BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONNA MILLER-O'BRIEN, Claimant, v. CYGNUS, INC., Employer, and ALASKA NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2012-005159** **2012-013226** **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** **File 12/20/2017**

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 September 30, 2013.[1] Claimant was present at each hearing and represented by Starr Kelso of Coeur d'Alene. Susan Veltman of Boise represents Employer in these proceedings. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and in August of 2017 Referee Powers submitted his Findings of Fact, Conclusions of Law and Recommended Order to the Commission for review and consideration. The

[1] The Referee also conducted a hearing in Coeur d'Alene on July 24, 2013, and in Sandpoint on July 25, 2013. The Commission issued its decision (the Decision) on March 14, 2014, ruling that Claimant suffered from a compensable occupational disease (bilateral shoulder calcific tendonitis) and gave timely notice of that condition. The State Insurance Fund was dismissed because Claimant's occupational disease did not manifest within their coverage period and they are not a party to the instant proceedings. Also, defense counsel for Employer is a different attorney than represented Employer at the First hearing/decision.

Commission has carefully reviewed the proposed decision and concludes that different treatment must be given to the issue of whether Claimant has suffered a compensable occupational disease involving her cervical spine. Therefore, the Commission declines to adopt the proposed decision and, instead, issues these Findings of Fact, Conclusions of Law, and Order.

The issues to be resolved as the result of the hearing are:

1. Whether Claimant suffered a compensable occupational disease involving her cervical spine and, if not,

2. Whether a proposed surgery on Claimant's cervical spine equates to reasonable and necessary treatment for her bilateral shoulder occupational disease.

CONTENTIONS OF THE PARTIES

Claimant contends that she developed cervical spine problems as the result of using vibratory equipment repetitively over a three-year period while working for Employer. She contends that her cervical condition amounts to an occupational disease under Idaho law and she has met her burden of proof in so establishing. Alternatively, Claimant argues that even if the Commission fails to find that she suffers from a compensable occupational disease; Defendants should be responsible for the payment of the cervical surgery recommended by her treating neurosurgeon as that surgery is reasonable and necessary medical care for her unresolved bilateral shoulder condition.

Defendants counter that Claimant has failed to prove that she suffers from any occupational disease regarding her cervical spine and rely on medical evidence to support that position. While acknowledging that the Commission has already found that Claimant suffers from an occupational disease involving her shoulders caused by the same job duties as those allegedly causing cervical spine issues, nonetheless, her chronic degenerative cervical disk disease is not characteristic of or peculiar to Employer's business. Further, because Claimant's cervical spine degeneration constitutes a pre-existing condition, the *Nelson* doctrine applies even though Claimant was asymptomatic prior to her

employment by Employer, and Claimant is unable to establish that she suffered an accident that aggravated that underlying condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The files and records generated as the result of the first hearing including the Decision.

2. The testimony of Claimant presented at both hearings.

3. Claimant's Exhibits (CE) A-M admitted at the instant hearing.

4. Defendants' Exhibits (DE) 1-8 admitted at the instant hearing.

5. The post-hearing depositions of Bret Dirks, M.D., taken by Claimant on December 8, 2016 and Michael A. Ludwig, M.D., taken by Defendants on January 5, 2017.

All pending objections are overruled.

FINDINGS OF FACT

Claimant's hearing (second) testimony

1. Claimant was sixty years of age and residing in Athol at the time of the 2nd hearing. Per Findings of Fact number 2 of the Decision, "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."

2. Claimant worked on a "deburring" machine, among other tools, for the three years she was employed at Employer's.[2] Claimant would take "rough" parts and "debur" them which she described as, "Sanding, cleaning all the edges, making them pretty so you could send them out." HT, p. 15. Deburring can take some time and labor-intensive sanding depending on the part needing deburred.

[2] The Referee found that Claimant credibly tried her best at both hearings to verbally describe exactly what she did during the deburring process and the movement and positioning of her body in so doing, but found it difficult to describe (vs. demonstrate) some activities.

3. Claimant would retrieve the part(s) to be deburred from buckets stored on shelving near her work area. She would ask for assistance if the bucket she needed was too heavy for her to lift by herself. Depending on the size of the parts, there could be from one to 1900 parts in a bucket. If the latter, Claimant could spend up to a week-and-a half deburring them. Claimant performed her deburring duties eight hours a day at least five and sometimes six days a week for the three years she worked for Employer.

4. Claimant's work station consisted of a barstool on which she sat at a table with her arms outstretched. She also used a grinding/sanding wheel and a "jitterbug" or hand sander while seated (she could stand if convenient) and reaching in front of her with her arms fully extended (the "Frankenstein" position). Claimant also had to continually move her head from side to side and up and down to watch what she was doing. Her arms and neck were sore after an 8-hour day. She was given a 5-minute break in the mornings and afternoons and had half-an- hour for lunch.

5. Once Claimant finished wheel-grinding the parts, she would then use the vibrating hand sander (jitterbug) to smooth out the wheel-grinded parts as necessary. She would be situated at her work station similarly as when she was using the wheel grinder. Claimant would have to push down on the jitterbug to have it operate properly; sometimes she would alternate hands as one hand would eventually get tired. She would use the wheel grinder about one-half of the day and the jitterbug the other half.

6. Once Claimant finished with the jitterbug, she would then use "Silicot" like a "scrubby pad," a steel wool-like scouring pad to finish the product. This activity would also require Claimant's arms to be outstretched and her head held down with side-to-side movements. She used the silicot less than the wheel sander and the jitterbug.

7. Claimant testified that she never had any neck problems before her employment with Employer. She had never seen a doctor for her neck or had any cervical diagnostic testing done.

Claimant's neck condition "came to the forefront" 10 or so days before she could not work anymore in late February 2012. After her bilateral shoulder surgeries, Claimant still has unrelenting neck pain and continuing shoulder pain.

