BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEMAE COOKE, Claimant, v. BONNER FOODS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-019578** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed March 20, 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 Coeur d'Alene, Idaho on February 2, 2012. Claimant, LeMae Cooke, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Bonner Foods, Inc., and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by E. Scott Harmon, of Boise, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 18, 2012. 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 by the Commission are:

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

2. Claimant's entitlement to medical care;
3. Claimant's entitlement to temporary disability benefits; and
4. Claimant's entitlement to an award of attorney fees.

CONTENTIONS OF THE PARTIES

Claimant alleges she suffered a cervical and upper extremity injury at work on July 4, 2009, while checking heavy groceries. She asserts entitlement to medical benefits for her resulting cervical injury and lateral epicondylitis, temporary disability benefits, and an award of attorney fees for Defendants' unreasonable denial of these benefits.

Defendants assert that Claimant's work activities on July 4, 2009, did not cause her cervical pathology and that she suffered no industrial accident as defined by law. They maintain that Claimant suffered pre-existing cervical arthritis, her work did not cause her need for medical treatment, and denial of benefits is justified.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1 through 15, and Defendants' Exhibits A through N, admitted at the hearing;
3. The testimony of Claimant taken at the February 2, 2012 hearing;
4. The post-hearing deposition of David L. Chambers, M.D., taken by Claimant on February 14, 2012;
5. The post-hearing deposition of John McNulty, M.D., taken by Claimant on February 14, 2012; and
6. The post-hearing deposition of William F. Ganz, M.D., taken by Defendants on August 10, 2012.

All pending objections are overruled, except Defendants' objection recorded at page 21 of Dr. Chambers' deposition, which is sustained.

FINDINGS OF FACT

1. Claimant was born in 1966. She was 45 years old and lived in Post Falls at the time of the hearing. She is right-handed. Claimant worked in child care for many years. She also worked as a grocery checker and cashier.

2. In December 2008, Claimant began working for Employer Bonner Foods (aka the Trading Company) as a cashier and grocery checker earning $9.00 per hour. By July 2009, Claimant was earning $10.00 per hour at Bonner Foods. Bonner Foods had no hand-held scanning guns so Claimant lifted all merchandise across a fixed scanner as she checked groceries. Often merchandise had to be turned and maneuvered to orient its bar code with the scanner. Some merchandise, including cases of bottled water or soft drinks, bulk purchases, and large bags of dog food, weighed up to 40 pounds. Claimant had no cervical or right upper extremity symptoms or complaints prior to July 2009.

3. Claimant testified that on July 4, 2009, Bonner Foods was very busy with long lines of customers purchasing holiday supplies. She worked as rapidly as possible checking groceries from 8:00 a.m. until approximately 4:30 p.m. that day. Claimant testified that before her break:

> I remember just working very hard trying to go as fast as I could, and lifting a lot of heavy items and was very hot and sweating. And I remember one particular case I was lifting up a case of bottled water and trying to maneuver it around, and part of the plastic ripped and I had to regroup and grab it again and scan it over the scan bar and then move it again, and at that moment, I felt a sharp pain in my shoulder.

Transcript, p. 33, ll. 3-11. As she continued to work, she "started to feel some pains going down [her] arm and into [her] elbow area." Transcript, p. 33, ll. 19-20. During her break she iced her

right arm and elbow and then returned to work and completed her shift. At the end of her shift, Claimant told her manager, Terry Putnam, that her arm was hurting. He thanked her for her hard work. That night at home, she iced her right shoulder and arm but the pain persisted.

4. Claimant continued to work her regularly assigned shifts for the next several days, although with increasing discomfort. She purchased an elbow brace and wore it at work and at home, but her pain increased. Her last day of work at Bonner Foods was July 14, 2009, after which her pain was intolerable. Claimant called several physicians' offices seeking an appointment for treatment; however, after describing the origin of her symptoms, she was advised she needed to seek treatment from the medical provider approved by her Employer. Claimant then inquired of Bonner Foods and Putnam directed her to seek medical care at Post Falls After Hours Urgent Care (Urgent Care).

5. On July 20, 2009, Claimant presented at Urgent Care to Howard Brinton, M.D. He recorded her complaints of pain radiating down from her neck to her shoulder and right elbow commencing on July 4, 2009 while working. "Patient states that she was very busy as a checker on 7/4 and had a much higher volume than usual with prolonged repetetive [sic] use of right arm. [E]lbow began hurting in mid afternoon." Claimant's Exhibit 7, p. 1. Dr. Brinton examined Claimant and ordered x-rays. Right elbow x-rays were normal. Cervical x-rays disclosed moderate disc space narrowing at C5-6, degenerative facets at C4-5, C5-6, and C6-7, and mild cervical spondylosis. Dr. Brinton prescribed medication and referred Claimant to physical therapy. She attended several physical therapy sessions with Michael Whitney, P.T., however her pain increased. The therapist noted signs of C4-C5-C6 radiculitis and intermuscular spasms in her upper back, cervical spine, shoulder and right upper extremity.

