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

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| GARY E. FAULKNER,<br>Claimant,<br><br>v.<br><br>FEDERAL EXPRESS CORPORATION,<br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br>Surety,<br>Defendants. | **IC 2007-035184**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>April 5, 2012 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho on November 20, 2009. Claimant, Gary E. Faulkner, was present in person and represented by Clark L. Jordan, of Salmon. Defendant Employer, Federal Express Corporation (FedEx), and Defendant Surety, Indemnity Insurance Company of North America (Surety), were represented by Eric S. Bailey, of Boise.[1] The case was reassigned to Referee LaDawn Marsters after Referee Veltman left the Commission. Referee Marsters conducted a Supplemental Hearing in Boise on June 3, 2010, attended by the same parties and respective counsel. Documentary evidence was admitted at the first hearing, and the parties presented witness testimony at both hearings. Post-

[1]Defendants were formerly represented by Thomas P. Baskin, who withdrew from the case upon his appointment as a Commissioner on the Industrial Commission. Commissioner Baskin did not participate in this decision.

hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 12, 2012.

## ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant suffered an injury to his left shoulder caused by an accident on September 19, 2007, arising out of and in the course of employment at FedEx;

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident of September 19, 2007;

3. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including left shoulder surgery;

4. Whether and to what extent Claimant is entitled to temporary total disability and/or temporary partial disability benefits; and

5. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

## CONTENTIONS OF THE PARTIES

Claimant contends that he suffered an injury to his left shoulder when he unloaded a banded set of tires from above shoulder height on September 19, 2007. Claimant relies upon the medical opinion of Blake Johnson, M.D., his treating orthopedic surgeon, who opined that the appearance of Claimant's full-thickness rotator cuff tear in his left shoulder was consistent with the industrial accident Claimant described. Claimant seeks medical care benefits, including reimbursement for his left shoulder surgery, as well as temporary disability benefits and an award of attorney fees for Defendants' unreasonable denial of his claim.

Defendants counter that Claimant is not a credible witness; thus, under the facts presented, he cannot establish his left rotator cuff tear was the result of the unwitnessed

workplace accident he claims. Further, Claimant's medical records evidence a possible preexisting left shoulder tear from a prior injury. Defendants rely upon the medical opinion of Richard Knoebel, M.D., an orthopedic surgeon who performed an IME on November 29, 2007.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Gary E. Faulkner taken September 24, 2008;
2. Joint Exhibits 1 through 66 admitted at the November 20, 2009 hearing[2];
3. The testimony of Claimant and Ronald Straley taken at the November 20, 2009 hearing;
4. The testimony of Claimant taken at the June 3, 2010 hearing;
5. The post-hearing deposition testimony of Richard Knoebel, M.D., taken April 15, 2010; and
6. The post-hearing deposition testimony of Blake Johnson, M.D., taken October 13, 2011.

## OBJECTIONS

All pending objections are overruled.

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

[2] Exhibit Z, Claimant's September 24, 2008 deposition transcript, was admitted at the June 2010 hearing. It was formerly admitted as Exhibit 66. Because it is a duplicate, it is not listed as an additional exhibit taken into consideration in the development of the Referee's recommendation.

## FINDINGS OF FACT

***BACKGROUND***

1. Claimant was 50 years of age and residing at Richfield, Idaho at the time of the June 2010 hearing. He is right-hand dominant.

2. Claimant graduated with above-average grades from Gahr High School in Cerritos, California, in 1979. Thereafter, he attended some community college classes until he began working on lines for Pacific Bell at age 19. While working for Pacific Bell, in 1986 or 1987, Claimant sustained a right shoulder injury at work for which he required surgery. Pacific Bell initially denied the claim; however, Claimant hired an attorney, filed a claim, and prevailed. He obtained workers' compensation benefits including an $8,000 payment and "lifetime medical." Cl. Dep., p. 54.

