

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CRAIG C. BARTEL,

Claimant,

v.

DAVE SMITH CHEVROLET,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,

Defendants.

IC 2010-029534

ORDER

Filed August 23, 2016

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 conclusion 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 these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

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

1. Claimant has failed to prove his right shoulder condition is causally connected to his industrial accident of November 17, 2010.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to

all matters adjudicated.

DATED this 23rd day of August, 2016.

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 23rd day of August, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

KENT DAY
PO BOX 6358
BOISE ID 83707

_____/s/_____

jsk

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IC 2010-029534

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

Filed August 23, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur D'Alene, Idaho, on December 8, 2015. Claimant was represented by Starr Kelso, of Coeur d'Alene. Kent Day, of Boise, represented Employer and Surety. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter briefed the issue. The matter came under advisement on August 4, 2016.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Claimant's right shoulder condition represents a compensable injury, causally connected to his November 17, 2010 industrial accident.

Claimant's issues other than causation of his shoulder condition are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that when he slipped and fell in the course and scope of his employment for Employer on November 17, 2010, he injured his right shoulder, as well as his right knee and left hip. After the initial shoulder injury, Claimant continued to aggravate his right shoulder condition through “over use” at work, necessitated by the physical limitations imposed by Claimant’s hip injury. While Defendants ultimately accepted Claimant’s hip and knee injuries, they have continued to deny that Claimant’s right shoulder condition is causally connected to his industrial accident of that date. Claimant is entitled to reasonable medical care to address his industrial right shoulder injury.

Defendants argue Claimant did not injure his right shoulder when he fell while at work on November 17, 2010. Instead, his right shoulder complaints did not surface near the time of, and are not related to, that accident. They are not obligated to provide medical treatment for his non-industrial shoulder condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant’s testimony, taken at hearing;
2. The hearing testimony of witness Joni Bartel (Claimant’s wife);
3. Claimant’s Exhibits (CE) A through O, and S through U, admitted at hearing¹;
4. Defendants’ Exhibits (DE) 1 through 13, admitted at hearing;
5. The post-hearing deposition transcript of John McNulty, M.D., taken on February 3, 2016; and

¹Defendants objected to Claimant’s proposed exhibits P, Q, and R. Defendants’ objection was sustained, and exhibits P, Q, and R were not admitted.

6. The post-hearing deposition transcript of Spencer Greendyke, M.D., taken on March 2, 2016.

The objection made during post-hearing deposition of Dr. Greendyke is overruled.

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

FINDINGS OF FACT

1. Claimant, a 60 year old (at time of hearing) married man living in Osburn, Idaho, has worked as a service writer for Employer since 2006. As a service writer, his job is to help customers in the repair shop. Claimant would interact with the customers, going on test drives with them, handling paperwork, discussing issues with the service technicians, basic computering, and in general helping to keep the repair department operating efficiently.

2. On November 17, 2010, Claimant was attempting to pull open a glass door for approaching customers and his service manager when his left foot slipped out from under him, sliding into the doorjamb. He attempted to catch himself with his right hand on the metal door bar, and his left hand grabbing for a window sill which was adjacent to the door. As his left leg slid forward, Claimant's right knee impacted the ground. Claimant ended up basically sitting on his left buttock, with his left leg extended forward.

3. Claimant was able to immediately get up, and continue his duties. The following day he noticed soreness in his left hip and right knee. At hearing, he testified to what he felt as follows:

A. (Claimant)... Next day I went to work, it was getting pretty sore.

Q. (Claimant's attorney) What was getting sore?

A. My hip was getting sore, my arm was sore, my knee was sore.

Q. Right shoulder?

A. Right shoulder, right knee, left hip.

Tr. p. 30, ll. 13 – 19.

4. Employer directed Claimant to Mountain Health Services in Kellogg for evaluation and treatment.

5. Claimant saw Scott Reed, M.D. on November 19, 2010. Dr. Reed's office notes indicate that Claimant was seen for right knee and left groin pain. Dr. Reed diagnosed knee and hip strain. Dr. Reed advised Claimant to return if his condition did not improve.

6. Dr. Reed saw Claimant in followup on December 28, 2010. Claimant was complaining of persistent left hip pain. Claimant indicated his right knee was doing better but his left groin and medial left thigh were still painful with hip flexion. Dr. Reed decided to refer Claimant to John McNulty, M.D., an orthopedic surgeon, for further evaluation of Claimant's left hip.

