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

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| MAIDA C. ALLISON,<br><br>Claimant,<br><br>v.<br><br>KOOTENAI COUNTY,<br><br>Employer,<br><br>and<br><br>STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | **IC 2013-003466**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>August 14, 2014 |

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on May 12, 2014 in Coeur d'Alene, Idaho. Claimant was present in person and represented herself, *pro se*. Employer ("Kootenai County") and Surety (collectively, "Defendants") were represented by Bradley J. Stoddard of Coeur d'Alene. Oral and documentary evidence was admitted at the hearing. No post-hearing depositions were taken. Claimant's opening brief was filed June 19, 2014. On the next day, a *sua sponte* Order Staying Briefing Schedule was entered, allowing Claimant time in which to present a settlement offer to Defendants if she wished to do so. Subsequently, neither party notified the Commission that the matter had been settled, and both parties subsequently filed briefs. The matter came under advisement on July 30, 2014 and is now ready for decision.

## ISSUES

Pursuant to the parties' stipulation at the hearing, the issues to be decided as a result of the hearing are:

1. Whether Claimant has complied with the notice of limitations set forth in Idaho Code § 72-701;

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

3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and

4. Whether and to what extent Claimant is entitled to medical care.

Claimant also raises issues regarding mediation in her briefing. Notwithstanding being advised by the Referee in person at the hearing and in writing in the Order Staying Briefing Schedule, at the time of briefing, Claimant still apparently did not understand that mediation is a voluntary process, in which Defendants elected not to participate. Mediation will not be addressed further. Claimant's June 30, 2014 letter to Defendants via the Commission, as well as her attachment to her opening brief from page four on, have been determined by another Referee as correspondence related to settlement, and irrelevant to these proceedings. As such, they have been quarantined in the file such that the presiding Referee has not seen them.

## CONTENTIONS OF THE PARTIES

Claimant contends that she re-tore her right rotator cuff while moving notebooks and other objects in her office on February 17, 2012, during her last days of work. Therefore,

she is entitled to medical benefits related to her significant and progressive disability from that injury. No physician has provided a supportive causation opinion; nonetheless, Claimant asserts the February 17, 2012 event is the only possible causal event. Claimant acknowledges that she did not provide notice of her injury to Kootenai County until approximately eight months had passed, but asserts that this should not bar her claim because she did not suspect an industrial origin before then.

Without conceding that an industrial accident actually occurred, Defendants counter that Claimant's current right shoulder and upper extremity conditions are not related to any industrial injury, but are solely due to degenerative processes related to a prior right rotator cuff tear. Therefore, Claimant is not entitled to any workers' compensation benefits. They rely upon the medical opinion of Craig Stevens, M.D., a physiatriast and independent medical evaluator. Defendants further assert that there is an inadequate basis upon which to excuse Claimant's failure to provide notice within the statutory 60 days.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition of Claimant taken December 17, 2013;
2. Joint Exhibits ("JE") "1" through "8" admitted at the hearing; and
3. The testimony of Claimant taken at the hearing.

No evidence regarding settlement negotiations was considered, notwithstanding Claimant's filing of documents referencing this subject. Also, to the extent that Claimant's briefing alleges new facts not already in evidence, those facts are inadmissible and will be disregarded.

## FINDINGS OF FACT

After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

***BACKGROUND AND PREEXISTING RIGHT SHOULDER TREATMENT***

1. Claimant turned 86 years of age on the day of the hearing, and resided in Coeur d'Alene. She goes by her middle name, "Colleen." For 14 or 15 years, she worked as a grant writer and supervisor for Kootenai County. Her last day of work was February 17, 2012.

2. Claimant has a history of treatment for preexisting right shoulder pathology.

- In 1997, she was diagnosed with a shoulder strain after striking her right shoulder in a slip-and-fall at work. Concurrent x-rays were unremarkable.

- In 2001, she was treated for right shoulder pain for three months before x-rays demonstrating calcific tendinitis and mild AC joint spurring were taken.

- In 2005, she sought treatment for severe right shoulder pain following a presentation in which she was pointing at different charts. Right biceps tendonitis was diagnosed.

