

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MERLENE MULNIX, )  
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 Claimant, )  
 )  
 v. )  
 )  
 MEDICAL STAFFING NETWORK, INC., )  
 )  
 Employer, )  
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 and )  
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 TRAVELERS PROPERTY CASUALTY )  
 COMPANY OF AMERICA, )  
 )  
 Surety, )  
 )  
 Defendants. )  
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**IC 2008-036920**

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

Filed October 6, 2010

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on December 16, 2009. Claimant, Merlene Mulnix, was represented by Clinton E. Miner, and Defendants were represented by W. Scott Wigle. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on July 13, 2010.

**ISSUES**

The issues to be decided by the Commission were confirmed at the hearing and include the following:

1. Whether or not Claimant is entitled to medical benefits related to her December 10, 2009 shoulder surgery; and
2. Whether Claimant is entitled to temporary disability benefits during her period

recovery.

All other issues are reserved.

### **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant is entitled to workers' compensation benefits, including but not limited to temporary total disability and medical benefits, related to her left shoulder surgery on January 7, 2009, to repair injuries she incurred on November 13, 2008 when she dislocated her left shoulder while twisting and reaching for a laptop computer.

Claimant contends that Defendants are also liable for benefits for medical care and temporary total disability related to her second left shoulder surgery, on December 10, 2009. Claimant contends that the scar tissue and adhesions which necessitated that surgery are a natural and probable consequence of the November 13, 2008 accident. In this regard, Claimant contends that the scar tissue/adhesions are the result of her inability to mobilize her shoulder following the January 7, 2009 surgery, and that this period of immobility is either an expected consequence of that rather extensive procedure or the result of an intervening labral tear that is, itself, a natural and probable consequence of the November 13, 2008 accident.

Defendants counter that Claimant's new labral tear could not have been caused by ordinary physical therapy activities. They rely upon Dr. Schwartzman's opinion to assert that Claimant has failed to meet her burden of proving how she sustained her new labral tear and, therefore, Claimant is not entitled to benefits after March 30, 2009.

### **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 October 30, 2009;
3. The testimony of Claimant, taken at the December 16, 2009 hearing;

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4. Claimant's Exhibits 1 through 12 admitted at the hearing;
5. Defendants' Exhibits A through K admitted at the hearing;
6. The post-hearing deposition of Jeffrey Hessing, M.D., taken January 5, 2010; and
7. The post-hearing deposition of Roman Schwartzman, M.D., taken April 23, 2010.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## **FINDINGS OF FACT**

### **History and initial shoulder injury**

1. Claimant was 40 years of age at the time of the hearing. She has a history of right shoulder surgery in 1996, following a period in which the ball kept popping out of the socket. Surgical intervention was eventually required after she traumatically dislocated it in a jet ski accident. After surgery, Claimant had no further problems with her right shoulder.

2. On November 13, 2008, Claimant turned to reach for a laptop computer at Employer's, where she worked as a registered nurse. This ordinary act caused Claimant's left shoulder to dislocate. Emergency hospital care was administered to reassemble the joint; however, she was unable to return to work and the resultant damage required surgical intervention. On January 7, 2009, Claimant underwent arthroscopic shoulder surgery by Roman Schwartzman, M.D., an orthopedic surgeon. She was 39 years of age. There is no dispute that Claimant is entitled to workers' compensation benefits related to her 2008 left shoulder dislocation and the January 2009 surgery.

3. Claimant's recovery was complicated by a number of factors leading to a second surgery, performed on December 10, 2009, by Jeffrey Hessing, M.D., an orthopedic surgeon. Whether or not those complicating factors are natural consequences of the industrial injury is the

crux of the parties' dispute.

**Initial recovery: Medical records**

4. Medical records related to Claimant's initial recovery period are limited to those prepared by Dr. Schwartzman after four follow-up visits. He also prepared a note on April 21, 2008, in which he summarized and provided opinions about Claimant's course of recovery. Details concerning this note are set forth in the "Medical opinions" section, below.

