

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JACKIE BURROWS,

Claimant,

v.

H.J. HEINZ COMPANY,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,
Defendants.

IC 2010-024034

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

Filed December 3, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on January 10, 2013. Claimant, Jackie Burrows, was present and represented by James D. Ruchti of Pocatello. Defendant Employer, H.J. Heinz Company (Heinz), and Defendant Surety, Liberty Northwest Insurance Corp., were represented by E. Scott Harmon, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken. Thereafter, Joseph M. Wager, of Boise, substituted for Mr. Harmon and briefs were submitted. The matter came under advisement on August 6, 2013. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided are:

1. Whether Claimant's current lumbar and cervical conditions constitute a compensable occupational disease; and

2. Whether Claimant's current lumbar and cervical conditions were caused by an industrial accident.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant alleges that she suffers lumbar and cervical disc degeneration from a compensable occupational disease resulting from her repetitive bending, twisting, and lifting at Heinz. In the alternative, she alleges that she suffered lumbar and cervical injury from an industrial accident occurring September 22, 2010 at Heinz. She relies principally upon the opinion of Chris Johnson, D.O.

Defendants acknowledge Claimant's lumbar and cervical degenerative disc disease but maintain that there is no showing that Claimant's work activities at Heinz were sufficiently peculiar to satisfy the statutory requirements of a compensable occupational disease. Defendants further assert that her lumbar and cervical conditions were not caused by any industrial accident. They urge the Commission to accept the opinion of Richard T. Knoebel, M.D.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission's legal file;
2. The testimony of Claimant taken at the January 10, 2013 hearing;
3. Exhibits 1 through 24 admitted at the January 10, 2013 hearing;
4. The post-hearing deposition of Chris Johnson, D.O., taken by Claimant on January 30, 2013; and
5. The post-hearing deposition of Richard T. Knoebel, M.D., taken by Defendants on March 21, 2013.

At hearing, the Referee admitted pages 681 and 682 of Exhibit 20, regarding a description of Claimant's work duties on Line 9, over Defendants' objection.¹ Defendants renewed their objection to this exhibit in their post-hearing briefing. The Referee again overrules said objection. All objections posed during Dr. Johnson's and Dr. Knoebel's depositions are overruled.

FINDINGS OF FACT

1. Claimant was born in 1970 and is right-handed. She was 42 years old and had resided in Chubbuck for many years at the time of the hearing. In 1988, Claimant graduated from high school in Pocatello. She received no further formal education. After high school Claimant worked as an insurance representative in an insurance office, a dental office, and later a physician's office.

2. Prior to 2006, Claimant had several urinary tract infections that occasionally produced low back pain over her left kidney area. Otherwise, she had no back complaints and no history of treatment for back issues. She had no cervical complaints or history of treatment for cervical issues.

3. **Alleged occupational exposure.** In January 2006, Claimant commenced working full-time for Heinz as a production associate on Line 9 where she assembled frozen foods, including pizzas, calzones, breakfast sandwiches, and bagel bites. She rotated positions on the assembly line every 30 minutes throughout her shift. For the next three years, she worked on Line 9. Her customary duties required her to place product on large stainless steel trays, push and pull the trays on a conveyor line, constantly twist and reach from side to side to fill the trays,

¹ At the commencement of hearing, the Referee withheld ruling on the admissibility of Exhibit 20. Later, after Claimant's corroborating testimony, Claimant again offered Exhibit 20. Defendants then determined not to object to the admission of pages 681-A and 682-A to Exhibit 20, containing a summary description of Claimant's work duties on Line 14 at Heinz. Transcript, p. 36, ll. 8-15.

and lift the trays onto six-foot racks which were then pushed into the oven. She repeatedly bent almost to ground level and also reached above her head to lift and place the trays on the racks. The trays were heavy, each containing as many as 20 sandwiches. She regularly handled 40 pounds of dough in large totes and 10-15 pounds of cheese at a time. She worked eight hours per day, five days per week. She testified that the pace of the work was “fast, constant.” Transcript, p. 26, l. 2. Claimant experienced regular back and neck soreness and stiffness by the end of the work day while working on Line 9. Upon returning home, she used heat and ibuprofen to alleviate her discomfort.

4. On August 14, 2008, Claimant presented to Ryan Hope, M.D., for evaluation of neck pain. He recorded:

She says this began about three weeks ago and she can recall no specific injury. She has never really had neck problems before and never had surgery. She describes pain in the center and left side of her neck that radiates to her left shoulder and down her arm to about her elbow. She rates her pain today at 9/10 in intensity.