3. Claimant was transferred to U.S. West in Ketchum, Idaho after about twelve years at Pacific Bell. He worked there and in Hailey for approximately three-and-a-half years. On September 3, 1996, Claimant suffered an injury to his right elbow due to an accident at U.S. West, for which he received workers' compensation benefits for medical care, including surgery.

4. Claimant also volunteered as a first responder, from 1978 until 2005. In that capacity, he assisted paramedics and law enforcement officers in responding to emergencies as he was available, and received some hazardous materials (HAZMAT) training. Claimant additionally worked as a reserve deputy sheriff for about eight years.

5. After leaving U.S. West, Claimant worked as a police officer in Shoshone, Idaho. He left that job because he felt uncomfortable arresting people in his small community for drinking and driving offenses. Later, he performed telephone work on a contract basis at locations between Elmore County, Idaho, and Mountain City, Nevada, before moving to

Wyoming for about two years to work for CenturyTel. He left that job because the winters were too harsh.

6. Next, Claimant was hired by United Parcel Service (UPS). He spent about 75% of his time at the counter, and about 25% of his time working as a relief driver, delivering packages. This job required Claimant to be able to lift 75-pound packages. At this job, Claimant suffered injuries to his neck, knees and right elbow from a slip-and-fall accident on November 14, 2003, for which he received workers' compensation medical benefits.

7. Also in 2003, Claimant was treated by Randy Coriell, M.D. for bilateral shoulder pain. Dr. Coriell diagnosed bilateral shoulder impingement syndrome. Claimant followed up with Dr. Coriell on January 23, 2004 for bilateral shoulder pain, left greater than right.

8. Claimant next worked for Glanbia, where he operated a forklift and also did frequent lifting of 35-pound bags/boxes of whey. After this job, he worked as a gunsmith apprentice for a short period. Claimant also has some experience installing car stereos and working as a computer/electronics technician. Claimant has basic computer skills, but is only a hunt-and-peck typist.

9. In November 2005, Claimant went to work for FedEx, on a part-time basis, delivering letters and packages. On August 1, 2006, he suffered an industrial lumbar spine injury for which he received workers' compensation medical benefits.

10. On April 23, 2007, Claimant sought treatment for new pain in his left shoulder from David Jensen, D.O., a physiatrist, who he had seen in late 2006 regarding his back pain. Claimant followed up on May 16 for pain in both shoulders, worse in his left. X-ray images that day demonstrated normal results; however, Claimant's pain persisted.

11. On May 21 and June 18, 2007, Dr. Jensen administered cortisone injections into Claimant's left shoulder. Dr. Jensen diagnosed left rotator cuff tendonitis and a possible tear. Claimant testified at the 2009 hearing that, at the time, he associated his shoulder pain with lifting packages at work, but not with any specific event; however, he did not tell Dr. Jensen that he thought his pain was work-related. He also did not talk about his shoulder pain with anybody at work.

12. Then, on June 30, 2007, a dog bit Claimant while he was working, causing neck pain from jerking down to ward off the animal. Claimant was treated several times in relation to that injury through September 6, 2007. Throughout the period following his June 18, 2007 injection, Claimant did not complain of shoulder pain. According to Claimant, he thought it had resolved.

13. On July 13, 2007, Scott Roberts, Claimant's friend who owned a drywall business, wrote an open letter describing Claimant's work schedule at his drywall company, to encourage Claimant's supervisor at FedEx to let Claimant off work at 3 p.m. "I gave Gary a guarantee of work every day except Sunday. He has a guarantee of work starting at 3pm [*sic*] till 6pm [*sic*] and as late as seven or 8pm [*sic*] (him willing), every day with the exception of Sunday." JE 2, p. 16. Mr. Roberts went on to explain that good labor is difficult to find in the area and that he was happy to pay a good wage to Claimant because he is a good worker. Claimant provided this letter to FedEx, and he was, thereafter, released from work by 3:00 or 3:30 p.m. The letter clearly states that Claimant is being paid, and very strongly implies that Claimant was working as a drywaller for Mr. Roberts. However:

a. In his October 11, 2007 recorded statement to Surety, Claimant reported that he was employed by Mr. Roberts, but not as a drywaller. "Yeah, I work part

time [*sic*] for a drywaller doing design and some, uh, just sort of general, it's almost like housekeeping, just keeping the place clean. But mainly, mainly it's design work. Drawing, coming up with ideas and what not [*sic*]." JE 4, p. 56;

b. At the 2009 hearing, Claimant testified that Mr. Roberts is a very good friend, but that he never worked as a paid employee for Mr. Roberts, and never hung drywall. "…I have in the past done some sketches, whatnot, remodel and drywalling…It was unpaid. It was informal." 2009 Tr., p. 47; and

c. At his 2008 deposition, Claimant confirmed that he has never worked for Mr. Roberts. "I've never worked one day for Scott Roberts, and if you ask him, he'll back that up. The "him willing" part is the key phrase in that letter, and if you read it carefully, as if Gary wants to work, I have work for him, he's not saying anything there that Gary has worked for me. He's making the work available for me. He's indicating that the work is there, if I want it, as long as he is willing." Claimant Dep., p. 98.

14. Claimant knew that evidence of doing drywall work would complicate his claim, and he wished to dispel that notion.[3] He explained at his 2008 deposition that he used the Roberts letter because he was unhappy that Mr. Straley did not let him leave when he was finished with his daily deliveries:

> Because Ron had a terrible habit of consistently asking me to hang around just for the last minute, and I felt that if I didn't have - - it was a personal thing with me. I felt if I had a load, my 35 packages, and it was just me and I get to do it the way I want to do it when I'm working, my 35 packages, when I'm done, I wanted to go home. Ron wouldn't allow that.

[3]"Q. Why did you know it was going to come up? A. Because I'm sure if you would like to say that I was working for him, maybe I hurt myself working for this guy. So it's not the case. I never worked one day in my life for him, and I'll swear to that." Claimant Dep., p. 99.

> What he wanted to do was you just hang around until I tell you you can leave.

Claimant Dep., p. 99.

15. However, at the 2009 hearing Claimant said that Mr. Roberts wrote the letter for him so that Claimant could be home each day to watch his kids after school. "I had at the time -- my daughters were 14 and 16. They're teenagers. And it was important for me to be home by the time they got home at 3:30, the time they got off school." 2009 Tr., p. 48.

16. According to Claimant, he was following the advice of another part-time employee when he decided to use the Roberts letter. This coworker advised him that the only way he could ensure a 3:30 p.m. quitting time was if he had responsibilities related to another job, school, or child care that required him to leave at that time. Claimant explained that he obtained the letter from Mr. Roberts because it was easier to be deceptive with FedEx than to tell the truth:

> …And Jay told me, look, Gary, there's only three ways you can get home. He was a part-timer, also. He had insight. And he said, Gary, if you really want to get off at 3:30, there's only three ways you can do that. It's either have a second job, schooling, verifiable schooling, or some sort of a child care situation, something like that. And the easiest thing for me to do was to ask, to be deceptive, frankly. I asked Scott, the drywaller guy, for a letter so it would look like I had to work after 3:30 so I wouldn't – I could legitimately clock out…and it worked perfectly."

2009 Tr., pp. 49-50. Since child care was an automatic excuse, according to Claimant's 2009 hearing testimony, it would appear that Claimant was either being untruthful at the hearing, or else he found being deceptive easier than being truthful, even when both courses were equally calculated to lead to the same favorable result. The latter defies reason. It is more likely that Claimant was untruthful at the 2009 hearing.

17. Claimant alleges that he injured his left shoulder when he unloaded a banded set of tires from above shoulder height on September 19, 2007:

> It was - - there were some tires. We deliver tires, believe it or not, and they band them together, and they're just under 75 pounds, for the most part, so they can get in there on that weight limit that we set. And they were up high, and when I went to lift them - - they were sort of sunk down into a box. They were on top of a box and the box had sort of collapsed a bit from the weight. And I was pulling and lifting at the same time, and when I got it loose, I don't think I was anticipating that much weight, and it kind of - - it felt like it pulled my arm out of the socket just briefly. It may have been my imagination, but it felt like a separation of this part and the socket. And it was immediate. I mean, it was obvious what happened. I think I took too much off at one time from too great of a height, and I think it had a little momentum. I think that's really what the problem was. I believe it had a little too much momentum. And I naturally tried to stop them. You don't want that falling on other stuff. And that's what happened.

