

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHERINE GILLARD,

Claimant,

v.

HB BOYS, LLC.,

Employer,

and

AFFINITY INSURANCE,

Surety,

Defendants.

IC 2009-007073

2009-000471

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

Filed November 21, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Pocatello on August 9, 2011. Claimant, Katherine Gillard, was present and represented by Jonathan W. Harris, of Blackfoot. Defendant Employer, HB Boys, LLC (HB Boys), and Defendant Surety, Affinity Insurance (Surety), were represented by Alan K. Hull and Matthew O. Pappas, 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 July 25, 2012.

ISSUES

By agreement of the parties and as addressed in their post-hearing briefs, the issues to be decided as a result of the hearing are:

1. Whether one or more of Claimant's three midline hernias qualify as a compensable injury or occupational disease;
2. Whether Claimant gave legally required notice to her employer of such injuries or occupational disease; and
3. If Claimant prevails in whole or in part on items one and two, then to what extent Claimant is entitled to temporary total disability benefits from date of onset of injury or occupational disease.

Although the above issues are couched in terms of both "accident" and "occupational disease," Claimant did not argue in her briefing that she sustained an occupational disease as provided by Idaho Code § 72-437, nor that any other law supports her occupational disease claim. Similarly, she did not argue that she provided proper notice of an occupational disease claim as required by Idaho Code § 72-448. As a result, Claimant has waived any issues related to whether her injuries are the result of an occupational disease she contracted at HB Boys and whether she provided proper notice of an occupational disease.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that she incurred three midline hernias while working as a store manager at Burger King, owned by HB Boys, when she climbed onto the roof to fix an exhaust fan belt on or about May 18, 2008, and again on or about August 31 or September 1, 2008. Defendants counter that Claimant's evidence is inadequate to prove by a preponderance that any of her hernias were the result of a workplace accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Claimant, taken October 2, 2009;
2. The testimony of Claimant, Dorothy Angle, Cory Jones, Trina Thomson, Kenneth Cortes, Debbie Olpin, and Emily Harding, taken at the August 9, 2011 hearing;
3. Claimant's Exhibits, pages 100 through 155, and Defendants' Exhibits 1 through 26, admitted at the hearing; and
4. The post-hearing deposition testimony of Austin Richard Cushman, M.D., taken February 13, 2011.

OBJECTIONS

All pending objections are overruled.

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

FINDINGS OF FACT

BACKGROUND INFORMATION AND MEDICAL CARE

1. Claimant was 45 years of age and resided in Pocatello at the time of the hearing. In June 2007, she bought a sandwich at a local Burger King, owned by HB¹ Boys, but returned it because it contained a lettuce core. She received a fresh sandwich and, following a conversation with Debbie Olpin (managing director), a new job.² Claimant started on June 4, 2007, attended training for several weeks at the Twin Falls store,³ and soon became the store manager of the Chubbuck Burger King.

2. Claimant's tenure at HB Boys was marked by: workweeks in excess of 50 hours; lifting inventory items when necessary; climbing onto the roof via an indoor ladder and roof access, on occasion, to fix an exhaust system fan belt; stress and anxiety; and physical symptoms, including abdominal and flank pain of both known and unknown etiology.

¹ HB stands for Huntington Beach.

² Claimant had previously worked for HB Boys. However, the relevant period of employment referred to herein, unless otherwise indicated, begins June 4, 2007.

³ The parties refer to the various Burger Kings as "stores."

3. Prior to June 2007, Claimant had a long history of duodenitis, gastritis and shingles, all of which are exacerbated by stress. In addition, she had undergone two laparoscopic surgeries: one in 1997, in an unsuccessful attempt to diagnose periodic abdominal pain of unknown etiology; and another in March 2007, to remove her gall bladder (cholecystectomy).

4. Claimant's employment with HB Boys was terminated on November 2, 2008. A timeline of events, from the time she started working at HB Boys through her first two hernia surgeries, follows:

June 30, 2007 – While in temporary residence at Twin Falls for HB Boys management training, Claimant sought emergent care for dizziness and chest pressure. A head CT scan and a chest x-ray returned normal results. Valium was prescribed.