5. The first follow-up occurred on January 8, 2009, the day after Claimant's initial surgery. Dr. Schwartzman noted that Claimant's pain pump catheter was inadvertently pulled in the post-operative recovery area following surgery but otherwise, all looked well. He testified that the pain pump catheter delivered a numbing medicine directly to the affected area, and that he had intended to leave it in for 24 hours. He did not comment on whether Claimant was experiencing increased pain without it. Dr. Schwartzman took Claimant off work until January 15, restricted her from driving for six weeks, referred her to physical therapy, and prescribed Norco and Toradol for pain.

6. On January 15, Dr. Schwartzman ordered x-rays that evidenced well-maintained glenohumeral articulation, subacromial space and decompression. He maintained Claimant's driving restriction, but released her to right-handed work for four hours per day. He did not comment on her pain level.

7. According to Dr. Schwartzman's February 12 report:

The patient's progress has been slow with physical therapy. She unfortunately continues to smoke. She is again advised about the deleterious effects of smoking and the impact that it has on healing. Her flexion today is 110, abduction 90, external rotations of the \_\_\_\_\_(36:58) side is 50 degrees.

Claimant's Ex. 4, p. 8. Again, Dr. Schwartzman did not comment on Claimant's pain level. He maintained her January 15 restrictions.

8. On February 27, without further examining Claimant, Dr. Schwartzman released Claimant to discontinue wearing her sling and to drive.

9. On March 12, the last date on which Claimant treated with Dr. Schwartzman, he assessed 130 degrees of flexion, 90 degrees of abduction and 70 degrees of external rotation. He reported:

The patient has been cleared to drive and discontinued [sic] her sling, since 02/27/2009. She still wears a sling. Her recovery has been very slow. The patient continues to smoke and is very apprehensive about progressing with her activities.

Claimant's Ex. 4, p. 6. X-rays confirmed well-maintained glenohumeral articulation, subacromial space and hardware positioning. Dr. Schwartzman reiterated that Claimant had been released to drive and issued left arm lifting restrictions of no more than 5 pounds above chest level or 10 pounds overall. He provided a home exercise kit to Claimant with instructions to follow independently, and reduced his physical therapy recommendation to once per week. Dr. Schwartzman prescribed Norco and a Flector patch with oral NSAIDS until the patch arrived, advising Claimant that this was her final prescription for narcotic pain medications. He noted that she must taper herself off the Norco within one week. Again, Dr. Schwartzman did not comment on Claimant's pain level.

**Initial recovery: Physical therapy records**

10. Claimant's physical therapist, Jana Repulski, P.T., was not deposed. However, her records confirm that Claimant ranked her pain an "8" on a scale of 1 to 10 at her first visit on January 19, 2009. Ms. Repulski's primary treatment goals were to reduce pain and increase range of motion in Claimant's left arm. She provided a home exercise regimen and instructions to return for three visits per week for four weeks. Claimant attended her sessions as instructed.

11. Ms. Repulski's records consist mainly of forms on which she provided

generalized answers. It is impossible to discern the exact nature of Claimant's pain complaints from most of these forms. On January 28, Ms. Repulski noted a slight decrease in pain. By March 9, Claimant's pain had decreased to a "4" but she was still unable to reach behind her back, raise her arm overhead or reach behind her head.

12. More specific notes appear on March 16, when Ms. Repulski wrote that Claimant was generally out of her sling, but was not using her left arm at home. She observed Claimant and provided recommendations: ". . . still having excessive pain behavior, with movement of UE. Strongly encouraged use of LUE for light ADL at home." Claimant's Ex. 6, p. 10.

13. On March 25, Ms. Repulski noted Claimant was doing daily exercises at home but "still feels she cannot raise her arm away from her body" and that she "[e]ncouraged pt to use arm for ADL at home and advanced band isometric exs." Claimant's Ex. 6, p. 8. On April 1, Claimant's pain level was a "4." Ms. Repulski noted that Claimant felt more stiffness than previously and that she was obtaining a second medical opinion, as well as a new magnetic resonance image arthrogram (MRI/arthrogram) of her left shoulder. Claimant did not thereafter return to physical therapy with Ms. Repulski.