7. Claimant saw Dr. McNulty on February 2, 2011. Claimant filled out and signed an intake questionnaire. Therein, Claimant indicated had slipped and injured his left hip and right knee. No other injuries were mentioned. Dr. McNulty examined Claimant's left hip and right knee. He diagnosed left hip sprain with possible labral tear, and right knee contusion, most likely without significant internal derangement.

8. Records show that Claimant next treated with Mary Jo White, D.C., on July 26, 2011 for hip pain from a slip and fall last autumn.² Claimant signed the intake sheet. Claimant did not indicate any issue with his right shoulder. Dr. White's office notes do not mention shoulder complaints in 2011.

9. Claimant was also seen, at Surety's request, by Coeur d'Alene orthopedist Spencer Greendyke on October 12, 2011.³ Claimant was provided an intake questionnaire which he filled out at this appointment. Therein, when asked to mark all body parts involved in patient's primary orthopedic complaints, Claimant checked hip and knee. He did not mark his shoulder.

10. Dr. Greendyke focused his examination, treatment, and analysis on Claimant's left hip, as that was Claimant's chief complaint. Dr. Greendyke ordered a left hip MRI, and scheduled Claimant for a followup after the diagnostic study was completed. Dr. Greendyke treated Claimant for left hip complaints with different modalities, beginning with physical therapy, and an intraarticular cortisone injection in the left hip thereafter.

11. On November 9, 2011, Claimant presented to Pinnacle Physical Therapy. Under the heading of "Subjective Report: History:" on Claimant's initial evaluation form, it states in relevant part:

Patient reports in November of 2010 he slipped on a lubricant or an oil on the ground and he fell down, landing on his right

² Dr. White's records are interesting. She noted an almost identical "slip and fall" episode involving Claimant in September 2010 with left hip symptoms for which she rendered treatment. There is also one record claiming a slip and fall from May 25, 2010, which might be the same event. Neither party chose to clarify these records with Claimant, perhaps because his hip was not an issue for resolution herein.

³ Because Claimant's left hip and right knee condition and treatment are not in dispute, a detailed chronology of the course of treatment for those injuries is not included herein. Claimant's course of medical treatment is relevant only as it documents or fails to document an ongoing right shoulder condition from the time of accident forward.

knee with his left leg flexed forward. Patient states that he felt immediate pain in his left hip and right knee and went to the doctor the next day where he was given pain medications.

CE E, p. 57. Claimant treated for left hip complaints at Pinnacle into December 2011.

12. In January 2012, Dr. Greendyke referred Claimant to Joseph Bowen, M.D., an orthopedist in Coeur d'Alene, for possible surgical intervention on Claimant's left hip. Of interest in those records are findings under the heading of **Physical Examination** wherein there are notations for examination of Claimant's neck, spine, right and left upper and lower extremities, in addition to detailed examination findings of Claimant's left hip. Under each of the above-listed categories (other than left hip), it is noted that Claimant had "no major deformity with functional ROM, with normal strength." Specifically for the upper extremities it noted strength was normal "at shoulder and elbow." CE G p. 76. The remainder of Dr. Bowen's notes involves Claimant's left hip findings and recommendations, including hip replacement surgery. Surety denied causation and refused to fund the left hip surgery.

13. Claimant sought a second opinion on causation and medical necessity of the proposed surgery from Douglas McInnis, a Coeur d'Alene orthopedic surgeon. While Claimant testified he told Dr. McInnis about his shoulder, there is nothing supporting that assertion in the doctor's medical records. Dr. McInnis assisted Claimant with his efforts to obtain hip surgery.

14. Claimant met with ICRD field consultant Beth Griggs on November 30, 2012 to discuss his work situation. During the interview, Claimant acknowledged injuring his hip in the industrial accident in question. He stated his diagnosis was left hip

impingement. Claimant spoke of “off and on” hip pain since the accident. He made no mention of any shoulder complaints or limitations.

15. After several delays⁴, Claimant finally had hip replacement surgery in August 2013. Dr. McInnis performed the surgery.

