BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LYNDA ANDERSON, Claimant, v. GAMMA PHI BETA SORORITY, Employer, and CONTINENTAL CASUALTY COMPANY, Surety, Defendants.	**IC 2014-013005** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed June 7, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on September 8, 2015. Claimant, Lynda Anderson, was present in person and represented by Michael T. Kessinger, of Lewiston. Defendant Employer, Gamma Phi Beta Sorority (the Sorority), and Defendant Surety, Continental Casualty Company, were represented by Jamie K. Moon, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 22, 2016. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order. Although the Commission agrees with the Referee's proposed outcome, the Commission gives slightly different treatment to the issue of whether Claimant suffered a compensable accident/injury.

ISSUES

The issues to be decided are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.

2. Whether, and to what extent, Claimant is entitled to medical care.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant alleges she suffered an industrial accident causing cervical disc herniations on April 27, 2014, while working for the Sorority making pizzas. She seeks medical benefits including cervical surgery. Defendants admit Claimant needs medical treatment of her cervical spine but assert that Claimant's account of an accident is not credible, that her delayed reporting and differing descriptions to her medical providers after the alleged accident indicates the account is not credible, that her alleged work activities do not constitute an accident and did not cause cervical disc herniations, and that she is entitled to no benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The testimony of Claimant, Amy Westberg, Erin Jessup, and Kyle Hines taken at hearing;

3. Claimant's Exhibits 1-9 admitted at hearing;

4. Defendants' Exhibits 1-3 admitted at hearing;

5. The post-hearing deposition testimony of John McNulty, M.D., taken by Claimant on November 16, 2015; and

6. The post-hearing deposition testimony of Stephen Fuller, M.D., taken by Defendants on December 4, 2015.

FINDINGS OF FACT

1. Claimant was born in 1961. She was 54 years old and resided in Moscow at the time of hearing.

2. The Sorority is a corporation with a chapter at the University of Idaho that maintains a house in Moscow lodging approximately 75 women. At all relevant times, Erin Jessup was the corporation board president of the Sorority chapter in Moscow.

3. **Background.** In 2012, the Sorority hired Claimant as its house director to keep the Sorority house secure, ensure proper functioning of the kitchen and timely food preparation for the residents, and arrange for maintenance, routine repairs, and landscaping. Claimant also had the duty to prepare dinner each Sunday at 5:30 for the house residents.

4. **Alleged industrial accident and medical treatment.** On Sunday, April 27, 2014, Claimant hand-made 60 pizzas. She began preparing the pizzas around noon or 1:00 pm. She noted right shoulder, neck, and upper back pain and by the end of her shift was unable to lift the pans of pizzas in and out of the oven.

5. On Monday morning, April 28, 2014, Claimant presented to Michael Graham, M.D., who diagnosed burning, aching right upper shoulder pain with some radiation into her right arm. He prescribed medications. Claimant was subsequently treated by several physicians and ultimately diagnosed with cervical disc herniations. Surgery was recommended.

6. Claimant reported the April 27, 2014 accident on May 12, 2014, to Sorority board president Erin Jessup. Surety sent Claimant to Stephen Fuller, M.D., for examination and thereafter denied the alleged accident and refused to authorize surgical or other treatment.

7. **Condition at the time of hearing.** At the time of hearing, Claimant was on prescription medications for ongoing pain and limited to lifting no more than five pounds because of her cervical condition. She continued to desire cervical surgery but was unable to pay for treatment herself. The Sorority accommodated Claimant's restrictions and she continued to work at the Sorority house with assistance preparing Sunday dinners.

DISCUSSION AND FURTHER FINDINGS

8. The provisions of the Idaho Worker's 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).

9. **Accident causing injury.** The first issue is whether Claimant suffered an accident at work on April 27, 2014. Idaho Code § 72-102(18)(b) defines accident 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." An "injury" is defined as "a personal injury, caused by an accident . . .". *See* Idaho Code § 72-102(18)(a). Also, "injury" is construed to mean only an injury caused by an accident which results in violence to the physical structure of the body. *See* Idaho Code § 72-102(18)(c).

