

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEMAE COOKE,

Claimant,

v.

BONNER FOODS, INC., Employer, and
LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

and

DOCKSIDE RESTAURANT, Employer, and
STATE INSURANCE FUND, Surety,

Defendants.

IC 2009-019578

IC 2013-008560

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

Filed April 6, 2016

BACKGROUND

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned claim IC 2009-019578 to Referee Alan Taylor, who conducted a hearing in Coeur d’Alene, Idaho on February 2, 2012. Claimant, LeMae Cooke, was present in person and represented by Starr Kelso, of Coeur d’Alene. Defendant Employer, Bonner Foods, Inc. (Bonner), and Defendant Surety, Liberty Northwest Insurance Corporation (Liberty), were represented by Scott Harmon, of Boise. On March 20, 2013, the Commission issued its decision concluding that Claimant suffered an industrial accident causing cervical and right upper extremity injury while working for Bonner on July 4, 2009.

Claimant subsequently filed claim IC 2013-008560 alleging an industrial accident and injury to her neck, right arm, and right shoulder on or about March 25, 2013, while working for Dockside Restaurant. Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission

assigned this matter to Referee Taylor, who consolidated claims IC 2009-019578 and IC 2013-008560 for hearing after motion and notice of non-objection by the parties.

On May 15, 2015, Claimant filed a motion pursuant to Idaho Code § 72-313 for an order requiring one of the Defendants to immediately begin paying medical benefits and temporary disability benefits. The Referee denied the motion and on June 5, 2015, Claimant requested reconsideration by the full Commission. On June 5, 2015, the Commission dismissed Claimant's request for reconsideration.

On June 10, 2015, the Referee conducted a hearing in Coeur d'Alene, Idaho on the above-entitled consolidated cases. Claimant, LeMae Cooke, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer Bonner, and Defendant Surety Liberty, were represented by Kent Day, of Meridian, Idaho. Defendant Employer Dockside Restaurant (Dockside), and Defendant Surety, State Insurance Fund (the Fund), were represented by James Magnuson of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted.¹ The matter came under advisement on December 15, 2015.

ISSUES

The issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by either of the industrial accidents or whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury/condition;
2. Claimant's entitlement to medical care; and

¹ Without citing authority, Dockside and the Fund move to strike Claimant's Opening Brief because it contains facts and argument relating to Claimant's 2009 accident at Bonner and subsequent treatment therefore. The Fund did not object to joinder of the two instant claims as requested by Claimant due to injuries to the same body part. The Fund did not object to the admission into evidence at the June 10, 2015 hearing of many exhibits pertaining to Claimant's 2009 accident and treatment. Any valid objection, if one existed, has been waived. Dockside and the Fund's motion to strike Claimant's Opening Brief is denied.

3. Claimant's entitlement to temporary disability benefits.

CONTENTIONS OF THE PARTIES

Claimant maintains Bonner and Liberty did not provide her appropriate medical treatment for her July 4, 2009 industrial accident and resulting cervical, right shoulder, and right upper extremity injury in spite of the Commission's March 20, 2013 decision and order. She alleges another industrial accident while working for Dockside on March 25, 2013, resulting in further cervical and right upper extremity injury. Dockside and the Fund initially accepted the 2013 claim and provided cervical surgery. Claimant asserts entitlement to additional medical and temporary disability benefits for her cervical, right shoulder, and right upper extremity injuries.

Bonner and Liberty maintain that Claimant's need for medical treatment, if any, is due to her preexisting condition or to her March 25, 2013 accident at Dockside. Dockside and the Fund assert that Claimant suffered at most a mild traction injury to her right upper extremity and mild flare-up of her preexisting conditions in her 2013 accident, and that her injuries and need for further treatment, if any, result from her July 4, 2009 accident at Bonner or her preexisting conditions. All Defendants maintain that Claimant suffered pre-existing right scapula pathology and cervical arthritis, and that her work accidents did not cause her need for further medical treatment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence considered in the Commission's March 20, 2013 decision;
2. The Industrial Commission legal file;
3. Claimant's Exhibits A through Z and AA through EE, admitted at the June 10, 2015 hearing;

4. Defendants' (Dockside and the Fund) Exhibits 1 through 26, admitted at the June 10, 2015 hearing;
5. The testimony of Claimant taken at the June 10, 2015 hearing;
6. The post-hearing deposition of Bret Dirks, M.D., taken by Claimant on July 2, 2015;
7. The post-hearing deposition of Roger Dunteman, M.D., taken by Claimant on July 8, 2015;
8. The post-hearing deposition of Jeffrey Larson, M.D., taken by Defendants Dockside and the Fund on July 20, 2015; and
9. The post-hearing deposition of Stephen Fuller, M.D., taken by Defendants Dockside and the Fund on September 8, 2015.

