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

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| HEIDI MILLER,<br>Claimant,<br>v.<br>ENLIVANT,<br>Employer,<br>and<br>ARCH INSURANCE COMPANY,<br>Surety,<br>Defendants. | **IC 2018-018070**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**<br><br>**Filed July 30, 2020** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a default hearing in Boise on February 19, 2020. Randall Schmitz represented Claimant. Claimant presented documentary and testimonial evidence. She waived filing a written brief in favor of closing oral argument. The case came under advisement on February 19, 2020. Additional documentation was submitted by Claimant on April 21, 2020 and July 9, 2020. This matter is ready for decision.

## ISSUES

The issues to be decided as amended at hearing are:

Whether and to what extent Claimant is entitled to:

1. medical care and
2. attorney fees;

At hearing, Claimant limited her issues to medical care, including future medical care, and attorney fees. All other issues, being unripe because Claimant has not reached medical stability, are reserved.

## CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to benefits.

Defendants have not filed an Answer or entered an appearance.

## EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant; and

2. Exhibits A through T,

3. Additional medical billing information designated Exhibit U, and

4. Proposed Judgment designated Exhibit V.

The Referee has submitted proposed findings of fact and conclusions of law for the approval of the Commission. The Commission has reviewed the same, along with the testimony and evidence of record. The Commission declines to adopt the proposed decision and hereby issues these findings of fact and conclusions of law and order.

## FINDINGS OF FACT

1. Claimant began working for Employer, Enlivant, at its Heron Place facility, in June of 2016. Heron Place is a 40-bed assisted-living facility located in Nampa, Idaho. Claimant was employed as the facility's life enrichment coordinator. Her duties included frequent rearranging of furniture in the facility's common areas to accommodate various activities. She described these responsibilities as follows:

> A. So, the community is fairly small in the space, so many rooms had to serve multi-purpose and the main living area, common area, had couches and chairs set up for living and if I had entertainment I would have to rearrange the room and we had entertainment twice a week. Exercise daily. Rearrange the room. Get the couches out of the way, the chairs in place, so that they could do exercise. Shuffleboard. Rearrange the room. Bowling. Rearrange the room. Bingo. Rearrange the room. So, it was two to three times a day that I was rearranging the

room.

Q. And do you know how heavy this furniture is?

A. I didn't weigh it.

Q. Is it heavy?

A. Well, it's – I would rather not have moved the tables. The couches were on casters, but the tables were heavy.

Tr. 10:12 – 11:3.

2. Claimant's employment at Heron Place came to an end in late June of 2017. After leaving Heron Place, Claimant took a job at another assisted living facility. At her new job, her responsibilities do not include moving furniture. Tr. 11:21 – 12:1.

3. On September 14, 2016, Claimant was injured in an automobile accident while getting stamps from the post office within the course and scope of her employment.

4. Claimant reported the accident and injury and sought medical care that same day.

5. Claimant received conservative medical care from Drs. Barbara Quattrone and Stephen Martinez, chiropractic care from Dr. Rosie Main, and physical therapy from Jack Morris. During the course of her medical care she continued working. Surety accepted and paid medical care for neck and back injuries sustained in the car crash.

6. Claimant testified, and the medical records reflect, that her initial symptoms were of neck and low back pain. Tr. 12:12-17; Clt. Ex. C at 29; Clt. Ex. A at 1. She did not begin to develop right shoulder pain until sometime in November of 2016. Tr. 13:10-14; Clt. Ex. A at 1. Notwithstanding that her right shoulder pain did not arise until some months after the accident of September 14, 2016, Claimant nevertheless related her right shoulder symptoms to the motor vehicle accident by the following path:

A. So, it – as I was working and accommodating for my difficulties due to the back and neck injury, I was using more my upper torso, my shoulders and my arms to move the furniture throughout the community and it just started hurting and more and more to the point that I could no longer close my bra and I could not lift my arms when I would teach exercise class, I couldn't participate with my residents, because I just couldn't do the movements.

….

Q. Okay. What – at that time what did you think was causing – or what had caused the shoulder injury?

A. The more work in adjusting my posture and movements to accommodate my other injuries.

Q. Okay. And did you think that was related to the motor vehicle accident or to –

A. Yes, I did.

Q. Okay.

A. I thought it was a chain reaction.

Tr. 13:17-25; 14:19 – 15:2.