10. **Occurrence of an accident** . . . In the present case, Defendants argue that Claimant's testimony of an accident, or more precisely stated, an untoward event at work, is not credible. The hearing testimony of Claimant, Kyle Hines, Amy Westberg, and Erin Jessup,

together with several medical records have addressed the circumstances surrounding Claimant's alleged industrial accident and merit close examination.

11. *Claimant*. In her pre-hearing deposition Claimant testified that in the afternoon of April 27, 2014, when she started preparing pizzas, she was experiencing no pain in her neck, back, or shoulders. When closely questioned about her onset of pain while working that afternoon she explained:

> Q. When did you first notice it?
>
> A. After I started pulling all the cans off the shelves for prepping the pizzas.
>
> Q. What's? Sorry.
>
> A. The cans of—excuse me—the gallon cans of olives and pizza sauce and pineapple.
>
> Q. Okay. And how far up were they?
>
> A. They were on, like, three different shelves. There's overhead, then in the middle, and then towards the floor.
>
> Q. What is the highest one at, approximately?
>
> A. Probably six foot.

Claimant's Deposition, p. 47, ll. 3-14. Claimant described the initial pain as an ache or a burn which became worse as she lifted pans of pizza into the oven and pulled pans out of the oven.

12. Claimant's testimony at hearing was similar:

> Q. At what point did you begin experiencing pain that day?
>
> A. When I started pulling the stuff off the shelves in the pantry. But I'm over 50, and I didn't really think anything of it. But as my day progressed, and when I got to the point of cooking the pizzas, it got so I couldn't even lift the pans in and out of the oven anymore by the end of my shift.
>
> Q. Were there specific activities you recall during the preparation where the pain was worse than others?

A. Pulling the pans—I have to pull them off the baker's rack and put them back in.

Transcript, p. 54, ll. 12-24. Claimant described what she was pulling off the pantry shelves included gallon cans of pizza sauce, olives, and pineapple. Transcript, p. 53, ll. 24-25. By the end of her shift the pain had progressed to a "piercing pain between [her] right shoulder blade and [her] back, and a weakness in [her] right arm." Transcript, p. 55, ll. 8-10.

13. Claimant did not believe she was seriously injured, rather, she expected to get better: "I honestly thought I'm over 50 and I just overdid it that day. … I felt like I tweaked something." Transcript, p. 57, ll. 6-9. She did not report any work accident at that time. She testified: "I didn't have an accident. I mean, I didn't fall off a chair, I didn't trip, so I didn't consider it an accident." Transcript, p. 58, ll. 5-7.

14. *Kyle Hines*. Kyle Hines is a kitchen hasher who helped wash dishes and clean up the kitchen at the Sorority house. He testified as follows:

Q. When was the first time you ever saw Lynda having physical difficulties in the kitchen?

A. It was that night.

Q. Which night was that?

A. Honestly, I cannot remember the date. It's been a while. I remember it was pizza night Sunday, and she couldn't even lift the light pans out. Like they were not heavy. Maybe four pounds max, and she could not lift them out of the oven. I had to do it.

Q. Had you ever seen her like that before.

A. Never. That was the first night I actually saw her sit down, like on the job working. That was the first night I actually saw her sit down to take a break, to take a rest, because she was in so much pain.

Transcript, p. 42, l. 13 through p. 43, l. 3. Hines readily acknowledged that he did not see the accident; however, he observed Claimant cringe in pain pulling pans in and out of the oven. He testified:

> Q. Did she ever tell you that she had an accident?
>
> A. Yeah. When she was trying to move, she was like, "I can't do this, because I hurt my back moving these pans in and out."

Transcript, p. 45, ll. 13-17.