Claimant's Dep., pp. 115-116. Claimant's very detailed description is utterly at odds with his October 5, 2007 letter in which he clearly advises that he had suffered no identifiable accident event and his report to Surety, in which he describes his initial pain as an ache, something he thought might go away.

18. It is undisputed that, following September 19, Claimant continued to work for a week-and-a-half, without notifying anyone at FedEx about his shoulder problem. Thereafter, beginning on September 29, 2007, low back pain and shoulder pain prevented Claimant from returning to work:

a. On September 29, Claimant called in "sick" due to low back pain;

b. On October 1, he was treated by Dr. Jensen for low back pain that flared up after working over the weekend, and for severe left shoulder pain of which Claimant "continues to complain." JE 7, p. 257;

c. October 2, Claimant notified his supervisor, Ron Straley, via fax, that his physician had taken him off work for "at least a week" due to his back problem. JE 2, p. 11;

d. On October 5, Claimant underwent an MRI which identified a full-thickness left rotator cuff tear and received another pain injection into his left shoulder;

e. On October 10, Blake Johnson, M.D., orthopedic surgeon, took Claimant off work for two months due to his torn left rotator cuff tear. In his chart note of his initial examination, Dr. Johnson reported, "He states that during the course of his work he recalls a time loading boxes and had significant pain in his shoulder. Since then he has had persistent pain in the lateral aspect of the shoulder. He has not filed an incident report but is thinking of doing so…It is usually a dull ache…that becomes sharp with use." JE 8, 315;

f. On October 24, Claimant underwent a mini-open arthroscopic surgery on his left shoulder, by Dr. Johnson. His post-operative diagnosis was left shoulder impingement syndrome, left acromioclavicular joint degenerative joint disease and a 1.5 centimeter (a little over a half-inch) full-thickness rotator cuff tear. In addition, Dr. Johnson noted the tear appeared to be acute because there was no significant bursitis present. He confirmed this opinion in a letter dated July 7, 2008 and in his deposition testimony on October 13, 2011;

g. Claimant's recovery was complicated by financial issues, which contributed to his failure to attend physical therapy for several weeks following surgery;

h. Although Claimant initially reported improvement in his symptoms, his subsequent medical records are consistent with his claim that he may need another surgery in the future; and

i. Due to his shoulder-related limitations, Claimant never returned to work at FedEx. He was officially discharged on July 8, 2008.

***CLAIMANT'S INITIAL REPORT TO FEDEX***

19. On October 9, Mr. Straley received Claimant's initial report of his left shoulder injury, via a letter Claimant authored, dated October 5. The letter is well-organized and type-written. It notifies FedEx that Claimant was, that day, diagnosed with a full-thickness left rotator cuff tear that he believed was work-related. In his letter, Claimant expressed his desire to be "clear" at multiple junctures. The Referee finds he succeeded; there is little if any ambiguity in Claimant's statements that he believed his left shoulder injury was not the result of a single accident but, instead, was caused by a work-related repetitive injury:

> Dear Ron,
>
> I found out today after seeing my doctor, that I have been diagnosed with a full thickness tear of my rotator cuff in my left shoulder. After discussing the nature of my work for the last two years at FedEx with him, it became clear that the tear was a result of loading and unloading heavy objects on a daily basis.
>
> …
>
> I can not [*sic*] identify an exact day that this took place as I believe this occurred over a two year period while working at FedEx. I have been living with this pain and finally had an MRI performed last week that confirmed this serious injury.
>
> …