7. Claimant gave a similar account to Dr. Quattrone on April 3, 2017: "[Claimant] notes the shoulder hurts all the time. It hurts to do overhead activity. She at times has numbness in her fingers. This is intermittent. [Claimant] notes that she was using her arm more to lift things to not hurt her back and this is why she thinks it hurts now." Clt. Ex. A at 1. It does not appear that Dr. Quattrone ever endorsed Claimant's theory of causation.

8. Dr. Martinez took a slightly different history of onset from Claimant:

> [Claimant] presents for follow-up. She was last seen in the occupational medicine clinic on 12/13/16. At that time, she was being treated for a neck sprain and a back sprain. She was referred to Dr. Quattrone (physiatry) for further management of her condition. She developed right shoulder pain and stiffness which she attributes directly to the motor vehicle crash which occurred on 9/14/16. She reports that Dr. Quattrone referred her to Jack Morris physical therapy. She has completed physical therapy and reports that her neck discomfort has resolved. Similarly, her back discomfort has resolved. Unfortunately, she continues to experience right shoulder

> soreness and stiffness. She feels that her right shoulder discomfort is a direct result of her industrial motor vehicle crash. She reports that there was a scheduling mixup and she missed her last appointment with Dr. Quattrone and that Dr. Quattrone will not see her again. She continues to perform work as a caregiver. She reports that she is changing employers but will continue to perform direct patient care at a different facility. She reports pain when she reaches out in front of her and with overhead activities. She reports that her discomfort is of mild severity.

Clt. Ex. C at 29.

9. His note, though not necessarily inconsistent with Claimant's testimony and the theory she espoused to Dr. Quattrone, does not make reference to Claimant's specific belief that her right shoulder condition arose from accommodating the neck and low back injuries that were directly caused by the motor vehicle accident. Rather, Dr. Martinez broadly opined that Claimant's right shoulder condition was related to the motor vehicle accident: "DOI 9/14/16 sustained injury to the neck and back regions while on the job. She was driving for work when she was involved in a motor vehicle crash. She developed right shoulder pain subsequent to the crash … [t]his condition is deemed to be work-related (on a more probable than not basis) due to the motor vehicle crash." Clt. Ex. C at 27-28. While Dr. Martinez relates Claimant's right shoulder injury to the motor vehicle accident, it is not clear whether he does so because he believes the shoulder injury is a direct or indirect consequence of the September 14, 2016 accident.

10. On July 27, 2017, an MRI of Claimant's right shoulder revealed a tear, full thickness, of the superior labrum (a SLAP tear) and a partial tear of the anterior inferior labrum. Additional fraying, partial tearing, bursitis, and tendinopathy was seen in the rotator cuff. Surety did authorize this diagnostic imaging.

11. In August of 2017, Dr. Martinez referred Claimant to Dr. T. Clark Robinson for orthopedic evaluation. However, before Dr. Robinson could see Claimant, Defendants arranged for Claimant's evaluation by Dr. Daines. Dr. Daines's report is not in the record, but Claimant

testified that Dr. Daines did not relate Claimant's shoulder injury to the motor vehicle accident. He did, however, relate it to Claimant's work. Tr. 16:25 – 17:3. Dr. Robinson's subsequent report suggests that he, too, had some understanding that Dr. Daines related Claimant's right shoulder problem to the demands of her work.

12. Claimant eventually saw Dr. Robinson on February 9, 2018. He took the following history from Claimant concerning the onset of her right shoulder difficulties:

> The initial injury was in September 14 of 2016. She was involved in a motor vehicle accident. … Her initial complaints were of neck and back pain. She was treated with chiropractic manipulation and work restrictions and reports that her neck and back pain have resolved. She reports the shoulder started hurting in November. At work she was having to push couch is [sic] and table out of the way so that she could do her activities with the clients that she was treating. She would have to push the furniture around daily as the room was used for other activities. This is when she started noticing pain which she describes as a burning sensation in the anterior aspect of her shoulder. She had therapy on the shoulder but reports it aggravated her pain. She was also using iontophoresis. She had an MRI in July 2017. The MRI shows a SLAP injury as well as inflammation of the rotator cuff that no [sic] full-thickness tear. Patient had an IME in October by Dr. Deines [sic]. It was his opinion that the car wreck had nothing to do with her shoulder injury. She is [sic] been denied by work comp for the shoulder complaints.