15. *Amy Westberg*. Amy Westberg was a kitchen helper during April 2014 and regularly assisted Claimant in Sunday dinner preparations. Westberg testified that after April 27, 2014, she noted Claimant often had back and neck pain:

> Q. When did you first notice her having back and neck problems?
>
> A. Yeah. So on April 27, 2014, I went down to the kitchen area to find Lynda sitting at a table, and she had her head down, and she seemed to be in a lot of pain. And I asked her what was wrong, and she said that she had tweaked her back while pulling out some pizza trays. And I then approached her and felt all along her back, and there were knots as if a spasm had just happened.

Transcript, p. 19, ll. 3-12. Westberg had never seen Claimant in that condition before. Westberg did not observe an accident. However, she affirmed Claimant told of her accident:

> Q. Okay. But she didn't tell you that she had an accident, did she?
>
> A. She did—she said that she had tweaked her shoulder pulling out the pizzas, pizza trays, so yes, I would say she did tell me she had an accident.

Transcript, p. 21, ll. 14-18.

16. *Erin Jessup*. Erin Jessup, the Sorority's Moscow chapter board president testified that after a corporation board meeting on April 28 or 29, 2014, she saw Claimant for five to ten minutes in the context of renewing Claimant's contract as house director. Jessup observed that Claimant seemed physically uncomfortable, but did not then report she had experienced a work

injury. Defendants suggest if Claimant's accident actually occurred, she would have informed Jessup at that meeting. However, Jessup is an electrical engineer at Schweitzer Engineering Laboratories. At hearing, the Referee observed that she projected the polite but intense aura of a busy professional having little time for casual conversation. The Referee thought that it was not unexpected that Claimant did not engage Jessup with a recitation of her discomforts on April 28, 2014, when Claimant herself did not then characterize her experience as an accident and still believed her condition would resolve with time. Jessup testified she considered Claimant trustworthy and had no reason to believe Claimant would be untruthful about an accident.

17. *Medical records*. On Monday morning, April 28, 2014, Claimant sought medical care at a clinic from Michael Graham, M.D., who diagnosed burning, aching right upper shoulder pain radiating down her right arm to the wrist which had been present for one day. Claimant denied any specific injury or work relatedness. Dr. Graham prescribed pain medication and a muscle relaxer. Claimant took the muscle relaxer but declined the pain medication. On Tuesday morning, April 29, 2014, Claimant called Dr. Graham's office reporting the muscle relaxer was inadequate for pain control and requested the pain medication Dr. Graham had offered. He then ordered pain medication. On May 2, 2014, Claimant returned to Dr. Graham who recorded continued right upper back pain with muscle spasm. He suggested Claimant consider chiropractic care.

18. On May 6, 2014, Claimant presented to James McKenzie, D.C., reporting right shoulder blade pain appearing April 28, 2014. She did not report an accident. Chiropractic care was not helpful and her pain worsened.

19. On May 9, 2014, Claimant presented to Paul Ammatelli, M.D., at the emergency room reporting:

> The patient reports working as a house mother at a sorority on campus. …. Approximately two weeks ago on a Sunday afternoon, the patient was cooking pizzas and repetitively lifted a 10-pound pan into a commercial oven—at [or] above shoulder height. She does not recall experiencing any particular pain at that time. The following day she noted aching discomfort involving the right upper back along the medial aspect of the scapula.

Claimant's Exhibit 5, p. 34. Cervical MRI revealed C5-6 posterior disc spur complex with bilateral foraminal stenosis, right worse than left, and C6-7 posterior disc bulging. Claimant was hospitalized for pain control and released after two days with instructions to see a neurosurgeon.