16. On October 17, 2013, Claimant returned to Dr. White. At that time he complained of right shoulder issues and decreased range of motion. Her notes of that date state Claimant’s shoulder pain began two months’ previously. On his initial patient questionnaire, Claimant indicated his shoulder pain, which began “6 weeks to 3 months” before his visit, was a new symptom which he had not ever experienced previously. CE K p. 191. Claimant signed this form. On another form he signed, Claimant indicated the pain in his right shoulder was worst when reaching with, or lying on, his right arm, and was a recent condition.

17. Claimant treated with Dr. White for his right shoulder symptoms on October 17, 22, and 29, 2013. Thereafter, her notes indicate that Claimant began work on November 16, and would “call for appointments” thereafter. CE K p. 183. There are no treatment records from Dr. White beyond October 29, 2013.

18. On January 12, 2014, Claimant returned to Dr. McInnis voicing concerns with his low back and right knee. Claimant had been hopeful these conditions would spontaneously improve after hip surgery, but had not. Claimant had no documented complaints of right shoulder pain on this (or any) visit with Dr. McInnis.

⁴ At about this point in his treatment, Claimant found himself caught in a morass of causation issues and conflicting medical opinions regarding his hip. A detailed history of that journey is not relevant to the issue presented, and is not included herein. It will be discussed below when looking at the “big picture” of alleged reasons why Claimant may not have been complaining of shoulder pain during this time.

19. Claimant's wife testified at hearing in a manner consistent with Claimant and supportive of his claim of causation.

DISCUSSION AND FURTHER FINDINGS

20. 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). 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).

21. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993). 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). 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). Employer and its surety are only liable for medical expenses incurred as a result of an employment-related injury. I.C. § 72- 432(1). An employer can not be held liable for medical expenses unrelated to an on-the-job accident. *Sweeney v. Great West Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

22. Claimant primarily relies upon Dr. McNulty to support causation from a medical standpoint. The doctor prepared an IME report for Claimant, after a physical examination and record review, on January 7, 2015, and was deposed after the hearing.

23. In his IME report, Dr. McNulty documented Claimant's ROM limitations and weakness, and diagnosed a right shoulder rotator cuff tear. He acknowledged a lack of medical documentation on Claimant's right shoulder.⁵ Without any supporting documentation, Dr. McNulty stated that Claimant experienced right shoulder pain after the industrial accident. In 2015, Dr. McNulty noted findings consistent with a right shoulder rotator cuff tear. He also opined that the mechanism of injury – jerking the right shoulder during the fall – could injure a rotator cuff. Dr. McNulty then opined that as the result of Claimant's left hip injury, Claimant would have placed more reliance on his right shoulder to assist in pulling himself into and out of vehicles at work, adding to Claimant's right shoulder injury.

24. During his deposition, Dr. McNulty elaborated on his previous opinion. He put forth two possibilities to account for Claimant's right shoulder complaints. First, he thought perhaps Claimant could have injured his right shoulder when he slipped in 2010, which injury was made worse over time as Claimant pulled himself into vehicles, primarily trucks or other high clearance vehicles. Alternatively, Claimant might have simply developed a shoulder injury due to the limited function of his left hip, which required Claimant to use his right arm more while entering and exiting vehicles. In either event, Claimant's shoulder was made worse by the increased demand of getting into and out of vehicles while favoring his left hip. Dr. McNulty noted Claimant had no previous right shoulder complaints.

⁵ At the time he originally examined Claimant in 2011, Dr. McNulty stated that Claimant had tried to catch himself from falling using his left hand, which he suspected in 2015 was a typographical error,. However, even if the doctor's note was in error, he nonetheless did not find any injury, treat Claimant, or even acknowledge a complaint from Claimant concerning either of his upper extremities at Claimant's examination in 2011.

25. While the reading radiologist and Dr. Greendyke (discussed below) disagreed, Dr. McNulty felt the MRI showed a full thickness rotator cuff tear. Claimant's injury warrants surgery in the doctor's opinion.

26. In cross examination, Dr. McNulty acknowledged the MRI showed nothing which would allow one to determine whether Claimant's shoulder condition was traumatic versus degenerative damage. Dr. McNulty also did not know when Claimant lost ROM and became dysfunctional in his right shoulder, although he assumed it had been ongoing for several years at the time of his 2015 IME. Dr. McNulty agreed that it is most likely that with an acute full thickness tear, Claimant would have had limited ROM from, or nearly from, the time of injury.