Clt. Ex. G at 37.

13. Dr. Robinson concluded that Claimant's shoulder injury represented a new injury, unrelated to the motor vehicle accident. Dr. Robinson related Claimant's shoulder injury to the tasks of repetitive furniture moving imposed by her employment. Dr. Robinson neither referenced nor adopted Claimant's theory that the right shoulder injury is a natural and foreseeable consequence of the motor vehicle accident:

> It is reasonable to assume that the motor vehicle accident was not the cause of her right shoulder complaints. [H]er shoulder complaints began several months later. It is reasonable to assume on a more trouble[1] [sic] than not basis at [sic] the repetitive pushing a [sic] heavy furniture could lead to her right shoulder complaints. In that

[1] Clearly, Dr. Robinson meant "more probable than not" basis.

> since [sic] it would be a new work related injury but not related to the motor vehicle accident. The treatment options for her shoulder would be in my opinion to begin with a cortisone injection to the bicipital groove and therapy exercises. If she failed conservative treatment then a shoulder arthroscopy with decompression and biceps tenodesis would be considered.

Clt. Ex. G at 38.

14. Dr. Robinson's report of February 9, 2018 caused Claimant to file a separate notice and claim for an occupational disease incurred in connection with the repetitive demands of Claimant's work moving and rearranging furniture. In his opening remarks at hearing, Counsel for Claimant stated that he received Dr. Robinson's report on April 26, 2018, and immediately forwarded the same to surety with a demand to accept the new repetitive motion claim and provide treatment. *See* Clt. Ex. H. The record also contains a First Report of Injury ("FROI") prepared June 7, 2018 by a legal assistant at the office of Claimant's Counsel. Misty Coates, a claims examiner employed by surety's third-party administrator (Gallagher Basset), acknowledged receipt of the FROI by email dated June 15, 2018, and asked for further explanation concerning the date of injury, since the FROI did not reference a date of injury. Clt. Ex. J. The June 19, 2018 email from Coates reflects that she received an answer to her inquiry from Claimant's Counsel, who reported a date of injury of April 5, 2018. *See* Clt. Ex. J.

15. Finally, by Notice of Claim Status dated July 3, 2018, Coates denied a claim for injury of January 14, 2016, explaining that because this alleged injury predated Claimant's employment by Enlivant, no employment relationship existed at the time of the accident, and therefore no compensable claim could be entertained. Coates also explained that notice was untimely under I.C. § 72-701. Obviously perplexed by the Notice, Counsel explained that the original accident occurred on September 14, 2016, not January 14, 2016, and that in any event the recent FROI was for a new occupational disease claim based on Dr. Robinson's note of February

9, 2018. Clt. Ex. L. Nothing further from Coates was forthcoming, and on October 9, 2018 Claimant filed her complaint for occupational disease, alleging a date of manifestation of February 9, 2018. This was followed by an apparently identical "Amended Complaint" filed with the commission on January 7, 2019. Neither the original nor amended complaints were answered by Defendants. Claimant filed her Notice of Intent to Take Default on April 22, 2019, and on June 12, 2019 the Commission entered Claimant's default pursuant to Judicial Rules of Practice and Procedure (JRP) 6.

16. The medical bills of record support Claimant's claim for $480.00 in unpaid medical bills to the date of hearing. Medical records show Claimant is continuing treatment. No Physician has opined Claimant is medically stable.

**DISCUSSION AND FURTHER FINDINGS OF FACT**

17. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

18. A claimant bears the burden of proving that the condition for which compensation

is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). The Industrial Commission, as the finder of fact, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). 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).

19. Following the entry of default, JRP 6(c) requires Claimant to put on proof sufficient to establish a prima facie case to support an award. The prima facie case for an occupational disease claim may be summarized as follows:

> [Claimants] must demonstrate (1) that they were afflicted by a disease; (2) that the disease was incurred in, or arose out of and in the course of, their employment; (3) that the hazards of such disease actually exist and are characteristic of and peculiar to the employment in which they were engaged; (4) that they were exposed to the hazards of such non-acute disease for a minimum of 60 days with the same employer; and (5) that as a consequence of such disease, they became actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease.