- In 2006, Claimant reported right shoulder pain from no known cause. X-ray imaging demonstrated significant subacromial spurring. Specifically, bony degenerative changes with spurring of the glenohumeral and acromioclavicular joint, nonspecific sclerotic change of the inferior lateral scapula, metastasis versus reactive buttressing related to the degeneration at the glenohumeral joint, and a bone island off the right humeral head. Subacromial bursitis with contribution from subacromial spurring were diagnosed. A steroid injection into the bursa temporarily relieved Claimant's symptoms.

- In 2009, Claimant reported neck and bilateral shoulder pain from no known cause. Right upper trapezius spasm and tendonitis were diagnosed. Claimant took medications and participated in physical therapy for several months in referral by Neil Nemec, M.D., Claimant's personal physician.

· In 2011, Claimant reported constant moderate to severe right shoulder pain for about a week from no stated cause.

***ALLEGED INDUSTRIAL ACCIDENT AND INJURY***

3. On February 17, 2012, during her last days of work at Kootenai County, Claimant cleared out her office. At the time, she was annoyed at Kootenai County's failure to provide her any assistance, its requirement that the task be completed immediately, and the concurrent pressure she felt to discard years of research materials she had compiled. Along those lines, Claimant's clearing-out activities included lifting and emptying six shelves of three-ring binders. At her deposition and in her notification letter to Kootenai County (see below), Claimant confirmed that she did not experience any unusual shoulder pain at that time. As discussed, below, however, in or around January 2013, Claimant came to believe that she sustained a new right rotator cuff tear on that day.

***SUBSEQUENT RIGHT SHOULDER TREATMENT***

4. On March 28, 2012, Claimant sought treatment for right shoulder pain radiating down her arm over the previous month after lifting a bag out of the trunk. Subdeltoid bursitis was diagnosed and a bursal injection was administered.

5. On May 2, 2012, Claimant sought treatment for right shoulder pain radiating into her right arm that awakened her at night and was accompanied by weakness and tingling from shoulder to elbow. Paresthesia of the right arm was diagnosed and nerve root irritation from arthritis was suspected.

6. On May 17, 2012, Claimant sought treatment for moderate to severe right burning shoulder pain, with onset six weeks before, in the absence of any injury. She reported she was unable to pick up a coffee cup. Cervical radiculopathy was suspected, and

a referral to Dr. McDonald was made. X-ray imaging showed stable degenerative changes with no acute cervical abnormality or progressive arthritic change.

7. Claimant subsequently sought medical treatment related to her right shoulder and/or neck symptoms on July 23, 2012, August 16, 2012, and November 12, 2012. Dr. McDonald ruled out cervical spinal cord compression based upon a July 26, 2012 cervical spine MRI. On November 12, 2012, Dr. Dunteman diagnosed shoulder arthritis secondary to a chronic rotator cuff tear. He also noted that Claimant knew of no specific cause for her symptoms, and reiterated that point in subsequent chart notes.

8. After a long discussion regarding her options, Claimant elected to proceed with conservative care. Dr. Dunteman referred Claimant for physical therapy in November 2012, and renewed his referral several times through the time of the hearing. She also underwent a cortisone injection, which significantly improved her symptoms.

9. On January 7, 2013, Dr. Dunteman reported Claimant's condition was improved, and she wished to continue conservative care. Two weeks later, however, she had developed additional symptoms, including catching, locking, recurring sleep disturbances, and limited motion, worse with activity. "She claims she has been doing more overhead movement and that her pain has definately [*sic*] increased. Not sure if related to P.T." JE8-195. Claimant underwent another injection and continued physical therapy.

10. On January 23, 2013, Claimant wrote to Kootenai County, asserting she had sustained a new right rotator cuff injury while lifting and emptying notebooks in her final days at work, and explaining why she had not previously reported the event. Excerpts state:

> · I realize this is not a timely report on an accident that occurred in my final days at the County. That being said, I was unaware at the time it was an injury that will affect how I handle the rest of my life.

· The research was in full, three-ring binders located on six full shelves. … I grabbed the 3-ring binders, emptied the contents and kept the binders…. …this involved reaching to six shelves, high and low….

· At the time, I felt no pain or strain.

