BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUDY M. HULSE, Claimant, v. IDAHO STATE LIQUOR DISPENSARY, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-000306** **IC 2012-013397** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed May 1, 2015**

INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on July 22, 2014. Claimant was represented by Richard S. Owen of Nampa. Bridget A. Vaughan, of Boise, represented Idaho State Liquor Dispensary, ("Employer"), and State Insurance Fund, ("Surety"), Defendants[1]. Oral and documentary evidence was admitted. No post-hearing depositions were taken. The parties submitted post-hearing briefs. The matter originally came under advisement on October 27, 2014. The Findings of Fact and corresponding Order were filed and promulgated on or about November 7, 2014.

[1] Neither attorney was original counsel for the respective parties.

Claimant subsequently moved for Reconsideration of the decision. On January 20, 2015, the Commission granted Claimant's Motion for Reconsideration and remanded the matter to the undersigned Referee. The parties were given the opportunity to obtain additional expert testimony, particularly with regard to causation. The parties declined to submit additional testimony or exhibits, instead relying on the previously-admitted exhibits. The parties were given the opportunity to submit briefing on the issue of medical causation, and did so. The remanded matter came under advisement on April 21, 2015.

ISSUES

As clarified in Claimant's Motion to Reconsider, the issues to be decided are;

1. Whether Claimant suffered an accident as fully defined by I.C. § 72-102(18)(b); and

2. Whether Defendants had sufficient knowledge of Claimant's alleged injury in a timely manner, as set out in I.C. § 72-704, so as to preclude their lack-of-notice defense under I.C. §§ 72-701 through 703.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that on March 16, 2012, while in the course of her employment, she injured her low back lifting a heavy box full of liquor bottles. While Claimant acknowledges she was having low back issues prior to and at the time of this accident, the March 16 event greatly increased her symptoms and decreased her ability to function. Ultimately she required back surgery due to this accident. Her pre-existing medical condition may be a matter for future apportionment, but she suffered a compensable injury as described above.

Claimant further admits she did not specifically report this accident to Employer, but it nevertheless knew of her injury, and filed a "Form 1" within sixty days of the accident. As such, the provisions of Idaho Code §72-704 negate Defendants' notice arguments.

Defendants argue Claimant has not met her burden of proving she suffered a compensable injury from an accident arising out of and in the course of her employment on March 16, 2012, and even if she did suffer such injury she failed to give Employer notice of her injury within sixty days of the event.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;
2. Claimant's Exhibits A through H, admitted at hearing;
3. Defendants' Exhibits 1 through 6, admitted at hearing.

Having considered the evidence and briefing by the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Work History and Injury

1. Claimant was at the time of hearing a 72 year old married woman, living in Nampa with her husband. She has a GED and no further formal education.

2. Claimant began working for Employer as a permanent employee in 2002. Her duties included janitorial and cleaning, stocking product, taking bar orders, helping customers, receiving freight, and running the registers. Her shifts varied, and could be as long as eleven hours.

3. In late December 2007, Claimant injured her left knee while working for Employer. That injury is not the subject of the present proceeding, although it is one of the consolidated cases listed above.

4. Claimant alleges she injured her low back while in the course and arising out of her employment on March 16, 2012. It is this injury which is the focus of discussion herein.

5. Claimant testified she was lifting and stacking cases of Crown Royal in the late afternoon or early evening of March 16, 2012 when she felt a pain, like her low back was "imploding." The pain, which she described as "like a fire", was centered in her lower back, her groin, and down her right leg to her ankle. *Tr. pp. 32-33*.

6. Claimant did not drop the case she was carrying, but she did immediately stop stocking liquor for the rest of her shift. She testified she was working alone at the time of this incident; she was able to complete her shift and close the store.

7. The following day Claimant went to work. Her back was not as painful as it had been the previous evening.

8. At some point after March 16, Claimant told her co-worker, Lloyd Condron, that she had hurt herself but did not share any details. He often helped Claimant with stocking duties thereafter.

9. Claimant did not tell her supervisor, Jim Tully, about the incident of March 16, but he noticed she was having difficulty doing her job duties and advised Claimant to see a doctor. Believing Claimant's back issues were the result of repetitive lifting and bending at work, Mr. Tully filled out and filed a Form 1 on her behalf. He did not ask Claimant how she had injured herself.

10. During the last half of March and into April, Claimant's low back and right leg pain increased. She walked with a limp. Claimant continued to work until April 9, 2012. She has not worked since.

11. Claimant testified that she did not immediately tell her supervisor or treating physicians about her accident due to the fact that she felt she could "work through" her injury. Also, she was reluctant to mention it for fear she might lose her job if she missed significant time from work. Once she realized her condition was not going to improve promptly, she started openly relating the March 16, 2012 event to her low back condition.