#### **Second opinion: Dr. Radnovich**

14. Claimant was referred by her attorney to Richard Radnovich, D.O., a doctor of osteopathy, for a second opinion. Dr. Radnovich examined Claimant on March 30, 2009. She reported that physical therapy was helping but was painful. She explained that she had not been able to return to work, even though she had been released to do so, because constant pain prevented her from lifting her arm. Dr. Radnovich ordered a new MRI, noting that Claimant . . . is not responding to surgery as expected." Claimant's Ex. 5, p. 12. He explained, ". . . repeat imaging to rule out possible poor outcome or complication is standard of care and is indicated."

*Id.* He also suspected Claimant could be experiencing early symptoms of Complex Regional Pain Syndrome (CRPS). Dr. Radnovich continued Claimant's pain medication and prescribed new medications, including Valium to reduce muscle spasm.

15. On April 8, 2009, Claimant underwent a follow-up<sup>1</sup> MRI/arthrogram of her left shoulder. It revealed a labral tear, in the 11 o'clock to 7 o'clock position, that was not present at Claimant's January 2009 surgery. Dr. Radnovich reviewed the MRI/arthrogram results with Claimant on April 13. Diagnosing a labral tear and possible early CRPS, he referred Claimant to Jeffrey Hessing, M.D., an orthopedic surgeon, for a surgical assessment.

### **Second surgery: Dr. Hessing**

16. Claimant was unable to immediately follow-up with Dr. Hessing because Surety denied coverage as of March 30, 2009, and Claimant had no medical insurance. In late summer or early fall, however, she qualified for Medicare. On October 21, 2009, Dr. Hessing examined Claimant. He assessed only 90 degrees of flexion and 60 degrees of abduction, rotational limitations in both planes, and mobility-limiting pain. He also found crepitance in the subacromial space with positive impingement maneuvers on forced internal rotation.

17. Based upon her clinical presentation and her April 8 left shoulder MRI/arthrogram, Dr. Hessing diagnosed a new tear in Claimant's posterior labrum, rotator cuff impingement syndrome with degenerative AC joint changes and underlying impingement. He recommended surgery to redecompress Claimant's shoulder, excise her distal clavicle, and inspect and repair her rotator cuff and labrum as necessary.

18. Claimant underwent surgery by Dr. Hessing on December 10, 2009. He found a great deal of scarring that significantly restricted Claimant's range of motion. Dr. Hessing

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<sup>1</sup> Claimant underwent an initial left shoulder arthrogram prior to her January 2009 surgery.

manually maneuvered Claimant's shoulder through a full range of motion, breaking up the binding tissue and freeing up the joint. This maneuver creates tissue damage, which could have impeded Dr. Hessing's ability to visualize the labral tear identified on Claimant's April 2009 MRI. In any event, Dr. Hessing found no new labral tear. The parties agree that it had likely healed.

### **Medical opinions**

19. It is undisputed that the labral tear identified on Claimant's April 8, 2009 MRI/arthrogram was not present at her first left shoulder surgery in January 2009. It is also undisputed that Claimant: 1) never reported any trauma to her left shoulder following surgery other than pain from physical therapy, 2) took narcotic pain medications before and after physical therapy and continued to rely on these drugs for pain relief after Dr. Schwartzman refused to renew her prescription, 3) remained in her sling longer than Dr. Schwartzman recommended, and 4) failed to use her left arm at home or in physical therapy as recommended by Ms. Repulski and Dr. Schwartzman. Finally, the evidence establishes that there was no new labral tear at the second surgery because it had healed. With these "givens" in mind, Drs. Schwartzman and Radnovich each offer an opinion as to the genesis of Claimant's new labral tear. Dr. Hessing, on the other hand, addresses why Claimant needed a second left shoulder surgery.

20. In his April 21, 2009 chart note, Dr. Schwartzman opined, ". . . I would have to conclude that an intervening traumatic event had occurred to cause this pathology." Schwartzman Dep., p. 31. However:

The patient has not described any specific traumatic event during her postoperative follow-up visits. I am therefore unable to explain the presence of this posterior labral detachment on the basis of any natural progression from surgery or therapy.