20. On May 20, 2014, Claimant presented to Lois Niska, D.O., who recorded neck pain with onset three weeks earlier: "Trauma occurred due to work injury while at work on 05/04/2014." Claimant's Exhibit 6, p. 126. On her initial pain assessment that day, Claimant reported her pain started: "4/27/14 Pulling large pans of pizza (60)" and listed as the cause: "I tweaked my back I thought lifting pan …." Claimant's Exhibit 6, p. 137. Dr. Niska referred Claimant to neurosurgeon Bret Dirks, M.D., who diagnosed C5-6 and C6-7 disc herniations and recommended surgery.

21. On May 20, 2015, Claimant presented to neurosurgeon John McNulty, M.D., who found cervical radiculopathy and recommended anterior C5-6 and C6-7 discectomy and fusion.

22. *Credibility*. Defendants correctly note different dates of onset appear in Claimant's medical records and assert Claimant's story has changed over time. However, Claimant's story of her activities on April 27, 2014, has been consistent. The differences that have emerged upon close questioning have pertained to her specific activities when she first felt the onset of pain—removing gallon cans from the pantry shelves—and her activities when the pain progressed to the point of preventing her from performing her work duties—lifting pans of pizzas in and out of the oven. Claimant's deposition and hearing testimony of hurting herself making pizzas the afternoon of April 27, 2014, is corroborated by Hines' and Westburg's

testimony, and, given Claimant's understanding of an accident, is generally consistent with the medical records. The reported timing of the onset of Claimant's symptoms is consistent with the asserted occurrence of her accident.

23. Having observed Claimant, Hines, Westberg, and Jessup at hearing, and carefully compared their testimony with other evidence in the record, the Referee found that all are credible witnesses. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

24. Defendants emphasize that when asked by some early medical providers, Claimant denied a work accident. When expressly questioned at hearing about an accident, she elaborated:

> Q. Do you believe you had an accident?
>
> A. As far as an accident, I couldn't pinpoint like falling or tripping or anything, so I don't know. I didn't consider it an accident.
>
> Q. Do you know the condition [sic] of an accident under the Workers' Compensation laws?
>
> A. No.

Transcript, p. 62, ll. 17-23. Claimant's professed ignorance of the legal definition of an accident is not surprising. Insofar as the record discloses, Claimant had no prior work accidents.

25. Idaho worker's compensation law does not require an accident be dramatic before the injuries therefrom are compensable. "To constitute an 'accident' it is not necessary that the workman slip or fall or that the machinery fail. An 'accident' occurs in doing what the workman habitually does if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place." Wynn v. J.R. Simplot Co., 105

Idaho 102, 105, 666 P.2d 629, 632 (1983), quoting Hammond v. Kootenai County, 91 Idaho 208, 209, 419 P.2d 209, 210 (1966).

26. Even without falling or tripping, pulling gallon cans from pantry shelves and lifting pans containing six pizzas apiece is sufficient to constitute an untoward event or mishap if injury is caused thereby. "If the claimant be engaged in his ordinary usual work and the strain of such labor becomes sufficient to overcome the resistance of the claimant's body and causes an injury, the injury is compensable." Wynn v. J.R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

27. Finally, Claimant has related the onset of her symptoms to a date certain, April 27, 2014, during the afternoon hours. Her discomfort was first noted while taking gallon cans off shelves, and progressed as she put pizza pans into and took them out of the oven. On these facts Claimant has satisfied her burden of reasonably locating the accident as to time when and place where it occurred. Henry v. Department of Corrections, 2011 IIC 0045.

28. On the basis of the foregoing, we conclude that Claimant has met her burden of proving the occurrence of an accident on April 27, 2014.

29. **. . . causing injury.** To prove the occurrence of an injury, Claimant must prove more than the onset of pain; she must prove damage to the physical structure of her body.

30. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was 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 (2001).

31. Claimant herein alleges that her April 27, 2014, industrial accident caused her cervical disc herniations. While her post-accident MRI disclosed degenerative cervical conditions, there is no evidence Claimant had any cervical symptoms prior to April 27, 2014. Several physicians have opined regarding the causation of Claimant's cervical disc herniations. Their opinions are examined below.