September 18, 2007 – Claimant sought emergent care for abdominal pain for the prior eight days in her upper right quadrant radiating around her side to her right flank/back area, aching, and cramping, with no abdominal tenderness. No diagnosis was provided; Claimant was told to follow-up with her physician.

October 18, 2007- Claimant sought treatment for right leg pain and underwent ultrasound imaging, which showed no evidence of deep vein thrombosis.

October 19, 2007 – Claimant sought emergent care for abdominal pain, now with diffuse abdominal tenderness, with onset two months previously. No diagnosis for Claimant's abdominal pain was offered, but it was recommended that ovarian cysts be ruled out.

October 20, 2007- Claimant underwent a pelvic ultrasound, which returned normal results and, specifically, no ovarian cysts.

October 25, 2007 – Claimant was examined by W. Kurt Birkenhagen, Jr., M.D., a surgeon specializing in vascular and thoracic surgery, who performed her laparoscopic

cholecystectomy in March. She described right upper quadrant, moderately severe pain, in the area of her surgical site, worse with eating and different than gallbladder pain. An EGD showed duodenitis and gastritis, and Claimant's colonoscopy was normal. Dr. Birkenhagen thought Claimant's symptoms were most likely due to gastritis, and he prescribed Nexium.

December 26, 2007- Claimant sought emergent care for pain in her right flank and elsewhere, mostly along her right side. She had no nausea, vomiting or fever, and eating did not exacerbate her pain. Urinalysis and bloodwork results were normal. The attending physician, seeing no reason for imaging, recommended doubling up on Nexium and following up with Dr. Birkenhagen. According to the chart notes, upon hearing these recommendations, Claimant "became very irate and belligerent." Defendants' Exhibit 11, p. 116. When the nurse arrived, Claimant had already "ripped" her IV out. *Id.*, p. 113. Claimant's husband advised, "The doctors won't work for us," and, upon the nurse's apology, he replied, "Sorry this isn't gonna cut it." *Id.* They departed without receiving discharge instructions.

January 3, 2008- Claimant followed-up with Dr. Birkenhagen, reporting that the Nexium was no longer helping. She now had left-sided abdominal pain of "6" on a scale to "10," nausea and some episodes of elevated body temperature. Dr. Birkenhagen, noting that Claimant was "a somewhat difficult historian," suspected a gynecological cause for her symptoms and referred her to Denise J. Bruneau, M.D., an OB/GYN.

February 11, 2008- Claimant underwent an abdominal CT scan which revealed benign pulmonary and liver conditions.

February 14, 2008- Upon consulting with Dr. Bruneau, Claimant elected to undergo a hysterectomy and right salpingo-oophorectomy. Chart notes from Claimant's preoperative evaluation describe her symptoms:

The patient noted that the pain was cyclic and would occur approximately 5 days before her period. She said the pain would radiate down to the right lower quadrant and into her right leg as a constant sharp pain. She noticed that this pain would be there 5 days prior to the period and then last for another 5 days and then would go away. She said this has been going on for years but that it has been much worse in the last 6 months.

Id., p. 127.

In addition, on exam, Dr. Bruneau identified a very small umbilical hernia.

February 15, 2008- Claimant underwent laparoscopic hysterectomy and right salpingo-oophorectomy by Dr. Bruneau.

March 31, 2008- Claimant was released to work with no restrictions.

April 26, 2008- Claimant gave written notice, advising HB Boys that her last day would be May 30, 2008.

May 6, 2008- Claimant attended a mandatory day-long meeting for managers of various Burger King stores. Workers' compensation reporting procedures were discussed in a Power Point presentation by Emily Harding, human resources supervisor. Claimant's store had a high number of accidents already for the year (four), and the presentation provided guidance on preventing avoidable accidents. It also addressed proper reporting procedures. For each workplace accident, Claimant, as the store manager, was required to fill out an accident report form or forms provided in pre-packaged "packets" and send them on to HR for further handling.

May 18, 2008- The date on which Claimant asserts she sustained an injury while climbing up on the roof. Soon after this, Claimant decided not to quit.