Exhibit 4, p. 16. Claimant declined an MRI due to cost. Dr. Hope prescribed Tramadol and Cymbalta and directed Claimant to return in one month. The record contains no indication she returned to Dr. Hope as directed. She continued working at Heinz.

5. In March 2010, Heinz transferred Claimant to Line 14 where she helped prepare a different food product. Her usual duties required her to work at the same position 10 hours per shift, four days each week. She used a floor jack to move large totes full of fresh-baked loaves of bread. “All day long, bending over to put bread in, bending over to take bread out, lifting piles of bread, which is not real light.” Transcript, p. 33, ll. 19-21. She repeatedly bent and twisted to transfer bread from the totes to the racks and to the conveyor belt. The pace of the work on Line 14 was fast and constant, also requiring frequent stretching across the belt. While

working on Line 14, Claimant experienced back and neck discomfort almost daily. Line 14 duties did not often allow her to move from position to position, but rather required her to remain in the same location and look down at the conveyor belt and totes all day. Claimant experienced regular back and neck soreness and stiffness by the end of the work day while working on Line 14. She noted that her neck and back pain were aggravated by constantly looking down at the line. Upon returning home, she used heat and ibuprofen to alleviate her discomfort.

6. **Alleged industrial accident and treatment.** On Wednesday, September 22, 2010, Claimant was at work on Line 14 sealing deli spiral cheese logs. The process required her to twist to the right, reach and grab product from the belt, and seal it. Claimant started work at 6:30 a.m. and before her break at 8:30 a.m.:

I was actually on Line 14 at the end of the line where it's called sealing, where you would seal the deli spirals that come down. This is a part of the line where you are twisting and turning. On this side, mostly it would be to my right. And then in front of me—the line would be right in front of me. I would have to reach to grab these logs to you [sic] so you can seal them. I was doing that. I got a bad, sharp pain in the left lower [sic] of my back. It started hurting in my hip down to my knee.

Transcript, p. 38, ll. 17-25. Claimant contrasted her symptoms at that time with those she had previously experienced at work, noting the sharpness of her back pain: “[t]he other time was just, you know, when your muscles are sore and stiff. This was not just sore and stiffness.”

Transcript, p. 41, ll. 13-15.

7. Claimant continued working, but at her 8:30 break told a co-worker, Tammy Morrison, about the onset of her back pain. Morrison switched positions with Claimant, to place her in a position requiring less bending and twisting; however, her back pain continued. Claimant completed her shift, took ibuprofen, and rested that evening. The next day she took ibuprofen and worked although in pain because she feared losing her job. Claimant did not have

to work on Friday, Saturday or Sunday; however, her back pain worsened. She was in too much pain to work on Monday and called in sick.

8. On Tuesday, September 28, 2010, Claimant reported to work at 6:30 a.m. and told her supervisor that her back pain, commencing the prior week at work, had worsened to the point that she could not perform her job. The supervisor directed Claimant to complete an injury report and sent her to Heinz's on-site nurse, Marita Worthington, who referred Claimant to a physical therapist. Massage by the physical therapist that very morning significantly increased Claimant's pain and Ms. Worthington then directed Claimant to Physician's Immediate Care.

9. Later on September 28, 2010, Claimant presented to Warren Willey, D.O., at Physician's Immediate Care. Dr. Willey recorded:

[J]ob description is described as a stationary position on a line in an upright, standing position, sealing food as it passes by her on the conveyor belt.

She states that on 9/22/10, she noted her lower back aching while doing it. She went home and had a little soreness that seemed to resolve. Of note, it started on the left side low back, pointing to the S1 region. Again, it seemed to completely resolve with NSAIDs and heat. She woke up the following Thursday with it tight, but again, NSAIDs helped. She had Friday off and woke up on Saturday morning with her entire back involved with pain in the lower back, mid back, and upper back, particularly between the shoulder blades. She went to a massage therapist at the physical therapy office, had a massage, and states it hurt even worse. She has a history of similar back pain in the past without obvious injury or noted accident.

Exhibit 12, p. 136. Lumbar spine x-rays demonstrated no osseous changes or fractures. Urinalysis was suspect for urinary tract infection. Dr. Willey assessed diffuse back pain without notable mechanism, injury, or cause. Recognizing the possible urinary tract infection, he contacted Claimant's family physician, Kim Cox, M.D., who prescribed a course of antibiotics for the supposed urinary tract infection. Dr. Willey approved Claimant for FMLA from work as she was in too much pain to function.