All pending objections are overruled and motions to strike are denied. 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

1. Claimant was born in 1966. She was 48 years old and lived in Post Falls at the time of the 2015 hearing. She is right-handed. She had no cervical, right shoulder, or upper extremity symptoms prior to July 2009.

2. **July 4, 2009 accident at Bonner.** On July 4, 2009, Claimant suffered an industrial accident while working at Bonner Foods when she maneuvered a case of bottled water over the scan bar, causing cervical, right shoulder, and right upper extremity injury.

3. On July 20, 2009, cervical x-rays disclosed moderate disc space narrowing at C5-6, degenerative facets at C4-5, C5-6, and C6-7, and mild cervical spondylosis. Dr. Brinton

prescribed medication and referred Claimant to physical therapy. The therapist noted signs of C4-C5-C6 radiculitis and intermuscular spasms in Claimant's upper back, cervical spine, right shoulder, and right upper extremity.

4. On July 30, 2009, Dr. Chambers diagnosed cervical muscle spasm and lateral epicondylitis. A September 23, 2009 cervical MRI revealed C5-6 and C6-7 moderate diffuse circumferential disc bulges extending into the right neural foramina and resulting in right neural foraminal encroachment at C5-6 and C6-7, and extending into the left neural foramina at C5-6.

5. On October 28, 2009, Dr. McCollum examined Claimant at Liberty's request. He concluded that Claimant suffered pre-existing cervical spine arthritis. Dr. McCollum recommended evaluation by a neurologist. A November 17, 2009 nerve conduction study was normal. Dr. McCollum opined Claimant needed no medical treatment due to her 2009 industrial accident.

6. On December 15, 2009, Dr. Chambers reaffirmed his prior diagnosis. He referred Claimant to orthopedist Jonathan King, M.D., for evaluation of her right shoulder and arm, and to neurologist William Ganz, M.D., for evaluation of her neck. On January 6, 2010, Dr. Ganz examined Claimant and noted her cervical MRI showed disc bulges at C4-5, C5-6, and C6-7. He found Claimant's deep tendon reflex absent at the right triceps. He restricted her to lifting no more than 25 pounds, and directed her to avoid all over shoulder-height work. Bonner did not provide Claimant appropriate modified-duty work. Dr. Ganz referred Claimant to physical therapy and recommended cervical steroid injections. Liberty denied medical treatment and Claimant lacked the resources to obtain it. Liberty denied temporary disability benefits and Claimant sought suitable light-duty work.

7. On April 9, 2010, Claimant commenced working as a cashier at Daanen's Deli. She was subsequently promoted to a management position and her hours increased. In November 2010, Claimant was unable to continue the 50-hour per week schedule required of her as a manager and ceased working at the deli.

8. On March 23, 2011, Claimant began working as a server at Dockside at the Coeur d'Alene Resort. She continued to suffer cervical, right shoulder, and right arm symptoms and compensated by carrying heavier trays with her left arm and relying on coworkers to carry heavy items.

9. On July 29, 2011, John McNulty, M.D., examined Claimant and concluded that her 2009 industrial accident caused or aggravated her cervical disc pathology.

10. At the time of the February 2012 hearing, Claimant continued to have cervical, right shoulder, and right arm pain. She also continued to work as a server at Dockside, carrying heavier items on her left and asking for help from coworkers with heavy items. She modified the way she performed her work duties to minimize the use of her right arm.

11. On March 20, 2013, the Commission issued its decision finding Claimant suffered an industrial accident causing cervical and right upper extremity injury while checking heavy groceries for Bonner on July 4, 2009. The Commission found Claimant entitled to medical benefits, temporary disability benefits from July 20, 2009, through the date of the February 2, 2012 hearing and continuing until reaching medical stability, and an award of attorney fees for Liberty's unreasonable denial of medical benefits and temporary disability benefits prior to December 4, 2009. Liberty did not provide Claimant any medical treatment between the time of the February 2, 2012 hearing and the Commission's March 20, 2013 decision.

12. **March 25, 2013 accident at Dockside.** On March 25, 2013, Claimant was working at Dockside when she reached overhead for a tray of empty water glasses. Two trays began to fall from their overhead position to her right side. Claimant's right hand caught in the trays and she was able to catch the trays below waist level but before they hit the floor. She wrenched her right arm and felt immediate pain in her right shoulder, neck, and right arm. Her supervisor was standing behind her and saw her catch the falling trays. He exclaimed: "Holy cow. Are you okay?" Transcript, p. 26, l. 20. An accident report was prepared and her supervisor directed her to obtain medical treatment.

13. Upon learning of Claimant's March 25, 2013 accident at Dockside, Bonner and Liberty refused to provide any medical treatment for her right shoulder or cervical conditions as had been directed by the Commission's March 20, 2013 decision. Dockside and the Fund accepted the March 25, 2013 claim and began providing medical and temporary disability benefits.