May 19, 2008- Claimant reported to Dr. Bruneau a shingles outbreak because she had not been taking Valtrex. Claimant was referred to Martha O. Buitrago, M.D., a specialist in hyperbaric medicine and infectious diseases.

June 4, 2008- Claimant was examined by Dr. Buitrago, whose chart notes show Claimant reported she was employed at Burger King and owned a construction company,⁴ and worked 80-90 hours per week. Dr. Buitrago's chart notes indicate she recommended reducing stress because it seemed to correlate with her symptoms, and also a rheumatological workup, which Claimant apparently did not obtain.

June 6, 2008- Claimant took two days of sick leave.

July 5, 2008- Claimant took one day of vacation.

August 22, 2008- Claimant again provided notice that she was quitting, designating her last day as September 4. Subsequently, again, she decided not to quit. Also on this date, Claimant sought treatment from Chris L. Bachman, M.D., at an immediate care center, for what she described as a lung infection, ear pain, pain on her sides, and pain with breathing deep. Bronchitis was diagnosed and treated with medications.

September 2-4, 2008- Claimant was off work due to an acute illness, treated by Dr. Bachman and/or P.A. Nic Hale, with symptoms including diarrhea, nausea, vomiting, flank pain (worse with movement), tender abdomen, coughing up blood, body aches for a month, and shortness of breath.

September 22, 2008- Claimant was evaluated for abdominal and flank pain by Shawna Reynolds, PA-C, physician assistant to Richard Maynard, D.O., a family practitioner. Ms. Reynolds noted that Claimant had experienced similar pain since 1998,⁵ when she underwent

⁴ Claimant and her husband own a house-moving company.

⁵ Claimant's prior laparoscopy was actually performed in 1997 or before, so Dr. Maynard's note slightly underestimates the period of time during which Claimant has suffered similar abdominal symptoms. On April 14, 1997, Darryl B. Cook, M.D., wrote to Michael Gregson, M.D., a letter in which he summarized her diagnostic testing and treatment for her abdominal symptoms to date, which included an abdominal laparoscopy by a Dr. Breese which revealed ovarian cysts, an upper GI series which returned normal results, and a prescription for Prilosec. Dr. Cook further described Claimant's recurrent abdominal symptoms: "Despite this she continues to complain of right upper quadrant pain associated with nausea and sometimes heartburn. She is off the Prilosec now and it has not made much difference on stopping it. She does complain of a lot of bloating and has lower abdominal

diagnostic laparoscopic surgery, and that she seemed “overly tender to light touch diffusely across entire abdomen and CVA⁶ areas.” Defendants’ Exhibit 8, p. 2.

September 24, 2008- David Hill, PA-C, another of Dr. Maynard’s physician assistants, evaluated Claimant. She still had flank pain associated with intermittent bloating and diarrhea and intermittent nausea highly related to her gastroesophageal reflux disease (GERD). Her lab tests were all normal. Mr. Hill noted of Claimant: “When questioned, admits to being an anxious person, husband agrees. When work or social stressors increase, so does her anxiety, GERD, and IBS type symptoms. When anxious, occasionally has diaphoresis, CP, hyperventilation, mouth numbness.” *Id.*, p. 3. After discussing her condition with her for 45 minutes, Mr. Hill opined that her symptoms were related to her anxiety, and he diagnosed generalized anxiety disorder. Mr. Hill prescribed medications for anxiety and irritable bowel syndrome (IBS).

October 31, 2008- Mr. Hill noted that Claimant’s symptoms were under control and she was feeling better. He recommended follow-up in six months.

November 2, 2008- HB Boys terminated Claimant’s employment for poor performance based upon a number of factors that she acknowledged, in writing, were communicated to her at the time.

November 12, 2008- Claimant sought treatment from Mr. Hill for flank pain radiating to her abdomen and anterior proximal thighs, occasional nausea and constant diarrhea over the prior two weeks. Her pain was worsened by eating and, sometimes, by movement. She denied anxiety. She reported she had seen doctors in the past for similar symptoms,⁷ and that they had

discomfort as well. She tends to have a bowel movement every 2-3 days and sometimes gets relief of abdominal discomfort with defecation. Again, the pain has been episodic for years but she may go a month or two at a time without discomfort.” Defendants’ Exhibit 3, p. 3.