Medical evidence

8. On March 1, 2012, Claimant saw **J. Craig Stevens, M.D**., a physiatrist, for an IME at Surety's request. Dr. Stevens noted that Claimant's work with the deburring machine, "…exposes her upper body to very significant amounts of vibration." CE 8, first hearing, p. 106. Dr. Steven's "Impression" was: "Her diffuse pain pattern in conjunction with episodic dysesthesia is actually more worrisome for a cervical radiculopathy than true extrinsic shoulder joint pain. . . She may have 2 problems rather than one." *Id.* Dr. Stevens recommended cervical spine x-rays among other things and indicated that if Claimant failed to improve, he would pursue an MRI and electrodiagnostic testing[3] to determine the extent to which she has cervical radiculopathy. Cervical spine x-rays were performed on March 1, 2012 at Bonner General Hospital, and were read as follows by Edward VanVooren, DO:

> "Findings: There is a subtle retrolisthesis of C5 over C6. The cervical vertebral bodies are otherwise normal in height and alignment. There is no acute fracture or subluxation. There is disc space narrowing at C5-6 and C6-7 with endplate osteosclerosis and moderate anterior vertebral body osteophytes. There are mild uncoverterbral [sic] and facet joint spurs narrowing the neural foramen at C5-6 and C6-7. There is no prevertebral soft swelling. Impression: Moderate cervical spondylosis C5-6 and C6-7."
>
> CE 10, first hearing, p. 117.

9. In an addendum dated March 8, 2012, Dr. Stevens diagnosed a cervical strain and cervical radiculopathy and ordered a cervical MRI that was eventually obtained on April 30, 2013. The radiologist reported:

> 1. Mild central canal stenosis C4-5 and moderate segmental canal stenosis C5-6 and C6-7 due to bulging annulus.
>
> 2. Severe bilateral neural foramen stenosis C5-6 and C6-7 due to a combination of annular bulging, uncovertebral [sic] and facet joint hypertrophy/spurs.

[3] An upper extremity EMG had been previously been performed and was "entirely normal."

Stenosis is greater right of midline at C5-6 where there may be right lateral protrusion associated with the degenerative bone spurs.

3. Mild bilateral neural foramen stenosis C3-4 and C4-5.

CE 28, first hearing, p. 339.

10. Upon receipt of the MRI results, Claimant's treating **PA, Donna Foord**, recommended an orthopedic referral for Claimant's shoulders and a neurosurgical referral for her neck[4]. Surety's refusal to authorize further treatment resulted in the first hearing.

11. Dr. Stevens initially opined that Claimant had aggravated a pre-existing spondylitic condition. However, he subsequently informed the defense counsel that he did not wish to become involved in a litigated workers' compensation claim, and, if called upon to testify, would state that he was unable to determine the cause of Claimant's neck condition to a reasonable degree of medical probability.

12. Coeur d'Alene neurosurgeon **Jeffery Larson M.D**., saw Claimant on April 14, 2014 and again on May 27, 2014 at Surety's request. At the first visit, Dr. Larson noted, "Donna Miller-O'Brien has findings that need further attention." CE B, p. 68. Dr. Larson gave no opinion regarding the cause of Claimant's neck condition but deferred to an orthopedic work-up recommended for her bilateral shoulder problems, "Further testing is needed. Her findings appear to [be] shoulder related and not chronic findings with her neck." *Id.* Claimant was to follow-up after her evaluation by an orthopedic surgeon.

13. **Tycho Kersten, M.D**., an orthopedic surgeon, first saw Claimant on May 9, 2014 at Surety's request for her bilateral shoulder and neck issues. He performed Claimant's bilateral shoulder surgeries. Dr. Kersten declared Claimant to be at MMI regarding her bilateral shoulders on or about October 21, 2015.

14. Claimant saw **Terrence Rempel**, **M.D**., **MPH**, a board certified physiatrist, on June 4, 2014 at Surety's request. Claimant was complaining of neck and continuing bilateral shoulder pain.

[4] PA Foord opined regarding the cause of Claimant's bilateral shoulder calcific tendonitis but provided no opinion regarding Claimant's cervical situation.

Claimant informed Dr. Rempel that she was experiencing numbness and tingling into both hands. Dr. Rempel noted that Dr. Stevens had diagnosed a left C7 radiculopathy. Dr. Rempel had available the April 30, 2013 cervical MRI report. He noted that, "The patient reports neck pain with a pins and needles sensation in her cervical muscles. Cervical range of motion is limited and her neck feels stiff. She has increased neck pain with neck flexion, looking over her shoulders, and upward gaze" CE D, p. 199. Further, "Her job of injury involved deburring of parts. That job required application of pressure using both arms while pushing at both shoulders, power grasping with both hands, and exposure to vibration." *Id.*

15. With regard to Claimant's neck, Dr. Rempel diagnosed cervical multilevel degenerative change prominent at C5-6-7 and bilateral C7 radiculitis symptoms with negative EMG.[5] He prescribed physical therapy and assigned certain physical limitations.

16. In a June 9, 2014 follow-up, Dr. Rempel noted his agreement with Dr. Larson's decision to treat Claimant's shoulder problems first, and then address her cervical issues.

17. Claimant returned to Dr. Rempel on July 10, 2014, still complaining of continuing neck and bilateral shoulder pain, "Cervical range of motion is decreased. She has increased neck pain with neck movements." *Id.* While acknowledging that Claimant had been off work for two years, Dr. Rempel recommended a gradual return to light duty work.[6]

18. After being declared at MMI by Dr. Kersten for her shoulder surgeries, Surety sent Claimant to **Michael Ludwig, M.D**., a physiatrist, on December 2, 2015. Dr. Ludwig noted that Claimant denied any pre-existing shoulder or neck pain and, despite physical therapy, she has plateaued in her recovery; and her surgeon does not believe any further surgical intervention is likely to improve her functionality. After reviewing medical records and interviewing and examining

[5] Dr. Rempel suggested a new EMG study as the last one was two years old.

[6] Surety's nurse case manager informed Dr. Rempel that a light duty return to work with Employer was not an option.

Claimant, Dr. Ludwig diagnosed cervical degenerative disk disease (DDD) at C5-6 and C6-7 with moderate bilateral stenosis on a non-industrial basis.

19. At the time of his January 26, 2015 examination of Claimant, Dr. Ludwig pronounced her at a point of maximum medical improvement following her bilateral shoulder surgery. However, he felt that her functional limitations and pain complaints were atypical for someone with surgically treated shoulder impingement. He felt that part of Claimant's presentation was the result of referred pain from her cervical spine condition. In this regard Dr. Ludwig stated:

> Her posture with splinting of the cervical spine, along with referral pattern into the arms and upper extremities suggests possible cervical radicular pain referral pattern. Review of the operative reports yields relatively mild operative findings that seem out of proportion to her clinical presentation.
>
> As she presents today, the recommended restrictions of limited overhead work and limitation of lifting to 10# is appropriate. However, given her clinical presentation, a portion of her functional limitations are likely of cervical origin. If she pursues treatment of the cervical spine with functional improvement of the upper limbs, an additional examination to address any permanent restrictions solely related to the shoulders may be appropriate. I would not state the current shoulder restrictions are permanent at this time as further treatment of the cervical spine may improve her functional tolerance of activity.