14. On March 27, 2013, Claimant was treated at Urgent Care. On that date, Dr. Brinton recorded the March 25, 2013 accident and diagnosed radiculopathy. On April 3, 2013, Claimant presented to Stuart Denny, M.D., who recorded her report of an uncomfortable new clicking in her right shoulder and recorded his impression of cervical radiculitis.

15. On April 11, 2013, Claimant underwent a right shoulder MRI which showed a small cortical lesion at the posterior right humeral neck and acromioclavicular inflammation. She also underwent a cervical MRI which showed C4-5, C5-6, and C6-7 disc bulges and spondylosis with bilateral neural foraminal narrowing. On May 2, 2013, Claimant presented to James Lea, M.D., who performed an upper extremity nerve conduction study that was interpreted as normal. Claimant was referred to Jeffrey Larson, M.D., who recommended cervical epidural

steroid injection at C5-6. On June 7, 2013, Claimant presented to Michael Ludwig, M.D., who noted suggestions of right shoulder impingement. He provided a right shoulder steroid injection. Claimant returned to Dr. Larson who recommended C5-6 discectomy and fusion. She requested a second opinion and State Fund sent her to neurosurgeon Bret Dirks, M.D.

16. On September 26, 2013, Claimant presented to Dr. Dirks for a second opinion. He recommended C5-6 discectomy and fusion. Dr. Dirks also referred Claimant to orthopedic surgeon Roger Dunteman, M.D., for evaluation of her persisting right shoulder symptoms. On October 14, 2013, Dr. Dunteman examined Claimant and diagnosed right shoulder impingement and bursitis.

17. On December 2, 2013, Dr. Bret Dirks performed C5-6 anterior discectomy and fusion for Claimant's C5-6 herniated disc. The Fund paid for the surgery and continued to provide medical and temporary disability benefits.

18. On March 5, 2014, Dr. Dunteman examined Claimant and again diagnosed right shoulder impingement and prescribed physical therapy. On April 30, 2014, Dr. Dunteman examined Claimant and noted that physical therapy had inflamed her right shoulder.

19. In June 2014, Claimant underwent a functional capacity evaluation by Virginia Taft. She was restricted to lifting no more than 10 pounds.

20. The Fund sent Claimant to Stephen Fuller, M.D., who examined Claimant on July 30, 2014, and opined that Claimant suffered no cervical injury in 2009 or 2013, that she suffered no right shoulder injury and had only a preexisting scapular condition. At the Fund's request, Dr. Fuller rated Claimant's impairment due to her C5-6 surgery at 4% of the whole person. The Fund paid Claimant this impairment rating.

21. The Fund thereafter refused to authorize follow up with Dr. Dunteman or any other medical treatment. In August 2014, the Fund ceased paying Claimant's temporary disability benefits. Claimant has been unable to find work within her restrictions since that time.

22. In September 2014, Claimant was examined by Karl Goler, M.D., at Liberty's request. Dr. Goler issued his report in November 2014, opining Claimant needed no medical treatment, that all of her conditions preexisted her 2009 accident, and that neither the 2009 or the 2013 accident caused cervical injury.

23. On December 17, 2014, Dr. Dunteman examined Claimant and continued to diagnose right shoulder impingement syndrome. He recommended a new right shoulder MRI to evaluate Claimant's rotator cuff, long head of the biceps tendon, and labrum. Dr. Dunteman opined that if a new MRI was similar to her April 2013 MRI, he would recommend right shoulder arthroscopy with distal clavicle incision and subacromial decompression.

24. At the time of the June 10, 2015 hearing, Claimant continued to have cervical, right shoulder, and right arm pain. Additionally, Claimant experienced right hand symptoms of pain and numbness. Dr. Dunteman recommended right shoulder arthroscopy and subacromial decompression. Claimant continued to be unable to work due to her cervical and right shoulder pain.

25. **Credibility.** Having observed Claimant at the 2012 and 2015 hearings, and compared her testimony with other evidence in the record, the Referee reaffirms his prior finding that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

26. 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). 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).

27. **Causation.** The first issue is whether the condition for which Claimant seeks benefits was caused by either of her industrial accidents or whether her condition is due to a preexisting or subsequent injury or condition. All Defendants challenge whether Claimant's industrial accidents caused the injuries for which she seeks treatment.

28. 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). 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).

29. Claimant alleges that her July 4, 2009 industrial accident at Bonner caused right lateral epicondylitis and caused or aggravated her C5-6 and C6-7 disc bulging. She alleges her 2013 accident at Dockside caused her need for 2013 cervical surgery and her current need for right shoulder arthroscopy. Several physicians have opined regarding the causation of

Claimant's cervical, right shoulder, and right upper extremity complaints. Their opinions are examined below.