10. On October 7, 2010, Claimant presented to Dr. Cox who recorded Claimant's report:

[L]eft back pain which came on at work approximately three weeks ago. She was referred to physical therapy and then saw Dr. Willey in evaluation. She had significantly increased pain after physical therapy. Dr. Willey treated her for a urinary tract infection and did not find any work association with her back. She states that this has occurred before with the onset at work and resolves after rest at home. This time it has not resolved. She denies any persistent urinary symptoms. She states that the back pain is persistent and is unrelieved by Motrin and Tylenol and now she has some anterior thigh pain starting in her groin and extending down to her knee.

Exhibit 15, p. 172. Dr. Cox recorded that Claimant weighed 154 pounds. She had positive straight leg raising tests on the left. He assessed low back pain and referred Claimant to Chris Johnson, D.O.

11. On October 12, 2010, Claimant presented to Dr. Johnson who recorded:

Patient was injured while at work with some repetitive motions of her low back that has now radiated even up into the neck and is all at the lumbosacral junction of the lumbar spine. She was initially labeled as a patient states that [sic] urinary tract infection and that this was causing her left flank pain, but this has absolutely not changed whatsoever with any antibiotics She did not respond at all to the antibiotics, but now has continued to have pain to such an extent that she is unable to get any rest, standing or sitting, and has been frustrated with these issues, and is having a difficult time with her work on a daily basis.

Exhibit 10, p. 92. Dr. Johnson noted that Claimant had positive neural tension signs on the left L5 and S1 distribution on straight leg raise testing. Lumbar radiographs showed degenerative disc spacing at L4-5 and L5-S1 with neural foraminal narrowing. Dr. Johnson assessed: "Lumbar DDD/disc/radiculopathy with anticipated probable disc impingement and radicular symptoms easily seen. Repetitive motion from the lumbar spine at her job I think is the main culprit, as this is where she started this and has had some of these duties for a number of years." Exhibit 10, p. 93. He ordered an MRI.

12. On October 14, 2010, Claimant underwent a lumbar MRI that revealed L4-5 early disc desiccation, early facet joint degeneration and L5-S1 minimal left paracentral disc protrusion with mildly narrowed left neural foramen due to disc/osteophyte complex. Exhibit 7, p. 62.

13. Claimant continued on FMLA from work and on December 20, 2010, Dr. Johnson noted:

They have still not determined that this is due to worker's comp injury but certainly she has had problematic issues with this since but has never had back pain until she started working at Heinz and now has had these issues. I believe it is more probable than not that this can be tied to her assembly line work at Heinz due to her timing and the nature of her job.

Exhibit 7, p. 97. Dr. Johnson provided left L4 and L5 transforaminal epidural steroid injections which moderately improved Claimant's pain.

14. On January 20, 2011, Claimant presented to Dr. Hope who recorded: "Jackie Burrows returns to my clinic today after a long absence with a primary complaint of low back and left leg pain. She has had this pain for months and can recall no specific injury but she thinks it is job related." Exhibit 7, p. 59. He noted Claimant had axial facet-mediated lumbar pain, provided a medial branch block injection, and suggested surgical consultation.

15. On February 2, 2011, Claimant presented to spinal surgeon Benjamin Blair, M.D., who reviewed her MRI, noting degenerative lumbar disc disease and herniated nucleus pulposus. On February 11, 2011, Dr. Blair opined that Claimant's symptoms were due to her work injury at Heinz.

16. After 12 weeks of FMLA, Claimant continued off work for 12 more weeks on short term disability due to her continuing back pain. She returned to her usual work at Heinz in

early April 2011. Although significant symptoms persisted, she feared losing her job if she did not return to work. Claimant was the sole provider for her family.

17. On November 2, 2011, Claimant underwent a cervical MRI that revealed C5-6 disc bulging with left paramedian protrusion causing mild left C5-6 osteoforaminal narrowing. She also underwent a repeat lumbar MRI that revealed diffuse osteoarthritis of the facet joints at L4-5 and mild disc bulging at L4-5 and L5-S1.

18. On August 18, 2012, Claimant was examined by Richard Knoebel, M.D., at Defendants' request. Dr. Knoebel concluded that Claimant's work did not contribute to her lumbar or cervical conditions.

19. Claimant worked on Line 14 from April 2011 until September 2012, when she again took FMLA leave and then short-term disability from September through December 2012. On January 8, 2013, Claimant returned to work on Line 14, in spite of continuing back pain, because she continued to be the sole provider for her family.