JE 2, p. 13. Consistent with his past experience with workplace accident claims, Claimant conveyed a sense of confidence and control with respect to his expectations regarding the proper handling of his claim:

…

> Enclosed is a copy of the diagnosis by shoulder specialist Dr. Peter Jensen, Twin Falls. He feels that it is extremely important that this be surgically repaired as soon as scheduling permits, likely within two weeks. I want to be clear that this should be recorded as an on the job injury and assigned a work comp case number.
>
> I also request that you inform our benefits department of my circumstances. To be clear I have had no other employment that has had any impact that would result in an injury of this nature.
>
> …
>
> Needless to say, this is a very serious matter and your patience would be greatly appreciated during this time of surgery and recovery.
>
> In an effort to keep the lines of communication open while I am away from work, I will keep you informed and up to date regarding this situation and hope that you do the same. Please send any correspondence or papers regarding this matter to my home address provided below.

*Id.* Claimant explained at the hearing that when he wrote his letter, he was upset and frustrated about being injured:

> I think two things came into play there. When I wrote the letter, I was very upset. I was very frustrated with the whole unloading and loading situation and being injured, and - - but I knew I had to give Ron something to - - to identify why I wasn't going to be there to work the next day or the next week. And I just - - I think I just sort of, the way I felt, just kind of blasted out a letter to get him on track of what was happening with me.

2009 Tr., p. 42.

20. FedEx filed a First Report of Injury (FROI) on October 10, 2007. It indicates that Claimant suffered an "injury/illness" on September 19, 2007. Consistent with Claimant's October 5 letter, the FROI describes Claimant's left shoulder injury as the result of a repetitive motion injury: "Employee is claiming a repetative [*sic*] motion injury to his left shoulder from lifting and unloading packages on a daily basi [*sic*]." JE 1, p. 1.

21. On October 11, 2009 Claimant contradicted the statements he made in his October 5, 2007 letter when he told Dr. Johnson that he recalled a time when he had significant

left shoulder pain while unloading boxes at work. He explained at the 2009 hearing that, after talking with Dr. Johnson and consulting some unnamed source, he knew his shoulder symptoms began on a Wednesday. "As far as Dr. Johnson was concerned, he specifically asked me, you know, when did this happen; and after consulting - - I knew it was on a Wednesday." *Id.*

22. Also on October 11, 2007, Melissa McQueen interviewed Claimant on behalf of Surety, in a recorded telephone conversation. Claimant again confirmed that he did not recall experiencing an accident, and described his pain on September 19 as an ache he thought would resolve:

> MM: Okay. And I understand that you're having problems with your shoulder, can you tell me when, where and what happened to you. [*sic*]
>
> GF: Well, uh, the trouble really started you know, back, the first year I worked for FedEx I was a solo unloader at the Hailey station. And I think that that put a great deal of stress on my shoulder and I think it finally came to a head and on September 19th, it just got real weak and had pain in it and I decided to see a doctor about it.
>
> MM: Okay. On 9/19/07…..do you remember any specific accident around the 19th of September?
>
> GF: No, no, there was no accident, it was just an unloading scenario.
>
> MM: You were unloading?
>
> GF: Oh yeah.
>
> MM: …when did you first notice the pain?
>
> GF: Well, at the end of that morning, after unloading, it was, it kind of came to a head and the pain was just intense, inside my shoulder on sort of the top and outer edge of it. And it became weak, but you know, it wasn't like a, you know, it wasn't anything that would bring you to your knees, but I knew something was wrong, so that's probably the best way I can explain it on that day. It just felt like, if you've ever had something…..
>
> MM: Okay, so did you tell your boss about your shoulder that day?

> GF: No, no, like I said it wasn't the sort of thing that would take you to your knees you know, and like come limping in and saying you know, I'm in a bad way. This was, almost at first I thought it was just another ache or a pain that it, goes away, its [*sic*] just part of the job, but um, this time it didn't.