30. Dr. McNulty. As the Commission's 2013 decision noted, Dr. McNulty reviewed the 2009 MRI and concluded that Claimant's C5-6 bulging disc protruded into the right neural foramen at C6 and correlated with her right hand numbness. He observed that Dr. Ganz also reported there could be compression of Claimant's right C6 nerve root. Dr. McNulty testified that "[t]he [2009] EMG nerve conduction study has limitation on picking up sensitivity [sic] of picking up what is going on. So I would say her symptoms are consistent with a radiculopathy, pain going down her arm, originating from her neck. But it is not such that it is recognized by the EMG nerve conduction study." McNulty Deposition, p. 16, ll. 4-10. Dr. McNulty concluded that Claimant suffered cervical radiculopathy secondary to aggravation of her pre-existing cervical spondylosis by her 2009 industrial accident. He opined she would benefit from cervical spine epidural steroid injection.

31. Dr. McCollum. Richard McCollum, M.D., examined Claimant on October 28, 2009, at Liberty's request. The Commission's March 20, 2013 decision expressly found that Dr. McCollum's report and opinion were unpersuasive because he did not acknowledge Claimant's 2009 accident, but rather evidenced a materially incomplete understanding of the mechanism of her 2009 injuries.

32. Dr. Ganz. Liberty deposed neurosurgeon William Ganz, M.D., following the 2012 hearing. Dr. Ganz examined Claimant in 2010 and after reviewing her 2009 cervical MRI, noted "There could be some compression of the right C6 nerve root." Claimant's Exhibit 9, p. 3. On upper extremity neurological examination he recorded "Deep tendon reflexes are 2+ at the biceps, 1+ at the brachioradialis, 1+ at the left triceps, absent at the right triceps. She does

have intermittent pain that radiates into the right upper extremity but does not follow a true radicular pattern but the symptoms could fit with either a right C6 or C7 radiculopathy.” Claimant’s Exhibit 9, p. 4. Dr. Ganz restricted Claimant to lifting no more than 25 pounds and directed her to avoid working with objects above shoulder level. He prescribed physical therapy and epidural steroid injections at C5-6 and C6-7. Dr. Ganz expressly agreed with Dr. McNulty that Claimant suffered an exacerbation of a pre-existing cervical disorder due to her 2009 industrial accident. He did not agree with Dr. McNulty’s conclusion that Claimant suffered cervical radiculopathy in 2009, however he agreed with Dr. McNulty’s conclusion that Claimant suffered an aggravation of pre-existing cervical spondylosis; a cervical strain event at work in 2009. Ganz Deposition, p. 38.

33. Dr. Chambers. Dr. Chambers examined Claimant on July 30, and December 15, 2009. He agreed that Claimant suffered pre-existing cervical spine arthritis, but opined Claimant’s 2009 cervical radiculitis came from an acute 2009 work event that had been reported and documented. After reviewing her 2009 MRI findings of bulging discs resulting in neural foraminal encroachment at C5-6 and C6-7, Dr. Chambers opined: “her pain symptoms, her issues with numbness and tingling in the right arm, right hand, are consistent with irritation of the nerve roots in the areas where there are bulges and abnormalities on the [2009] MRI.” Chambers’ Deposition, p. 32, ll. 9-13. Dr. Chambers further opined that Claimant’s disc extrusion was consistent with the history of her 2009 accident.

34. Dr. Goler. Neurosurgeon Karl Goler, M.D., examined Claimant at Liberty’s request on September 15, 2014. He concluded that Claimant suffered a cervicothoracic sprain/strain in July 2009 and in March 2013. He opined Claimant’s 2013 cervical surgery was unrelated to either of her industrial accidents. Claimant’s Exhibit EE, p. 433. Dr. Goler

concluded that “There is no further treatment necessary as a result of the injury of July of 2009 or March 20[sic], 2013.” Claimant’s Exhibit EE, p. 434.

35. Dr. Goler’s report indicates that no imaging studies were provided for his review. Moreover, his report reflects a material misunderstanding of both of Claimant’s industrial accidents. Dr. Goler’s report references a cover letter from Liberty and then recites:

On July 4, 2009, she had a higher volume than usual of customers, with prolonged repetition of her right arm. She complained of pain from her upper back to her shoulder and right arm and elbow. On March 25, 2013, she sustained an accident with a new employer, twisting while reaching for a tray of glasses.

Claimant’s Exhibit EE, p. 416. Dr. Goler’s report later cites to Dr. McCollum’s October 28, 2009 report—which the Commission expressly found unpersuasive in 2013—that “there was no specific injury on July 4, 2009.” Claimant’s Exhibit EE, p. 420. Dr. Goler’s report later recounts the March 25, 2013, accident as “She was lifting and moving glass racks. Glass rack was too high, slipped, was able to catch, but it jarred shoulder and back. ... Apparently the injury was unwitnessed” Claimant’s Exhibit EE, p. 422. In fact, Claimant’s supervisor witnessed the 2013 accident and thereafter directed her to obtain medical treatment.