*Burrows v. H.J. Heinz Co.*, 120313 IDWC, IC 2010-024034 at ¶ 24.

20. It is important to emphasize that the instant claim is for an occupational disease, allegedly incurred as a result of the repetitive demands of Claimant's employment, with an alleged manifestation date of February 9, 2018. This decision does not address the original claim for an accident of September 14, 2016, although facts and medical opinions relating to the original accident may have some bearing on whether Claimant has met the prima facie elements of her current occupational disease claim.

21. It seems clear that Claimant's right shoulder impingement syndrome can constitute an occupational disease, if shown to be causally related to the repetitive demands of her employment. *See* I.C. § 72-438. Therefore, the first issue of consequence is whether Claimant has adduced sufficient proof to establish a causal connection between the demands of her employment and her disease to the requisite degree of medical probability. There are a number of medical opinions to consider on this question. First, Dr. Quattrone's opinion may be dispensed with, because a review of her report does not establish that she ever rendered an opinion on the cause of Claimant's right shoulder condition. Certainly, she recounted Claimant's theory that the right shoulder condition is an indirect consequence of the September 14, 2016 motor vehicle accident, but her report expresses neither her agreement nor disagreement with that theory.

22. Dr. Martinez stated that he relates Claimant's shoulder condition to the September 14, 2016 motor vehicle accident. His opinion, if accepted, would denigrate Claimant's designs upon establishing a prima facie occupational disease claim; if the right shoulder is related to the September 14, 2016 accident, then it cannot constitute a separate occupational disease claim. However, Dr. Martinez's report leaves it unclear whether he believes that Claimant's shoulder injury was a direct consequence of the motor vehicle accident, or rather, an indirect result of

Claimant's accommodation of the neck and low back injuries from which she suffered immediately following the September 14, 2016 accident. If it is Dr. Martinez's opinion that the right shoulder injury is a direct result of the September 14, 2016 accident, he has not explained why it would take so long for symptoms to manifest. On the other hand, if it is Dr. Martinez's opinion that Claimant's right shoulder injury results from favoring her neck and low back, thereby overusing her shoulder to compensate, his report is silent on the biomechanical mechanism by which this might occur, rendering his opinion significantly under-supported.

23. More persuasive on the question of causation is the opinion of Dr. Robinson, who relates Claimant's shoulder condition to the repetitive demands of Claimant's employment. As Claimant has testified, her work at Heron Place required her to rearrange and move heavy furniture on a daily basis to set up for various events. Dr. Robinson's report establishes that he had a good understanding of Claimant's work. He found that Claimant's shoulder condition was, more likely than not, related to the demands of this work, as opposed to the September 14, 2016 accident. We find his opinion in this regard more persuasive. Accordingly, we conclude that Claimant has met her burden of proving that her right shoulder condition is causally related to the repetitive demands of her employment, and not to the September 14, 2016 accident.

24. Next, Claimant must prove that her employment subjected her to a risk of injury that was characteristic of and peculiar to that employment. *See* I.C. § 72-102(22). In other words, she must show that her employment subjected her to a risk that was different in character from the risk to which others are exposed in the general run of occupations. *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 323, 581 P.2d 770, 781 (1978), *overruled on other grounds by DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999). Without belaboring the issue, we find that the demands of Claimant's work are distinguishable from the general run of

occupations. In *Mulder v. Liberty Northwest*, a claims examiner developed carpal tunnel syndrome as a result of the physical demands of his employment. 135 Idaho 52, 53, 14 P.3d 372, 373 (2000). He demonstrated that the risk to which he was exposed consisted of driving, writing and keyboarding. *See id.* The employer defended the action by arguing that the risks to which the claimant was exposed could not be distinguished in character from the risks generally prevalent in all employments. *Id.* at 55, 375. The Court disagreed, finding that not every occupation involves exposure to the risks of developing carpal tunnel syndrome. *Id.* While many jobs might expose workers to similar risks, an equally great number might not. *Id.* The claimant in *Mulder* satisfied his burden of proof. *See id*. It is even easier to say that Claimant has satisfied her burden in the instant matter. The risk to which she was exposed, i.e. moving heavy furniture up to two or three times a day, is a risk that can be distinguished from the risks which exist in the general run of occupations.