32. *Dr. Niska*. On September 18, 2014, Dr. Niska wrote: "Lynda was hurt lifting repetitively at work on April 27, 2014. She has had diagnostic testing indicating that she needs surgery to relieve a nerve in her neck to resolve the situation and prevent permanent nerve damage." Claimant's Exhibit 6, p. 172.

33. *Dr. Dirks*. On June 3, 2014, Bret Dirks, M.D., examined Claimant and noted "She initially injured herself back in early April of 2014. She was pulling some pizzas out of the oven." Claimant's Exhibit 7, p. 189. Dr. Dirks diagnosed herniated discs at C5-6 and C6-7. Dr. Dirks expressed his specific disagreement with Dr. Fuller's opinion that Claimant's injury is not related to the events of April 27, 2014. *See* Claimant's Exhibit 7 at p. 192.

34. *Dr. Fuller*. Dr. Fuller is a board certified orthopedic surgeon but has performed no surgery since 1987. Since 1987, 95% of his practice has consisted of conducting independent medical evaluations, virtually all for insurance companies. He examined Claimant on July 8, 2014, at Defendants' request. Dr. Fuller recorded Claimant's history of her alleged industrial accident as follows:

> [O]n Sunday, 04/27/14, she was fixing 60 pizzas. She uses large, commercial pans which hold about 6 pizzas apiece. She had performed this activity for several years without any problems. However, on 04/27/14, as she was lifting/pulling pans out of the ovens, she indicates that the racks were not sliding

> in an even fashion and therefore, it was seemingly more difficult to pull the pizzas out.
>
> She felt something tweak in the right scapular region. This became worse as the night went on. The next morning, Monday, she was still worse ….

Claimant's Exhibit 8, p. 196. Dr. Fuller's impressions included "reported onset of cervical and right arm pain which she attributed to lifting six 10-pound pizza pans out of an oven which was at shoulder height." Claimant's Exhibit 8, p. 199.

35. Dr. Fuller's report concluded:

> Regarding her claimed mechanism of injury on 04/27/14, these work activities are not consistent with causing a disc herniation. First of all, the neck is not loaded by lifting activities. This can be confirmed by a simple experiment—one can carry the end of a sofa and walk backwards looking over one's shoulder because the neck is not loaded. Therefore, there is no reason to suppose that lifting approximately six to seven 10-pound pizza pans in/out of the oven on 04/27/14 causes any untoward force to be place across her cervical spine.
>
> On the other hand, it is well known to all spine surgeons that spontaneous soft disc herniations occur in the cervical spine simply because of sleeping wrong. A large proportion of the presenting patient population simply states, "I woke up with it."

Claimant's Exhibit 8, p. 200. Dr. Fuller concluded: "The basic cause of her soft disc herniation is the fact that she had significant preexisting degenerative disc disease to such a degree that spontaneous disc herniation probably occurred." Claimant's Exhibit 8, p. 202. In his post-hearing deposition, Dr. Fuller estimated that 75% of presenting patients report they woke up with a herniated disc. Dr. Fuller based his conclusion in part upon his understanding the chiropractic records indicated Claimant herniated her cervical disc while sleeping. However, Dr. McKenzie's records at most contain speculation that the injury may have occurred while sleeping—which Dr. Fuller admitted did not constitute an evidence-based medical assessment.

36. At his post-hearing deposition, Dr. Fuller adhered to his assertion of spontaneous disc herniation:

> Q. So coincidence is what you're testifying, coincidence that she has these issues on April 27, call it an injury, call it cramping, call it what you will, coincidence that she has these issues on April 27th and then, less that two weeks later, she has an MRI that shows a herniated disc?
>
> A. The presentations were different.
>
> Q. So coincidence?
>
> A. Has to be.

Fuller Deposition, p. 55, l. 18 through p. 56, l. 1.