Defendants' Ex. B, p. 38. Further regarding his recollection of Claimant's pain reports:

Throughout her postoperative period, the patient expressed reluctance to progress with therapy and activities per the rotator cuff and SLAP<sup>2</sup> protocol. Her recovery has been very slow. She has not been forthcoming with any specific complaints, simply stating that her shoulder hurts when asked to elaborate. The patient denied any intervening traumatic events.

Defendants' Ex. B, p. 38.

Dr. Schwartzman further explained that the intervening trauma he suggests would have been of a magnitude that a "patient fully in control of their faculties" would have found "painful." Schwartzman Dep., p. 27. Specifically, he posited:

The mechanism by which a posterior labral tear would have occurred would, in this case, out of necessity, involve displacement of the humeral head...In other words, the ball of the shoulder would have to somehow slide back in the socket, sheer against that labrum, and push the labrum off...That's a mechanism that could occur, for instance, with a fall to an out stretched arm, where the ball of the shoulder is pushed back in the socket.

Schwartzman Dep., p. 27-28. Dr. Schwartzman also suggested that, as of March 12, 2009, Claimant demonstrated improper pain medication-seeking behavior: "[Claimant's] progress was within normal limits, with the exception of the fact that—I don't know how to put this delicately – but she really liked her pain medications, much more so than the average person." Schwartzman Dep., p. 20. He did not elaborate. Neither do his records prepared contemporaneously with Claimant's visits, which are conspicuous for their lack of reference to Claimant's pain levels or what treatments therefor may or may not be indicated. Likewise, there is nothing in the record to suggest anything about Claimant's past experience using pain medications.

21. Dr. Radnovich disagrees with Dr. Schwartzman. On July 13, 2009, Dr. Radnovich opined ". . . the most likely explanation for this new labral tear would be

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<sup>2</sup> "Superior Labrum Anterior Posterior" protocol, which requires, among other things, close attention to a patient's abnormal pain response.

manipulation or exercise during physical therapy, as she appears to have otherwise had the arm in a sling.” Claimant’s Ex. 5, p. 3. Dr. Radnovich took into consideration the atypical way in which Claimant dislocated her left shoulder in 2008, by simply twisting and reaching:

Because of the small amount of force needed to cause the initial injury I felt there was a possibility that some of those painful maneuvers she had complained about in physical therapy might have inadvertently caused damage to Dr. Schwartzman’s [sic] repair, or caused new pathology.

*Id.* He also took into account the absence of evidence of trauma, other than pain with physical therapy, and Claimant’s reluctance to come out of her sling due to pain. Dr. Radnovich only examined Claimant once; however, unlike Dr. Schwartzman, he correctly identified the source of Claimant’s ongoing pain. In addition, his opinion accounts for Claimant’s unique shoulder injury history, which Dr. Schwartzman’s opinion does not recognize.

22. Dr. Hessing did not directly address the new labral tear. He opined that Claimant’s second surgery was necessary due to post-operative scar tissue build-up due to immobility.

### **Claimant’s credibility**

23. A claimant’s credibility is generally at issue in a workers’ compensation proceeding. Here, the scrutiny is heightened because Dr. Schwartzman has opined that Claimant’s failure to recover from her initial surgery was caused by a subsequent injury that Claimant would have felt, had she been in full control of her faculties at the time. He also opined that he believed Claimant was overly dependent on narcotic pain medications. So, whether Claimant intentionally concealed facts about a subsequent trauma from her medical care providers and the Referee, as well as whether her propensity for truthfulness was impeded by an improper pain medication-seeking motive, must be addressed. Toward that end, Claimant’s testimony concerning her course of recovery is summarized below.