36. Dr. Goler’s misunderstanding apparently prompted him to discount accurate and more complete accounts of Claimant’s industrial accidents. In his report, Dr. Goler recounts a history by Dr. Fuller of Claimant’s 2009 accident thus “She was lifting a heavy water container which broke, jerking her shoulder and causing pain in the posterior shoulder, with pain down her arm. (Reviewer’s note: This sounds like embellishment as well. This is the first time we have heard of any acute injury in July of 2009.)” Claimant’s Exhibit EE, p. 424. Dr. Goler later recounted Dr. Fuller’s description of the March 2013 accident of “crates, which toppled over and fell on her and her right upper extremity and shoulder girdle had a pretty good jerk. (Reviewer’s note: This is a different description of the injury.)” Claimant’s Exhibit EE, p. 424.

37. Dr. Goler's report is based upon a materially incomplete understanding of both of Claimant's industrial accidents and it is not surprising that he concluded she needed no further medical treatment. His opinion is unpersuasive.

38. Dr. Fuller. Dockside and the Fund deposed Stephen Fuller, M.D., following the 2015 hearing. He is board certified in orthopedic surgery but has not performed surgery since 1987. He has performed independent medical evaluations for the past 25 years. Dr. Fuller testified that Claimant reported three injuries to him: the 2009 work event, a second injury—"she wasn't too clear how that happened," and a March 25, 2013 injury. Fuller Deposition, p. 10, ll. 6-7. Dr. Fuller's report's accuracy is suspect as the record is otherwise entirely devoid of any indication of a third injury occurring between Claimant's 2009 and 2013 work accidents.

39. Dr. Fuller believed that Claimant suffered no traction injury in 2009, but merely pain with normal work activity. He opined that normal work activities would be insufficient to cause either a strain or sprain. Dr. Fuller testified that: "an injury in 2009 was not described. My understanding is that an injury is an untoward event, normal work activities in 2009 apparently did not cause an untoward event." Fuller Deposition, p. 41, ll. 1-5. The Commission's 2013 decision expressly concluded that Claimant sustained an industrial accident, an untoward event causing injury, at Bonner on July 4, 2009.

40. Dr. Fuller opined that "With respect to the July 4, 2009 incident, she is capable of returning to work without restrictions and has not needed restrictions since at least a week after the incident." Fuller Deposition, p. 44, ll. 5-8. The Commission's 2013 decision expressly concluded that Claimant was not able to return to her normal work duties from the time she ceased work at Bonner through the time of the February 2, 2012 hearing.

41. When questioned about Claimant's 2013 accident, Dr. Fuller testified:

Q. And with regards to the March 2013 accident at the resort, is it your testimony that LaMae Cooke did not suffer an injury to her neck as a result of that accident?

A. That's correct. She had a symptomatic flare as a result of the traction event. She had a flare of her pre-existing chronic complaints, but there was no evidence medically of new objective pathology.

Fuller Deposition, p. 49, l. 18 through p. 50, l. 1. Dr. Fuller opined that Claimant's condition was due to the natural progression of preexisting disease and that her July 2009 and March 2013 accidents did not contribute "to any substantive degree." Fuller Deposition, p. 39, l. 24.

42. Dr. Fuller opined that both of Claimant's electrical studies were normal, thus disproving any cervical radicular injury. Drs. McNulty, Dirks, and Larson all testified that electrodiagnostic studies are non-specific and may not detect valid existing radicular pathology.

43. Dr. Fuller testified that Claimant's right shoulder MRI was basically normal for her age. He opined there were no objective indications for right shoulder arthroscopy. He testified there was no rotator cuff tear, no labral tear, no long head biceps problem and thus there was "nothing to fix." Fuller Deposition, p. 21, l. 18. Dr. Fuller attributed Claimant's right shoulder symptomatology to preexisting degenerative snapping scapula, which was unrelated to her industrial accidents.

44. Dr. Fuller testified that after the 2013 injury there were no objective changes in Claimant's physical examination. However, he expressly acknowledged that, except for Dr. Ganz's records, he did not have any records from the 2009 event, including the 2009 MRI. Dr. Fuller relied upon Dr. McCollum's October 2009 IME report which the Commission expressly found unpersuasive in its 2013 decision. Dr. Fuller testified that Dr. Goler on September 15, 2014 reached the same conclusions that Dr. Fuller did and that Dr. Dirks also agreed with Dr. Goler's conclusions. In fact, Dr. Dirks initially agreed, but later strongly disagreed with Dr. Goler's conclusions.