⁶ Lower sides of the back/flank areas.

⁷ For example, in March 2003, Claimant sought emergent care for abdominal pain radiating to her back, diagnosed as most likely related to gastritis.

been frustrated. Mr. Hill administered Toradol, which helped. He ordered an abdominal/pelvic CT scan and suspected Crohn's disease, inflammatory bowel disease, or IBS accompanied by anxiety might be the cause of her abdominal pain.

November 17, 2008- Claimant underwent an abdominal/pelvic CT scan which revealed a new infraumbilical anterior abdominal wall hernia since her February 11, 2008 CT scan. Mr. Hill did not assume the hernia was related to her pain. He questioned whether the hernia findings were at all related to her abdominal symptoms: "CT findings role in abdominal pain? Red herring? Have consult and go from there." *Id.*, p. 13. Later that same day, Claimant sought emergent care for diffuse, intermittent abdominal pain radiating from her periumbilical area to her back, worse with eating.

December 2, 2008- Dr. Birkenhagen examined Claimant and identified a second, "surprisingly large" hernia, at the site where a trocar was inserted during her February 2008 hysterectomy. Defendants' Exhibit 4, p. 17. There is no explanation in the record for why, if this hernia existed on November 17, 2008, it was not identified by CT imaging.

December 15, 2008- Claimant underwent hernia repair surgery by Dr. Birkenhagen. Dr. Birkenhagen converted the two hernias into one hernia, located in the midline of her abdomen, below Claimant's navel, and repaired it with mesh.

December 16, 2008- Claimant and Emily Harding spoke on the telephone, after which Ms. Harding sent Claimant an email providing payment due dates, apparently for COBRA medical insurance payments, and a mailing address for HB Boys. She also wrote, "So glad you're feeling better! Have a great Christmas! If you have any questions, please feel free to call me. Thanks for your help!" Claimant's Exhibit 155.

December 18, 2008- Claimant sought emergent care for postoperative abdominal pain and increased swelling near the surgical site, among other things. Following examination, Claimant was given a pain medication. She declined to take it before leaving, as was apparently intended. She said she did not want to wait around 30 minutes after taking it, so she told the nurse she'd take it at home.

January 3, 2009- On examination, Mr. Hill identified a probable new hernia. Claimant reported she had quit her job with Burger King, now had less stress, and her husband's income was sufficient to enable her to stay at home and not work. She had back pain with no known injury, but she reported her abdominal pain had resolved with surgery. Also on this date, Claimant executed a First Report of Injury (FROI), alleging "acute illness" on August 30 or September 1, 2008, in "all muscels [*sic*]" from "climbing on roof, moving stock and equipment, working (11th day) of 18 hrs [*sic*] shifts" and "working 80 to 100 hrs week." Defendants' Exhibit 2, p. 1. Claimant also wrote on the FROI that she notified her employer of her accident on that day. She filed it with the Commission on January 21, 2009.

January 27, 2009- Claimant was treated by Mr. Hill for abdominal pain, present for one week after walking through the mall. He noted:

Today's [*sic*] abdominal pain most likely due to muscle strain or complication of scar tissue following surgery, both I believe are self-limited, should be fine with rest and time. By her account and my observation, her abdominal pain is greatly increased with her anxiety. She also has a hard time not ruminating on the workman's comp claim and the hardships she believes Burger King put her through. Seems as though she has poor insight into situation...Patient is advised to continue workman's [*sic*] comp claims if she feels it's [*sic*] necessary, and she is told to have her caseworker contact our office if they need any info. She's [*sic*] also advised that no matter what happens with claim, she will still have history of surgeries, and will have to live healthy lifestyle to feel well.

Defendants' Exhibit 8, p. 17.