24. Claimant testified that she progressed well for a short time after her initial surgery. She explained that her trouble began when she started physical therapy and had a sudden onset of abnormal pain while performing an exercise in which she tried to raise her left arm straight up overhead grasping a bar lifted by her right arm. Otherwise, Claimant testified, her pain was “normal.” Tr., p. 18. The pain on the bar lift exercise was so severe, Claimant testified, that she developed right-sided pain from over-compensation that required treatment by the physical therapist:

All I can tell you is the last six weeks that overhead stretch was getting worse and worse and worse to the point where – I explained this to you, that [r]ight side would spasm so badly – I mean she was putting warm compresses down, because she couldn’t even figure out why it was so painful.

Tr., p. 42. Claimant further testified that she took narcotic pain medication before and after physical therapy to get through the sessions.

25. Claimant also testified that she told Dr. Schwartzman that she had abnormal pain performing the overhead exercise at physical therapy, probably during her February 12 visit, and definitely at her March 12 visit. She testified that Dr. Schwartzman never really examined her on her follow-ups, but only asked her questions to establish her range of motion. As for her pain, he told her that it was psychological. He issued restrictions on her February visit, which Claimant understood would remain in place until he reevaluated her in March. So, she was concerned when she got a call from Surety, on February 27, advising that she had been released to discontinue wearing her sling and to drive, even though her pain at physical therapy had increased and Dr. Schwartzman’s “wait and see” period had not yet expired. Further, Claimant was concerned about driving because wearing a seatbelt posed a risk of reinjury to her shoulder and her need for narcotic pain medications posed a risk of driving while impaired. Although Claimant called repeatedly to discuss the matter with him, Dr. Schwartzman did not return her

calls.

26. Claimant's final visit with Dr. Schwartzman took place on March 12, 2009. Claimant originally testified that she last saw Dr. Schwartzman on February 12. However, upon being refreshed by the medical records, she agreed that she had seen him on March 12. She testified that he advised that he was discontinuing her narcotic pain medications in favor of an anti-inflammatory patch. After trying the patch and finding it ineffective to treat her pain, Claimant "kept calling and telling them that that patch did not work." Tr., p. 24. When Dr. Schwartzman finally returned her call, she told him she was still having pain and that her workers' compensation benefits had been discontinued. According to Claimant, Dr. Schwartzman sighed and told her he would speak with Janice at Travelers. However, Claimant testified, she never heard back from him. As noted above, Claimant transferred her care to Dr. Radnovich, who ordered an MRI/arthrogram of her left shoulder that identified a new tear to her labrum.

### **DISCUSSION AND FURTHER FINDINGS**

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).

#### **Causation**

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers'

compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*.

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. *Larson's, The Law of Worker's Compensation*, § 13.

27. Claimant seeks benefits related to her December 10, 2009 left shoulder surgery, which was initially recommended by Dr. Hessing to repair a new labral tear but, as it turned out, was actually required to remove restrictive scar tissue.

28. There is no dispute that Claimant's labral tear, identified on the April 8, 2009

MRI/arthrogram, had healed by the time of the December 10, 2009 left shoulder surgery performed by Dr. Hessing. Moreover, the evidence reflects that the surgery performed by Dr. Hessing was principally required to treat scar tissue and adhesions impeding left shoulder function. As noted by Defendants, the issue in this case has evolved following the discovery that the intervening labral cuff tear had healed and that Claimant's principal problem was with scar tissue/adhesions. The question now is whether the condition for which Dr. Hessing actually treated Claimant is a natural and probable consequence of the accepted injury and first surgery. Dr. Hessing has persuasively testified that the Claimant's development of scar tissue/adhesions, is due to her failure to mobilize her shoulder following Dr. Schwartzman's surgery. Dr. Hessing has also stated that Claimant's shoulder immobility is due to the pain and apprehension Claimant experienced when she attempted to use her shoulder. Dr. Hessing's testimony is relevant to the propositions that Claimant's discomfort is due either to her post-surgical condition, or the fact that she suffered an intervening labral cuff tear. It is only if the medical evidence establishes that Claimant's intervening labral tear contributed to her shoulder immobility, that it becomes necessary to ascertain whether the labral tear, itself, is a natural and probable consequence of the work injury. If the labral tear did not contribute to Claimant's left upper extremity immobility then the existence of that tear, now healed, is not particularly relevant to the issue before the Industrial Commission.

