

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

DONNA MILLER-O'BRIEN,

Claimant,

v.

CYGNUS, INC., Employer, and ALASKA  
NATIONAL INSURANCE COMPANY,  
Surety,

and

CYGNUS, INC., Employer, and STATE  
INSURANCE FUND, Surety,

Defendants.

**IC 2012-005159**

**2012-013226**

**2012-028686**

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

**Filed March 14, 2014**

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on July 24, 2013, and in Sandpoint on July 25, 2013. Claimant was present and represented by Starr Kelso of Coeur d'Alene. Alan R. Gardner of Boise represented Employer Cygnus, Inc., and its Surety, Alaska National Insurance Company (Alaska National). H. James Magnuson of Coeur d'Alene represented Employer Cygnus, Inc., and its Surety, Idaho State Insurance Fund. Oral and documentary evidence was presented. No post-hearing depositions were taken, and the parties submitted post-hearing briefs. This matter came under advisement on November 4, 2013 and is now ready for decision.

**ISSUES**

By agreement of the parties, the issues to be decided are:

1. Whether Claimant has complied with the provisions of Idaho Code § 72-448,<sup>1</sup> and
2. Whether State Insurance Fund insured Employer at the time of manifestation of Claimant's alleged occupational disease.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that she first became aware of her work-related occupational disease on January 26, 2012, when so informed by her health care provider, Donna Foord, R.N., P.A. She timely reported the same to Employer and its Surety, Alaska National, on February 28, 2012.

Employer and Alaska National contend that Claimant was informed by PA Foord of the work-related nature of her shoulder problem in October or November 2011 and did not inform Employer of the same until February 2012; more than the 60 days allowed by statute.

Employer and State Insurance Fund argue that the manifestation of Claimant's occupational disease was as she alleges and, if the same is adopted by the Commission, places their coverage outside of any relevant findings regarding manifestation and they should be dismissed as a party.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

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<sup>1</sup> In their post-hearing brief, Alaska National raises the issues of whether Claimant's left shoulder injury was caused by an accident rather than by occupational disease and whether Claimant's alleged COPD has been proven to be the result of an occupational disease. Claimant responded in her Reply Brief that she has never alleged her left shoulder injury was the result of an accident, and the cause of Claimant's COPD was not a noticed issue herein. The Referee agrees, and these two issues will not be addressed in this decision.

1. The testimony of Claimant, Intermountain Claims adjuster Sue Ridlon, Intermountain Claims claims manger Cindy Weigel; ICRD consultant Richard Hunter, and Donna Foord, R.N., PA-C, taken at the hearing.

2. Claimant's Exhibits 1-36 admitted at the hearing.

3. Employer/Alaska National's Exhibits 1-8 admitted at the hearing.

4. Employer/State Insurance Fund's Exhibits 1-4 admitted at the hearing.

After having considered all the above evidence and the 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 was 57 years of age and resided in Athol, Idaho at the time of the hearing.

2. Cygnus is an airplane parts manufacturer. Claimant was employed there as a sheet metal fabricator from March 9, 2009 until February 28, 2012. She was terminated on May 24, 2012, the last day of her FMLA leave.

3. Claimant's main job at Employer's was to sand and remove burs from metal parts. In order to accomplish this, Claimant used a vibrating "jitterbug" or palm sander "all day long." Hearing Transcript, p. 165.

4. On October 25, 2011, Claimant presented to Donna Foord, R.N., PA-C, for an annual exam.<sup>2</sup> Ms. Foord noted, *inter alia*, "She is also notice [sic] has a strange pain in her LT upper arm with not [sic] known injuries." Claimant's Exhibit 2, p. 19. The October 25<sup>th</sup> office note, as well as the testimony of Claimant and Ms. Foord, establish that

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<sup>2</sup> Claimant first saw Ms. Foord in June of 2011 to establish care.

Claimant's job duties were not discussed on that date. Ms. Foord assessed left arm pain with no known injury. She ordered an x-ray of Claimant's left arm and humerus.

5. Claimant next saw Ms. Foord on November 8, 2011. The left shoulder x-rays revealed calcific tendonitis of the rotator cuff. Ms. Foord encouraged Claimant to attend physical therapy, as calcific tendonitis can lead to a rotator cuff tear that could result in surgery. Claimant was unable to comply due to lack of funds. The November 8 office note, as well as testimony from Claimant and Ms. Foord, establish that Claimant's job duties were not discussed on that date.