(DE 7, p. 7).

Therefore, per Dr. Ludwig, some part of Claimant's loss of shoulder function is likely cervical in origin, and treatment of her cervical spine is likely to improve her referred pain with a corresponding increase in her shoulder function.

20. Dr. Ludwig did not relate Claimant's cervical DDD to her employment. He recommended "… revisiting treatment of the cervical spine to include possible diagnostics (EMG) and possible cervical epidural injections for diagnostic and therapeutic purposes." *Id.*

21. By letter dated April 20, 2016, defense counsel posed a number of additional questions to Dr. Ludwig. Dr. Ludwig responded to these questions as follows in a chart note dated May 3, 2016:

> 1. Did claimant's employment for 03/09/2009 through 02/28/2012 cause the cervical spine MRI findings of 04/30/2013?

> No. The findings of the cervical radiographs of 3/1/12 are long-standing at C5/6 and C6/7 degenerative spondylosis with remodeling. This is a chronic condition, and would not be caused by the nature of her employment.
>
> 2. Did the 04/30/2013 cervical spine MRI findings pre-date claimant's employment which began on 03/09/2009?
>
> Yes, on a more likely than not basis. No prior images are available to me of the spine prior to 3/1/12, but these types of changes typically occur slowly over decades of life.
>
> . . .
>
> 4. Did claimant's employment from 03/09/2009 through 02/28/2012 aggravate claimant's cervical spine condition? If so, and in what matter?
>
> Her employment did not likely alter the natural progression of degenerative osteoarthritis of the cervical spine.
>
> 5. Are the changes and claimant's cervical spine MRI findings between the studies of 04/30/2013 and 02/25/2016, if any, causally related to the claimant's employment from 03/09/2009 through 02/28/2012?
>
> There is slight worsening of condition noted in the Interval from 4/30/13 to 2/25/16. This would be consistent with progression of an underlying degenerative condition over that period of time, and would not be attributed to any unique physical demands of her employment. Time and activities of daily life would explain the change in condition.

(DE 7, p. 12-13)

Finally, Dr. Ludwig agreed with Dr. Dirks that a cervical diskectomy and fusion at C5-6 and C6-7 would be reasonable to treat pain related to her DDD, but such a procedure would not be related to her employment.

22. Defendants authorized Claimant to be seen by Coeur d'Alene neurosurgeon **Bret Dirks, M.D**., who first saw Claimant on February 16, 2016. A that time, Claimant was complaining of "… low back pain as well as neck pain and bilateral shoulder and arm pain." CE G., p. 447. Dr. Dirks requested updated MRIs of Claimant's low back and neck.

23. After reviewing Claimant's cervical MRI, Dr. Dirks recommended a cervical fusion, the need for which he attributed to Claimant's employment.

Medical Testimony

24. Both Dr. Dirks and Dr. Ludwig were deposed, and both rendered opinions on the threshold issue at the heart of this case, i.e. to what extent, if any, is Claimant's cervical spine condition the product of the hazards to which she was exposed in the course of her employment by Defendants. Both doctors came to different conclusions on this question, and a careful examination of their testimony is necessary to ascertain whose is the most persuasive opinion.

Bret Dirks, M.D.

25. Dr. Dirks is a board certified neurosurgeon. After a brief review of his understanding of Claimant's work activities, Dr. Dirks was asked to comment on the extent to which the cervical spine condition with which Claimant presents can fairly be related to the aforementioned activities of her employment. Dr. Dirks testified to his opinion that Claimant's cervical spine condition is, indeed, causally related to her employment, but it is worth examining this opinion in the broader context of his views on the etiology of Claimant's cervical spine condition:

> A. So I will give the short version and then I will explain why I come up with the answer to the short version. The short version, just so the commission understands it, I think on a more probable than not basis there is no question in my mind, based upon reviewing this work history, based upon everything else, that it is related to an occupational hazard and it contributed to her neck problem. Okay.
>
> The answer and explanation is this. I am going to assume that what you state in this paper work you have given me, Exhibit #1, that she had no neck problems or complaints prior to this. She had never sought treatment for neck pain. She had never undergone an MRI or x-rays of her neck. Making those assumptions as being true, then she clearly had not had neck issues prior to this job.
>
> Now I don't doubt that she had some element of preexisting condition in her neck. I don't doubt that she had some sort of element of degenerative disease in her neck as she - - she is 59 years old when she came to see me. And so we all go through a certain amount of degenerative changes in our spine. That's not debatable. The question is did she have symptoms prior to the occupation that she was involved in. And the answer is no, she did not based upon this information in Exhibit #1. So she goes on this job. She spends three years doing this job. It's very detailed on this sheet of paper. Clearly she had an occupation hazard that could have contributed, and probably did on a more probable than not basis, to cause her neck injury. You have Dr. Stevens who testified to that. You have Dr. Ludwig who testifies to that. They are both physiatrists. They are

> physical medicine doctors that deal with occupational issues all the time. I deal with them from a cervical spine or lumbar spine standpoint. So I think in agreement, all three of us, it's clear that we all think that this occupation that she was involved in on a more probable than not basis contributed to her neck problem. So you have a situation where she does all of the work and now she has neck issues, now she has shoulder issues. Those need to be addressed. And occupational hazard is often times very difficult to prove. I think when you have three physicians willing to say that this of a more probable than not basis was related to this job I think there is no question in my mind. And I think it should be accepted. (Emphasis supplied).

…

> Q. [By Ms. Veltman] Dr. Dirks your testimony was that you believe the job that Ms. Miller-O'Brien did contributed [sic] to her neck problem. Is that accurate?
>
> A. Yes.
>
> Q. Is that another way of saying it aggravated a pre-existing condition?
>
> A. We don't know that. I said it's very possible she had some degenerative changes prior to her starting this job. But we don't have any evidence of that if you have no x-rays, no complaints from her, no doctor visits from her, no MRIs prior to this. I said she could have very easily had some degenerative changes in her neck and I would expect that we'd have some. But I would expect you to have some and me to have some and Mr. Kelso to have some as well. I currently don't have neck pain. So if I started a job like this, I probably would have neck pain after three years of doing this. So the answer is did the work contribute to the problem. Absolutely, because she was asymptomatic prior to the job. Three years later now she becomes really symptomatic. And so we have this situation now.

