

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GYPSTIE SHELTON,)
)
 Claimant,)
)
 v.)
)
 IDAHO YOUTH RANCH, INC.,)
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 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2007-020457

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

Filed: November 18, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls, Idaho, on May 28, 2009. Claimant, Gypstie Shelton, was present in person and represented by Dennis R. Petersen of Idaho Falls, Idaho. Defendant Employer, Idaho Youth Ranch, Inc. (Youth Ranch), and Defendant Surety, Idaho State Insurance Fund, were represented by Russell E. Webb of Idaho Falls, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on October 1, 2009.

ISSUE

The issues to be decided were narrowed at hearing to the sole issue of whether Claimant is entitled to right shoulder surgery as a result of her industrial accident.

CONTENTIONS OF THE PARTIES

Claimant asserts her entitlement to right shoulder surgery due to her industrial accident of June 2, 2007. She relies upon the opinion of her treating orthopedic surgeon, John Howar, M.D. Defendants acknowledge Claimant's industrial accident of June 2, 2007, but deny that she needs right shoulder surgery as a result thereof. They rely upon the opinion of orthopedic surgeon Richard Knoebel, M.D.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant taken May 6, 2009 (admitted at hearing as Defendants' Exhibit R);
3. The testimony of Claimant taken at the May 28, 2009, hearing;
4. Claimant's Exhibits 1 through 10, admitted at hearing;
5. Defendants' Exhibits A through R, admitted at hearing;
6. The deposition of John William Howar, M.D., taken by Claimant on June 24, 2009.
7. The deposition of Richard T. Knoebel, M.D., taken by Defendants on July 2, 2009.

The objection posed during Dr. Howar's deposition is sustained. All objections posed during Dr. Knoebel's deposition are overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 37 years old and lived in Jerome at the time of the hearing. She is right hand dominant. During high school Claimant worked at Albertsons. In approximately 1991, she fell and hurt her right knee while working at Albertsons. She underwent arthroscopic surgery and her knee improved. She was off work for approximately three weeks and then returned to work without restrictions or further knee symptoms. In 1991 Claimant graduated from high school. She then worked as a milk sampler and tester for seven years and became a supervisor. On one occasion between 1991 and 1997, Claimant slipped off a porch and broke her right ankle. This injury healed.

2. In 1997 Claimant began cosmetology school in Provo, Utah. She worked while attending school. After approximately one year she returned to Idaho. In November 1998, Claimant had an industrial accident while working for Magic Valley Dairy Herd Improvement. At hearing Claimant testified she had no recollection of this accident. Claimant completed her cosmetology training in Idaho and received her cosmetology certificate in 1999. She then began working as a hairdresser.

3. From 1999 until 2000, Claimant worked at a beauty salon. Thereafter, Claimant attended the College of Southern Idaho for three semesters. Claimant and her husband opened and operated a floor covering business. From 2001 until 2006, Claimant opened and operated a salon and day spa business.

4. In 2003, Claimant underwent liposuction. In preparation for liposuction, she completed a medical form wherein she listed under previous injuries: "Broke right ankle [.] Dislocated right shoulder." Defendants' Exhibit E, p. 50. At hearing, Claimant readily

acknowledged that the entry on the form was in her hand-writing, but denied any recollection of dislocating her right shoulder. Claimant underwent another weight loss surgery in 2006.

5. On September 5, 2006, Claimant began working at the Youth Ranch as a warehouse supervisor, where she oversaw the receiving and sorting of donations. Claimant worked in Youth Ranch stores in Idaho Falls, Blackfoot, Twin Falls, and Jerome. She enjoyed her work.

6. On Saturday, June 2, 2007, Claimant was working alone at the Youth Ranch warehouse in Kimberly when a donor arrived with a horse trailer containing several appliances, including a large older gas stove. The floor of the horse trailer was littered with dried manure that prevented Claimant from easily sliding the appliances or effectively using a hand truck to unload them. The donor became impatient when Claimant needed his help to unload the trailer. As Claimant and the donor tried to slide the gas stove across the uneven surface, the donor shoved it abruptly, pinning Claimant's right knee between the stove and the trailer wall. Claimant instinctively pushed the stove very forcefully to free her right knee. She felt immediate right knee and right shoulder pain. She noted no back pain at that time. Claimant and the donor finished unloading the trailer. Claimant made notes of the accident and then called a manager to notify him.

7. Claimant's right shoulder and knee pain continued, so on Monday, June 4, 2007, Claimant asked her manager to complete an accident report. He refused. On Thursday she again asked him to fill out an accident report and he again refused. Claimant quit her job that very day.