37. *Dr. McNulty*. Board certified orthopedic surgeon John McNulty, M.D., examined Claimant at her counsel's request on May 20, 2015. He has been a practicing orthopedic surgeon for the last 25 years. Over 90% of his medical practice is treating patients. Less than 10% of his practice is independent medical evaluations. Dr. McNulty assessed right upper extremity weakness and radicular pain. He recorded that Claimant "recounted making pizzas and developing pain in the right posterior trapezius area in her shoulder." McNulty Deposition, p. 11, ll. 7-8. Dr. McNulty diagnosed C5-6 and C6-7 radiculopathy. He noted that Dr. Dirks observed Claimant had motor weakness and recommended surgery on an urgent basis to decompress the involved nerve. Dr. McNulty testified that given the delay between her injury and surgery resulting in prolonged compression of the nerves, her chance of full recovery even after surgery was small.

38. Dr. McNulty related Claimant's report of "lifting these cans of ingredients out of different cabinets and developing posterior shoulder, upper back pain, radiating to her right upper extremity." McNulty Deposition, p. 29, ll. 18-20. He opined: "the work she performed on 4-27-2014, making those pizzas, bending, stooping, using various ingredients, which entails lifting and getting pizzas in and out of the oven, those seem to provide a temporal relationship between that and development of symptoms." McNulty Deposition, p. 15, l. 24 through p. 16, l.

4. He concluded that those work activities caused her symptoms and explained the mechanism of injury:

> Q. So how does lifting a pizza in and out of the oven load your neck?
>
> A. You're straining. So when you use your shoulders, when you use the muscles in your shoulders, your trapezius is part of connecting into the neck, and when you're lifting—
>
> Q. That can cause pressure?
>
> A. Cause pressure. She's twisting, she's turning, you know, she's got to get awkward to get the pizzas in, she's got to get up on the shelf to lift these heavy cans. That's how it happened.

McNulty Deposition, p. 38, l. 25 through p. 39, l. 10.

39. Dr. McNulty readily acknowledged that pre-existing degeneration may predispose to disc injury:

> Q. … Could Ms. Anderson's degenerative disk disease have played a role in her herniated disk?
>
> A. Yes.
>
> Q. Okay. How so?
>
> A. It would predispose her to having problems like her and everybody else who's got degenerative disk disease. You know, I've got degenerative disk disease in my neck. I don't have disk herniation.

McNulty Deposition, p. 37, l. 22 through p. 38, l. 5.

40. *Weighing the medical opinions*. Defendants rely upon Dr. Fuller's opinion that Claimant's cervical disc herniations were spontaneous. However, there is no evidence Claimant "woke up" with cervical pain. To the contrary, she had no cervical, right shoulder, or upper back pain or limitations when she commenced making 60 pizzas the afternoon of April 27, 2014.

41. Dr. Fuller noted that because Dr. Graham's April 28, 2014 records did not reference neck pain, Claimant suffered no acute cervical disc herniation the day before.

However, Dr. Graham's notes reference upper back pain. Dr. Fuller acknowledged that even orthopedic surgeons and neurosurgeons sometimes find it challenging to initially differentiate between neck and shoulder pathology. Moreover, Dr. Graham's April 28 notes indicate Claimant's pain arose the previous day and she attempted to manage it by taking ibuprofen that night. Moreover, although Dr. Graham's April 28, 2014 notes do not expressly record complaints of neck pain, they document indicia of cervical disc herniation: "The pain is best described as burning/aching. It radiates yes down into her right wrist. Intensity is 7/10. The pain is made worse by head movement and right arm movement." Claimant's Exhibit 3, p. 11 (emphasis supplied).

42. Dr. Fuller's insistence that lifting with the arms causes no load on the cervical spine and thus cannot cause disc herniation appears inconsistent with his agreement that Claimant should not return to her time of injury condition because she has herniated cervical discs and is limited to lifting five pounds.