6. On July 23, 2009, Putnam prepared the First Report of Injury or Illness for Claimant's "right arm shoulder strain." The report lists July 14, 2009, as her last day of work and July 20, 2009, as the date disability began. Putnam entered no date of injury on the report.

7. On July 24, 2009, Claimant returned to Urgent Care and presented to Henry Downs, M.D. Dr. Downs recorded that Claimant had "Rt arm pain. Work related injury." Claimant's Exhibit 8, p. 6. He noted she was emotionally upset because she feared losing her job since her employer would not let her work. Dr. Downs referred Claimant to David Chambers, M.D., also at Urgent Care.

8. On July 30, 2009, Claimant presented at Urgent Care to Dr. Chambers who recorded: "Patient comes in today for a follow-up on Arm pain Work comp, 3rd visit." Claimant's Exhibit 8, p. 9. He diagnosed cervical muscle spasm and lateral epicondylitis. Dr. Chambers ordered a cervical MRI and directed Claimant to return in two weeks.

9. On July 31, 2009, Claimant visited the Coeur d'Alene Industrial Commission field office on referral by Dr. Chambers. On August 5, 2009, Claimant met with Commission rehabilitation consultant Carol Jenks who recorded Claimant's report that Dr. Britton put her on light-duty work but "her boss told her that there is no light duty and she needs to get a full release to return to work." Defendants' Exhibit F, p. 41.

10. Claimant continued physical therapy sessions through approximately August 12, 2009. On August 13, 2009, Jenks met with Bonner Foods and performed a job site evaluation. No alternate or modified position was then available.

11. On August 13, 2009, Claimant returned to Urgent Care, however the MRI ordered by Dr. Chambers had not been authorized by Surety. On August 14, 2009, Jenks sent her case notes, including Claimant's initial interview form, to Surety.

12. On August 26, 2009, Claimant reported to Jenks that she continued in pain from her July 4, 2009 injuries and that Surety still had not approved a follow-up doctor's visit in spite of Claimant's repeated phone calls. Claimant indicated she had contacted an attorney.

13. No later than September 3, 2009, Surety received copies of Claimant's medical records documenting treatment by Drs. Brinton, Downs, and Chambers through August 13, 2009, and physical therapy records by Michael Whitney through August 12, 2009.

14. On September 4, 2009, Jenks contacted Surety about the status of the claim. Surety's representative, Teresa Nolan, advised Jenks that Surety "is awaiting medical records before being able to proceed." Defendants' Exhibit F, p. 43.

15. On September 8, 2009, Jenks received a letter of representation from Claimant's counsel.[1]

16. On September 22, 2009, Claimant advised Jenks that Surety had approved a cervical MRI scheduled for the following day.

17. On September 23, 2009, Claimant underwent a cervical MRI which revealed straightening of the normal cervical lordosis, C5-6 and C6-7 moderate diffuse circumferential disc bulges extending into the right neural foramina and resulting in right neural foraminal encroachment at C5-6 and C6-7, and extending into the left neural foramina at C5-6.

18. On October 2, 2009, Surety representative, Lori Kofoed, advised Jenks that the claim had not been accepted and a medical evaluation was being scheduled.

19. On October 14, 2009, Surety representative Lori Kofoed wrote Richard McCollum, M.D., requesting he evaluate Claimant for her July 4, 2009 injury. Kofoed expressly

[1] In 2009, Claimant was represented by different counsel than at the time of hearing.

advised Dr. McCollum that Claimant experienced no specific event but only the onset of pain on July 4, 2009.

20. On October 28, 2009, Dr. McCollum examined Claimant at Surety's request. He reviewed the MRI and concluded that Claimant suffered pre-existing cervical spine arthritis. Dr. McCollum recommended Claimant be evaluated by a neurologist. On November 17, 2009, Claimant underwent a nerve conduction study by Keith Mackenzie, M.D. Dr. Mackenzie reported the results of the study were normal. Dr. McCollum opined Claimant needed no medical treatment due to her industrial accident.

21. By letter dated December 4, 2009, Surety first advised Claimant through her counsel that her claim was denied.

22. On December 15, 2009, Dr. Chambers examined Claimant again. He reaffirmed his prior diagnosis and also found decreasing grip strength. Dr. Chambers referred Claimant to Jonathan King, M.D., for evaluation of her right shoulder and arm and to William Ganz, M.D., for evaluation of her neck. On December 21, 2009, Dr. Chambers recorded that Claimant was released to light duty work with a 20-pound lifting restriction pending evaluation by an orthopedic surgeon of her shoulder and arm and by a neurosurgeon of her cervical symptoms.