This is the earliest reference to workers' compensation claims in Claimant's medical records. Mr. Hill also wrote:

Of note, and this is the patients [*sic*] biggest concern as of late, causing her much distress. Patient is filing a workman comp claim against. [*sic*] Burger King. She would like to be compensated somehow for the suffering she has endured. She claims that by not listening to her. [*sic*] requests for cutting back her hours from 80-100 hours/week over this past summer and fall she was [*sic*-“not”] able to recover from her GB. [*sic*] and hysterectomy surgeries, possibly causing hernias and other pain that would otherwise have not been present. Her and her. [*sic*] husband have both told me that she did not need to work in the past, his salary could cover home costs for both and that her work is. [*sic*] very stressful to her. She may have been able to find some resolve if she had quit. But for some reason she continued to work. Now. [*sic*] she states, “they should have to pay for what they’ve done to me, no one should have to work their fingers to the bone.”. [*sic*]

Mr. Hill also noted the timeline of events as related by Claimant:

In March of 2007 patient had cholecystectomy with Dr. Birkenhagen. In June. [*sic*] patient returned to work working 80+ hours/week at Burger King as manager. Job strenuous, lifting 100+ lbs boxes. In February of 2008. [*sic*] patient having very painful menses and abdominal pain, went to see OB/Gyn Dr. Brion,⁸ would [*sic*-“who”] did hysterectomy. In March 2008 returned. [*sic*] to work, 80+ hours/week. In May abdominal pain re-presented and she had f/u with Brion. She was then referred to CDC in Idaho Falls. She does not know why she was sent to CDC, “I had an infection.” She returned to work, asking then [*sic*] to reduce her hours, but for whatever reason. [*sic*] according to patient, they did not. In late August 2008 patient was seen at PICC for URI, while there [*sic*] MD on staff told her that she had a “muscle strain,” advised to cut back work. In September she requested less hours at work, but according to her she kept working 80+. [*sic*] hours/week. In early November she was fired for unknown reason (originally she told me she had quit, for her healths [*sic*] sake, less stress,. [*sic*] etc.). I saw patient in November and due to her history and request did a ABD CT. Hernias found, see report. Patient was sent to Dr. Birkenhagen for eval and he elected to do surgical repair of hernias on December 15th.

⁸ Dr. Bruneau is misidentified throughout this chart note as “Dr. Brion.”

Also at this visit, Claimant denied she needed a change in anxiety medication. Mr. Hill noted, "That's ok, but I advised her and I believe we should follow up further with this in future. Possibly referral for counseling. F/U 1 month." Defendants' Exhibit 8, p. 17.

February 3, 2009 – A nurse at Dr. Birkenhagen's office took a message from Claimant, in which Claimant reported that Mr. Hill "has some concerns that these hernias are work-related and advised her to call workmen's comp for a claim." Defendants' Exhibit 4, p. 19. According to the nurse's note, "Dr. B stated that he doesn't believe that these hernias have anything to do with the patient's job and she can go back to work at this time." *Id.*

February 27, 2009 - Surety denied Claimant's January 2009 claim because HB Boys had insufficient notice of the alleged injury. It asserted that the first notice HB Boys received of the September 2008 accident was the FROI filed with the Commission on January 21, 2009.

March 10, 2009⁹- Claimant completed another FROI in which she reported she sustained an abdominal strain from climbing on the roof on May 18, 2008, that she notified HB Boys the same day, and that she returned to work on May 19, 2008.

March 30, 2009 – Claimant underwent a second hernia surgery by Dr. Birkenhagen, in which he repaired two spigelian hernias¹⁰ and one ventral midline hernia. The ventral midline hernia was located just below her prior hernias, in her suprapubic area, on an incision site from her 1997 laparoscopic surgery. Dr. Birkenhagen acknowledged that these hernias were not previously identified.

April 7, 2009 – Dr. Birkenhagen authored a letter "To Whom It May Concern," apparently at Claimant's request, opining that her two spigelian and one ventral hernia "became

⁹ The form is dated March 10, 2008; however, Claimant does not dispute that she actually completed the form on March 10, 2009.

¹⁰ Dr. Birkenhagen initially believed these, too, were incisional hernias, but revised his opinion upon observing them at surgery. Claimant is not seeking benefits in relation to her spigelian hernias.

noticeable and symptomatic because of the stressful lifting and reaching that this patient had to do at work. I think that these should certainly be considered aggravated by her working conditions." Defendants' Exhibit 4, p. 29.¹¹

April 16, 2009 – Mr. Hill authored a letter "To Whom It May Concern," opining that Claimant's abdominal and back pain are "possibly associated" with physical, mental and emotional stressors at work. Defendants' Exhibit 8, p. 25.