JE 4, pp. 56-57. At the hearing, however, Claimant described his pain associated with the September 19 injury as "excruciating", "pointed", "burning", and "an injury rather than a soreness":

> …before that, I had had occasional bouts of, like, soreness. But when that, when I lifted the tires and they slipped and I caught it and I extended my shoulder, it was excruciating. It was very pointed. It was very burning. Totally unlike what I had experienced before. So it was a completely different type of pain. It was an injury rather than a soreness, in my mind."

2009 Tr., p. 43.

23. During his telephone interview with Surety, Claimant resisted answering questions about accidents he had been involved in, in the past. Instead of answering these questions, he interjected, "Let's make it a little clearer. I can tell you that I've never had a shoulder injury anywhere." JE 4, p. 60.

24. Mr. Straley followed up and wrote a letter to Surety, which it received on November 2, 2007. He advised that, in his ten years with FedEx, no employee he knew of had ever incurred a repetitive motion injury from unloading boxes. Further, "I have seen folks with a one time [*sic*] lifting injury but they knew it right when it happened." JE 2, p. 2. Mr. Straley confirmed that Claimant had not reported any shoulder problems before October 9 and that no employees were aware of Claimant's shoulder problem. He further reported that he had worked with Claimant after September 19 on two occasions, but had not noted any shoulder pain behaviors. "I observed Gary on Tues. the 18th and 25th of September and did not notice any sign of pain, restraint, or indication of an injury." JE 2, p. 2.

25. A copy of a work schedule for the week including September 19, 2007 indicates that Claimant worked as an "unloader" from 8:50 until 9:30 a.m. Typically, Claimant worked as an unloader for two shifts each week. Each unloader shift lasted up to 70 minutes. Claimant had previously complained to Mr. Straley about working so much as an unloader, on the basis that it was unfair; Claimant believed others should pitch in more on this task. Apparently, Claimant's unloader duties were reduced following this discussion, as reflected in the schedules in the record.

***INDEPENDENT MEDICAL EVALUATION***

26. **Richard Knoebel, M.D.** On November 29, 2007, Dr. Knoebel, a semi-retired orthopedic surgeon, performed an IME at Surety's request. In preparation to author his report, Dr. Knoebel reviewed Claimant's relevant medical records, conducted an interview and performed an examination. He noted facts concerning Claimant's various initial injury onset reports consistent with those apparent from the evidence in the record.

27. On examination, Dr. Knoebel found Claimant's presentation only partially credible:

> The patient's presentation is partially credible only. The patient has facial grimacing, extremely slow and guarded movements, non-anatomic and inconsistent sensory and motor exam of the left upper extremity, history of multiple prior industrial injuries and complaints, and attorney representation. The patient also has a history of chronic narcotic use. These are factors noted to be associated with pain amplification on a conscious or unconscious basis and prolonged recovery.

JE 10, p. 377.

28. Given Claimant's preexisting left shoulder symptoms with treatment as recent as May and June 2007, and in the absence of sufficient evidence of an accident on September 19, 2007, Dr. Knoebel opined that Claimant's left shoulder injury is not reasonably work-related. "It

cannot be stated with a reasonable degree of medical probability that the patient's work at Federal Express or a specific 9/19/07 incident resulted in any significant or permanent aggravation of the patient's pre-existing left shoulder condition." JE 10, p. 379.

***CLAIMANT'S CREDIBILITY***

29. Significant evidence establishes that Claimant made statements, at or near the time of his left rotator cuff tear diagnosis, which are directly inconsistent with his current claim that he injured his left shoulder while lifting a set of banded tires from above shoulder-height on September 19, 2007. In addition, there are significant inconsistencies surrounding Claimant's various explanations of the July 2007 letter Claimant provided to FedEx stating he worked daily hanging drywall. The evidence in the record fails to reconcile these inconsistencies. Further, it was determined that, in at least one instance, Claimant testified to inaccurate information while under oath at the 2009 hearing. Therefore, the Referee finds Claimant is not a credible witness.

**DISCUSSION AND FURTHER FINDINGS**

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).

***CAUSATION***

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by

an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v.Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine*, *Id*..