20. At the time of hearing, Claimant continued to work at Heinz in spite of her ongoing back and neck pain.

21. **Credibility.** Having reviewed the evidence and observed Claimant at hearing, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

22. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

23. **Occupational disease.** Claimant first alleges that her degenerative lumbar and cervical conditions constitute a compensable non-acute occupational disease. The Idaho Workers' Compensation Law defines an "occupational disease" as "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" Idaho Code § 72-102(22)(a). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) "such disease is actually incurred in the employer's employment," and (2) for a non-acute occupational disease, where "the employee was exposed to the hazard of such disease for a period of 60 days for the same employer." The 60-day period of exposure required by Idaho Code § 72-439 need not be a single continuous period. Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977). Furthermore, the law provides that:

[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, . . . shall be entitled to compensation.

Idaho Code § 72-437. Disablement means "the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease," and "disability means the state of being so incapacitated." Idaho Code § 72-102(22)(c). Finally, "Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefore." Idaho Code § 72-439(3). However: "Nothing in these statutes

indicates an intent to require that an employer who employs an employee who comes to the employment with a pre-existing occupational disease will be liable for compensation if the employee is disabled by the occupational disease due to an injurious exposure in the new employment.” Reyes v. Kit Manufacturing Co. 131 Idaho 239, 241, 953 P.2d 989, 991 (1998).

24. In summary, under the statutory scheme employees with occupational disease claims must demonstrate (1) that they were afflicted by a disease; (2) that the disease was incurred in, or arose out of and in the course of, their employment; (3) that the hazards of such disease actually exist and are characteristic of and peculiar to the employment in which they were engaged; (4) that they were exposed to the hazards of such non-acute disease for a minimum of 60 days with the same employer; and (5) that as a consequence of such disease, they became actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease. In the present case, Claimant’s occupational disease claim for lumbar and cervical degenerative disc disease must be examined in light of the above elements.

25. Disease. Drs. Knoebel and Johnson agree, and Defendants do not dispute, that Claimant suffers from degenerative lumbar and cervical disc disease.

26. Causation. “As with industrial accident claims, an occupational disease claimant has the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation is claimed and occupational exposure to the substance or conditions which caused the alleged condition.” Watson v. Joslin Millwork, Inc., 149 Idaho 850, 855, 243 P3d 666, 671 (2010), quoting Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

27. In the present case, Defendants deny that Claimant contracted and incurred degenerative lumbar and cervical disc disease from her employment at Heinz. They assert that her degenerative conditions result from non-work-related causes. Several physicians have addressed this issue. Their opinions are examined below.

28. *Dr. Knoebel.* Dr. Knoebel is a board certified orthopedic surgeon, but is no longer a practicing surgeon. He has performed disability evaluations full-time for the past 17 years. On August 18, 2012, Dr. Knoebel examined Claimant at Defendants' request. He reviewed her medical records, noting that Claimant reported no neck pain when he examined her and demonstrated full lumbar range of motion, negative straight leg raising, and a normal neurologic exam. He observed:

The report of her MRI scan showed degenerative disk disease at L-4/5 and L-5/S-1, a common occurrence seen in the general population to a greater or lesser extent to anyone over 30, sometimes even sooner. The medical literature reports degenerative changes are congenital, and they did studies on twins, one doing heavy labor work, the other doing office work. Their lumbar spines looked the same. Degenerative changes are determined by that, maybe aggravation from smoking, would be what the literature says.

The literature also says that general activity and work do not produce back problems. The literature states that nonspecific back problems such as this person has are a part of daily life, with 80 percent of people having low back pain some time during their life, and as many as 20 percent of people each year having back pain.

Knoebel Deposition, p. 12, l. 22 through p. 13, l. 12.

29. On cross-examination, Dr. Knoebel affirmed his opinion that physical labor does not cause degenerative disc disease:

No structural changes or long-term problems occur with general work conditions and specific to those work conditions. Bending and twisting, yes, you can herniate a disc at any time, whether that's at work or not. But such nonspecific back pain complaints that you have with—without evidence of fracture, dislocation or nerve root impingement, disk herniations are those that are minimal, that usually resolve within six weeks or so and that cause no structural problems, and those types of injuries can occur at work, they can occur at home,

they can most often occur without specific accident or injury, and that's what I'm referring to.

Knoebel Deposition, p. 15, l. 17 through p. 16, l. 3. Dr. Knoebel concluded that Claimant's work at Heinz did not cause or contribute to her lumbar or cervical conditions. Defendants encourage the Commission to accept Dr. Knoebel's conclusions.