(Dirks' Deposition, 16/2-17/25; 22/22-23/18).

Therefore, per Dr. Dirks, the cause of Claimant's cervical spine presentation is multi-factorial. Dr. Dirks does not doubt that Claimant suffered from pre-existing degenerative disease of the cervical spine. He also makes it clear that Claimant's employment related activities "contributed," on a more probable than not basis, to Claimant's current cervical spine condition.

26. Dr. Dirks was next asked whether, by review of the 2013 and 2016 MRI studies, it is possible to date the onset of the changes seen on those studies. Dr. Dirks noted that the medical record does not contain radiological studies of Claimant's cervical spine taken before she began her employment with Employer. Therefore, the condition of Claimant's cervical spine immediately

preceding her employment by Employer cannot be known. Even in the absence of pre-employment radiology studies, if Claimant had presented with complaints of neck discomfort prior to the commencement of her employment with Employer, it might be possible to deduce that some part of the changes noted on the 2013 MRI actually pre-dated her employment with Employer. However, at the end of the day, in response to counsel's pointed question about dating the onset of the changes seen in Claimant's 2013 and 2016 MRI studies, Dr. Dirks stated, "We can't say this is from 25 years ago because we don't know. So on a more probable than not basis, we don't know." (Dirks' Deposition, 18/23–19/1). In other words, based on review of the MRIs alone, it is impossible to know whether or not, or to what extent, the changes seen on those studies pre-date Claimant's employment. Dr. Dirks believes that Claimant's employment is responsible for the changes seen on the 2013 MRI because there is no evidence that it is not. (Dirks' Deposition, 25/13-26/8). As developed *infra*, Dr. Ludwig testified that it is possible for an expert to review the 2013 cervical spine MRI and make some informed deductions concerning the age and etiology of the changes seen on the 2013 study. Dr. Dirks feels that the MRI is not inconsistent with a pure industrial cause, and an industrial cause is further supported by the fact that Claimant had no cervical spine symptoms prior to her employment by Employer.

27. Finally, Dr. Dirks offered the following comments in connection with counsel's assertion that Dr. Ludwig thought that Claimant's "neck condition was creating the shoulder problems." (Dirks' Deposition, 11/9-12). Dr. Dirks testified:

> A. So what I am reviewing now is the report provided by Dr. Ludwig. And the date on that was 12/2/2015. And he comments that treatment of the cervical spine with functional improvement of the upper limbs and talks about this may be related to her cervical spine. I would not disagree with that.
>
> If the commission says that she has bilateral shoulder calcific tendonitis, I would testify that neck surgery is not going to fix calcific tendonitis. However, I think it is important to recognize that there is a lot of overlap between shoulder pain, shoulder issues in the neck. Sometimes it's hard to say this is a shoulder problem, this is a neck problem. Sometimes it's both. It very well may be both. And I would agree with Dr. Ludwig's

> assessment that the neck as it presents itself as seen on these MRI's, which I have reviewed previously, that taking care of the neck problem, as I have described in my surgical request, that this would probably help with some of the shoulder pain, if not all of it, depending on how much is contributing from the calcific tendonitis as they have already accepted.

(Dirks' Deposition, 11/21-12/18).

Therefore, Dr. Dirks expressed his agreement with Dr. Ludwig's view that some part of Claimant's shoulder symptomatology might actually be referred pain from her cervical spine condition; the shoulder symptoms from which Claimant currently suffers may be mediated by both her calcific tendonitis of the shoulder and her cervical spine condition. However, as developed *infra*, this testimony does not support the conclusion that Claimant's need for cervical spine surgery is causally related to her accepted occupational disease for bilateral shoulder calcific tendonitis.

Michael A. Ludwig, MD

28. As noted, Dr. Ludwig is board certified in physical medicine and rehabilitation. (DE 7, p. 16). His practice focuses on musculoskeletal and spinal disorders. (Ludwig Deposition, 5/11-16). While acknowledging that the MRI studies at issue provide only a "snapshot" of the condition of Claimant's cervical spine, he testified that it is entirely possible to date and establish the etiology of certain of Claimant's cervical spine conditions from review of those snapshots. (Ludwig Deposition, 27/8-34/17). Claimant's counsel challenged Dr. Ludwig with the example of an x-ray revealing a broken leg. He suggested to Dr. Ludwig that this snapshot would reveal only that the leg was broken, but nothing about how long it had been broken or what had caused it. Dr. Ludwig explained that, in fact, such an x-ray will reveal something about how long prior to the study the leg was broken, since one can observe the absence or presence of a healing response on the film. Dr. Ludwig explained that exactly the same analysis applies to the interpretation of Claimant's cervical spine films. A trained interpreter is able to explain whether the changes seen are chronic or acute, and if chronic, within what time frame those changes are likely to have developed. According to Dr. Ludwig, the changes seen on

Claimant's 2012 and 2013 radiological studies take years to develop and likely pre-date Claimant's first day of work for Employer.

> Q: [By Ms. Veltman]: The portion of your response to Question No. 1 where you indicated the cervical radiographic findings were long-standing, why do you believe that?
>
> A: I believe her images were taken within a few weeks of her date of injury. The changes on her radiograph show a loss of disc height with an accommodating enthesopathy or uncovertebral joint hypertrophy, and that is typically a slow, chronic response to loss of disc height and degenerative change. That process takes years to develop. That is not something that's seen in the acute stage from an injury.
>
> Q: And I want to be sure we're talking about the same diagnostic study. I'm currently talking about the cervical x-ray from March 1, 2012?
>
> …
>
> A: Yes. The earliest x-ray that I have access to is March 1, 2012.
>
> Q: So with regard to the findings on that x-ray, March 1, 2012, do you have a medical opinion as to whether or not those would have preexisted March 9, 2009?
>
> A: My opinion would be that they likely preexisted the 2009.
>
> Q: When you say "likely," is that - -
>
> A: On a more likely than not basis.
>
> Q: Why do you say that?
>
> A: These appear to be long-standing changes. And again, watching people over time, these changes develop very slowly. So in a process of three years I would not expect to see the development of this stage of degenerative change.
>
> Q: And I'm going to ask a similar question with regard, now, to the cervical MRI spine findings of April 30th, 2013. Do you have an opinion as to whether or not these MRI findings would have predated March 9th of 2009?
>
> …
>
> A: In my review of the MRI these findings are consistent with the x-ray showing long-standing degenerative changes of the midcervical spine, and I would anticipate that this process of degeneration most likely started before 2009.
>
> Q: Is that opinion on a more probable than not basis?