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

30. Claimant incurred a full-thickness left rotator cuff tear, a little over a half-inch long, during the period in which he was employed by FedEx. The pivotal question is whether or not that tear resulted from a workplace accident.

31. It was determined, above, that Claimant is not a credible witness. Therefore, his testimony regarding the circumstances surrounding the onset of his pain is unpersuasive. If the unwitnessed workplace accident Claimant alleges is to be proven, it must be proven through the medical evidence alone.

32. Dr. Johnson testified that the appearance of Claimant's shoulder pathology was consistent with his description of a September 19, 2007 workplace accident. He explained that

rotator cuff tears occurring over time are preceded by bursitis and, as the condition progresses, tendonitis. At surgery, Dr. Johnson noted little bursitis, so he stated in his operative report that Claimant's tear appeared to be acute. He explained, "I felt at the time it was clearly straightforward - - I mean, I felt that it was fairly straightforward that there was a rotator cuff tear that was present that I felt was consistent with what I'd heard, consistent with the work-related injury." Johnson Dep., p. 8. He went on to acknowledge Claimant's preexisting pathology without changing his causation opinion.

33. Dr. Knoebel, however, testified that nothing about Claimant's injury, itself, confirms his allegation that he injured it pulling down a set of banded tires at work.

34. There is credible medical evidence to support the proposition that Claimant's left shoulder injury *could* have happened consistent with his tire-lifting report. However, the medical evidence in the record is inadequate to prove by a preponderance that such an accident *did* occur on or about September 19, 2007. Most notably:

a. Claimant worked his regular job, with no doctor visits, until September 29, when he notified Mr. Straley that he could not work due to *back* pain;

b. Claimant had, three months earlier, received his second pain injection into his left shoulder for symptoms diagnosed as a possible partial left rotator cuff tear;

c. Claimant did not seek medical treatment for pain in his left shoulder for twelve days after September 19. When he did, on October 1, 2007, his primary complaint was low back pain following working over the weekend, with severe left shoulder pain of which Claimant "continues to complain". JE 7, p. 257; and

d. Dr. Johnson, the only physician who opined that Claimant's left shoulder pathology is due to a workplace accident on September 19, cannot pinpoint Claimant's accident to that date without assuming Claimant's report is accurate, which the Referee has declined to find.

35. Also, the evidence suggests another plausible explanation for Claimant's injury: that is, that Claimant may have permanently aggravated his preexisting partial tear while doing drywall work for Mr. Roberts.

36. Claimant has failed to adduce sufficient evidence to prove that his left shoulder injury was caused by an accident arising out of the course of his employment. There is also insufficient evidence in the record to establish that his left shoulder pathology is the result of a repetitive motion injury.

37. All other issues are moot.

## CONCLUSIONS OF LAW

1. Claimant has failed to prove that his left shoulder condition was caused by an accident occurring during the course of his employment.

2. All other issues are moot.

## RECOMMENDATION

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

DATED this _27th_ day of ___March_____, 2012.

INDUSTRIAL COMMISSION

/s/_____
LaDawn Marsters, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __5th___ day of __April_____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

CLARK L JORDAN
PO BOX 1015
SALMON ID 83467-1015

ERIC S BAILEY
BOWEN & BAILEY, LLP
PO BOX 1007
BOISE ID 83701-1007

sjw /s/_____

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

| | |
|---|---|
| GARY E. FAULKNER,<br>Claimant,<br><br>v.<br><br>FEDERAL EXPRESS CORPORATION,<br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br>Surety,<br>Defendants. | **IC 2007-035184**<br><br>**ORDER**<br><br>April 5, 2012 |

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

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

1. Claimant has failed to prove that his left shoulder condition was caused by an accident occurring during the course of his employment.

2. All other issues are moot.

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

DATED this __5th__ day of ____April_____, 2012.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
R.D. Maynard, Commissioner

Recused_____
Thomas P. Baskin, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __5th__ day of ____April_____, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLARK L JORDAN
PO BOX 1015
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