23. On December 30, 2009, Bonner Foods advised Jenks that it had light-duty work available.

24. On January 6, 2010, Dr. Ganz examined Claimant's cervical condition. He recorded that: "Her symptoms started around July 4, 2009 after a particularly busy week working as a checker at a grocery store. She was using her right arm with repetitive lifting and reaching of heavy objects." Claimant's Exhibit 9, p. 1. He noted her cervical MRI showed disc bulges at C4-5, C5-6, and C6-7. Dr. Ganz found Claimant's deep tendon reflex absent at the

right triceps. He approved her return to light duty work, restricted her to lifting no more than 25 pounds, and directed her to avoid all over shoulder-height work. Dr. Ganz referred Claimant to physical therapy and recommended cervical steroid injections. Surety denied the treatment recommended by Dr. Ganz and Claimant lacked the resources to obtain it.

25. On January 14, 2010, Dr. King examined Claimant's right shoulder and right arm. He recorded that "She started having this problem as a grocery checker. She denies any trauma or any injury but just feels that the repetitive motions at work started to make her problem worse." Claimant's Exhibit 8, p. 1. Dr. King noted that she had no right shoulder or right elbow symptoms at that time and that her persisting concerns arose from her cervical condition.

26. Claimant actively worked with Jenks seeking employment within her restrictions from January to April 2010.

27. On April 9, 2010, Claimant filed her Complaint in the present case.

28. On April 9, 2010, Claimant commenced working as a cashier at Daanen's Deli. She was subsequently promoted to management level and her hours increased.

29. On October 19, 2010, Dr. Chambers responded to Surety's letter indicating he agreed with the findings and conclusions set forth in Dr. McCollum's October 28, 2009 report.

30. In November 2010, Claimant was unable to continue the 50 hour per week schedule required of management at Daanen's Deli and ultimately ceased working at the deli. She began seeking employment with assistance from Industrial Commission rehabilitation consultant Roy Murdock.

31. On January 27, 2011, Dr. Ganz responded to Surety's letter indicating he agreed with the findings and conclusions set forth in Dr. McCollum's October 28, 2009 report.

32. On March 23, 2011, Claimant began working as a server at the Coeur d'Alene Resort. She carried small trays with her left arm and relied on coworkers to carry large trays. She received $3.35 per hour plus tips. Her earnings totaled $1,000.00 to $1,500.00 per month.

33. On July 29, 2011, John McNulty, M.D., examined Claimant and concluded that her industrial accident caused or aggravated her cervical disc pathology. On October 12, 2011, Dr. McCollum disagreed with Dr. McNulty's conclusions. On December 8, 2011, Dr. Ganz responded to Surety's letter indicating he continued to agree with Dr. McCollum's report and disagreed with Dr. McNulty's opinions.

34. At the time of the hearing, Claimant continued to have cervical and right arm pain. She also continued to work as a server; however, her hours had been limited due to remodeling at the resort. She testified that her persisting cervical and right arm pain precluded her from performing her prior duties as a cashier at Bonner Foods.

35. Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee found that Claimant was 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

36. 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).

37. **Causation.** The first issue is whether the condition for which Claimant seeks benefits was caused by the industrial accident. Defendants admit that Claimant suffered an onset of pain at work on July 4, 2009. However, Defendants challenge both whether Claimant suffered an industrial accident as defined by law, and if so, whether her accident caused the personal injury for which she seeks treatment.

38. Occurrence of an 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 reasonably located as to time when and place where it occurred, causing an injury."

39. In the present case, Defendants argue that Claimant's hearing testimony of a specific untoward event at work—scanning a case of bottled water on July 4, 2009—is suspect because her treating physicians at Urgent Care recorded no specific event as precipitating her cervical and arm pain on that day. However, Claimant never asserted that she reported the specific details of her accident to her treating physicians and the reports of the treating physicians are not necessarily inconsistent with her testimony at hearing.

40. On July 20, 2009, Dr. Brinton noted Claimant's complaints of pain radiating down from her neck to her shoulder and right elbow commencing on July 4, 2009 while working: "Patient states that she was very busy as a checker on 7/4 and had a much higher volume than usual with prolonged repetetive [sic] use of right arm. [E]lbow began hurting in mid afternoon." Claimant's Exhibit 7, p. 1.

41. During his deposition, Defendants questioned Dr. Chambers about the lack of specific detail regarding Claimant's accident in Dr. Brinton's notes. Dr. Chambers testified "in the context of urgent care that the history and the recording of the history is [sic] often times a

summation or an outline and not necessarily a narrative of detailed information." Chambers Deposition, p. 38, ll. 17-20.