A: Yes.

…

Q: [By Mr. Kelso]: So let's predict. When did the changes shown on Ms. Miller-O'Brien's MRI first begin?

Q: [By Ms. Veltman]: Just to clarify, there's two MRIs. Are you talking about the 2013 MRI?

Q: [By Mr. Kelso]: 2013.

A. I would state that the process started at least ten years prior, based on an estimate - -

Q: Based on what?

A: Of the amount of desiccation of those discs. The discs lose hydration very slowly, so the desiccation and darkening of the disc physiologically has been shown to take years to develop. The reactive changes of the bone also is a process that is a very slow process.

(Ludwig Deposition, 15/25-16/14, 16/23-17/19, 17/25-18/8, 31/11-25). Dr. Ludwig testified that changes of the type seen in Claimant's cervical spine are "chronic," i.e. changes that have been present for more than six months. This explanation does not denigrate his opinion that Claimant's radiological studies demonstrate changes which pre-date her employment. Dr. Ludwig's testimony is similar to the initial testimony of Dr. Dirks, above quoted. However, Dr. Dirks and Dr. Ludwig part ways on the issue of the extent to which those changes pre-dated Claimant's employment. In conformance with his written opinions, Dr. Ludwig proposed that Claimant's cervical spine condition is unrelated to her employment, and that the conditions observed on the 2013 MRI simply represent the natural progression of pre-existing degenerative changes unconnected to her employment. In reaching this opinion, Dr. Ludwig had access to Dr. Dirks' deposition along with the synopsis of Claimant's work activities which Dr. Dirks reviewed in reaching his conclusions. Also, Dr. Ludwig performed a literature search, and was unable to locate peer reviewed studies which supported the theorized mechanism of injury from repetitive use of the upper extremities. He acknowledged that such

repetitive activities can be responsible for upper extremity injury, but because the upper extremities dampen vibrations associated with the insulting activity, the literature, unsurprisingly, does not establish a connection between such activities and cervical spine injury. (Ludwig Deposition 18/9-19/14). Dr. Ludwig did not find the articles/advertisements gathered at Claimant's Exhibit L to be persuasive; none appeared to represent the findings of peer reviewed studies.

DISCUSSION AND FURTHER FINDINGS

Occupational disease

29. 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).

30. Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code § 72-102(22) which defined 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 . . .
>
> (b) "Contracted" and "incurred" when referring to an occupational disease, shall be equivalent to 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 or her 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 his or her work in the last occupation in which he or she 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 or process in which he or she was employed within the period previous to his or her disablement as herein after limited, the employee, or in the case of his or her death, his or her dependants shall be entitled to compensation.

Finally, 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.

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

1) That she was inflicted 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 disease occurred while she was employed with Employer, and

5) That she became disabled as a result of the disease.

Causation

31. In the context of an occupational disease claim, the term "incurred" is the equivalent of the term "arising out of and in the course" as used in an accident/injury case. (*See* Idaho Code § 72-102(22)(b)). Therefore, in an occupational disease case, as in an accident/injury case, Claimant bears the burden of proving that the occupational disease is caused by exposure to the hazards of her employment. *Sundquist v. Precision Steel & Gypsom, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

32. It seems obvious, but it is worth reiterating, that a pre-existing condition unconnected to the employment is never compensable. However, an employer can be held responsible for the payment of workers' compensation benefits for the worsening of a pre-existing condition caused by a work-related accident. The law does not admit the payment of workers' compensation benefits where a pre-existing condition is worsened by the day-to-day activities of Claimant's employment. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). In order for an occupational disease to be compensable, it must be demonstrated that it is the product of a claimant's employment,

as opposed to a pre-existing condition aggravated by the day-to-day demands of her employment; or that there was a work-related accident which worsened the pre-existing condition.

33. Here, the medical evidence is in conflict on the contribution of Claimant's employment to her diagnosed cervical spine condition. Dr. Ludwig contends that Claimant's cervical spine condition is unconnected to the demands of her employment. Dr. Dirks initially acknowledged that Claimant "doubtless" had degenerative changes of the cervical spine which pre-dated her employment, but that the demands of her employment "contributed" to her current condition. However, Dr. Dirks later suggested that all of Claimant's current cervical spine presentation is referable to the demands of her employment because (a) the MRI is consistent with a pure industrial cause, (b) Claimant was asymptomatic prior to the subject accident and (c) there is no radiological study pre-dating her employment to challenge the proposition that all of Claimant's cervical spine degeneration is referable to her post-employment activities. We are skeptical of this reasoning, and we find it difficult to reconcile this testimony with Dr. Dirk's earlier acknowledgement that Claimant suffered from cervical spine degeneration which pre-dated her employment. In all, we find Dr. Ludwig's testimony more persuasive, and therefore, we conclude that Claimant has failed to demonstrate that it is more probable than not that her cervical spine condition is causally, related to her employment.[7]

[7] In his dissent, Commissioner Maynard suggests that the medical opinions adduced in this case preponderate in favor of an industrial cause of Claimant's cervical spine condition. (See Dissent at p. 1, 3). In fact, only Dr. Dirks and Dr. Ludwig have weighed in on this issue. The record does not reveal that Drs. Kersten and Rempel expressed opinions on whether Claimant's cervical spine condition is, in some respect, related to her employment. While it might be argued that Dr. Rempel endorsed the notion that Claimant's bilateral shoulder complaints are referable to Claimant's employment (see CE D, p. 199) in none of the records he generated between June 6, 2014 and November 11, 2014 did he offer an opinion on the cause of Claimant's cervical spine condition. Dr Kersten, who performed Claimant's bilateral shoulder surgeries, did not express an opinion on the cause of Claimant's neck condition. Dr. Stevens currently has no opinion on this issue but his noncommittal position was taken defensively, to protect against the prospect of being called as a witness.