25. Next, Claimant must prove that if hers is a non-acute occupational disease, she was exposed to the hazards of such disease for a minimum of sixty (60) days. There is no medical testimony on whether to characterize Claimant's disease as acute or non-acute. However, even if her disease is best characterized as non-acute in origin, it seems that she has satisfied the 60-day exposure requirement. She began working for Employer in June of 2016 on a full-time basis. She was exposed to the risk of injury on a daily basis. She first noted the onset of right shoulder discomfort in November of 2016.

26. Finally, Claimant must show that her disease left her actually and totally incapacitated from performing work in the last job in which she was injuriously exposed to the hazards of her disease. The record suggests that Claimant was placed on modified duty on or about December 20, 2017, by Dr. Martinez. There is evidence that Claimant was not exposed to the

hazards of her disease in her subsequent employment. Therefore, Claimant has satisfied this element of the prima facie case as well.

27. To summarize, we conclude that Claimant has satisfied the prima facie elements of her occupational disease claim as required by JRP 6(c).

**Medical Care**

28.. A claimant is entitled to reasonable medical care for a reasonable period of time for an industrial injury. Idaho Code § 72-432.

29. Here, all past medical care claimed relates to treatment and evaluation of Claimant's right shoulder injury. Such care is compensable.

30. Although the medical records and billing are not entirely transparent as to what was and was not paid by Surety, Claimant makes a prima facie case to support her claim for $480.00 in medical benefits to the date of hearing. Past denied bills are payable at one hundred percent of the invoiced amount pursuant to *Neel v. Western Const., Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). Future medicals for care of Claimant's right shoulder incurred after the date of this decision shall be payable by Defendants at the fee schedule rate. *Id.* at 150, 852.

**Attorney Fees**

31. Attorney fees are awardable where Defendants have unreasonably delayed payment of benefits due or unreasonably denied a claim. Idaho Code § 72-804. The handling of this occupational disease claim by Defendants is, frankly, mystifying. It would be easier to explain the actions of Employer were it uninsured and unsophisticated. However, Employer is appropriately insured, and the Surety's responsibility to timely adjust the workers compensation claims of the employees of its insured was legally assigned to a third-party administrator with many years of experience in adjusting Idaho Workers Compensation claims. Receipt of the occupational disease

claim was acknowledged by Gallagher Basset, and yet the denial issued on July 3, 2018 is almost nonsensical, apparently relying on a date of injury predating Claimant's employment as grounds to deny the claim. At any rate, it did not address the occupational disease claim referenced in the June 7, 2018 FROI. We think it important that Claimant's counsel tried to pierce the opaque lassitude of the third-party administrator by his letter of September 18, 2018, in which he explained that the accident occurred on September 14, 2016, but, regardless, the instant claim is for a separate occupational disease with a manifestation date of February 9, 2018. Even this failed to penetrate, causing Claimant to file her complaint on October 9, 2018, and an amended complaint on January 7, 2019. Defendants' answer was not forthcoming, and their default was subsequently entered per JRP 6(c). Even then, they could have taken some action to set aside the default within the time allowed but failed to do so. Defendants' actions and inactions leave us to conclude that Defendants have, at the very least, contested a claim for compensation without reasonable grounds, and/or neglected or refused, after receipt of a written claim, to pay the compensation owed to Claimant. Claimant is entitled to an award of attorney fees under Idaho Code § 72-804. Within 21 days of the date of this order, Claimant shall submit her memorandum in support of her claim for attorney fees, with particular attention to the factors enumerated in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

**CONCLUSIONS OF LAW AND ORDER**

1. Claimant has satisfied the prima facie case for an occupational disease with a manifestation date of February 9, 2018, and she is entitled to benefits therefor, to include the following;

2. Claimant is entitled to the invoiced amount of past medical expenses in the amount of $480.00.

3. Claimant is entitled to such future medical care as she may require for her right shoulder pursuant to I.C. § 72-432, such care to be paid at the fee schedule rate.

4. Jurisdiction over this case is retained as respects claims for future medical, indemnity and other benefits to which Claimant may be entitled for her occupational disease.

5. Claimant is entitled to an award of attorney fees under I.C. § 72-804. She shall submit her memorandum in support thereof within 21 days of the date of this order.

6. Pursuant to I.C. § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 30th day of July, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

## CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2020, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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