42. Dr. Chambers recalled Claimant's report of her industrial accident as follows:

> Q. And what did the patient relay to you with regards to the incident when you discussed it with her on July 30th [2009]?
>
> A. That she had had arm pain that was related to a heavy workday and it came on while she was doing some checking and that there had been a heavy traffic that day and she had lifted a number of boxes in doing her checking activities. And her arm and shoulder pain ensued subsequent to that.
>
> Q. Did you inquire further as to any specific lifting of an item that caused the arm and shoulder pain?
>
> A. I did not ask a specific incident at that point, no.

Chambers Deposition, p. 11, l. 20 through p. 12, l. 8.

43. As previously noted, Surety expressly informed Dr. McCollum prior to his evaluation that Claimant experienced no accident, just the onset of pain at work. Not unexpectedly, his description of Claimant's injury reflects the perspective communicated to him by Surety:

> She said that over the 4th of July weekend she was really dizzy [sic] and had to do a lot of lifting and checking, and developed acute elbow pain laterally on the right, and it was very bad. She continued working and about two weeks later she developed pain in the right scapular, with shooting pain down the arm and pain into the neck. At the same time, two weeks after the July 4th weekend, she developed tingling and numbness which involved her hand and all five fingers, and this was on the right side only.

Defendants' Exhibit I, p. 67. Dr. Chambers testified that Dr. McCollum's conclusion that Claimant suffered no acute injury at work was contradictory to the history obtained by Claimant's treating physicians, including Dr. Chambers, at Urgent Care. Chambers Deposition, p. 33.

44. At his deposition, Dr. McNulty testified that Claimant recounted her accident

occurred on a very hectic Fourth of July holiday "that she was lifting repetitively cases of beverages, heavy items. And during that time she injured her neck. She couldn't tell me that I lifted a case of water at 3:00 or something, but she mentioned that yeah, I was lifting these items and boy, my neck and my arm was hurting." McNulty Deposition, p. 8, ll. 6-12. Dr. McNulty testified that he asked Claimant a general question and he did not "remember her telling me, or me trying to pin her down, was it a case of soda at 3:00 or something like that." McNulty Deposition, p. 8, ll. 21-23.

45. Dr. King's January 14, 2010 notes record Claimant's right shoulder and arm symptoms and indicate she "started having this problem as a grocery checker. She denies any trauma or any injury but just feels that the repetitive motions at work started to make her problem worse." Claimant's Exhibit 8, p. 1. Dr. King recorded the problem had persisted for six months. A close review of the note reveals it is very cursory in nature. No day or month of onset is even mentioned. Claimant's denial of traumatic injury is not altogether surprising as the event precipitating her injury did not involve a collision, fall, or similar dramatic event. Her reported assertion that repetitive work motions worsened her problem is consistent with her hearing testimony that as she continued to work, she "started to feel some pains going down [her] arm and into [her] elbow area" Transcript, p. 33, ll. 19-20, which worsened until by July 14, 2009, she was no longer able to work. Dr. King's notes are not irreconcilable with Claimant's account of her July 4, 2009 industrial accident.

46. The details of Claimant's accident do not appear in the First Report of Injury prepared by Claimant's supervisor. However, that report does not bear Claimant's signature. Insofar as the record discloses, Defendants took no pre-hearing statement from Claimant regarding her accident. There is no indication that Defendants deposed Claimant prior to

hearing. It is thus not surprising that Defendants may not have been aware of the specific details of Claimant's July 4, 2009 accident until hearing.

47. Defendants cite the Commission to Konvalinka v. Bonneville County, 140 Idaho 477, 95 P.3d 628 (2004) for the proposition that the evidence does not support a finding that Claimant has suffered a "accident" causing an "injury", as those terms are defined in Idaho Code § 72-102. In Konvalinka, supra, Claimant was employed as a court reporter, a job requiring her to use her hands to operate a keyboard. Claimant suffered from pre-existing bilateral osteoarthritis at the base of her thumbs. During a three week trial, Claimant experienced bilateral thumb pain, which resolved after the completion of the trial. However, when her work load again increased her thumb pain returned, causing her to seek medical treatment. The medical evidence established that Claimant's pre-existing bilateral osteoarthritis at the base of her thumbs was aggravated by the conditions of her employment, causing her condition to become symptomatic. The Commission concluded that the aggravation of Claimant's pre-existing condition constituted an accident and that Claimant was entitled to an award of benefits.