· In the days that followed I only thought….arthritis, bursitis, or just old age was causing my right arm to be in pain with reaching and lifting.

· Knowing I didn't report the accident in a timely manner as I didn't realize at the time it was an accident or even an issue, I am reporting the situation at the time it was finally diagnosed, and the injury was connected to the only time and way it could have produced a re-torn rotator cuff which is inoperable.

JE1-9.

11. On January 29, 2013, Dr. Dunteman opined that Claimant suffered from right shoulder arthritis secondary to a chronic and retracted rotator cuff tear, and that her condition was significantly and progressively disabling. "Her condition is permanent and will continue to deteriorate with time and become more disabling." JE8-164.

12. On April 24, 2013, Claimant wrote to the claims adjustor, via the Commission, seeking reconsideration of the denial of her claim and explaining why she was unaware of her right shoulder condition within 60 days of her alleged industrial accident.

13. On May 10, 2013, Claimant reported a recent exacerbation of her right shoulder pain, though no details related to that event are provided in the corresponding chart note.

14. On May 21, 2013, MRI imaging of Claimant's right shoulder confirmed that she had a full-thickness supraspinatus tendon tear with three centimeters of retraction and a high-riding humeral head, a small shoulder joint effusion with a 1.2 centimeter loose body anterior recess, a proximal biceps tendon tear, and degenerative changes involving the acromioclavicular joint.

15. Claimant's symptoms persisted, and she continued to attend physical therapy and receive cortisone injections. On October 18, 2013, Dr. Dunteman's physician assistant noted, "She has chronic rotator cuff arthropathy secondary to her rotator cuff tear a few years ago." JE8-214. This is at least partially consistent with Claimant's claim that she re-tore her right rotator cuff.[1]

16. On November 20, 2013, Claimant underwent an independent medical evaluation ("IME") by Dr. Stevens. Prior to preparing his report, he interviewed and examined Claimant, and reviewed her medical records. Claimant reported that her symptoms changed after February 17, 2012. Previously, she said, her pain was more distal in her right arm, almost at the level of the elbow. Dr. Stevens remarked that "this is somewhat at odds with the records provided which very clearly detail right shoulder symptoms and treatment directed to the right shoulder itself." JE8-220.

17. Dr. Stevens diagnosed right-sided rotator cuff tear involving primarily supraspinatus with retraction that is chronic and preexisting. "The symptoms that she now describes are very similar to those that she had noted to multiple providers in the pre-injury timeframe which causes me to come to the conclusion that her current condition represents a continuation of her pre-injury status on a more probable than not basis." JE8-221. Dr. Stevens opined that Claimant would require further treatment in the future as her symptoms wax and wane, and also assessed 17% PPI to her right upper extremity along with restrictions, again opining that none of these is related to the alleged industrial accident. "Again I render this determination based upon several factors, first that the immediate post injury medical records do not reveal any mention of the injury and second that imaging

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[1] Claimant claims she re-tore her right rotator cuff; however, her medical records in evidence do not mention a prior tear.

obtained in the pre-injury timeframe (MRI was never performed pre-injury) revealed advancing and degenerative features." JE8-223.

18. Eventually, Claimant agreed to undergo surgery recommended by Dr. Dunteman. He performed arthroscopic right shoulder surgery on January 30, 2014 to debride her glenohumeral joint (to include the glenoid cartilage, labrum and humeral head, as well as rotator cuff and bursa), release the coracoacromial ligament (subtotal bursectomy and acromioplasty), and to diagnose remaining conditions. Dr. Dunteman reported gross interoperative findings via the arthroscope:

> …the biceps tendon was absent. The superior labrum was partially torn. The posterior labrum was partially torn. The inferior recess was severely synovitic. The glenoid cartilage had grade 3-4 chondromalacia throughout. The humeral head had grade 3-4 chondromalacia throughout. The rotator cuff articular surface had an irreparable full-thickness tear encompassing the supraspinatus tendon with retraction to the glenoid. The anterosuperior labrum was frayed but otherwise attached. The subscapularis was normal. The anteroinferior labrum and ligaments were normal. On the bursal surface there was a denuded coracoacromial ligament with exposed bone on the acromion and moderate spurring anterolaterally.