6. Claimant next saw Ms. Foord for shoulder-related problems on January 26, 2012, at which time Claimant complained that her arm was somewhat worse at night. Ms. Foord noted, "She works with a "jitterbug" and other vibrating machines at work. Her husband is out of work and until he gets back to work can she afford to take him off or go to P.T. I do believe this is work related and she will speak to her supervisor. It was noted on x-ray to have calcific tendonitis and now her RT shoulder and both forearms." *Id.*, p. 26. Based upon the record, this is the first time Ms. Foord informed Claimant that her bilateral shoulder tendonitis was work-related.

7. On February 28, 2012, Claimant reported to Employer that the problems she was experiencing with her shoulders were, according to Ms. Foord, related to her work.

8. Right after reporting the work-related nature of her shoulder problems, Claimant returned to Ms. Foord who noted:

This is a 55 year old female who presents in the clinic today with increasing shoulder pain, the left worse than the right. Patient states she had to leave work today because she felt so much pain and is getting intolerable. Pt. first told me about a "funny sensation [sic – ]" in her LT shoulder back in the fall during her annual. I said to rest, Ice [sic] and monitor. She returned a month later and it was worse, and again a month ago, X-rays showed

Calcifying tendonitis in her LT shoulder and since then the RT shoulder has been affected. I have asked her to talk to her employer about different work or some time off.

Claimant's Exhibit 2, p. 27.

9. Ms. Foord took Claimant off work as a result of the above visit.

## **DISCUSSION AND FURTHER FINDINGS**

### Occupational disease

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code §72-102(22) which defines occupational diseases and related terms as follows:

- (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
- (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.
- (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in

which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

Lastly, Idaho Code §72-439 provides:

An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.

Thus, in order to prevail on her claim, Claimant must prove:

- 1) That she was afflicted by a disease;
- 2) That the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which she was engaged;
- 3) That the disease was incurred in, or arose out of and in the course of her employment;
- 4) That the last injurious exposure to the hazard of the diseases occurred while she was employed with Employer, and
- 5) That she became disabled as a result of the disease.

10. The Referee finds that Claimant has proven she suffers from an occupational disease. She testified that for the entire time she worked for Employer she utilized hand sanders and other vibrating instruments to de-bur metal airplane parts. Such extensive use of vibrating equipment was characteristic of and peculiar to Employer's business. Ms. Foord concluded that Claimant was suffering from bilateral calcific tendonitis caused by her use of vibrating equipment. Claimant was disabled from working as a result of her occupational disease as is evidenced by her being taken off work by Ms. Foord on February 28, 2012.

## Manifestation

Idaho Code § 72-448 provides that written notice of the manifestation of an occupational disease must be given to an employer within 60 days of such manifestation. Idaho Code § 72- 102(19) defines “manifestation” as the time when an employee knows that he or she has an occupational disease, or whenever a qualified physician shall inform the injured worker that he or she has an occupational disease.

11. Ms. Foord’s medical records are clear that the first time she informed Claimant of the work-relatedness of her shoulder condition was on January 26, 2012. However, Alaska National asserts that Claimant’s telephone conversation with Sue Ridlon of Intermountain Claims on March 12, 2012 and Ms. Foord’s telephone conversation with Ms. Ridlon on March 15, 2012 cast doubt on the accuracy of the January 26 date.

### Claimant’s conversation with Ms. Ridlon

12. Ms. Ridon called Claimant on March 12, 2012 and obtained a recorded statement from her. In her statement, Claimant indicated that she began experiencing pain in her shoulders in October 2011 that began when Claimant began to lift heavy buckets or totes. Claimant denied any memory of this conversation at hearing and testified that she was unaware of the conversation until her deposition when counsel for Alaska National questioned her about it.

13. Claimant had just been discharged from the hospital late on March 11 where she had been admitted on March 9 for breathing and other problems. Claimant testified that she was turning blue and thought she was dying. Claimant further testified that after her discharge, she was “whacked out”:

They gave me breathing - - I had been - -I was on oxygen. I don’t know. I was on steroids (for her breathing problems). I was on everything.

Morphine, painkillers. I was on everything. Plus I'm bipolar, so I was on all that medication. It was counteracted with the steroids. I was a mess.

Q. (By Mr. Kelso): You say the - - bipolar - -

A. My bipolar - - I'm bipolar. And I take medication for bipolar. And it keeps me on a - - you know, on a pretty even keel. I've got to take my medication. Well, what happens when they give me the steroids, it mixes in my body and makes me whacked. It's an awful feeling.