30. *Dr. Smith.* Jessie Smith, D.C., treated Claimant briefly in early 2011. On February 2, 2011, he wrote:

Jackie Burrows presented to my office on January 31, 2011 complaining of low back pain and left radicular [sic] symptoms. Upon history and physical examination and review Dr. Johnson's and Dr. Hope's notes. [sic] In my opinion her low back pain and radicular [sic] symptoms are a result of a repetitive injury as a result of her job.

Exhibit 7, p. 58. The extent of Dr. Smith's familiarity with Claimant's medical history and her job requirements at Heinz is not well illuminated in the record, rendering his opinion less persuasive.

31. *Dr. Blair.* Dr. Blair is a spinal surgeon who examined Claimant on February 2, 2011. He observed that Claimant suffered both degenerative lumbar disc disease and a herniated lumbar disc. Dr. Blair offered no opinion as to the causation of Claimant's degenerative lumbar or cervical disc disease; however, as discussed hereafter, he attributed Claimant's symptoms and need for treatment to the September 22, 2010 work injury.

32. *Dr. Johnson.* Dr. Johnson is board certified in family medicine with a certificate of added qualification in sports medicine. He is Claimant's treating doctor for her lumbar and cervical conditions. In his post-hearing deposition, Dr. Johnson testified that Claimant's urinalysis from September 28, 2010, did not show the presence of a urinary tract infection. By letter dated December 29, 2010, Dr. Johnson recounted Claimant's September 22, 2010 injury, degenerative lumbar disc disease, including lumbar disc bulging and irritation of the left L4 and L5 nerve roots, and concluded:

After evaluating her and taking a thorough history, as well documented in her chart, which you have available to you, the patient was found to have longstanding degenerative disc disease and facet condition, which relates, I think, in very close measure and is more probable [sic] than not due to her current job, working on the assembly line. These chronic repetitive jobs cause, in certain patients, significant lumbar problems. I believe that such is the case for Jackie Burrows.

Exhibit 7, p. 53.

33. Dr. Johnson disagreed with Dr. Knoebel's opinion as to the effects of repetitive activity on the spine. When asked about Dr. Knoebel's reliance on medical literature asserting that genetics—not activity—determine spinal degeneration, Dr. Johnson noted:

There is a genetic predilection that has been found to be a part of that. To what extent the literature and the experts at—all of the expert councils that I go to at meetings, nobody agrees with enough certainty to really even make a statement from an academy as to that other than to say there seems to be some tie to that

And I agree with Dr. Knoebel that he—that that's a consideration, but I do not agree that it's the only consideration or that it's the determining factor.

And the statement that he makes out of—I don't know. I can't remember how it was stated, but something to the effect that there is no—there's no tie between a person's livelihood or the repetitive motions that they may do In fact, he quotes one guy and I looked at that article and actually read some of it and I found it somewhat humorous, actually, that increased motion is always more healthy than not.

And I said, well, in the right circumstances, motion is lotion. That's a well known statement in orthopedics and sports medicine and spine care. But at the same point, anything taken to an excess overloads the system. And that is—that's about as basic a principle as I know in my profession.

Johnson Deposition, p. 72, l. 8 through p. 73, l. 13.

34. Dr. Johnson concluded: “the point is that any motion, if done to excess, has the possibility—and it's not just my opinion—has the possibility and usually probability, if continued for a long enough length of time, will lead to degradation processes.” Johnson Deposition, p. 67, ll. 16-20. Regarding Claimant's symptoms, Dr. Johnson noted: “While she

had radiating nerve pain, she also had axial facet syndrome mediated pain, which is a hallmark of—well, it’s tied to twisting.” Johnson Deposition, p. 64, ll. 5-7.

35. Dr. Johnson confirmed that Claimant’s degenerative disc condition was “contributed to or aggravated by her work duties” at Heinz. Johnson Deposition, p. 66, ll. 18-22 and p. 68, l. 1. While his earlier chart notes express a causal relationship between Claimant’s disc disease and her work, during cross-examination at his deposition, Dr. Johnson specifically declined to fully attribute Claimant’s disc disease to her work at Heinz:

Q. (by Mr. Harmon) Do you have an opinion as to whether the degenerative disc disease was caused by her employment? Not contributed to or aggravated, but caused by?

A. (by Dr. Johnson) I couldn’t comment on that.

Johnson Deposition, p. 87, ll. 20-23. When further questioned, Dr. Johnson affirmed:

Q. (by Mr. Harmon) And do I understand that you are not rendering an opinion regarding the cause of Ms. Burrows’ lumbar pathology and pain?