Neither Dr. Schwartzman nor Dr. Radnovich have speculated on the question of whether or not the labral cuff tear at issue contributed to Claimant's left shoulder immobility during her period of recovery. Dr. Schwartzman did propose that sometimes labral cuff tears, such as the one demonstrated in the April 2009 MRI arthrogram, are painful, and sometimes they are not:

“ Q. What is the significance to the patient of this new pathology, the new, large labral tear?

- A. It's a potential source of pain and a potential source of instability in the shoulder. And I say "potential" because it's not absolutely necessary that it be a source of pain or instability, but it certainly may."

Schwartzman Dep., p. 25/2-9.

The only physician who came close to addressing the question of whether or not the intervening labral cuff tear contributed to Claimant's shoulder instability is Dr. Hessing. In this regard, Dr. Hessing testified as follows:

"Q. The scarring was itself a significant factor in this, was it not?

A. Absolutely.

Q. In her inability to move her shoulder—

A. Absolutely.

Q. —when she came to you? Why does that scarring develop?

A. It's just the way the body heals. Any kind of an insult, whether that be the initial injury or the surgery that Dr. Schwartzman did and associated with the healing response and in her situation — everybody gets that to some degree, but we have to get them moving, get them working. In Merlene's situation she just did not get this moving soon enough and so that inflammatory response and associated with injury and trauma will lay down scar tissue and in this situation it built up faster than she got it moving and she ended up inability [sic] to move the joint.

Q. What role does physical therapy play in this post-surgery?

A. Normally physical therapy we use to help regain motion. I use it to help push some of these people that just have a harder time getting their motion. I don't say that I use it — probably about — oh, a third to 50 percent of the time in my practice in this situation and I usually am able to get people moving. But some of them you don't and you need to take them back and manipulate them and clean them out just like we did."

...

"Q. Doctor, we are back on the record at this point. Do you have an opinion as to what was the cause for the need for your surgical intervention?

A. Yes.

Q. And what was it, doctor?

A. I believe it's a result of injury, complete evulsion of the inferior aspect of her labrum, the need of that to be repaired. The surgical technique that required extensive dissection, putting tacks around the glenoid, sewing it down, combined with finding a tear in the rotator cuff that needed to be closed. So, that extensive surgical procedure is potentially associated with

post-operative scarring and adhesions, inability to get the shoulder moving. I think that was what happened in Merlene's case. Just could not break loose the scar, even after extensive post-op rehab. So, we needed to proceed with that post-op complication and correct it and that's what we did.

Q. Because of how records turn out, you said something about the surgical technique. You don't have any issues with how Dr. Schwartzman treated this initially; is that correct?

A. That's correct.

Q. He did appropriate steps to take care of what he found?

A. That's correct.

Q. And what happened is just the resulting scar tissue that came from this?

A. That's correct."

Hessing Dep., pp. 26/16- p. 27/14; 18/24-19/25.

Dr. Hessing's testimony strongly suggests that it is his view that Claimant did not work her shoulder well or aggressively enough following the first surgical repair, and that her period of relative immobility during her period of recovery is what caused her to develop the scar tissue and other adhesions which necessitated the second surgery. Dr. Hessing did not specifically state that the intervening labral tear caused or contributed to Claimant's immobility following the first surgery. Instead, his comments suggest that the Claimant's immobility during her period of recovery are simply a consequence of having undergone a rather significant repair at the time of the first surgery.

Though there is scant medical evidence on the issue, what evidence there is suggests that the intervening labral cuff tear is not necessarily responsible for contributing to, or extending, Claimant's period of immobility following the first shoulder surgery. If this is, in fact, the case, then it is clear that the scar tissue/adhesions treated by Dr. Hessing in the course of the second surgery are but a natural and probable consequence of the original injury and first surgery.