JE6-89, 90. Claimant's recovery was not documented in great detail in the record. Apparently, her symptoms improved, but no medical opinion regarding the nature and degree of her improvement is provided.

## DISCUSSION AND FURTHER FINDINGS

19. The provisions of the 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).

***NOTICE IS UNTIMELY***

20. Claimant contends that the accident giving rise to her injuries occurred on February 17, 2012, her last day of employment. Claimant concedes that she did not notify her employer of the occurrence of the accident until January 23, 2013. She concedes that notice is late but argues that late notice should be excused by virtue of the fact that she did not discover the true extent and degree of her right shoulder injury until sometime in early 2013, when she was so advised by her physicians. Claimant testified that it was at that point that she put two and two together and realized that the only incident that could have caused her injuries was her activities on her last day of work.

21. Claimant also testified that while she did remember experiencing some increase of pain/discomfort immediately following her activities of February 17, 2012, she originally thought that she had simply irritated some preexisting arthritis. She also described how, on the day following the events of February 17, 2012, she dropped a coffee cup because her arm "let go".

22. In addressing Claimant's assertion that late notice should be excused under these circumstances, attention must first be directed to the requirements of Idaho Code § 72-701. That section specifies:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident or, in the case of death, then within one (1) year after such death, whether or not a claim for compensation has been made by the employee. Such notice and such claim may be made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required.

Claimant does not argue that she gave notice to employer within the time required. Nor does she argue that employer had actual knowledge of the accident, such as to excuse a lack of timely notice as contemplated by Idaho Code § 72-704. Finally, Claimant does not argue that late notice should be excused because employer was not prejudiced by lack of timely notice. Instead, Claimant argues that because she did not discover the true nature of her injuries until January of 2013, late notice should be excused. This same argument has been advanced and rejected in at least two reported cases. In *Smith v. IML Freight, Inc.*, 101 Idaho 600, 619 P.2d 118 (1980), claimant suffered a fall at work which caused immediate pain in his shoulder. He continued to work and did not report the accident. He treated, and was eventually told that he suffered from osteoarthritis. He later saw another physician who eventually came to the conclusion that some of claimant's problems were related to the fall at work. He argued that his claim should not be time barred because he did not learn of the work-related nature of his condition until over a year following the alleged accident. Claimant argued that the term "accident" must be given a broader interpretation to allow the filing of a claim within the statutory period following discovery of the results of the accident. The Idaho Supreme Court rejected this argument, ruling that legislative intent was clearly expressed in the statute's language requiring that notice be given within a time certain following the accident. Had the Legislature intended the interpretation favored by claimant, it would have been simple to write the statute as requiring notice within a time certain following the "injury". However, the Legislature wrote the statute the way it did and it unambiguously requires notice within 60 days following the occurrence of the accident. The court noted the surprising harshness of the statute in light of the supposedly beneficent purposes of the Workers Compensation Act.

23. To the same effect is the court's treatment of the provisions of Idaho Code § 72-701 in the subsequent case of *Arel v. T&L Enterprises, Inc.*, 146 Idaho 29, 189 P.3d 1149 (2008). There, too, claimant argued that under Idaho Code § 72-701, so long as he gave notice within 60 days after discovering that his mishap had caused physical injury, notice was timely. Employing the same rationale adopted by the court in *Smith*, the *Arel* court ruled that the provisions of Idaho Code § 72-701 are unambiguous and that a so-called discovery exception could not be engrafted to the plain wording of the statute.

24. Here, as well, Claimant contends that while she experienced an increase in discomfort following the alleged accident, which she attributed to an irritation of her arthritis, she did not discover the true extent of her injuries until January of 2013. She contends that so long as she gave notice within 60 days following this date of discovery, notice should be deemed timely or, at the very least, that late notice should be excused. For the reasons as set forth in the cases discussed above, the Referee is compelled to reject Claimant's argument.

***MEDICAL CAUSATION***

25. Even were we to excuse Claimant's lack of timely notice, the claim fails for another reason. Simply, Claimant has failed to adduce medical evidence necessary to support her claim that her injuries are causally related to the subject accident.

26. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244

(1967). Claimant asserts that her time-of-hearing symptomatology was caused by the February 2012 industrial injury.