Nelson

34. Even were we to accept, as Dr. Dirks has testified, that the repetitive demands of Claimant's employment "contributed" to the development of her cervical spine condition, we would nevertheless be constrained to deny the claim on the basis of the rule finding its most notable contemporary expression in the case of *Nelson v. Ponsness-Warren Idgas Enterprises*, *supra*. Here, the evidence does not reflect that Claimant suffered any cervical spine symptoms prior to the commencement of her employment with Employer. However, Dr. Dirks acknowledged that Claimant's cervical spine disease pre-dated her employment, to some extent, even though she was asymptomatic. Although, as noted above, this case can be disposed of on the basis that Claimant has failed to establish causation, for the sake of argument, let it be supposed that, as Dr, Dirks has suggested, Claimant had asymptomatic degenerative disease of the cervical spine which pre-dated her employment, but that her employment worsened her pre-existing condition and caused it to become symptomatic.

35. As developed in *DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999), a pre-existing condition need not be symptomatic in order for the rule of *Nelson* to apply. In *DeMain*, Claimant suffered a work-related accident causing injury to his back in 1976, while working for another employer. Claimant began his employment with McLaughlin in 1985, by which time his low back condition was asymptomatic. However, the general demands of claimant's work at McLaughlin soon produced low back symptoms and evidence of additional injury to his lumbar spine. The Commission characterized claimant as suffering from pre-existing degenerative disk disease and a herniated disc which had been asymptomatic at the time he started work for McLaughlin. Therefore, the pre-existing condition at issue in *DeMain* (asymptomatic) can be distinguished from the pre-existing condition at issue in *Nelson* (symptomatic). The Commission initially relied on this

distinction to distinguish *Nelson* from the facts before it in *DeMain,* and to conclude that *Nelson* did not bar claimant's claim. On appeal, the Court stated:

> Although the evidence in Nelson established that the claimant suffered from a preexisting occupational disease, the holding in Nelson is not limited to those cases where the preexisting condition amounts to an occupational disease. In Nelson the court relied on several earlier cases in reaching its decision, including *Carlson v. Batts*, 69 Idaho 456, 207 P.2d 1023 (1949). In *Carlson* the Court held that in order to receive compensation for aggravation of a "preexisting bodily weakness, infirmity or susceptibility" a claimant must establish that the aggravation or injury was the result of an accident. The reliance on Carlson indicates that the holding in Nelson extends to all preexisting conditions, whether they are occupational diseases or simply weakness or susceptibilities.

Therefore, after *DeMain*, a pre-existing asymptomatic bodily weakness, infirmity or susceptibility is sufficient to implicate the rule of *Nelson*. Such a condition must be worsened by a work-related accident in order for the work-caused injury to be compensable. There is nothing in *Demain* to suggest that an asymptomatic pre-existing degenerative condition, like that at issue here, should receive different treatment than an asymptomatic pre-existing accident caused condition, like that at issue in *Demain*.

36. *DeMain* was also discussed in *Sundquist v. Precision Steel & Gypsom, Inc., supra*, in connection with another issue that has some bearing on this case, i.e. if Claimant's pre-existing cervical spine condition was not the result of an accident, must she show that the condition was "manifest" before the rule of *Nelson* applies? The *Sundquist* Court noted that while DeMain suffered from a pre-existing asymptomatic weakness or susceptibility, that condition had its genesis in a remote work accident. Per *Sundquist, DeMain* expanded *Nelson* to apply not only to pre-existing occupational diseases but also to the effects of pre-existing injuries. Here, there is no evidence that Claimant's pre-existing cervical spine condition has its genesis in a remote accident, occupational or otherwise. Nor is there any evidence that Claimant's pre-existing cervical spine condition constitutes an occupational disease which would implicate the rule of *Sundquist*. Under *Sundquist,* where a pre-existing condition is caused by long-term exposure to an occupational hazard, it must "manifest" before it can be said to

be a pre-existing occupational disease warranting application of the rule of *Nelson*. In other words, a claimant must know that his pre-existing disease is occupational in origin and he must learn this prior to the last employment in which he was injuriously exposed to the hazard of the disease. It would be nonsensical to impose such a requirement on a pre-existing condition caused by long-term exposure to a hazard or other circumstance which is not occupational in origin. Simply, such a condition would never qualify as an occupational disease because of the lack of a causal link between a prior employment and the condition. There is no evidence before us to suggest that Claimant's pre-existing degenerative disease of the cervical spine is, itself, occupational in origin. Therefore, we can perceive no reason why the rule of *DeMain* does not apply with equal force to the facts of this case. It is impossible to apply the manifestation requirement to a pre-existing non-occupational disease. Claimant's condition should receive the same treatment as the asymptomatic pre-existing condition at issue in *Demain*. In the instant matter, as in *Demain*, Dr. Dirk's testimony, or part of it, shows that Claimant suffered from a pre-existing physical abnormality which was asymptomatic prior to the employment in question, but which was made symptomatic by the demands of that employment. Therefore, the rule of *Nelson* prohibits the compensability of Claimant's claim, even if we accept that Claimant's current condition represents the industrial aggravation of a pre-existing condition.

37. To be sure, the rule of *Nelson* denies relief for aggravations of pre-existing conditions where it is shown that the occupational hazard to which such a claimant was exposed contributed to the development of his disease. It is difficult to explain this rule in light of the equally entrenched rule which recognizes that as long as a pre-existing condition is aggravated by an accident, the employment caused aggravation is compensable. It may be that the rule requiring proof of an aggravating accident in a case where claimant's injury has its genesis in a pre-existing condition was thought necessary to avoid evidentiary and other problems that might arise without some limit on occupational disease claims. Consider some of the difficulties that would attend abandonment of the rule of *Nelson*;

currently, a pre-existing bodily weakness, infirmity or susceptibility is compensable if aggravated by an accident. It is hard enough, sometimes, to ascertain whether an accident has aggravated a pre-existing condition, but ordinarily, the proof lies in adducing medical evidence of an acute injury which has aggravated a pre-existing condition. Absent *Nelson*, every pre-existing condition would be compensable on proof that the general demands of Claimant's work (if characteristic of and peculiar to his employment) aggravated a pre-existing condition. It would be much more challenging to sort-out whether the general demands of a claimant's work aggravated a pre-existing condition. How would one distinguish between wear-and-tear from the job and wear-and-tear that predated claimant's employment? Even if one could demonstrate a progression of a degenerative condition during a worker's employment, how would one determine whether that progression was the result of the demands of claimant's work versus the natural progression of the condition? Proving and defending such claims would be problematic, and might end up involving little more than guess work and speculation. While the rule of *Nelson* is well understood, the rationale for distinguishing between the two ways in which pre-existing conditions can be aggravated (one compensable, one not) is found neither in *Nelson*, nor *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 712 P.2d 559 (1985) nor *Carlson v. Bass*, 69 Idaho 456, 207 P.2d 1023 (1949). Perhaps it has something to do with the difficulties discussed above.