48. On appeal, the court noted that the aggravation of a pre-existing condition is compensable only if caused by an "accident". Therefore, the only route to compensability for Claimant was via an accident/injury theory. The court noted that although an accident may and usually does cause the onset of pain, an "accident" under the Workers' Compensation laws of the state is not simply the onset of pain. To establish the occurrence of an accident, the injured worker must do more than show an onset of pain while at work. Nor could Claimant satisfy her burden of proof by demonstrating that she developed her symptoms contemporaneous with hard work. Claimant argued that both Wynn v. J. R. Simplot Co., 105 Idaho 102, 666 P.2d 629

(1983) and Spivey v. Novartis Seed, Inc., 137 Idaho 129, 43 P.3d 788 (2002), supported her contention that she had demonstrated the occurrence of an accident causing an injury. The Court noted that in Wynn, Claimant suffered a cervical disc rupture as a result of his usual work activities. The Court noted that in Spivy the claimant suffered a rotator cuff tear when she was performing her usual work of reaching across a conveyor belt to remove a bad seed. The court noted that although Spivey and Wynn stand for the proposition that an accident can occur while the claimant is performing his or her usual work, those cases do not eliminate the requirement of an accident, nor do they establish that a mere manifestation of symptoms is sufficient to constitute an accident. In both Wynn and Spivey, it was established that an "unexpected, undesigned and unlooked for mishap or untoward event" occurred which caused injury to the physical structure to claimant's body.

49. The facts before the Commission in the instant matter are more like the facts before the court in Wynn and Spivey than the facts of Konvalinka. Here, Claimant has reasonably located the time when and place where the accident occurred, i.e. July 4, 2009, before her break. At that time, Claimant noted the onset of shoulder pain while scanning a case of bottled water, and the subsequent development of right arm and elbow pain as she continued to check groceries during the period of time on July 4, 2009 before her break. This is not a case in which Claimant has attempted to establish the occurrence of an accident simply by demonstrating the occurrence of pain alone. Rather, as developed in the next section, Claimant has established by persuasive medical evidence that the activity in which she was engaged on July 4, 2009 is causally related to an injury to the physical structure of her body.

50. Claimant has proven she suffered an accident—an untoward event—and not solely the onset of pain while working on July 4, 2009.

51. Causing injury. Having proven the occurrence of an untoward event at work, the companion inquiry is whether the accident 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 provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (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). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). 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. Claimant herein alleges that her July 4, 2009 industrial accident caused right lateral epicondylitis and caused or aggravated her C5-6 and C6-7 disc bulging. Four physicians have opined regarding the causation of Claimant's cervical and upper extremity complaints. Their opinions are examined below.

53. *Dr. McNulty*. Dr. McNulty is a board certified orthopedic surgeon. He examined Claimant on July 29, 2011, and recorded her report of "a work-related injury on 07/04/2009 while working as a cashier for Trading Company in Post Falls." Claimant's Exhibit 14, p. 1. Dr. McNulty reviewed both the MRI and the MRI report. He concluded that Claimant's C5-6

bulging disc protruded into the right neural foramen at C6 and correlated with her right hand numbness. He observed that Dr. Ganz also reported there could be compression of Claimant's right C6 nerve root. Regarding the seeming inconsistency of Claimant's upper extremity complaints and her normal nerve conduction study in November 2009, Dr. McNulty testified that "[t]he EMG nerve conduction study has limitation on picking up sensitivity [sic] of picking up what is going on. So I would say her symptoms are consistent with a radiculopathy, pain going down her arm, originating from her neck. But it is not such that it is recognized by the EMG nerve conduction study." McNulty Deposition, p. 16, ll. 4-10. Dr. McNulty concluded that Claimant suffered cervical radiculopathy secondary to aggravation of her pre-existing cervical spondylosis by her industrial accident. He found her right elbow symptoms mild, but opined she would benefit from treatment of her cervical spine by repeated cervical MRI and cervical spine epidural steroid injection.

54. *Dr. McCollum*. Richard McCollum, M.D., is an orthopedic surgeon. He examined Claimant on October 28, 2009, at Defendants' request. Dr. McCollum's report describes his understanding of Claimant's industrial accident, part of the foundation upon which his opinion rests:

> The examinee is seen at the request of Lori Kofoed, case manager for Liberty Northwest by way of an introductory letter of October 14, 2009.
>
> This is in evaluation for an injury date of July 4, 2009, while working for Bonner Foods, Incorporated.
>
> The cover letter indicates she is a cashier for the above company, and on the morning of July 4, 2009, she was assisting customers with their purchases. When things slowed down, she began to experience right elbow pain. There was no specific event, just the onset of pain.
>
> She began to have right shoulder pain. On July 20, 2009, 16 days later, she sought treatment at After Hours Urgent Care Clinic.

Defendants' Exhibit I, p. 65.

55. Dr. McCollum expressly concluded: "there was no acute injury so the only way this could be related to the workplace would be as an occupational disease." Defendants' Exhibit I, p. 71. Dr. McCollum opined that Claimant's MRI findings of cervical disc herniations were "incidental" and concluded that Claimant suffered pre-existing degenerative arthritis of the cervical spine, not caused or aggravated by her workplace. He recommended no further treatment and concluded she could return to work without restrictions.