43. Defendants provided Dr. Dirks a copy of Dr. Fuller's examination of Claimant wherein Dr. Fuller concluded Claimant's cervical disc herniations were not work-related and asked whether Dr. Dirks agreed with Dr. Fuller's findings. Dr. Dirks responded on July 31, 2014 by checking the box "No" and adding: "Pain/weak occurred at time of work-related injury. She has increasing weak[ness] which needs to be treated." Claimant's Exhibit 7, p. 192.

44. According to Dr. Fuller, none of Claimant's work activities produced sufficient force to herniate her cervical discs; however the force of doing nothing but sleeping was sufficient. Dr. McNulty disagreed with Dr. Fuller's opinion that Claimant's herniation was not caused by her work, testifying that in 25 years of private practice he has never found a patient

who sustained cervical disc herniation as a result of sleeping. He disagreed with Dr. Fuller's opinion that lifting activities do not load the cervical spine and explained:

> [T]here's fatigue involved in repetitive moving of pizza pans, there's awkward position, there's straining. People go and reach forward and they strain. My response would be if there's not enough force putting pizza pans in, how is there enough force sleeping to cause a disk herniation. I mean, intuitively, it doesn't really make much sense. So I disagree. I think there is plenty of opportunity to herniate your disc in your neck lifting a sofa, as well as putting pizza pans in.

McNulty Deposition, p. 18, l. 23 through p. 19, l. 7.

45. Defendants assert Dr. McNulty's opinion is unfounded as he failed to cite supporting medical literature. However, Dr. McNulty's past 25 years as a practicing orthopedic surgeon provides adequate support for his opinion.

46. The opinions of Dr. Niska, Dr. Dirks, and Dr. McNulty that Claimant's April 27, 2014 accident caused her cervical disc herniations are consistent with the evidence, including Claimant's credible testimony of her onset of symptoms upon lifting gallon cans of pizza sauce, olives, and pineapples and increasing symptoms lifting pans of pizzas in and out of the oven, and are persuasive.

47. Claimant has proven that her April 27, 2014, industrial accident caused her cervical injury, including disc herniations.

48. **Medical care.** The next issue is Claimant's entitlement to medical care. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an "employer cannot be held liable for medical expenses unrelated to any

on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus Claimant's requests for medical benefits must be supported by medical evidence establishing causation.

49. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court overruled in part Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), regarding the determination of reasonable medical treatment, stating:

> This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72–432(1) is a question of fact to be supported by substantial and competent evidence.
> ….
>
> [T]he central holding of Sprague, which remains valid, is simply: "It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable." 116 Idaho at 722, 779 P.2d at 397.
>
> The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

Chavez, 158 Idaho at 797-798, 353 P.3d at 418-419.

50. In the present case, Claimant asserts that her April 27, 2014 industrial accident requires additional treatment, including cervical surgery. Dr. Dirks opined: "I believe that because of the increasing neurological deficit, I think surgery is probably her best option to help prevent permanent nerve damage." Claimant's Exhibit 7, p. 190. He recommended anterior cervical diskectomy with fusion at C5-6 and C6-7 with plating and caging. Dr. McNulty and Dr. Niska have also persuasively opined that Claimant needs cervical surgery due to her industrial accident.

51. Claimant has proven that due to her industrial accident, she is entitled to

reasonable past and future medical treatment for her cervical injury and cervical disc herniations, including but not limited to cervical surgery.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she suffered an accident while working at the Sorority house when she lifted gallon cans and lifted pizzas into and out of the oven on the afternoon of April 27, 2014. Claimant has proven that her April 27, 2014, industrial accident caused her cervical injury, including disc herniations.

2. Claimant has proven that due to her industrial accident, she is entitled to reasonable past and future medical treatment for her cervical injury and cervical disc herniations, including but not limited to cervical surgery.

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

DATED this 7th day of June, 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 7th day of June, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

JAMIE K MOON
PO BOX 829
BOISE ID 83701

____/s/_____