27. The claimant has the burden of proving 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 medical testimony supporting the claim for compensation to a reasonable degree of medical probability. 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, 560-561, 511 P.2d 1334, 1336-1337 (1973), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

28. The Idaho Supreme Court has held that 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).

29. Claimant asserts that she suffered an industrial right rotator cuff tear on February 17, 2012. Although Claimant sincerely believes, upon reflection, that her February 17, 2012 industrial activities caused her injury, the record lacks any medical opinion supporting her position. Interestingly, she testified at her deposition that she is medically qualified to render this opinion, but unqualified to comment upon the effect taking a bag out of her trunk may have had on her right shoulder:

> [Within a line of questioning regarding the cause of Claimant's right shoulder condition:]
>
> A. [Claimant] What you need to know, as I proceeded through the medical

arena, I didn't mark anything on my entry thing as an accident or work related because I didn't know.

Q. [Mr. Stoddard] Okay.

A. The only time I finally thought there's only one way I could have done it is that day.

Q. What day?

A. My last day of work. I mean, you have to have something occur that can tear a rotator cuff.

Q. What about lifting a bag out of a trunk?

A. I'm not medically qualified to answer that.

Q. Okay. Would you be medically qualified to answer if it would be knocking or taking three-ring binders off shelves?

A. Yes, I would.

Q. Why would - - what's your medical qualification in that regard, with all due respect, because you said you're not qualified?

A. I have none except being I removed those binders and emptied them. The Irish temper had caused that. I thought that they could have handled that differently. So I was really revved up to get out of there. I felt, Colleen, you probably irritated arthritis just go home [*sic*], which I did at the end of my hours. No, I'm not medically - - but my only thing is that in my mind that is the only time I could have done that kind of damage.

Cl. Dep., pp. 44-45. Claimant's comments in this regard are amusing and relatable, but they do not establish that Claimant actually believes she is qualified to render a medical opinion and, more importantly, the record fails to establish that she is. Therefore, her testimony fails to establish that she sustained an industrial torn right rotator cuff on February 17, 2012.

30. On the other hand, Dr. Stevens, whose medical qualifications are in evidence, and who was fully apprised of both the information contained in Claimant's medical records and her time-of-examination condition, opined that it is unlikely that any part of Claimant's right shoulder

condition, including her right rotator cuff tear, was caused by the events she described on February 17, 2012. Dr. Stevens' opinion is persuasive and supported by the weight of evidence in the record. Claimant has failed to establish that her right shoulder condition was caused by a workplace accident on February 17, 2012.

31. All other issues are moot.

## CONCLUSIONS OF LAW

1. Claimant has failed to establish that she suffered an industrial right shoulder injury.

2. All other issues are moot.

## RECOMMENDATION

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

DATED this _31st_____ day of July, 2014.

INDUSTRIAL COMMISSION

_/s/________________________________
LaDawn Marsters, Referee

## CERTIFICATE OF SERVICE

I hereby certify that on the __14th____ day of ___August____________, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MAIDA C ALLISON
103 W IDAHO AVE
COEUR D'ALENE ID 83814

BRADLEY J STODDARD
PO BOX 896
COEUR D'ALENE ID 83816-0896

sjw

_/s/______________________________

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

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| MAIDA C. ALLISON,<br><br>Claimant,<br><br>v.<br><br>KOOTENAI COUNTY,<br><br>Employer,<br><br>and<br><br>STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | **IC 2013-003466**<br><br>**ORDER**<br><br>August 14, 2014 |

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

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

1. Claimant has failed to establish that she suffered an industrial right shoulder injury.

2. All other issues are moot.

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

DATED this __14th____ day of ___August____________, 2014.

INDUSTRIAL COMMISSION

__/s/_____________________________________
Thomas P. Baskin, Chairman

__/s/_____________________________________
R.D. Maynard, Commissioner

___/s/____________________________________
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/___________________________________
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __14th_____ day of ___August______________, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MAIDA C ALLISON
103 W IDAHO AVE
COEUR D'ALENE ID 83814

BRADLEY J STODDARD
PO BOX 896
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sjw

__/s/______________________________