due to Claimant's choices. His current complaints cannot be linked to the accident. He showed no basis for an award of disability in excess of PPI.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant;
2. Claimant's Exhibits 1 – 5;
3. Defendants' Exhibits 1 – 6; and
4. The posthearing deposition of treating physician Blake Johnson, M.D.

All objections raised in the deposition are overruled. After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## **FINDINGS OF FACT**

### **Procedural History of the Case**

1. Claimant alleged an injury dated August 10, 1998. He first filed a Complaint on February 11, 2000. This claim was dismissed without prejudice for lack of prosecution on September 26, 2002.

2. Claimant refiled a Complaint on December 16, 2002.

3. Claimant last submitted discovery responses in July 2000. These were never supplemented with more current information.

4. At hearing, pursuant to J.R.P. Rule 10, Claimant's proposed Exhibit 6 was not admitted. This exhibit included a 2008 MR arthrogram of Claimant's shoulder. It showed a labral tear. An MR arthrogram taken more than nine years earlier showed no tear. Claimant's Exhibit 6, whether admitted or not, would not change the conclusions reached in this case.

5. Also at hearing, pursuant to J.R.P. Rule 10, Claimant's testimony was limited. For failure to supplement his discovery responses since the year 2000, he was prohibited from testifying about his employment history between 2000 and 2008.

### **Eligibility, Accident, and Treatment**

6. Claimant worked for Employer on August 10, 1998. He had worked there for about two months when the accident occurred. He alleged he nearly fell from the roof of a mobile home and caught himself by his right arm.

7. He first sought medical treatment on August 14, 1998. He complained of bruising and strain of his low back and right shoulder.

8. In early October 1998, Claimant visited Blake Johnson, M.D. Dr. Johnson diagnosed a lumbosacral strain and symptoms of bicipital tendinitis. Claimant exhibited some right shoulder weakness, but an X-ray report described no abnormality.

9. On October 23 and 30, 1998, Claimant again visited Dr. Johnson. He reported his shoulder pain was gone. An MR-arthrogram of the right shoulder was negative for injury. The glenoid labrum was reported to be normal and intact.

10. On December 1, 1998, Claimant next visited Dr. Johnson. He reported some shoulder symptoms with activity. Dr. Johnson noted Claimant was guarding his shoulder too much for an effective examination.

11. On Claimant's next visit, January 29, 1999, Claimant was healing well. Dr. Johnson ordered physical therapy.

12. On Claimant's next visit, March 17, 1999, Dr. Johnson noticed some signs of shoulder impingement. He believed Claimant was better than he had been at the time of injury.

13. On Claimant's next visit, May 6, 1999, he saw Dr. Johnson's partner, Dr. May. Dr. May diagnosed an impingement syndrome caused by bone spurs and considered recommending arthroscopic surgery. Bone spurs should not have grown in that time interval if the accident had caused or initiated their growth. The bone spurs preexisted the accident but were too small to be noticed in the radiological studies immediately after the accident.

14. On Claimant's next visit, May 21, 1999, Dr. Johnson provided a PPI rating of 1% of the upper extremity. Claimant went to California and was not seen again until May 22, 2001. X-rays were negative. Dr. Johnson found a cyst and arthritis in the shoulder joint. Such a cyst is associated with chronic irritation of the rotator cuff. Dr. Johnson has

never seen such a cyst grow so much in the time interval. It likely preexisted the accident. Dr. Johnson last saw Claimant on November 18, 2004.

15. Dr. Johnson opined Claimant would benefit from an arthroscopic shoulder surgery. He opined the need likely arose because of the accident. He based his opinion largely upon Claimant's report that he had no shoulder pain before the accident and chronic pain thereafter. Thus, Dr. Johnson opined the accident exacerbated a preexisting asymptomatic condition in Claimant's shoulder.

16. On January 16, 2003, Robert T. Burks, M.D., evaluated Claimant. The shoulder examination showed normal strength and range of motion without impingement symptoms. He opined Claimant's then-current condition was not likely to be attributable to the 1998 accident. He recommended against surgery based upon the absence of radiological findings.

#### **Vocational and Disability Factors**

17. Claimant was born in September 1963. He has a high school diploma and studied two years in college. He has worked in the automotive industry as a mechanic and auto body repairman. He has worked in masonry and plumbing.

18. Claimant earned \$6.00 per hour at the time of the accident. After the accident, he worked at least one other job and earned \$6.00 per hour.