A. (by Dr. Johnson) Right.

Q. Do I also understand that you are not rendering an opinion regarding the cause of Ms. Burrows’ cervical pain?

A. True.

Q. Or any of the pathology identified?

A. True.

Johnson Deposition, p. 99, ll. 15-24. Nevertheless, Dr. Johnson testified during redirect examination that none of the questions asked on cross-examination changed any of the causation opinions he provided during direct examination. Johnson Deposition, p. 108, ll. 4-7.

36. The essence of Dr. Johnson’s final opinion appears to be that Claimant’s work at Heinz was one factor that contributed to an unspecified degree to her development of degenerative lumbar disease. Dr. Johnson’s ultimate opinion is therefore only partially

supportive of Claimant's assertion that her degenerative lumbar disease was caused by her work at Heinz.

37. Dr. Johnson was even less decided as to whether Claimant's work at Heinz caused her degenerative cervical spine condition. He testified: "could they be related? Yes. To what extent? I don't know." Johnson Deposition, p. 70, ll. 14-15. Dr Johnson's opinion is thus largely unresponsive of Claimant's assertion that her degenerative cervical condition was caused by her work at Heinz.

38. Claimant's proof that she contracted and incurred degenerative lumbar pathology due to her work at Heinz is questionable at best. Dr. Knoebel's opinion to the contrary is corroborated in part by Dr. Johnson's testimony. Claimant's proof that she contracted and incurred degenerative cervical pathology due to her work at Heinz is noticeably lacking.

39. Claimant has not proven her degenerative lumbar and/or cervical conditions constitute a compensable non-acute occupational disease.

40. **Industrial accident.** In the alternative, Claimant alleges that she suffered an industrial accident causing injury on September 22, 2010, while working at Heinz. Defendants assert that Claimant has shown no industrial accident as defined by statute in that she has not shown the occurrence of an event that medical evidence establishes caused the injurious condition of which she now complains.

41. Untoward event. Idaho Code § 72-102(18)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonable located as to time when and place where it occurred, causing an injury."

42. In the present case, Claimant's October 7, 2010 recorded statement to Surety's adjuster identified no unusual event:

JO: (by adjustor Judy Osler) Okay, can you give me the date and time of your incident?

JB: (by Claimant Jackie Burrows) Um, well I started hurting on a Wednesday.

....

JO: Okay, alright, so tell me what caused your back to hurt?

JB: Um, I don't know, um, I was just working on the line and I just have back pain in my lower, um, left side.

JO: Uh huh.

JB: And it's hurt before I just have come home and put heat and massage on it, um, but this time it just, um, hasn't gone away. There's times when I'm standing on the line and I have to put my feet up because my back hurts so bad.

JB[sic]: Uh huh.

JB: And so I, there's no particular reason why. We don't know why.

JO: Okay, it just started to hurt.

JB: Yeah.

JO: It wasn't anything that happened.

JB: Right.

Exhibit 19, p. 350. Based upon Claimant's account, Dr. Johnson recorded: "Patient was injured while at work with some repetitive motions of her low back." Exhibit 10, p. 92. Mention of any accident is similarly absent from Dr. Hope's records: "Jackie Burrows returns to my clinic today after a long absence with a primary complaint of low back and left leg pain. She has had this pain for months and can recall no specific injury but she thinks it is job related." Exhibit 7, p. 59.

43. Dr. Knoebel opined that:

There was no accident, injury or extraordinary event reported by the Claimant in regards to the onset of back pain. She just noted on the date of injury, 9/22/10,

that she was just in too much pain to continue. She saw the plant nurse, and then when she was seen six days later, she reported standing on a line sealing food product, each one weighing about two pounds, standing throughout the shift with some breaks, resulted in the back pain.

Knoebel Deposition, p. 12, ll. 1-9. Significantly, the history recited by Dr. Knoebel is only partly accurate. Additionally, the record discloses that Surety's adjustor's letter, requesting Dr. Knoebel's medical causation opinion, stated that Claimant "is alleging a back injury from standing on hard floors. She did not have an accident." Exhibit 19, p. 385.

44. It is apparent that Claimant did not refer to any event as an "accident" when she recounted to various providers and others the circumstances surrounding the onset of her back pain at work on September 22, 2010. However, at hearing Claimant credibly described her work activities at the time of the onset of her back pain. On September 22, 2010, she was standing at the line, sealing deli spiral cheese logs. She started work at 6:30 a.m. and sometime before her 8:30 a.m. break:

I was actually on Line 14 at the end of the line where it's called sealing, where you would seal the deli spirals that come down. This is a part of the line where you are twisting and turning. On this side, mostly it would be to my right. And then in front of me—the line would be right in front of me. I would have to reach to grab these logs to you [sic] so you can seal them. I was doing that. I got a bad, sharp pain in the left lower [sic] of my back. It started hurting in my hip down to my knee.