27. Defendants hired J. Craig Stevens, M.D., a north Idaho physiatrist, to perform a record review in response to Dr. McNulty's January 2015 report.⁶ As it relates to Claimant's right shoulder, Dr. Stevens disagreed with Dr. McNulty on causation. Dr. Stevens pointed to the fact that earlier records made no mention of right shoulder symptoms. Dr. Stevens concluded Claimant's right shoulder complaints represented a separate condition which "evolved" subsequent to the accident.

28. Defendants also hired Dr. Greendyke to perform an IME on Claimant on October 19, 2015. Dr. Greendyke prepared a report subsequently, and was deposed post hearing.

29. Dr. Greendyke, after examining Claimant and reviewing MRI films and previous medical records, diagnosed right shoulder type II acromion,

⁶ Defendants had previously hired Dr. Stevens to perform record review analyses on other issues related to Claimant's industrial accident in question, but since those did not involve Claimant's right shoulder, they are not discussed herein.

and acromioclavicular (AC) joint osteoarthritis with osteophytes, pre-existing and unrelated to the industrial accident. Dr. Greendyke attributed Claimant's right shoulder pain to impingement syndrome, not related to the industrial accident but rather the result of the shoulder conditions listed above. Based upon those findings and a lack of medical documentation of previous shoulder complaints, Dr. Greendyke concluded Claimant's right shoulder condition was not causally connected to the accident in question. Dr. Greendyke did acknowledge the mechanics of Claimant's slip and fall could produce a shoulder injury, but given the lack of medical records supporting a shoulder injury at the time of the accident, the doctor felt Claimant's right shoulder impingement is a new condition, unrelated to the work place fall.

30. In his deposition, Dr. Greendyke pointed out that a type II acromion is an anatomical genetic condition which can predispose one to impingement syndrome. Claimant's AC joint arthritis with osteophytes that rub into the rotator cuff is an age-related condition. The MRI showed tendinitis to the rotator cuff from rubbing of the acromion and osteophytes, which is activity related, and therefore could be related to repetitious movements at work.

31. Neither the testing done by Dr. Greendyke at his IME examination or the MRI films showed a full thickness rotator cuff tear.

32. The bottom line for Dr. Greendyke is that because Claimant did not complain of right shoulder pain for a considerable period of time after the accident, it is unlikely his current shoulder condition is related to the slip and fall. Dr. Greendyke testified that if Claimant had injured his shoulder in the accident, within five to seven days after the fall, he should have had pain in his right shoulder which would continue

until treated. Claimant's first documented complaint occurred three years after the accident. That history is inconsistent with a shoulder injury at the time of the fall.

33. On cross examination, Dr. Greendyke acknowledged that not every complaint a patient may casually mention during a medical examination will find its way into the physician's office notes. Often, only those complaints significant enough for the patient to seek treatment will be included. Therefore if Claimant had mentioned his shoulder discomfort to Dr. Reed, but not as a significant complaint for which Claimant was seeking treatment at that time, Claimant's shoulder complaint might not have been included in Dr. Reed's notes.

Causation Analysis

34. Claimant argues that the lack of documentation in the medical records is not dispositive on the issue of causation. After all, Claimant can not be responsible for what is or is not included in the physician's notes. Sloppy or incomplete record taking by the doctor should not dictate the outcome of this case. Compounding the issue is the fact that in worker's compensation cases, physicians often will only treat those injuries covered by the surety, and will not even address other maladies or complaints. In contrast, Claimant and his wife testified to Claimant's ongoing shoulder pain since the accident, and all physicians agreed the forces involved when Claimant attempted to break his fall were sufficient to produce a shoulder injury. The repetitious overuse of Claimant's right shoulder (due to his left hip limitations) at work after the accident could aggravate even a minor shoulder injury, thus leading to a symptomatic condition over time.

35. Claimant also notes that his left hip injury was the overwhelming issue until it was properly treated. Claimant's knee and shoulder injuries were relegated to

the background both by the physicians and by him. Once his hip was “fixed,” his knee and shoulder pain “took center stage.”

36. Conversely, Defendants point out that it is beyond dispute that there is no medical documentation of shoulder complaints in the record until nearly three years after Claimant’s accident, and at that time, Claimant indicated his shoulder symptoms began not three years previous, but rather less than three months previous. Furthermore, the idea that Claimant’s repetitious entry into vehicles aggravated his shoulder is not supported by the record. His shoulder became symptomatic at a time he was not working while recovering from hip surgery.