Medical History Pre-March 16, 2012

12. Relevant to this proceeding, Claimant first saw acupuncturist Bobette Gray on February 22, 2012 for right sided chronic sciatica of four weeks' duration. Claimant noted her pain was constant and sitting made it worse. Turning her head to the left produced pain in Claimant's right thoracic and lumbar area. Claimant complained of sharp sciatica pain in her right leg which disrupted her sleep on a nightly basis. She reported difficulty rising from a sitting position, as well as standing for sustained periods of time. Claimant walked with a shuffle and limp.

13. At her followup with Ms. Gray on February 29, 2012, Claimant still reported right sided sciatic pain radiating down her leg almost to her ankle. Claimant also reported neck pain.

14. Claimant next presented to her family doctor's office on March 6, 2012, complaining of neck pain attributed to work. There she saw Jeff Reimers, P.A. Claimant cited to no trauma or over use, but noted she was required to lift heavy materials at work. P.A. Reimers diagnosed a recurrent recalcitrant cervical strain, which he felt may have

been exacerbated by "recent chiropractic and accupuincture [sic] care."[2] DE 1, p. 67.

15. Claimant returned to Ms. Gray on March 7, 2012, again complaining of sharp, constant sciatic pain which interfered with her sleep. She continued to walk with a shuffling gait. She continued to have difficulty rising from a sitting position or standing for prolonged stretches of time. Claimant mentioned she was required to stay on pain medications due to her radiating back pain. Claimant's neck and shoulder symptoms had improved, but she still had limited range of motion.

16. Acupuncture failed to help Claimant's complaints, so she next sought care from Robert L. Rutz, D.C. on March 9, 2012. On her Case History intake form, Claimant listed her major complaints as sciatica of one month duration, headaches, which she claimed she had endured for years, a "frozen" right arm, and a stiff neck. Sitting, bending and being on her feet aggravated her condition, and she felt her symptoms interfered with "everything" in her daily routine. Claimant rated her pain at level 7. She also noted the pain was increasing and came on gradually over time. She described her pain as sharp, stabbing, shooting, burning, tingling and sore. Asked to indicate on a pain diagram where her symptoms were located, Claimant marked her entire back down the midline, and into her right buttocks and leg, nearly to the ankle. She also marked her feet and left thumb.[3] On Claimant's Patient History form, under the heading "How did it (Claimant's low back sciatica with right sided buttock and leg pain) occur?" the doctor simply noted "?". DE 1, p. 72.

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[2] No relevant chiropractic records predating March, 2012 are part of the record.
[3] She explained at hearing that her foot and thumb issues were the result of her diabetes.

17. Dr. Rutz' cryptic notes reveal he saw Claimant a total of three times after March 9, 2012. On March 14, he listed improving pain but still a limited ROM. It is unclear if these notes are directed solely at Claimant's neck complaints, or if they include her low back condition as well.

Medical History Post March 16, 2012

18. On Wednesday, March 21, 2012, Claimant returned to Dr. Rutz. His notes of that date state that Claimant "was good until Mon night then pain rtn up T & LB rad into legs cause ? work lifting Limited neck & LB ROM." DE 2, p. 74.

19. On April 4, 2012, Claimant made her last visit to Dr. Rutz. His notes indicate Claimant still suffered from low back pain radiating into her leg.

20. Claimant next returned to her family physician, Randall Hutchings, M.D., on April 12, 2012. Claimant complained of ongoing neck and low back pain. Dr. Hutchings noted Claimant's low back pain had been present for the past three months, and with sneezing or coughing, radiated down her right buttocks to her calf. Dr. Hutchings' notes further indicate her low back pain fluctuated in intensity and was moderate in severity.

21. Claimant returned to Dr. Hutchings on April 18, 2012. At that time, her back pain was listed as severe and constant. Dr. Hutchings arranged for an open MRI scan (Claimant refused a closed MRI). In his final note for this visit, the doctor observed Claimant "still can't walk without cane and severe pain x 3 months." DE 2, p. 82.

22. After Claimant underwent the MRI scan, Dr. Hutchings referred her to Bruce Andersen, M.D., a local neurosurgeon. Her first visit with Dr. Andersen was on May 2, 2012, at which time Claimant filled out a health history form. The form contained multiple choice boxes regarding the cause of her current complaints and included a choice

for work accident, as well as other types of accidents. Claimant did not check any box to indicate her symptoms were caused by an accident. In her history, she told Dr. Andersen her low back pain radiating down her right leg had been ongoing for four months but was worse in the past couple of weeks. She related that she had been using a cane for the past two weeks, and on occasion was starting to get pain down her left leg. Claimant rated her pain at 7. She mentioned she was a state liquor store clerk, but did not mention a specific event as causing her current symptoms.