45. Dr. Fuller testified that “Dr. Dirk’s conclusions were different than everybody else’s.” Fuller Deposition, p. 29, l. 25 through p. 30, l. 1. In fact the findings of Drs. Larson, McNulty, Ganz, and Chambers are in large part similar to Dr. Dirks’ findings regarding Claimant’s cervical pathology relating to her industrial accidents.

46. Substantial elements of Dr. Fuller’s opinion are directly contrary to the Commission’s March 20, 2013 decision and order. It is further apparent that Dr. Fuller did not meaningfully review Claimant’s testimony from the first hearing, or the Commission’s 2013 decision, or the deposition testimony of Drs. McNulty, Ganz, and Chambers. Dr. Fuller’s opinion is contrary to the weight of medical evidence in this case as noted above and more fully detailed hereafter. Dr. Fuller’s opinion is unpersuasive.

47. Dr. Larson. Dockside and the Fund deposed neurosurgeon Jeffrey Larson, M.D., following the 2015 hearing. He first examined Claimant after her 2013 accident and found C5-6 radiculopathy. Dr. Larson testified that Claimant’s 2009 cervical MRI and her April 2013 cervical MRI showed C5-6 disc protrusion/herniation and were consistent with Claimant’s clinical complaint of neck pain radiating down her right arm in a C6 distribution into her thumb and index finger and with her right biceps weakness. Dr. Larson concluded that the 2009 and 2013 MRIs were not significantly different. He testified that by Claimant’s history and MRI imaging, her need for cervical surgery relates to her 2009 injury. Dr. Larson opined that Claimant’s March 25, 2013 accident aggravated her cervical condition, but that her need for cervical surgery arose from her 2009 accident.

48. Dr. Larson’s opinion that Claimant suffered cervical injury due to her 2009 industrial accident, and additional cervical injury due to her 2013 industrial accident, is credible. However, his conclusion that Claimant’s need for cervical surgery is due to her 2009 accident is

not altogether persuasive. Significantly, Dr. Larson acknowledged that Dr. Ganz's examination notes from January 6, 2010, record a negative Spurling's test and no upper extremity muscle weakness. In contrast, Dr. Larson's examination notes after Claimant's 2013 accident record a positive Spurling's test and right biceps weakness—both indicative of cervical radiculopathy arising after the 2013 accident.

49. Dr. Dirks.² Dr. Dirks is a board certified neurosurgeon. He noted in his September 26, 2013, examination that Claimant demonstrated neck pain with bilateral radiculopathy of C5-6 dermatomes, correlating with her 2013 cervical MRI findings of C5-6 disc bulge with right greater than left encroachment. He opined the 2013 cervical MRI showed more C5-6 neural foramen compression as compared to the 2009 cervical MRI. He concluded that the nerve conduction studies by Dr. Lea in May 2013, although normal, did not rule out cervical radiculopathy. Dr. Dirks testified that Claimant's upper extremity muscle strength when he examined her on September 26, 2013, was dramatically decreased as compared to Dr. Ganz's January 2010 examination. Dr. Larson noted a similar loss of upper extremity strength after Claimant's 2013 accident. Dr. Dirks performed Claimant's C5-6 discectomy and fusion on December 2, 2013.

50. After Claimant's recovery from cervical surgery, Dr. Dirks restricted her to lifting no more than 10 pounds and noted that she continued to have right shoulder problems that needed treatment. He examined Claimant on May 21, 2015, noting that she no longer had cervical radiculopathy but did show indications of right shoulder impingement and needed to followup with an orthopedic surgeon. He testified that shoulder problems can mimic cervical

² Docksider and the Fund objected to the opinion of Dr. Dirks (Dirks Deposition, p. 20) regarding what caused Claimant's need for cervical surgery because his opinion was not disclosed in response to discovery requests. However, Dr. Dirks communicated his opinion in his June 13, 2014 response to the Fund that he was treating Claimant's March 2013 injury of herniated cervical disc. State Fund's Exhibit 7, p. 158.

problems and vice versa.

51. Dr. Dirks testified that Claimant clearly had neck symptoms following her 2009 injury and that her “2009 injury ultimately would have culminated in surgery. But I do believe the 2013 injury accelerated the process.” Dirks Deposition, p. 22, ll. 14-16. Dr. Dirks agreed with Dr. Larson’s conclusion that Claimant’s cervical condition required surgical intervention.

52. Dr. Dirks disagreed with Dr. Goler’s report and opinion that Claimant was not injured in either the 2009 or the 2013 accident. Dr. Dirks also disagreed with Dr. Fuller’s opinion that there was no evidence of radiculopathy or other pathology stemming from the March 2013 accident. Dr. Dirks succinctly summarized his disagreement with Dr. Fuller’s position:

Keep in mind these workers [sic] compensation independent medical exams, they are seeing the patient after the fact. They are seeing the patient after I have fixed the patient. So he’s saying the patient doesn’t have radiculopathy. So apparently I must have done a good job because he couldn’t find radiculopathy on his exam at that time.