Q. And what do you mean by it makes you feel whacky? Describe that.

A. Very manic. Very high manic. Do you know what manic is? Very hyper and manic and it - - and it's not a good feeling. So then they have to give me Valium to bring me down off that. So it's counter - - anyway, it's just a mess. I was a mess. I don't ever want to go through that again.

Hearing Transcript, p. 154.

14. Donna Foord graduated from Marshalltown, Iowa, as a Registered Nurse. She worked as an RN until 1992 when she received a BS in science at Lewis and Clark. She then went to North Dakota University on a "fast-track" physician assistant program graduating in 1995. Ms. Foord has practiced in Sandpoint for 33 years under the direction of various local physicians.

15. Ms. Foord addressed Claimant's March 9, 2012 hospitalization and March 13 statement to Ms. Ridon at the hearing:

Q. (By Mr. Kelso): There was some discussion about steroids and bipolar medication. Do you - - can you give us any general wisdom on the impact of steroids on bipolar medication?

A. Well, steroids in and of themselves, particularly at high doses - - I can't - - she was on 20 milligrams a day by then. But she'd been in the hospital and having some IV, I'm sure.

They can create a steroidal psychosis. And people can get really - - I don't know. Some people can get mean. Some people can just get goofy. You know, just emotionally in that they just can have some sort of a short-term psychosis until you start weaning them down off that.

Q. Tell the north Idaho miner what you mean by psychosis.



A. An emotional disturbance. You're not really psychotic, but you can have - - I mean, with her bipolarism it could exacerbate her symptoms. But to - - to specifically go to this patient instead of an ungeneral [sic] steroids could exacerbate either a very manic state or a very depressed state. So I guess specifically in her case that would be what I would be concerned about.

Q. Okay. How about clarity of thought?

A. Yeah.

Q. What do you mean "yeah"?

A. Well, if you're not - - if she's severely depressed, she's not necessarily going to be thinking along the right lane - - or the right path. And if she's severely manic, her thoughts are going to be kind of flight of ideas and kind of that way.

Hearing Transcript, pp. 196-197.

16. While Ms. Foord was unable to testify regarding how the particular medicines affected Claimant specifically, she did testify that, in her opinion, Claimant would have been in no condition to give any important information in a recorded statement so soon after her release from the hospital.<sup>3</sup>

17. The Referee finds that Claimant's lack of memory regarding giving the recorded statement to Ms. Ridlon was reasonable under the circumstances. Such a finding certainly does not mean that Claimant did not give the statement; only that the weight to be given it is less due to her mental condition at the time. Further, there were inaccuracies in the statement giving credence to the proposition that Claimant may have been somewhat confused while recounting certain historical events. For example, Claimant testified that her shoulder became sore while moving buckets of parts. However, she never mentioned to Ms. Foord moving buckets as a potential cause of her shoulder pain. Further, Claimant stated that Ms. Foord suggested that Claimant file a workers' compensation claim in

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<sup>3</sup> To Ms. Ridlon's credit, she did give Claimant at least two opportunities to stop the interview; Claimant declined.

October 2011 but she refused as she could not afford to as her husband was out of work. However, Claimant testified that her husband was not out of work in October, it was not until December or January that he was out of work on his seasonal break. Moreover, Ms. Foord's records for October 25, 2011 fail to mention anything regarding any work-related injury or that Claimant should file a workers' compensation claim.

Ms. Ridlon's conversation with Ms. Foord

18. On or about March 15, 2012, Ms. Ridlon called Ms. Foord to verify what Claimant had told her (Ms. Ridlon) about Ms. Foord's recommending to Claimant that she file a workers' compensation claim in November 2011. Ms. Foord confirmed that she had told Claimant in November 2011. Ms. Foord followed-up the conversation with Ms. Ridlon with a March 15, 2012 note wherein she indicated:

On 11/8/11 she came in for the results of her tests. I told her she had calcific tendonitis and that she need [sic] to rest this arm. It will put her at a higher risk of tendon tear. We discussed her job wherein I think the problem laid. I asked her to fill out a W.C. form and talk to her supervisor to do a different job, while this heals. I do remember her telling [sic - me] she had to work because her husband was laid off at the time. She would see what she could do.

Alaska National's Exhibit 4, p. 53.

19. At hearing, Ms. Foord testified as follows regarding her conversation with Ms. Ridlon:

I do remember that phone call. And I do remember - - this is my schedule with a flight out of town right here. (Indicating.)<sup>4</sup> I had to - - of course, for HIPPA regulations, each one of these is a patient. (Indicating.) She (Ms. Ridlon) called me on this day. I was interrupted, came out. And

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<sup>4</sup> Ms. Foord was referring to her calendar for the date of the telephone conversation that showed a number of appointments (names redacted for HIPPA purposes) followed by a scheduled flight.