23. Dr. Andersen read Claimant's open MRI scan as showing moderate stenosis at L2-3, 3-4, and 4-5, with a questionable right lateral disk at L3-4. Dr. Andersen felt that due to Claimant's "extreme deconditioning" and weight issues, and not having tried "true" conservative therapy, she should engage in water aerobics for a month to improve her strength and flexibility.

24. After pool therapy failed to alleviate Claimant's symptoms, she next sought treatment on June 7, 2012 with Beth Rogers, M.D., at the Idaho Spine Institute. For the first time, Claimant associated her low back condition with a lifting/twisting accident in mid-March while working for Employer. Claimant asserted this event caused her additional severe pain over what she had been experiencing previously. Dr. Rogers administered steroid injections which failed to provide any lasting relief.

25. At a follow up visit in early July, Dr. Rogers ordered a lumbar MRI for Claimant. After reviewing the MRI findings which included disk extrusion at T12-L1 and multiple levels of lumbar stenosis, Dr. Rogers recommended a surgical consult and referred Claimant to surgeon Richard Manos, M.D.

26. On August 1, 2012, Dr. Manos set forth in a letter to Dr. Rogers the results of his initial visit with Claimant. He recounted Claimant's history of worsening symptoms after lifting a box of liquor on March 16, 2012 while at work. He noted her previous treatments of chiropractic care, acupuncture, pool therapy, and physical therapy were ineffective, and her pain continued to worsen with time. Dr. Manos ordered pelvic hip x-rays, which showed osteoarthritis in the right hip. Dr. Manos felt the osteoarthritis could well account for some of Claimant's groin pain. Furthermore, Dr. Manos read Claimant's MRI as showing a right L3-L4 herniated nucleus pulposus, degenerative spondylolisthesis at L4-L5 with instability and lateral recess stenosis, left great than right, and left T11-T12 extruded disk herniation with cord compression. Dr. Manos felt the extruded disk at T11-T12 was not causing Claimant's lower extremity issues; rather her problems were caused by the herniated disk at L3-L4 and Claimant's degenerative instability. He proposed an L3-L4 microdiskectomy and interbody fusion and laminectomy at L4-L5.

27. Prior to surgery, Surety requested a second opinion from Dr. Andersen, who saw Claimant in follow up on October 3, 2012. On October 5, 2012, Dr. Andersen responded to the inquiry from Surety with the following information and opinions:

- When Claimant first saw Dr. Andersen in May 2012, she did not mention her belief that her back and leg pain was temporally linked to any injury, including a work-related accident.

- Dr. Andersen could not tell if Claimant sustained a work injury.

- Dr. Andersen noted Claimant had multilevel lumbar stenosis, multiple levels of disk herniations, and multiple levels of facet arthropathy, all of which could naturally befall an obese 70-year-old.

- During his office visits of May 2 and October 3, 2012, Dr. Andersen identified no acute findings tied to a specific event that would require urgent surgery.

Dr. Andersen concluded his report by agreeing that surgery was reasonable, based upon back and leg pain which had "been going on for at least 5 months or so." DE 2, pp. 134, 135.

28. On February 4, 2013, Claimant had back surgery. She described the results as "mediocre, if that" and has continuing pain issues. Tr. p. 56.

DISCUSSION AND FURTHER FINDINGS

29. The provisions of the Idaho 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).

30. 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). An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(18)(a). An accident is defined in Idaho Code § 72-102(18)(b) as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, *causing an injury*." (Emphasis added.) A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

31. Claimant must provide medical testimony, by way of physician's testimony or written medical record, which 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). However, magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

32. Even if, as Claimant testified to at hearing, she experienced a terrific pain while stacking boxes at work, that fact alone will not support a claim for workers' compensation benefits. As noted above, Claimant must prove her case with corroborating medical testimony.