Dirks Deposition, p. 33. l. 24 through p. 34, l. 5.

53. Dr. Dirks’ final conclusion was that “The 2013 [injury] definitely aggravated that and ultimately culminated in surgery.” Dirks Deposition, p. 22, ll. 24-25.

54. Dr. Dirks’ opinion that Claimant’s 2013 accident caused her cervical injury, including radiculopathy, ultimately culminating in the need for her C5-6 surgery is credible, well supported by the record, and persuasive.

55. Dr. Dunteman. Dr. Dunteman is a board certified orthopedic surgeon. He emphasized that Claimant had no history of right shoulder problems prior to her 2009 accident at Bonner, and that there is “a lot of overlap between cervical disease and shoulder disease.” Dunteman Deposition, p. 12, ll. 18-19. He believed Claimant had both cervical and shoulder

problems. Dr. Dunteman opined that Claimant's right shoulder never fully healed from her 2009 injury and the 2013 injury at Dockside exacerbated her previous shoulder problem. He testified Claimant needed another right shoulder MRI due to likely change in condition because she was definitely worse on her last office visit.

56. On August 20, 2014, Dr. Dunteman agreed with Dr. Fuller's IME conclusions. However, Dr. Dunteman later rejected Dr. Fuller's conclusions and expressly disagreed with Dr. Fuller's conclusion that Claimant's right shoulder MRI was normal. Dr. Dunteman read the MRI himself and noted right shoulder bursitis and inflammation of the acromioclavicular joint which was not commented on by the radiologist. Dr. Dunteman practices primarily shoulder medicine and reviews shoulder MRIs himself. He relies upon the radiologists' reading of MRIs approximately half of the time.

57. On June 1, 2015, Dr. Dunteman opined that Claimant suffered a right medial scapular impingement, right lateral epicondylitis injury, and a right glenohumeral shoulder injury due to her 2009 accident at Bonner. He opined Claimant suffered an exacerbation of her right glenohumeral shoulder injury due to her 2013 accident at Dockside for which she needed a right shoulder MRI to evaluate the status of her right rotator cuff, long head of the biceps tendon, and any additional or new right shoulder injury.

58. Dr. Dunteman testified Claimant has "a lot of scapular pain that is caused by the dysfunctioning in the glenohumeral joint." Dunteman Deposition, p. 24, ll. 20-21. He opined that Claimant's 2009 accident commenced the injury to her glenohumeral shoulder joint which was exacerbated by her 2013 accident. Dunteman Deposition, p. 26. Dr. Dunteman observed that the right shoulder clicking Claimant noted after her 2013 accident is likely from the acromioclavicular joint and is evidence of worsening symptoms, suggesting the 2013 injury was

more severe than the 2009 injury. Dr. Dunteman relied upon Claimant's testimony that she had shoulder discomfort after the 2009 accident, but her shoulder condition worsened significantly after the 2013 injury. Dunteman Deposition, p. 32. He summarized that Claimant sustained shoulder injury from the 2009 accident, but "was able to work, despite the fact that she was in some way incapacitated with that [right] arm." However, "When she had the [2013] injury at the resort, she was basically really unable to work. I mean it made it significantly worse." Dunteman Deposition, p. 40, ll, 9-10 and 14-15.

59. Dr. Dunteman's straightforward causation opinion is well supported by the record, credible, and persuasive.

60. The opinions of Drs. McNulty, Ganz, and Chambers—who all examined Claimant shortly after her 2009 accident—are in general agreement that Claimant's July 4, 2009, industrial accident caused cervical and right upper extremity injury. However, in the aftermath of Claimant's 2009 accident, no physician recommended surgical intervention, only epidural steroid injections, physical therapy and prescription medications.

61. The opinion of Dr. Dirks, who performed Claimant's 2013 C5-6 discectomy and fusion, that Claimant's 2013 accident aggravated her cervical condition and culminated in the need for cervical surgery is credible and persuasive. The opinion of Dr. Dunteman that Claimant's 2013 accident also caused and aggravated her right shoulder injury resulting in the current need for further right shoulder treatment is credible and persuasive.

62. Claimant has proven that her July 4, 2009 industrial accident caused cervical and upper right extremity injury. Claimant has proven that her March 25, 2013 industrial accident caused worsening of her cervical condition resulting in the need for C5-6 surgery. Claimant has proven that her March 25, 2013 industrial accident caused right glenohumeral joint dysfunction,

right shoulder bursitis, inflammation of the acromioclavicular joint, and worsening of her right shoulder condition.