37. Defendants note Dr. McNulty’s theories for injury do not comport with the facts. The theory that Claimant injured his shoulder in the 2010 accident has no support in the medical record. The theory that Claimant’s previous asymptomatic degenerative condition was aggravated by repetitiously climbing in and out of trucks at work does not line up with the fact that Claimant’s shoulder became symptomatic during the time he was not working.

38. As discussed in greater detail below, there is not more evidence in favor of the notion that Claimant’s shoulder condition is causally related to his industrial accident of November 17, 2010 than there is against the notion.

39. At the outset, it is noted that Claimant and his wife appeared credible at hearing. However, the significant weight of evidence lined up against their testimony on the issue of when and for how long Claimant suffered shoulder pain and limitations is overwhelming. When the totality of the evidence is considered, their testimony,

standing in stark contrast to the remainder of the record, is afforded diminished consideration.

40. Other than Claimant's testimony, there is no evidence that his shoulder hurt from the time of his fall. Two days after the accident, Employer filled out an accident report, assumedly with input from Claimant. It lists left hip and right knee as the part of Claimant's body injured in the accident. There is no reason to believe Claimant's safety manager would know this information without input from Claimant.

41. For three years, Claimant labored in pain from his right hip. As he testified at hearing, his co-workers were aware of his limitations. Yet not one such individual was called to corroborate Claimant's testimony about his right shoulder pain. Obviously, Claimant's hip injury would have been the most noticeable, but the idea that in three years Claimant would not have confided in even a single co-worker about the pain in his right shoulder (if it was injured) is hard to imagine. Given the paucity (or absence) of other corroborating evidence, it seems logical that if there were financially-disinterested witnesses who could have testified about Claimant's ongoing right shoulder struggles at work, those people would have been called at hearing.

42. Contrary to Claimant's proposition, this case is not as much about what the physicians did or did not include in their records as it is about what the Claimant did or did not include. Claimant had a chance to list his right shoulder in the record when he saw Dr. McNulty in February 2011. There was no mention of such an injury. Likewise, Claimant filled out a form with Dr. Greendyke wherein he could have listed his right shoulder. He did not do so. Claimant made no mention of right shoulder complaints to the physical therapists or ICRD.

43. Dr. Bowen's notes specifically list normal strength and ROM for Claimant's upper extremities, including right shoulder and elbow. Claimant is critical of this note, claiming in argument that it was "boilerplate" and suggesting Dr. Bowen did not make such observations. There is nothing in the evidence to support such a claim. Simply because the same language was used to describe a normal exam does not mean the doctor either did not conduct the exam or made the claim in the face of observed abnormalities in those extremities. Dr. Bowen was not deposed. Nothing else in his record would serve to call into question his observations on Claimant's right shoulder.⁷

44. When Claimant did mention his right shoulder condition to Dr. White in October 2013, he specifically stated those complaints were of recent origin, and began approximately two months prior to this office visit. Those same medical records specifically state that no injury had occurred to Claimant's right shoulder.

45. When examining all the facts, it is more likely that Claimant did not have ongoing right shoulder pain prior to late summer 2013. Dr. McNulty's argument, that even if Claimant's right shoulder symptoms began in mid-2013, that fact would be consistent with Claimant aggravating his shoulder by climbing in and out of tall vehicles, is factually flawed. Claimant did not work after July 2013 due to his hip injury and joint replacement surgery. The record from Employer shows Claimant did not begin working again until November, which was after Claimant began complaining about his right shoulder to Dr. White. Clearly, climbing in and out of vehicles could not account for Claimant's shoulder pain genesis in approximately August 2013.

⁷ In *Wegner v. CdA Power Tools*, IC 2012-031071 (May 19, 2015), this Referee was critical of a physician's "boilerplate" entries in his medical records. A review of that case will show the differences between these two situations. In *Wegner*, the records showed such things as the same blood pressure, weight, and other statistics which would not be identical on each of several visits. It also listed items which could not have been accurate in light of the doctor's examination. None of those conditions are present in Dr. Bowen's records.

46. When the totality of the record is examined, Claimant has failed to prove by a preponderance of the evidence his right shoulder condition is causally connected to his November 17, 2010 industrial accident.

CONCLUSION OF LAW

Claimant has failed to prove his right shoulder condition is causally connected to his industrial accident of November 17, 2010.

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 12th day of August, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2016, 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:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

KENT DAY
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_____/s/_____

jsk