8. Claimant's right knee and shoulder pain persisted, so she selected a physician from the phone book. On June 13, 2007, Claimant presented to orthopedic surgeon John Howar, M.D. Dr. Howar x-rayed her right shoulder and knee and put her right arm in a sling. Dr.

Howar's notes of June 13, 2007, recorded positive impingement testing with internal rotation, suggesting irritation of the rotator cuff. He recommended physical therapy. Claimant participated in physical therapy regularly for a time and her condition improved. Physical therapist Dave Little recorded Claimant's right shoulder pain and right rhomboid pain. After repeated visits and conservative treatment, as late as August 1, 2007, Dr. Howar noted that Claimant still had some shoulder pain.

9. Claimant complained of back pain and Dr. Howar referred her to Mark Saccoman, D.C. On August 8, 2007, Claimant presented to Dr. Saccoman for chiropractic treatment of her low back complaints. Dr. Saccoman recorded pain on palpation of the supraspinatus muscle on the right with global decreased right shoulder range of motion. He diagnosed rotator cuff sprain and strain and dislocation (subluxation) of the right shoulder. Dr. Saccoman expressly noted, "rotator cuff tear, right shoulder." Defendants' Exhibit K, p. 146.

10. On August 16, 2007, Dr. Howar noted that Claimant had a palpable enlargement of the right rhomboid muscles, which were rather tender. He deferred a cortisone injection because Claimant was pregnant. By September 18, 2007, Dr. Howar noted that Claimant continued with right rhomboid discomfort and advised Claimant that he had no further treatment for her during her pregnancy, but she should return after her delivery if her shoulder continued to be a problem.

11. From approximately September 2007 until July 2008, Dr. Saccoman provided chiropractic treatments regularly and continued to record Claimant's right shoulder pain, limited right shoulder range of motion, and pain on palpation of the supraspinatus muscle on the right.

12. In December 2007, Claimant began working for Dell Computers as a customer service representative assisting customers via phone with computer problems.

13. On February 11, 2008, Claimant's baby was born.

14. On April 28, 2008, Claimant presented to Dr. Howar with continuing right shoulder pain and reports of right shoulder popping. Dr. Howar again recorded positive impingement testing with internal rotation. He concluded that Claimant likely had a right shoulder rotator cuff tear. Approximately June 1, 2008, Claimant underwent a right shoulder MRI which Dr. Howar noted showed tendinosis of the rotator cuff, bursal fluid, and a possible labral tear. On June 5, 2008, Dr. Howar provided a cortisone injection. However, this provided no relief. He then recommended arthroscopic surgery and at least subacromial decompression.

15. Claimant worked for Dell Computers until June 2008. Dell was very helpful in trying to accommodate her increasingly painful right shoulder. However, by June 2008 Claimant left her employment with Dell because of increasing right shoulder pain.

16. On August 14, 2008, orthopedic surgeon Richard Knoebel, M.D., examined Claimant at Defendants' request. He noted subjective complaints outweighing objective findings, with right shoulder pain everywhere except the subacromial space. He found no evidence of impingement syndrome. Dr. Knoebel found bicipital tendonitis but with pain amplification behavior. He noted a bone contusion consistent with Claimant's history. Dr. Knoebel rated Claimant's permanent impairment at 1% of the whole person due to her industrial right shoulder injury and opined no surgery was indicated.

17. At the time of the hearing, Claimant testified that her right shoulder continued to be symptomatic.

18. It is apparent when comparing Claimant's testimony with the medical records that her memory is imperfect. It also appears from Dr. Knoebel's records that Claimant consciously or unconsciously overstated her symptoms in some respects when he examined her. However,

Claimant's demonstrated longstanding work ethic, presentation at hearing, and sustained attempt to work at Dell from December 2007 to June 2008, persuade the Referee that her testimony of ongoing shoulder complaints and popping is generally credible.