56. Dr. McCollum's understanding of Claimant's industrial accident is materially incomplete, lacking recognition of the lifting she was performing at the time her symptoms commenced. Defendants maintain that Dr. McCollum's report was dictated in Claimant's presence and that she could have corrected Dr. McCollum if his understanding of her accident was inaccurate. However, at hearing, Claimant credibly testified that Dr. McCollum advised her that she "wasn't allowed to ask questions or say anything to him" during the examination. Transcript, p. 84, ll. 21-22.

57. *Dr. Ganz*. William Ganz, M.D., testified in behalf of Defendants. Dr. Ganz is board certified in neurosurgery. He examined Claimant on one occasion on January 6, 2010. After reviewing her cervical MRI, he noted "There could be some compression of the right C6 nerve root. …. There might be some compression of the right C7 nerve root." Claimant's Exhibit 9, p. 3. Dr. Ganz recorded Claimant's report of intermittent pain radiating into her upper right extremity. On upper extremity neurological examination he recorded "Deep tendon reflexes are 2+ at the biceps, 1+ at the brachioradialis, 1+ at the left triceps, absent at the right triceps. …. She does have intermittent pain that radiates into the right upper extremity but does

not follow a true radicular pattern but the symptoms could fit with either a right C6 or C7 radiculopathy." Claimant's Exhibit 9, p. 4.

58. At his deposition, Dr. Ganz explained that in January 2011, when he agreed with Dr. McCollum's 2009 report, he responded according to the information he had at that time, but readily acknowledged that he lacked information. Dr. Ganz testified that he checked the box agreeing with Dr. McCollum's findings and conclusions, because he believed that Claimant's injury would have resolved during the year and a half since he saw her. Dr. Ganz noted that he intended to see Claimant in follow-up, but never saw her again. He was not aware that Surety had denied all medical care and Claimant had no means to pay for further visits with him or to obtain the physical therapy and steroid injections that he had prescribed for her.

59. Dr. Ganz testified to a number of differences between his 2010 examination findings and those recorded by Dr. McCollum. Among others: Dr. McCollum reported normal range of motion in Claimant's right shoulder; Dr. Ganz reported decreased right shoulder range of motion. Dr. McCollum reported no muscle spasm; Dr. Ganz reported significant paraspinous muscle spasm with even light palpation around Claimant's cervical spine. Dr. McCollum reported Claimant had no work restrictions; Dr. Ganz restricted Claimant to lifting no more than 25 pounds and directed her to avoid working with objects above shoulder level. Dr. McCollum recommended no further treatment; Dr. Ganz prescribed physical therapy with an experienced spine physical therapist and epidural steroid injections at C5-6 and C6-7. In addition, Dr. McCollum found Claimant's triceps reflexes were +1 left and right; as noted above, Dr. Ganz found Claimant's deep tendon reflex was absent at the right triceps.

60. After reviewing in greater detail Claimant's records and the reports of the treating and examining physicians, Dr. Ganz expressly agreed with Dr. McNulty that Claimant suffered

an exacerbation of a pre-existing cervical disorder due to her industrial accident. Ganz Deposition, p. 36. Dr. Ganz testified that he did not agree with Dr. McNulty's conclusion that Claimant suffered cervical radiculopathy, however he agreed with Dr. McNulty's conclusion that Claimant suffered an aggravation of pre-existing cervical spondylosis; a cervical strain event at work. Ganz Deposition, p. 38. After close review of reports by Dr. Ganz, Dr. McCollum and Dr. McNulty, Dr. Ganz testified that he agreed with all of Dr. McNulty's report except for Dr. McNulty's conclusion that Claimant suffered cervical radiculopathy.

61. *Dr. Chambers.* Dr. Chambers is a board certified family practitioner who examined Claimant on July 30, and December 15, 2009. Dr. Chambers opined that Claimant's cervical radiculitis came from an acute situation, a defined work event that had been reported and documented. He also concluded that Claimant suffered from acute lateral epicondylitis. Dr. Chambers opined that Claimant's right shoulder and arm complaints were consistent with her work injury. He noted that C5-6 impingement could produce symptoms radiating down the arm through the thumb and index fingers, and C6-7 impingement could produce symptoms in the lateral aspect of the shoulder, arm and into the mid portion of the hand.

62. Dr. Chambers testified that bulging discs and bony prominences are common degenerative findings on MRI, but that Claimant's C5-6 disc bulging extruding into the neuroforamen would not be a common degenerative finding on MRI. After commenting on the MRI findings of bulging discs resulting in neural foraminal encroachment at C5-6 and C6-7, Dr. Chambers opined: "her pain symptoms, her issues with numbness and tingling in the right arm, right hand, are consistent with irritation of the nerve roots in the areas where there are bulges and abnormalities on the MRI." Chambers' Deposition, p. 32, ll. 9-13. Dr. Chambers further opined that Claimant's disc extrusion was consistent with the history of her accident. He agreed that

Claimant suffered pre-existing cervical spine arthritis, but disagreed that her July 4, 2009 accident did not aggravate her condition. At his post-hearing deposition, Dr. Chambers expressly testified that he agreed with Dr. McNulty's report, and given additional consultations and Claimant's historical chronology, he no longer agreed with Dr. McCollum's report.