Transcript, p. 38, ll. 17-25 (emphasis supplied). It is undisputed that at 8:30 a.m. Claimant told her coworker, Tammy Morrison, of her back pain and Morrison switched positions with Claimant so Claimant could work a less taxing position.

45. Given the facts of the present case, three prior decisions are instructive and merit brief review: Perez v. J.R. Simplot Co., 120 Idaho 435, 816 P.2d 992 (1991), Spivey v. Novartis Seed Inc., 137 Idaho 29, 43 P.3d 788 (2002), and Page v. McCain Foods, Inc., 141 Idaho 342, 109 P.3d 1084 (2004).

46. In Perez, the employee stood while inspecting French fries on a conveyor belt. On her third day of work, after standing for two hours, she felt pain in her hip. She sought medical treatment the next day and was found to suffer overuse of her legs from standing, in conjunction with her pre-existing diabetes. The Supreme Court affirmed the Commission's conclusion that: "standing for two hours does not an accident make" and that the onset of pain at work is not sufficient to establish an accident. Perez, 120 Idaho at 438, 816 P.2d at 995.

47. In Spivey, the employee suffered a rotator cuff tear when performing her usual work of reaching across a conveyor belt to remove a bad seed. Medical evidence indicated her rotator cuff was so compromised by pre-existing degenerative conditions that a minor trauma produced the tear. The Supreme Court affirmed the Commission's finding that this constituted an accident causing injury.

48. In Page, the employee arose from a chair at work and felt pain and a locking sensation in her knee. Medical evidence indicated she suffered a torn meniscus. The Commission concluded she had shown no accident in merely arising from the chair. The Supreme Court reversed, stating: "Contrary to the Commission's erroneous conclusion that Page merely arose from a seated position 'without incident,' Page experienced a quite significant 'incident' in arising from the chair. It is irrelevant that Page did not consider this to be an 'accident.'" Page v. McCain Foods, Inc., 141 Idaho 342, 348, 109 P.3d 1084, 1090 (2004).

49. The facts of the instant case are more analogous to those of Spivey and Page than those of Perez. Claimant herein has reasonably located the time when and place where the accident occurred: September 22, 2010, before her 8:30 a.m. break. At that time, Claimant "got a bad sharp pain" in her left lower back while she was performing her usual duties on Line 14, twisting and turning to her right side while reaching to grab spiral deli cheese logs to seal them.

This is not a case in which Claimant has attempted to establish the occurrence of an accident simply by demonstrating the onset of pain alone. Rather, as developed in the next section, Claimant has established by persuasive medical evidence that the event she experienced on September 22, 2010, is causally related to an injury to the physical structure of her body. Defendants argue that Claimant's deposition testimony concerning the occurrence of the accident is of recent invention, and is entirely inconsistent with her unsworn recorded statement. However, careful comparison of Claimant's hearing testimony and her earlier statement fails to establish the existence of unambiguous contradictions between the two. Claimant told the adjuster that her back "just started to hurt" on September 22, while she was working. She could not identify "anything that happened" that she could point to as the cause of her pain. That Claimant did not identify a mishap or event may have more to do with her lay person's perception of what constitutes an "accident." However, nothing Claimant said in her statement is inconsistent with her subsequent testimony that while doing her work, i.e., twisting and turning to grab the deli spirals, she felt the onset of pain. As with the injured employee in Page, it is irrelevant that Claimant did not consider this to be an "accident."

50. Claimant has proven she suffered an accident—an untoward event—and not solely the onset of pain while working on September 22, 2010.

51. Causing injury. Having proven the occurrence of an untoward event at work, the companion inquiry is whether the event caused Claimant injury. An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(18)(a). A claimant must present medical evidence that supports a claim for compensation to a reasonable degree of medical probability. Duncan v. Navajo Trucking, 134 Idaho 202, 203, 998 P.2d 1115, 1116

(2000). A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

52. In the present case, Dr. Knoebel, Dr. Johnson, and Dr. Blair have opined regarding the injuries caused by Claimant's September 22, 2010 accident. Their opinions are examined below.