DISCUSSION AND FURTHER FINDINGS

19. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

20. **Medical care.** The sole issue is whether Claimant is entitled to right shoulder surgery due to her industrial accident. Idaho Code § 72-432(1) mandates that 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 reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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. The Idaho Supreme Court has held that Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The Court further held it was 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). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the

employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Thus 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." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

21. Defendants herein raise the question of a possible prior right shoulder dislocation. Claimant's handwritten note from 2003 is the only suggestion in the record of the possibility of such an injury. There are no medical records of such an event and no record of any resulting medical treatment. Claimant herself had no recollection of such an event. Although both Dr. Howar and Dr. Knoebel testified that a shoulder dislocation may cause labral tearing, there is no evidence of such here. Claimant worked steadily in various capacities from 2003 until hired at the Youth Ranch in 2006. Furthermore, it is undisputed that Claimant satisfactorily performed a very heavy job—including moving refrigerators, stoves, and other household appliances—at the Youth Ranch for approximately nine months without any difficulty or complaint. There is no persuasive basis to conclude that Claimant's present right shoulder condition is the result of an alleged shoulder injury sometime prior to 2003.¹

¹ Even if Claimant suffered a prior shoulder dislocation which made her more susceptible to injury: "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

22. Claimant's MRI is significant to the present dispute. Approximately June 1, 2008, radiologist F.B. Fitts, M.D., performed a right shoulder MRI without contrast and reported an intact appearing rotator cuff with mild signal changes consistent with mild tendinitis; anterior supraspinatus tendon with fatty infiltration and mild edema suggestive of an old local tear or contusion; and a small focal fluid collection in the anterior/superior labrum representing either a Buford complex or possible labral tear. Dr. Fitts noted that a diagnosis of Buford complex was favored, but concluded that "based upon current images, a labral tear cannot be entirely excluded. Clinical correlation required." Claimant's Exhibit 8.

23. Dr. Knoebel testified that he personally reviewed the MRI films and opined that the MRI showed no labral tear and no rotator cuff tear. However, Dr. Knoebel testified that labral tears are "not always that easy to see on an MRI scan. But if there's a big tear there or a significant tear there, you can certainly see it." Knoebel Deposition, p. 24, ll. 19-22. He testified that he found no impingement sign at the right shoulder indicative of rotator cuff injury. Dr. Knoebel opined that Claimant's failure to improve, at least temporarily, with the cortisone injection confirmed that she did not suffer any rotator cuff impingement.

24. Dr. Howar's notes from 2007 and 2008 repeatedly record positive impingement testing with internal rotation, suggesting irritation of the rotator cuff. Dr. Howar also noted palpable enlargement of the rhomboid indicative of a right shoulder injury. He noted that Claimant's MRI showed tendinosis of the right rotator cuff, bursal fluid, and a possible labral tear. He testified that the ineffective cortisone injection, rather than disproving rotator cuff pathology, indicates more significant pathology than can be resolved via injection. Dr. Howar testified that increasing right shoulder "popping" over time—as Claimant reported—is normal for the kind of injury Claimant sustained. He reaffirmed that Claimant has a positive

impingement sign and testified that his clinical examination of Claimant tends to confirm rotator cuff tendinosis and labral tear, all due to Claimant's industrial accident. Dr. Howar continues to recommend arthroscopic surgery.

25. Physical therapist Dave Little confirmed right rhomboid enlargement, a condition that Dr. Howar testified is an indication of right shoulder pathology. Dr. Saccoman repeatedly recorded pain on palpation of the right supraspinatus muscle and diagnosed right rotator cuff sprain, strain, and tear.

26. Thus, Claimant's treating orthopedic surgeon finds right rotator cuff impingement and labral tear and recommends surgery; the radiologist confirms some right shoulder pathology, reporting an equivocal MRI (without contrast) for rotator cuff and labral tears; Claimant's chiropractor reports right rotator cuff sprain, strain, and tear; and Defendants' retained orthopedic surgeon finds no rotator cuff impingement sign and opines that the MRI shows no labral tear. Dr. Knoebel entirely excluded a labral tear based on the MRI, whereas the radiologist, Dr. Fitts, expressly reported that a labral tear could not be excluded based upon the MRI.

27. The Referee finds the opinion of Dr. Howar, as corroborated by Dr. Fitts' MRI report and Dr. Saccoman's consistent notes of right rotator cuff symptoms, more persuasive than the opinion of Dr. Knoebel. Claimant has proven her entitlement to right shoulder surgery as recommended by Dr. Howar.

CONCLUSION OF LAW

Claimant has proven her entitlement to right shoulder surgery, as recommended by Dr. Howar, due to her industrial accident.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 13th day of November, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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

RUSSELL E WEBB
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IDAHO FALLS ID 83405

sc

/s/ _____

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IC 2007-020457

ORDER

Filed: November 18, 2009

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended 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 has proven her entitlement to right shoulder surgery due to her industrial accident.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 18th day of November, 2009.

INDUSTRIAL COMMISSION

/s/ R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
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/s/