August 4, 2009 – Claimant told Dr. Birkenhagen she was concerned that she had reherniated one of her incision sites at physical therapy. Dr. Birkenhagen replied that she "should do full activities and not restrict her activity at this point." Defendants' Exhibit 9, p. 30. "I told her that if she does get a recurrent hernia, that it would happen sooner or later regardless." *Id.*

Post-August 4, 2009 – Claimant experienced serious complications leading to more hernia repair surgeries.

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).

¹¹ Mr. Hill first identified one or more of these hernias in January 2009. Dr. Birkenhagen tried, but could not, identify any of them by examination on January 13, 2009. Dr. Birkenhagen was finally able to locate these hernias by examination on March 3, 2009. Apparently, Dr. Birkenhagen was unaware that Claimant was no longer working for HB Boys during these periods.

WITNESS TESTIMONY AND CREDIBILITY

5. The credibility of witnesses is hotly at issue in this case. Each witness is addressed, in turn, below.

6. **Claimant.** On October 2, 2009, Claimant was deposed. She testified that she hurt herself going onto the roof on May 18, 2007¹² and, as a result, she had to go home. "...I kind of drug my body over coming up and going down, and when I came down, I was - - I couldn't tell you what was hurting where, just my abdomen just felt like it was ripped apart." Claimant's Deposition, p. 102. According to Claimant, Trina Thomson, assistant manager, sent her home and Kenny Cortes, district manager, called later her at home and told her to get back to work. Although she did not feel like she could do it, she recalled that she returned to work the next day, and for several days thereafter. At some point, she had a conversation with Debbie Olpin about the event and that she had previously given notice (in April) and would be quitting effective May 30. Recalling the conversation, Claimant testified:

When I believe she came in, on Tuesday - - Tuesday or Thursday of the following week, she had got my notice, and I informed her that, you know, I worked a hundred twenty hours this week, I'm still feeling worn down. You know, yesterday I went on the roof - - a few days ago I went up on the roof, this is how Kenny handled it.

You know, she wanted to know what can she do to resolve it. And I said: You can get my hours down.

Id., p. 104.

7. Claimant also testified that she felt pain in her abdomen again when she went onto the roof, on either August 31 or September 1, 2008. Claimant now attributes this pain to one or more of her midline hernias (she does not specify). Nevertheless, Claimant does not contest that even though she was checked by physicians for hernias following both alleged injury dates, none

¹² Claimant explained that she would, on occasion, have to climb up a ladder inside the store to a roof hatch to access the roof to fix a fan belt on the exhaust equipment.

were detected until November 17, 2008, approximately two weeks after HB Boys terminated her employment, and January 3, 2009.

8. Claimant testified at the hearing that she believes her work conditions, including climbing on the roof, combined over time to cause her three midline hernias, which are the subjects of her instant claims. She does not believe that any one instance is responsible:

Q. (BY MR. HULL) You talked about what you say happened on August 31st, of which you finally reported in December or January; is that right?

A. You guys, you're trying to associate the roof as the day of this injury. I don't look at it that way. It's a combination of long hours, lifting, and the roof.

Q. Are you saying that there was no one incident that caused your problems?

A. I believe that in May, around May 18th, and August 30th, with the combination of the long hours and the roof, it was too much for me to handle.

Q. Are you claiming in this case, because the way your pleadings are written, and there was quite a discussion before we started with opening statements, or during the opening statements actually, but are you claiming that the incidents on the roof did or did not cause your hernias?

A. I am claiming that it is a workplace illness because of the combination of lifting, long hours, the roof. The roof added a lot of – resulted in a lot of problems.

...

Q. So you're not claiming any specific incident, just a combination of long hours, constant lifting and constant working?

A. Correct. I believe that the working conditions that I experienced resulted in an aggravation of my duodenitis, which ultimately led to my hysterectomy. Aggravation of my shingles. I begged for a day off without interruption.