63. The opinions of Drs. McNulty, Ganz, and Chambers are in general agreement that Claimant's July 4, 2009, industrial accident caused cervical and right upper extremity injury. These opinions arise from an accurate understanding of Claimant's accident, are supported by the medical evidence, and are more persuasive than the opinion of Dr. McCollum. Claimant has proven that her July 4, 2009 industrial accident caused cervical and upper right extremity injury.

64. **Medical care.** The next issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

65. Claimant herein has proven that her July 4, 2009 industrial accident caused cervical and right upper extremity injury and thus has proven her entitlement to reasonable medical care therefore, including diagnostic testing and treatment already rendered by her physicians and physical therapist.

66. Additionally, in January 2010, Dr. Ganz prescribed physical therapy with an experienced spine physical therapist and epidural steroid injections at C5-6 and C6-7. During his post-hearing deposition, Dr. Ganz reaffirmed that these measures constituted reasonable and necessary medical treatment of Claimant's condition. Dr. Ganz specifically testified that the physical therapy and steroid injections were reasonable treatment for the aggravation of Claimant's pre-existing cervical disease caused by her 2009 industrial accident. Dr. Chambers concurred that Dr. Ganz's treatment recommendations, including physical therapy and cervical epidural steroid injections, constituted reasonable medical treatment of Claimant's condition. Dr. McNulty similarly recommended further treatment for Claimant's cervical spine, including repeat cervical MRI and cervical spine epidural steroid injection.

67. Dr. King's notes from January 14, 2010, indicate that Claimant had no active right elbow symptoms at that time; however, he prescribed "lateral epicondylitis exercises with her physical therapy to strengthen and stretch her lateral elbow musculo-tendinous insertion." Claimant's Exhibit 8, p. 2.

68. Claimant has proven her entitlement to medical care for her cervical and right upper extremity injury sustained in her July 4, 2009 industrial accident, including medical care recommended by Drs. Ganz, King, Chambers, and McNulty.

69. **Temporary disability.** Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The

burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

70. In the present case, Claimant has proven that her cervical and right arm complaints were caused by her industrial accident and thus has proven her entitlement to benefits for temporary disability resulting therefrom.

71. The record establishes that Claimant was earning $10.00 per hour at the time of her accident. Her last day of work for Bonner Foods was July 14, 2009. Dr. Brinton restricted Claimant to light-duty work when he first examined her on July 20, 2009. Dr. McCollum found her capable of work without restriction on October 28, 2009; however, as already noted, his opinion is unpersuasive. During their post-hearing depositions, both Drs. Chamber and Ganz disagreed with Dr. McCollum's conclusions. Thus, Drs. Downs, Chambers, Ganz, and King did not approve Claimant's release to full-duty work. Dr. Ganz imposed a 25-pound lifting restriction and directed Claimant to avoid all over shoulder-height work on January 6, 2010.

72. Claimant's testimony and the records of rehabilitation consultant Carol Jenks establish that no light duty work was even arguably available at Bonner Foods until January 2010. Although Jenks recorded that Bonner Foods advised her it had light duty work available

in January 2010, Claimant testified that she then contacted Bonner Foods but was told there was no light duty work available that did not require above shoulder-height work.

73. The record does not establish that Bonner Foods made a reasonable and legitimate offer of employment to Claimant which she was capable of performing within the terms of her work restrictions and which employment was likely to continue throughout her period of recovery. Claimant was able to find suitable light duty work in the open labor market and actually worked from May until November 2010 at Daanen's Deli, and from March 2011 until the time of hearing at the Coeur d'Alene Resort. However, except for Claimant's employment at Daanen's Deli and the Coeur d'Alene Resort, the record does not establish that suitable employment was available to Claimant in the general labor market during her period of recovery.

74. Pursuant to Idaho Code § 72-408 and Malueg, Claimant is entitled to temporary disability benefits during her period of recovery from July 20, 2009, through the date of hearing, and until such time as she reaches medical stability or Defendants meet their burden of establishing that Claimant is no longer entitled to time loss benefits. Defendants are entitled to a credit for wages paid to Claimant during her periods of employment following the subject accident as contemplated by Idaho Code § 72-408.