33. No physician has opined that Claimant's low back and lower extremity issues are causally related to her alleged March 16, 2012 industrial accident. The closest any physician came to supporting Claimant's position is Dr. Manos, who signed a letter dated March 21, 2013, which had been prepared by Sari Lavarias, P.A.-C, who works with the doctor. Therein, Ms. Lavarias writes:

> Judy Hulse is under the care of Dr. Richard Manos for a status post L4 minimally invasive TLIF with a right L3-4 microdiscectomy. Prior to the surgery, the patient was followed for degenerative spondylolisthesis of L3 on L4 as well as a right L3-4 disc herniation by Dr. Rogers. She was sent to us for surgical referral and consultation. She reports that her job requires frequent heavy amount of lifting. She reports lifting a 60-pound box of liquor resulted in severe pain in the right leg shortly thereafter. She tried the conservative treatments before seeking surgical consultation including chiropractic care, acupuncture, injections, pool therapy, physical therapy and a series of injections with Dr. Beth Rogers. She then consulted with us and we recommended a minimally invasive L4 TLIF as well as a right L3-L4 microdiscectomy. Due to the patient's nature of surgery, which was likely caused by the constant heavy lifting, bending and twisting as required by her job. In order for the patient to seek the best prognosis from surgery, we have encouraged

> the patient to not continue with any sort of heavy lifting at this time. She is on weight restrictions and she is also to limit bending, stooping, and twisting.
>
> As stated above, due to the nature of the patient's work is likely caused by the bending, lifting, twisting, carrying heavy amounts greater than 50 pounds on a regular basis at work that caused this injury and exacerbated the patient's symptoms and pain, thus requiring surgery.

DE 2, p. 167. (Copied verbatim.)

34. While Dr. Manos may believe the constant demands of Claimant's job led or contributed to her need for surgery, Claimant did not seek benefits under a theory of occupational disease. In order to prevail, Claimant must prove that her injuries are related to the specific incident which is the subject of this claim. This case is not like *Wynn v. J.R. Simplot Co.*, cited above. In *Wynn*, Claimant was found to have suffered a discrete mishap/event at 7:30 p.m. on March 17, 1980, while engaged in his usual work of operating a front-end loader. However, unlike the instant matter, in *Wynn* there was medical testimony which clearly related Claimant's left L3-4 disc herniation to the mishap/event.

35. Dr. Manos did not even mention Claimant's purported industrial accident of March 16, 2012 as being related to her condition, in spite of the fact Claimant told Dr. Manos about it, and indicated to him that the accident significantly worsened her pre-existing low back condition.

36. The only other mention of a possible work connection came from Dr. Rutz who thought perhaps Claimant's work related lifting might be causing her back and neck issues. His cryptic notes are subject to various interpretations, but in no event constitute "plain and unequivocal testimony conveying a conviction" that a specific lifting event on March 16, 2012 was causally related to Claimant's low back condition. At most, it can be

read to support a notion that Claimant's job, which included repetitious lifting, might have had something to do with her low back and neck complaints.

37. While Claimant testified convincingly at length that she felt an increase in pain while lifting and stacking a case of Crown Royal, the evidence is clear that her back condition pre-dated this event. Examination of her medical records do not support the idea that Claimant suffered a profound, sudden, and long-lasting increase in her ongoing symptoms, or experienced new symptoms immediately following March 16, 2012. Rather, she experienced increasing pain and physical limitations over time. Unfortunately, without medical testimony, there is no way of knowing if Claimant would have had the same progressing symptoms even had she not worked on March 16. Nothing on her most recent MRI or X-rays were interpreted as showing any "new", "acute", "recent", or "traumatic" findings which would indicate Claimant had suffered a new injury.

38. Without a medical opinion on causation, Claimant has failed to prove by a preponderance of the evidence that she suffered an industrial injury on March 16, 2012.

Notice Issue

39. Defendants argue that even if Claimant suffered a compensable accident and injury on March 16, 2012, she failed to timely give notice, as required by Idaho Code § 72 701. Claimant argues Employer had sufficient notice of the injury, as outlined in Idaho Code § 72-704, so as to negate the notice requirements of Idaho Code § 72-701. Given the finding that Claimant has failed to prove she suffered a compensable work-related accident on March 16, 2012, the issue of timely notice is moot, and will not be discussed further.

CONCLUSIONS OF LAW

1. Claimant failed to prove she suffered a work-related accident on March 16, 2012.

2. Claimant's Complaint should be dismissed with prejudice.

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 21st day of April, 2015.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2015, 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:

RICHARD OWEN
PO BOX 278
NAMPA ID 83651

BRIDGET VAUGHAN
1311 N 25TH ST
BOISE ID 83702

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUDY M. HULSE, Claimant, IDAHO STATE LIQUOR DISPENSARY, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-000306** **IC 2012-013397** **ORDER** **Filed May 1, 2015**

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 failed to prove she suffered a work-related accident on March 16, 2012.
2. Claimant's Complaint should be dismissed with prejudice.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 1st day of May, 2015.

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 1st day of May, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD OWEN	BRIDGET VAUGHAN
PO BOX 278	1311 N 25TH ST
NAMPA ID 83651	BOISE ID 83702

_____/s/_____

jsk