38. Finally, Claimant argues that even if the rule of *Nelson* is applicable to these facts, Claimant is nevertheless entitled to reasonable and necessary medical treatment for her cervical spine because such treatment is necessary in order to complete treatment of her accepted occupational disease of the shoulders, bilaterally. Per Claimant, cervical spine surgery is reasonable and necessary to "arrest and stay the ongoing functional limitations caused by the occupational disease in both shoulders." For the reasons set forth below, we reject this argument.

39. It is axiomatic that an employer is responsible for all the natural and probable consequences of a work-related injury. For example, where a work-related injury to a left knee causes gait alterations which, in turn, cause a need for treatment in the contralateral knee, employer will be responsible for that treatment as a natural and probable consequence of the original injury. See *Hartgrave* v. *City of Twin Falls* 2017 WL 3081748; 2 Lex K. Larson, Larson's Workers Compensation § 10.01 (Matthew Bender, Rev. Ed.) Further, other Commission cases recognize the proposition that if a claimant suffers from a non-work-related condition, the existence of which makes it impossible for her to proceed with care for a work-related injury, care for the non-work-related condition may be the responsibility of surety. For example, where claimant's orthopedic surgeon will not perform surgery until claimant stops smoking, surety may be held responsible for the costs of smoking cessation treatment. Similarly, where claimant's pregnancy makes it impossible for her to undergo carpal tunnel surgery, surety may be responsible for the continuation of TTD benefits during claimant's pregnancy, and until she can undergo the work-related surgery. *Feurer* v. *Universal Frozen Foods*, 1991 IIC 0791. Neither of these considerations is at play in the instant matter. There is no medical evidence relating Claimant's bilateral shoulder calcific tendonitis as the cause of Claimant's cervical spine condition. Nor is there evidence that Claimant must receive treatment for her cervical spine condition in order that she receives the treatment she requires, or the outcome she seeks, for her bilateral shoulder disease. The evidence only establishes that Claimant has shoulder pain, and that this pain may be multifactorial in origin; it may be caused in part by the residual condition of her shoulders following surgery, and it may be caused in part by referred pain from her cervical spine condition. No physician recommends further treatment for Claimant's shoulders. She has been deemed at a point of maximum medical improvement for this condition. The fact that Claimant may experience an improvement in function if the other source of her shoulder pain is treated, i.e. her cervical spine, does not mean that she requires cervical spine treatment because of her shoulder condition. It simply means that two

separate entities are contributing to her pain complaints. It is like saying because an individual has a work-related crush injury to the foot which continues to cause pain after maximum medical improvement, surety is also responsible for treatment of his diabetic neuropathy which is also thought to contribute to claimant's foot pain. The two things simply pass in space. We find Claimant's arguments in this regard unpersuasive. Claimant's shoulder function may improve as a result of cervical spine surgery, but simply because the cervical spine condition has been addressed, not because it has anything to do with Claimant's shoulder condition, a condition which may independently mediate some portion of Claimant's current complaints.

40. For the reasons above stated we conclude that Claimant has failed to demonstrate that she suffers from a compensable occupational disease of the cervical spine, and that she has likewise failed to prove that she is entitled to treatment of her cervical spine as part of the compensable shoulder claim.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has not proven that she suffers from an occupational disease regarding her cervical spine.

2. Claimant has not proven her entitlement to the medical treatment recommended by Dr. Dirks.

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

DATED this _20th_ day of __December__, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

COMMISSIONER R.D. MAYNARD, DISSENTING:

Following review of the record and controlling precedent in Idaho law, I respectfully dissent from the analysis and conclusions of the majority that this case is subject to the holding in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994) and its progeny, *DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999) and *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005). I believe the weight of the medical evidence supports the conclusion that Claimant did not have a pre-existing condition.

While it is within the purview of the majority to find one physician more persuasive than another, I would have conveyed less weight to Dr. Ludwig's opinion as compared against the combined medical records of Claimant's treating surgeon and the four other IME doctors' opinions regarding the condition of Claimant's neck. I would have concluded that Dr. Ludwig's opinion was less persuasive because his December 3, 2015 did not contain a review of Claimant's medical records prior to May 27, 2014, with the exception of the two MRIs from April 30, 2013. Dr. Ludwig did not examine medical records from 2012 and 2013 until late April 2016, well after he had submitted his opinion that he could not "draw a causal relationship of the cervical degenerative disk findings to her employment." DE 7, 7.

I would also have concluded that Dr. Ludwig's opinion was less persuasive because he demonstrated a significant lack of familiarity with the physical demands placed on Claimant by her work for Employer. *See,* Ludwig Dep., 38-43. During cross-examination, Dr. Ludwig either did not know or admitted he did not have information on how heavy Claimant's machinery was, how far she

had to extend her arms from her body to complete her work, how big or how heavy the parts were that she worked on, or the height of the workstation Claimant used. Additionally, Dr. Ludwig testified that he considered chronic conditions to be those present for at least six months, and that he was "comfortable agreeing to" the statement that the degenerative changes present on the April 30, 2013 MRIs would have been present for at least six months. Ludwig Dep., 34/20. To reiterate, Claimant was hired by Cygnus on March 9, 2009 and worked there until February 28, 2012 when she was taken off work by her physician. This timeframe fits within Dr. Ludwig's own chronic diagnosis, and cuts against his conclusion that Claimant must have had degeneration in her neck prior to 2009 despite a lack of medical imaging from that time.