63. **Medical care.** The next issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The physician, not the Commission, decides 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. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

64. Claimant has proven that her March 25, 2013 industrial accident caused cervical pathology resulting in her need for reasonable medical treatment therefore, including cervical surgery by Dr. Dirks on December 2, 2013. Claimant has proven that her March 25, 2013 industrial accident also caused right shoulder injury and that she is entitled to reasonable medical treatment therefore, including right shoulder MRI and likely right shoulder arthroscopy for subacromial decompression as recommended by Dr. Dunteman.

65. **Temporary disability.** Idaho Code § 72-102 (11) defines "disability," for the

purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

66. In the present case, Claimant has proven that her cervical and right arm complaints were caused by her industrial accident and thus has proven her entitlement to benefits for temporary disability resulting therefrom.

67. Insofar as the record discloses, Liberty has not provided Claimant temporary disability benefits as directed by the Commission’s 2013 decision. Pursuant to Idaho Code § 72-408 and Malueg, Claimant has proven she is entitled to temporary disability benefits from Bonner and Liberty from July 20, 2009, through March 24, 2013, consisting of partial temporary disability benefits during the time she was employed at Daanen’s Deli or Dockside, and total temporary disability benefits when she was not. Liberty is entitled to deduct Claimant’s

actual earnings at Daanen's Deli and Dockside during this same period.

68. The record does not establish that Dockside made a reasonable and legitimate offer of employment to Claimant which she was capable of performing within the terms of her work restrictions by Dr. Dirks and which employment was likely to continue throughout her period of recovery after August 2014. The record does not establish that suitable employment was available to Claimant in the general labor market during her period of recovery. Pursuant to Idaho Code § 72-408 and Malueg, Claimant has proven she is entitled to total temporary disability benefits from Dockside and the Fund from August 2014 through the date of hearing and continuing until she reaches medical stability.

CONCLUSIONS OF LAW

1. Claimant has proven that her March 25, 2013 industrial accident caused worsening of her cervical condition resulting in the need for C5-6 surgery. Claimant has proven that her March 25, 2013 industrial accident caused right glenohumeral joint dysfunction, right shoulder bursitis, inflammation of the acromioclavicular joint, and worsening of her right shoulder condition.

2. Claimant has proven that her March 25, 2013 industrial accident caused cervical pathology resulting in her need for reasonable medical treatment therefore, including cervical surgery by Dr. Dirks on December 2, 2013. Claimant has proven that her March 25, 2013 industrial accident also caused right shoulder injury and that she is entitled to reasonable medical treatment therefore, including right shoulder MRI and likely right shoulder arthroscopy for subacromial decompression as recommended by Dr. Dunteman.

3. Claimant has proven she is entitled to temporary disability benefits from Bonner and Liberty from July 20, 2009, through March 24, 2013, consisting of partial temporary

disability benefits during the time she was employed at Daanen's Deli or Dockside, and total temporary disability benefits when she was not. Liberty is entitled to deduct Claimant's actual earnings at Daanen's Deli and the Coeur d'Alene Resort during this same period. Claimant has also proven she is entitled to total temporary disability benefits from Dockside and the Fund from August 2014 through the date of hearing and continuing until she reaches medical stability.

RECOMMENDATION

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

DATED this 14th day of March, 2016.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2016, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-2288

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEMAE COOKE,

Claimant,

v.

BONNER FOODS, INC., Employer, and
LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

and

DOCKSIDE RESTAURANT, Employer, and
STATE INSURANCE FUND, Surety ,

Defendants.

IC 2009-019578
IC 2013-008560

ORDER

Filed April 6, 2016

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has proven that her March 25, 2013 industrial accident caused worsening of her cervical condition resulting in the need for C5-6 surgery. Claimant has proven that her March 25, 2013 industrial accident caused right glenohumeral joint dysfunction, right shoulder bursitis, inflammation of the acromioclavicular joint, and worsening of her right shoulder condition.
2. Claimant has proven that her March 25, 2013 industrial accident caused cervical pathology resulting in her need for reasonable medical treatment therefore, including

cervical surgery by Dr. Dirks on December 2, 2013. Claimant has proven that her March 25, 2013 industrial accident also caused right shoulder injury and that she is entitled to reasonable medical treatment therefore, including right shoulder MRI and likely right shoulder arthroscopy for subacromial decompression as recommended by Dr. Dunteman.

3. Claimant has proven she is entitled to temporary disability benefits from Bonner and Liberty from July 20, 2009, through March 24, 2013, consisting of partial temporary disability benefits during the time she was employed at Daanen's Deli or Dockside, and total temporary disability benefits when she was not. Liberty is entitled to deduct Claimant's actual earnings at Daanen's Deli and the Coeur d'Alene Resort during this same period. Claimant has also proven she is entitled to total temporary disability benefits from Dockside and the Fund from August 2014 through the date of hearing and continuing until she reaches medical stability.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 6th day of April, 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 6th day of April, 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 W DAY
PO BOX 6358
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H JAMES MAGNUSON
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sc

/s/