75. **Attorney fees**. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant has proven her entitlement to medical and temporary disability benefits relating to her July 4, 2009, industrial accident. However, attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for

> compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

76. Defendants herein have contested whether Claimant suffered an industrial accident on July 4, 2009, and whether her accident caused her cervical and right upper extremity injuries. Claimant promptly notified her supervisor of her July 4, 2009 injury and on July 20, 2009, sought treatment from the medical provider specified by her supervisor. The First Report of Injury was signed by Claimant's supervisor on July 23, 2009, and indicated that Claimant's disability began July 20, 2009. On July 30, 2009, Dr. Chambers ordered a cervical MRI. On August 4, 2009, Commission rehabilitation consultant Carol Jenks telephoned Surety, providing actual notice of the dates of Claimant's recent medical appointments. No later than September 3, 2009, Surety received copies of Claimant's medical records documenting work restrictions by Dr. Brinton and treatment by Drs. Brinton, Downs, and Chambers, and physical therapist Michael Whitney. Yet, when Jenks contacted Surety about the status of the claim on September 4, 2009, Surety advised Jenks that it "is awaiting medical records before being able to proceed." Defendants' Exhibit F, p. 43. Claimant was sufficiently concerned with Defendants' unresponsiveness, that by September 8, 2009, she retained an attorney to pursue benefits for her.

77. On September 22, 2009—55 days after Dr. Chambers ordered an MRI, 65 days after Dr. Brinton restricted Claimant from working, and only after Claimant retained counsel—Surety approved a cervical MRI. Dr. Chambers testified his office would not have scheduled the MRI without authorization from Surety. On September 23, 2009, Claimant underwent a cervical MRI which revealed C5-6 and C6-7 moderate diffuse circumferential disc bulges extending into the right neural foramina at C5-6 and C6-7, and into the left neural foramina at C5-6. The record contains no indication Surety ever paid for the MRI.

78. Defendants delayed arranging for a medical examination by their selected physician, Dr. McCollum, until October 28, 2009—100 days after Claimant's disability began, 97 days after Employer completed the First Report of Injury, and 85 days after Jenks' provided actual telephonic notice to Surety of Claimant's accident, work restrictions, and ongoing medical treatment. The formulation of Dr. McCollum's opinion was further delayed until after EMG testing on November 17, 2009. On December 4, 2009—five full months after Claimant's accident, 136 days after she was disabled from working, 133 days after the First Report of Injury was signed by Claimant's supervisor and at least 121 days after Surety received actual notice of the claim—Defendants finally denied the claim citing Dr. McCollum's opinion that Claimant did not sustain an acute injury from her work on July 4, 2009, and that Claimant's pre-existing cervical arthritis was not caused or aggravated by her work.

79. Although Claimant was unable to work due to her injury, Defendants allowed five months to elapse before obtaining Dr. McCollum's medical opinion to support denial of the claim. During these five months Surety provided no medical or temporary disability benefits. Insofar as the record discloses, Surety never sought or obtained a statement from Claimant, her supervisor, or any co-worker about her accident prior to representing to Dr. McCollum that

Claimant suffered no accident but only the onset of pain at work.[2] While the history of Claimant's accident as recorded in the notes of Drs. Brinton, Downs, and Chambers lacks detail, there is no indication Surety ever sought clarification from any of these treating physicians regarding Claimant's reported accident prior to representing that she suffered no accident on July 4, 2009—a conclusion that Dr. Chambers testified was "contradictory to the history that was obtained by our urgent care physicians." Chambers Deposition, p. 33, ll. 13-15. After obtaining Dr. McCollum's opinion, Defendants had grounds to contest the causation of Claimant's injuries. However, Defendants' failure to make a reasonable investigation of the claim for nearly five months is concerning.

80. Even more objectionable is Defendants' handling of Claimant's cervical MRI. Claimant asserts, Defendants do not deny, and the record establishes that Surety eventually authorized the cervical MRI ordered by Dr. Chambers, but then did not pay for it. Defendants unreasonably denied payment of medical benefits for Claimant's cervical MRI.

81. Claimant has proven she is entitled to an award of attorney fees for Defendants' unreasonable denial of medical and temporary disability benefits prior to December 4, 2009.

CONCLUSIONS OF LAW AND ORDER

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

1. Claimant has proven her 2009 industrial accident caused her cervical and right upper extremity injuries.

2. Claimant has proven she is entitled to reasonable medical benefits for her cervical and right upper extremity injuries.

[2] The record contains no indication Defendants ever sought or obtained any statement from Claimant regarding her accident prior to the date of hearing.

3. Claimant has proven she is entitled to temporary total disability benefits from July 20, 2009, through the date of hearing, and until such time as she reaches medical stability or Defendants meet their burden of establishing that Claimant is no longer entitled to time loss benefits. Defendants are entitled to a credit for wages paid to Claimant during her periods of employment following her subject accident as contemplated by Idaho Code § 72-408.

4. Claimant has proven she is entitled to an award of attorney fees for Defendants' unreasonable denial of medical and temporary disability benefits. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. See Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this _20th_____ day of ___March_____, 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 __20th____ day of ___March_____, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE, ID 83816-1312

E SCOTT HARMON
PO BOX 6358
BOISE, ID 83707-6358

/s/_____