53. *Dr. Knoebel.* Dr. Knoebel opined that Claimant's work at Heinz did not cause her lumbar or cervical conditions. Claimant's work duties at Heinz required bending, twisting, reaching, and lifting. Dr. Knoebel expressly acknowledged that "[b]ending and twisting, yes, you can herniate a disc at any time, whether that's at work or not." Knoebel Deposition, p. 15, ll. 19-21. Claimant's sharp left-sided lumbar pain commenced at a discrete time—before her 8:30 a.m. break on September 22, 2010—as she twisted and reached for product at Heinz. Nevertheless, Dr. Knoebel concluded that Claimant's work activity at Heinz did not cause, aggravate or contribute to her lumbar pathology. He noted Claimant's L4-5 and L5-S1 degenerative disc disease but did not address her left L5-S1 disc protrusion also documented on her 2010 lumbar MRI. Dr. Knoebel examined Claimant on August 18, 2012—nearly 23 months after the September 22, 2010 event. By then Claimant had received significant treatment including physical therapy, prescription medications, multiple epidural steroid injections, and at least one medial branch block injection. Her back pain had improved and her left leg radicular symptoms abated sufficiently that she had been able to return to work for extended periods. Dr. Knoebel's opinion that Claimant's work at Heinz, necessarily including her accident on

September 22, 2010, did not cause or contribute to her lumbar and cervical condition, is unpersuasive.

54. *Dr. Johnson.* Although during Dr. Johnson's deposition he was questioned extensively and offered opinions regarding Claimant's degenerative lumbar and cervical conditions, it does not appear that he addressed or was asked to address the relationship between her lumbar or cervical symptoms and her September 22, 2010 accident. However, his notes of January 7, 2011, support a causal relationship between the onset of Claimant's lumbar symptoms and her September 22, 2010 accident:

Here for recheck of left L4 and L5 TF ESI with some degenerative disc disease and certainly disc impingement with on the job injury at Heinz. This disc protrusion and extrusion has certainly come on and was work related per her report but she is getting some push back in terms of the fact that we have mentioned there was some degenerative disc condition. However, patient has never had symptoms until she experienced these issues while at work.

Exhibit 19, p. 591.

55. *Dr. Blair.* Dr. Blair is a spinal surgeon who examined Claimant and on February 11, 2011, recorded:

Ms. Jackie Burrows is a patient of mine who has an underlying diagnosis of internal disc derangement and degenerative disc disease in the lumbar spine, as well as herniated nucleus pulposus. She has a fairly physical job. She states in September she had sudden onset of severe symptomatology. This was while standing on the production line. Prior to this, she had symptomatology on an occasional basis; however, it was not nearly as severe as this particular episode and it was not long lasting. Therefore, I believe, by patient relayed history, that she was functioning at a high level until the work injury of 9/22/10 and that her current symptomatology and need for treatment is due to the work related injury of 9/22/10.

Exhibit 13, p. 147 (emphasis supplied). Dr. Blair's notes and correspondence make no reference to any cervical symptoms or pathology.

56. Dr. Blair correctly observed that Claimant had both degenerative lumbar disc disease and a herniated lumbar disc. He reviewed Claimant's October 2010 lumbar MRI and commented on both conditions. Dr. Blair did not relate Claimant's degenerative lumbar disc disease to her September 22, 2010 incident. However, he correctly observed that Claimant was functioning at a high level until her work injury of September 22, 2010. Dr. Blair's opinion clearly attributes Claimant's current lumbar symptoms and need for treatment to her September 22, 2010 work injury at Heinz.

57. Dr. Blair's and Dr. Johnson's opinions are persuasive as they are consistent with the evidence of record, including Claimant's high functioning work activities until the abrupt onset and thereafter persistence of her lumbar symptoms commencing with the untoward event of twisting, reaching, and grabbing product on September 22, 2010, while working at Heinz.

58. Claimant has proven she suffered an untoward event causing personal injury—an accident—as defined by statute. Claimant has proven that she suffered an industrial accident on September 22, 2010, causing her lumbar symptoms.

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CONCLUSIONS OF LAW AND ORDER

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

1. Claimant has not proven that her current lumbar and cervical conditions constitute a compensable occupational disease.
2. Claimant has proven that she suffered an industrial accident on September 22, 2010, causing her lumbar symptoms.

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

DATED this __3rd__ day of __December__, 2013.

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 __3rd__ day of __December__ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JAMES D RUCHTI
275 S 5TH AVE SUITE 140
POCATELLO ID 83201

JOSEPH M WAGER
PO BOX 6358
BOISE ID 83707-6358

/s/ _____