On the cause of Claimant's cervical spine condition, I therefore find Dr. Dirks' opinion the most persuasive. It is worth repeating here:

> I think on a more probable than not basis there is no question in my mind, based upon reviewing this work history, based upon everything else, that it is related to an occupational hazard and it contributed to her neck problem. Okay.
>
> The answer and explanation is this. I am going to assume that what you state in this paperwork you have given me, Exhibit #1, that she had no neck problems or complaints prior to this. She had never sought treatment for neck pain. She had never undergone an MRI or x-rays of her neck. Making the assumptions as being true, then she clearly had not had neck issues prior to this job.
>
> Now I don't doubt she had some element of preexisting condition in her neck. I don't doubt that she had some sort of element of degenerative disease in her neck as she -- she is 59 years old when she came to see me. And so we all go through a certain amount of degenerative changes in our spine. That's not debateable. The question is did she have symptoms prior to the occupation that she was involved in. And the answer is no, she did not based on this information in Exhibit #1.

Dirks Dep., 16/6-25-17/1-3 (emphasis added). Rather than substitute his own vision of what Claimant's neck looked like prior to 2009, Dr. Dirks acknowledged the limits of Claimant's medical records in reaching his opinion on what probably led to her neck pain in 2012:

> We don't have a point in time prior to the work where we have an MRI to show what was going on inside of her neck. Clearly, based on this information given to me, she was asymptomatic prior to the job. We now have a point in time in 2013 where she

> shows a bulging disk, disk herniations, whatever you want to call them, along with some degenerative disease causing stenosis or narrowing around the nerves and potentially the spinal cord. So if she were symptomatic prior to this work, then I would say, okay, well, she had probably a lot of issues going on in her neck. We don't have the ability to say those words. We can't say this is from 25 years ago because we don't know. So on a more probable than not basis, we don't know. But we do know in 2013 she clearly had degenerative changes seen on the MRI. She clearly had disk bulging, disk herniations, which are indicative of more recent involvement, i.e., in the past few years let's say.

Dirks Dep., 18/11-25-19/1-5 (emphasis added). Dr. Dirks' opinion recognizes the lack of diagnostics against which he could compare Claimant's 2013 MRIs to evaluate the extent of the degeneration of her cervical spine. It also points out the likelihood of Claimant's degenerative changes occurring "in the past few years" prior to the 2013 MRIs. Dr. Dirks' opinion addresses Claimant's case in a more holistic way, with full knowledge of the physical demands of her job for Cygnus and of her medical history leading up to her neck pain:

> I am going to make that assumption [that everything must have been caused by the work] because I don't have anything else to believe otherwise. I mean I do this -- I take care of workers compensation patients all of the time. And what I see from them typically, if somebody comes in and they have had previous neck injuries, they've had previous neck problems and they showed degenerative -- have x-rays that I have to review from 20 years ago that shows a lot of these degenerative change [sic]. I don't have that here. It would be pure conjecture. And that's something we don't want to deal with. We want to deal with on a more probable than not basis that this job created the problem, that this job created her symptoms. It would be pure conjecture to say, oh yeah, her neck was like this 25 years ago. That makes no sense.

Dirks Dep., 27/2-17 (emphasis added). Dr. Dirks' causation opinion mirrors the treatment notes from other physicians in record, as well as Claimant's own recollection of her symptom chronology. In a March 21, 2012 Recorded Statement, Claimant stated that her cervical pain started around February 2012, the same time as her bilateral shoulder occupational condition, and that initially her shoulder pain was worse than her neck pain. DE 1. Claimant stated at that time that she believed the neck pain was due to her compensating because of the pain in her shoulders. DE 1, 55. These statements lend persuasive authority to the medical decision, made by Dr. Larson and confirmed by Dr. Rempel, to treat Claimant's shoulders before treating her neck. Dr. Dirks' opinion should have been found to

carry the most weight on the issue of whether or not Claimant's spinal degeneration was pre-existing or related to the nature of her work for Cygnus, especially when evaluated in the larger context of Claimant's documented medical history.

The Idaho Supreme Court's holdings in *Nelson*, *DeMain*, and *Sundquist* are distinguishable from Claimant's case. Claimant Nelson had a documented occupational disease prior to being hired by her employer. Claimant DeMain had a documented herniated disc injury about nine years prior to being hired by Employer that caused his previously asymptomatic pre-existing degenerative disc disease. Claimant Sundquist claimed workers' compensation liability against prior employers in an occupational disease claim. The common thread in *Nelson* and *DeMain* is that both claimants had medical documentation establishing the existence of an actual pre-existing condition. In *Nelson*, the Court concluded that when a claimant has a pre-existing occupational disease, she must establish that she suffered an accident while working for her current employer as a part of establishing an aggravation of that condition. *DeMain* extends the rule in *Nelson* to those claimants with asymptomatic pre-existing conditions, even those non-occupational in origin. Such is not the case before us with Claimant's cervical spine, as there is no evidence in the expansive medical record that she had mentioned neck pain to a medical provider prior to 2012. At no point in her prolonged litigation has Claimant averred that her neck pain was caused during a prior employment relationship. Claimant's testimony, combined with the medical records and the testimony of Dr. Dirks, supports a finding that Claimant did not have a pre-existing condition, weakness, infirmity, or susceptibility prior to her work for Employer, and therefore should not be required to establish that she suffered an accident per the holdings in *Nelson*, *Sunquist*, or *DeMain*.

Without a pre-existing condition in Claimant's cervical spine, I believe that the majority's application of *Nelson*, *DeMain*, and *Sundquist* to Claimant's case is in error. The precedent set by *Nelson* serves a purpose not applicable here; we should not utilize it to penalize injured workers or to

reward defendants for the natural aging processes of the human body. As the Idaho Supreme Court has repeatedly stated, "When interpreting the Act, we must liberally construe its provisions in favor of the employee in order to serve the humane purpose for which it was promulgated." *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009)(citing *Reese v. V-1 Oil Co.*, 141 Idaho 630, 633, 115 P.3d 721, 724 (2005); *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994)). It cuts against this humane purpose to place Claimant under the umbrella of *Nelson*. I would have concluded, as did Referee Powers in his recommendation, that to apply Idaho case law in this way "effectively eliminates everybody with joints in their bodies from succeeding in an occupational disease claim because all of us are degenerating to some extent with the passage of time." For these reasons, I must dissent.

DATED this _20th_ day of _December_, 2017.

____/s/_____
R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __20th__ day of _December_, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

STARR KELSO
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_____/s/_____

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