However, even if it be assumed that the labral cuff tear is responsible for contributing to, or extending, Claimant's period of immobility following the first surgery, the second surgery is

still compensable, since the best medical evidence establishes that the intervening labral cuff tear is, itself, a natural and probable consequence of the original work injury.

29. Claimant testified that she was unaware of any specific event in which she reinjured her left labrum, but that she had abnormal pain on an overhead exercise at physical therapy that grew constant over time. In reliance on these facts, Dr. Radnovich opined, to a reasonable degree of medical probability, that Claimant incurred her new labral tear in physical therapy. However, Dr. Schwartzman opined, also to a reasonable degree of medical probability, that Claimant could not have reinjured her labrum by engaging in ordinary physical therapy activities. The strength of Dr. Radnovich's opinion must be measured by the credibility of Claimant's self-report and the soundness of the proposition that Claimant suffered her new injury in physical therapy.

30. Claimant's testimony that she did not experience a new traumatic injury outside of physical therapy is called into question by Dr. Schwartzman's testimony that, had Claimant had her faculties about her, she would have known when she incurred the new labral tear because it would have been very painful. Notwithstanding Dr. Schwartzman's implication that Claimant must be concealing something, her testimony is consistent with other facts in the record.

31. First, there is no evidence in the record that Claimant ever engaged in, or was predisposed to engage in, any behaviors that may have reinjured her labrum. On the contrary, Claimant's recovery course is marked by a tendency to be over-protective of her left shoulder and to refrain from using her left arm, to the apparent consternation of both Dr. Schwartzman and Ms. Repulski.

32. Second, it is undisputed that Claimant was taking narcotic pain medications during the period in question, which could dull pain related to a new injury.

33. Third, Claimant consistently testified that she had onset of pain on the overhead lift in physical therapy that grew constant, and that she reported this pain to Dr. Schwartzman. Dr. Schwartzman denies this; however, the record tends to support Claimant's version. Claimant's physical therapy records by mid-March indicate trouble with lifting her left arm overhead and, due to the vagary of the form responses, does not exclude the possibility that she reported such problems previously. Dr. Schwartzman's records do not address Claimant's pain levels, ever: not when her pain pump catheter was erroneously removed, not when prescribing pain medications, and not even when ceasing to prescribe pain medications over Claimant's objections that she still needed them. Since he apparently did not keep notes detailing Claimant's pain, his written opinion on April 21, 2009, more than one month after his last visit with Claimant, carries less weight than Claimant's testimony with respect to what she reported. The Referee finds Claimant's testimony concerning the onset of her abnormal pain, specifically that she did not experience a new traumatic injury outside of physical therapy, is credible.

34. Dr. Schwartzman also alleged that Claimant demonstrated improper pain medication-seeking behavior. However, Claimant's reluctance to move her left arm and her desire to continue her pain medications were explained by her new injury, revealed only after Claimant's pain complaints were taken seriously by Dr. Radnovich. Further, it is difficult to square his testimony that Claimant did not complain of specific or abnormal pain with his allegation that she was overly dependent upon pain medication. The Referee finds Dr. Schwartzman's allegation that Claimant improperly sought pain medication is unfounded.

35. To the extent Dr. Radnovich's opinion relies on Claimant's self-reports, it is sound. However, Dr. Schwartzman also asserts that Claimant could not have torn her labrum with ordinary physical therapy exercises. He challenges Dr. Radnovich's opinion that, given

Claimant's history of dislocating her shoulder without any trauma, her abnormal pain with the physical therapy exercise, and the absence of any evidence of other trauma, it is more likely than not that her new tear occurred in physical therapy.

36. Often, a treating surgeon is in the best position to observe a claimant's symptoms and demeanor and to draw conclusions for providing proper care. However, in this case, there is no evidence that Dr. Schwartzman considered Claimant's specific history in developing either his expectations for her recovery, or his opinion that she could not sustain a new labral tear in physical therapy.<sup>3</sup> Similarly, Dr. Schwartzman chose to ignore Claimant's legitimate pain complaints. Rather than investigate them, he assumed some psychological problem must be to blame for her "failure" to conform to his initial 6-week recovery regimen. Although Dr. Schwartzman may have been in the best position to observe Claimant, he nevertheless did not see her condition as clearly as did Dr. Radnovich. Dr. Schwartzman is a credible witness with respect to shoulder pathology. However, the record does not demonstrate that he took all of the pertinent factors about Claimant's condition into account when forming his opinion. As a result, the Referee finds the opinion of Dr. Radnovich, which appropriately considers the unique factors underlying Claimant's case, to be more persuasive.