19. Claimant has been unavailable for work during substantial periods of time between his accident and the date of hearing because he has been incarcerated.

#### **Discussion and Further Findings**

20. **Credibility.** Claimant has been convicted of forgery. His testimony is impeached. Claimant lied on a job application about having been a first lieutenant in the U.S. Air Force when he actually never served in the military. Because of Claimant's

incarceration, he was unavailable for evaluation of his demeanor except by telephone. While his demeanor could not be assessed visually, Claimant's vocal demeanor was not credible. Particularly in his explanation of lapses of treatment and other efforts at excusing his failures, Claimant used misleading euphemisms to understate the impact his incarceration had on his perceived disability. Ultimately, having only Claimant's voice available to assess demeanor, the Referee deems the demeanor evidence to be insufficient to affect this credibility analysis.

21. **Medical stability.** Dr. Johnson opined Claimant to be medically stable as a result of his shoulder injury as of May 21, 1999. Claimant failed to show it likely that he has been unstable since.

22. **Causation.** A claimant must prove his condition was caused, more likely than not, by his work in order to be eligible for any benefits under the Idaho Workers' Compensation Law. 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. ISIF, 126 Idaho 781, 890 P.2d 732 (1995).

23. Dr. Johnson's opinions which are favorable to Claimant are based upon Claimant's representations. These representations are not credible. Claimant is not credible when he asserts he had no shoulder pain before the accident. Radiological evidence taken shortly after the accident suggests conditions were present before the accident which likely should have caused him some pain. Claimant is not credible when he asserts his shoulder pain has been chronic since the accident. His attempts to seek medical care have been irregular, at best. If Claimant's Exhibit 6 had been admitted, it would tend to show

a subsequent injury and/or progression of the preexisting degenerative condition, either of which would more likely result in occasional irregular pain consistent with his occasional irregular attempts to seek medical treatment. Without the benefit of Claimant's Exhibit 6, Claimant's representations are still not credible. Claimant failed to show it likely that his pain was chronic and constant throughout those periods of time between doctor visits. Indeed, Claimant's irregular attempts at seeking medical treatment are more likely related to periods when Claimant was motivated to seek additional workers' compensation benefits to attempt to resolve unrelated temporary financial crises in his life.

24. Claimant failed to show his complaints at the time of hearing related to the industrial accident. He failed to show his shoulder injury related to the industrial accident was medically unstable after May 21, 1999.

25. **Average weekly wage.** This issue is only relevant if further medical care and temporary disability were awardable. They are not. Thus, this issue is moot. Regardless, Claimant's average weekly wage is calculable at a rate of \$6.00 per hour.

26. **Medical care.** An employer is required to provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). Employer did so. Further, Defendants authorized the dubious additional arthrogram in 2002. Claimant did not elect to take it then. It is no longer within a "reasonable time" for him to request it. This rationale is independent of the findings on causation above.

27. **PPI.** "Permanent impairment" is defined by statute. Idaho Code §§ 72-422, -224. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

28. Claimant suffered 5% whole person PPI to his low back as a result of the accident. This was paid. He suffered no lingering symptoms and only mild restrictions were suggested.

29. Claimant suffered PPI rated at 1% of the upper extremity to his right shoulder as a result of the accident. This was paid. His perceived pain and self-imposed restrictions are unrelated to the accident.

30. **Permanent disability and apportionment.** Permanent disability and its evaluation are defined by statute. Idaho Code §§ 72-423, -425, -430. Claimant failed to show his access to jobs or wage-earning capacity were measurably affected by the accident. Claimant failed to show it likely he suffered any permanent disability in excess of that implied by the PPI ratings.

31. There being no excess permanent disability, the issue of apportionment under Idaho Code § 72-406 is moot.

### **CONCLUSIONS OF LAW**

1. Claimant was injured on August 10, 1998. He suffered a 5% whole person PPI to his low back and a 1% upper extremity PPI to his right shoulder. Defendants have paid these.

2. Claimant's low back became medically stable without sequelae. Claimant's right shoulder became medically stable on May 21, 1999. Claimant failed to show it likely that any symptoms in his right shoulder after that date are related to the compensable accident.

3. Claimant's current shoulder condition was likely caused by progression of a pre-existing degenerative condition.

4. Claimant failed to seek reasonable medical treatment within a reasonable time.

5. Claimant failed to show he suffered permanent disability in excess of PPI.

**RECOMMENDATION**

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

DATED this 9TH day of December, 2008.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

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