I'm flipping back and forth between pages<sup>5</sup> and I'm trying to give her the best knowledge.

And then this shows up in writing, I go back and look at my actual chart notes in chronological order. And apparently I'm summarizing this right here.

\* \* \* \* \*

I would have no other reason to go back and, you know, specifically pick out all the - - my notes, put them in chronological order and read them in that manner. And I remember this phone call, being called out of a room and clicking on Donna's [chart] and looking at this encounter and then that encounter and - - when I should have said I cannot talk to you right now.

20. Ms. Foord is a credible witness. She convincingly testified<sup>6</sup> that she was busy and somewhat distracted during her telephone conversation with Ms. Ridlon and did not review Claimant's chart in chronological order. Ms. Foord reiterated her belief, under oath, that she first informed Claimant on January 26, 2012 of her work-related bilateral calcific tendonitis and the need to file a workers' compensation claim. Ms. Foord's testimony in this regard is also consistent with her chart notes taken contemporaneously with her visits with Claimant.

21. Claimant is also a credible witness. It was clear from observing her and listening to her testimony at hearing that she is frustrated at not being able to receive the care she needs for a condition that, to her at least, is clearly work-related. Her testimony is also consistent with the medical evidence in this matter.

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<sup>5</sup> Ms. Foord is referencing her chart notes regarding her treatment of Claimant.

<sup>6</sup> Ms. Foord has never before been called as a witness in 33 years of practice. The Referee noted that Ms. Foord appeared very concerned that her words to Ms. Ridlon regarding when she first told Claimant about the work-relatedness of her shoulder could have created such confusion. Further, she candidly admitted that she should not have talked to Ms. Ridlon at that time, as she was busy and otherwise preoccupied.

22. The Referee finds that Claimant was first informed that she had work-related occupational disease when so informed by Ms. Foord on January 26, 2012.

#### Notice

23. The Referee further finds that Claimant gave notice to Employer of her occupational disease on February 28, 2012, well within the 60 days allowed by statute.

#### State Insurance Fund

24. State Insurance Fund's coverage for Employer ended December 31, 2011. Because it has been found that Claimant's occupational disease did not manifest within State Insurance Fund's policy period, they bear no responsibility in this matter.

25. While Claimant's counsel spent considerable effort in attempting, through witnesses, to reconcile the various dates of first manifestation and notice found on various First Reports of Injury and other claims-associated documents, the Referee is disinclined to make findings in this regard because they would not be relevant considering the above findings.

### **CONCLUSIONS OF LAW**

1. Claimant was first informed by a medical practitioner that she was suffering from an occupational disease on January 26, 2012.

2. Claimant timely notified Employer that she was suffering from an occupational disease on February 28, 2012.

3. State Insurance Fund was not on the risk at the time of the manifestation of Claimant's occupational disease and should be dismissed as a party hereto.

## RECOMMENDATION

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

DATED this \_\_28<sup>th</sup>\_\_ day of February, 2014.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

## CERTIFICATE OF SERVICE

I hereby certify that on the \_\_14<sup>th</sup>\_\_ day of \_\_March\_\_, 2014, 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 83816-1312

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

ALAN R GARDNER  
PO BOX 2528  
BOISE ID 83701

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Gina Espinosa

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

DONNA MILLER-O'BRIEN,

Claimant,

v.

CYGNUS, INC., Employer, and ALASKA  
NATIONAL INSURANCE COMPANY,  
Surety,

and

CYGNUS, INC., Employer, and STATE  
INSURANCE FUND, Surety,

Defendants.

**IC 2012-005159**

**2012-013226**

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**ORDER**

**Filed March 14, 2014**

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Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with 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 was first informed by a medical practitioner that she was suffering from an occupational disease on January 26, 2012.

2. Claimant timely notified Employer that she was suffering from an occupational disease on February 28, 2012.

3. State Insurance Fund was not on the risk at the time of the manifestation of Claimant's occupational disease and is dismissed as a party hereto.

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

DATED this \_\_14<sup>th</sup>\_\_ day of \_March\_\_\_\_, 2014.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas P. Baskin, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_14<sup>th</sup>\_\_ day of \_\_March\_\_ 2014, 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 83816-1312

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

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ge

\_\_\_\_\_/s/\_\_\_\_\_