37. The Referee finds that Claimant's new labral tear and the build-up of excess scar tissue following her January 2009 shoulder surgery were natural consequences that flowed from her 2008 industrial injury. Claimant has met her burden of proving she is entitled to workers' compensation benefits related to treatment for those conditions.

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<sup>3</sup> It must be remembered that Claimant's initial labral tear was caused by the rather innocuous event of reaching for a laptop computer.

### **Reasonable Medical Care**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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). “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).

In *Sprague*, the following factors were found to be relevant to the determination of whether the particular care at issue in that case was reasonable: (1). A claimant should benefit from gradual improvement from the treatment rendered. (2). The treatment was required by a claimant’s treating physician. (3). The treatment was within the physician’s standard of practice and the charges were fair and reasonable.

38. Defendants do not argue that Claimant’s second left shoulder surgery was not reasonable or necessary.<sup>4</sup> Dr. Hessing testified, without opposition, that ultimately Claimant required the surgery to remove restrictive scar tissue.

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<sup>4</sup> Dr. Schwartzman testified that he would have treated the new tear conservatively; however, he did not assert that surgery was not reasonable or necessary by December 2009, after Claimant’s shoulder had seized up from scar tissue growth.

39. The Referee finds that the December 10, 2009 left shoulder surgery performed on Claimant constitutes reasonable and necessary medical care pursuant to Idaho Code § 72-432, and that Claimant is entitled to past and future reasonable and necessary medical care for consequential injuries related to her November 13, 2008 industrial accident, including but not limited to her new labral tear identified on April 8, 2008 and scar tissue build-up identified at surgery.

**Temporary total disability.**

40. Idaho Code Sections 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled. The evidence establishes that Claimant is entitled to such benefits from the date Surety denied benefits, March 30, 2009, until such time that she reaches maximum medical stability.

**CONCLUSIONS OF LAW**

1. Claimant has proven that her restrictive scarring in her left shoulder is a natural consequence of her November 13, 2008 industrial accident and resultant surgical repair, and that she is entitled to reasonable and necessary medical treatment, including a second surgery on December 10, 2009, for these conditions.

2. Claimant has proven that she is entitled to temporary total disability benefits from March 30, 2009 until such date that she reaches maximum medical stability.

3. All other issues are reserved.

**RECOMMENDATION**

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

DATED this \_\_20<sup>th</sup>\_\_ day of September, 2010.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_6<sup>th</sup>\_\_ day of \_\_October\_\_, 2010, 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:

CLINTON E MINER  
4850 N ROSEPOINT WAY STE 104  
BOISE ID 83717

W SCOTT WIGLE  
PO BOX 1007  
BOISE ID 83701-1007

ge

*Gina Espinosa*

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MERLENE MULNIX, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 MEDICAL STAFFING NETWORK, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 TRAVELERS PROPERTY CASUALTY )  
 COMPANY OF AMERICA, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2008-036920**

**ORDER**

Filed October 6, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 that her restrictive scarring in her left shoulder is a natural consequence of her November 13, 2008 industrial accident and resultant surgical repair, and that she is entitled to reasonable and necessary medical treatment, including a second surgery on December 10, 2009, for these conditions.

2. Claimant has proven that she is entitled to temporary total disability benefits from March 30, 2009 until such date that she reaches maximum medical stability.

3. All other issues are reserved.

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

DATED this \_\_6<sup>th</sup>\_\_ day of \_\_\_October\_\_\_, 2010.

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 \_\_6<sup>th</sup>\_\_ day of \_\_\_October\_\_\_ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLINTON E MINER  
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*Gina Espinosa*