Hearing Transcript, pp. 113-114.

9. Claimant admits that she did not provide HB Boys with written notice of either of her alleged workplace injuries until well after the 60-day statutory notice period had passed. She explained that HB Boys' workers' compensation reporting procedures stressed and frustrated

her. She believed that the company did not keep an incident reporting log, which she thought it ought to do, and she witnessed injuries at work that she believed were not handled appropriately. Further, Claimant testified that Debbie Olpin told her that she and the other managers were not allowed to file any more workers' compensation injury reports related to the Chubbuck location because, during the beginning of 2008, four reports had already been filed and HB Boys was concerned about triggering an OSHA inspection. Debbie Olpin and Emily Harding both testified that they were unaware of any OSHA inspection trigger related to the number of accidents reported, and each disputed that Claimant was ever told not to report workplace accidents.

10. Claimant's job as store manager, among other things, required her to handle workplace injuries by filling out one or more incident report forms, provided by the corporate office in a pre-compiled packet, and sending them on to the HR department for further handling. Claimant also had years of prior experience in fast food management where she was required to report workplace accidents. Based upon this prior experience, Claimant thought she should fill out a First Report of Injury in such instances. However, at HB Boys, the HR department completed this task upon receipt of an incident report. Claimant was also concerned that the workers' compensation packets in which the reporting documents were compiled were not readily available and that she never really understood the reporting requirements.

11. Claimant knew there was a method for reporting workplace accidents, and if she thought she had suffered one, there is no reason why she would not have properly reported it in writing. Claimant has demonstrated through her testimony and her medical records that she is assertive in protecting her interests. For example, rather than wait for a nurse to check her out of the hospital, she tore out her IV and prepared to leave without assistance. Also, the record establishes that she complained regularly to her supervisors about problems she saw in the

workplace. As such, the evidence is insufficient to establish that oppressive supervisors and confusing rules, rather than the more obvious reason that Claimant did not believe she had suffered a workplace accident, are the reasons that she did not contemporaneously report her alleged workplace accidents.

12. Further along these lines, the evidence in the record establishes that Claimant did not suspect that climbing onto the roof may be a causal factor until after her second hernia surgery, in March 2009. Through this period, Claimant chiefly complained about her long hours, not about being “made” to climb onto the roof. She mentioned this on her first FROI filed in January 2009, but listed other factors as well. In any event, it is apparent that Claimant began attempting to piece things together, well after her first hernia surgery in December 2008, in a determined attempt to “make them pay.” Even at this point, Claimant was not focusing on climbing up to the roof as a causal factor, but on the long hours, as demonstrated by Mr. Hill’s January 27, 2009 chart note.

13. The Referee finds Claimant was most likely unaware she suffered an injury at work on or around May 18, 2008 and on or around August 31 or September 1, 2008 and, instead, believed her shingles, duodenitis or other preexisting conditions, exacerbated by long hours and stress at work, was causing her abdominal pain. This finding alone does not exclude climbing on the roof as a causal factor, as this is ultimately a medical determination.

14. Claimant is not a credible witness. Her medical records evidence attempts to manipulate Mr. Hill and Dr. Birkenhagen with respect to issues directly related to this case. For instance, she lied to Mr. Hill by first delaying any report of her termination, instead reporting that she had not experienced any anxiety lately in mid-November, and later by telling him that she quit HB Boys, before finally disclosing the truth (that she had been terminated) in late

January 2009. After speaking with Mr. Hill, whose notes do not support the proposition that he believed a causal connection existed between Claimant's hernias and her work at HB Boys, Claimant left a message for Dr. Birkenhagen. The message implied that Mr. Hill believed such a connection existed and that Claimant sought a similar opinion from Dr. Birkenhagen. Interestingly, Dr. Birkenhagen responded at that time that no such link was likely. The record is insufficient to establish that Claimant intentionally attempted to manipulate her medical care providers, but it does support the conclusion that, once Claimant decided that HB Boys bore responsibility for her hernia condition, she molded her perceptions of related matters to fit this belief.

15. **Cory Jones.** Cory Jones worked with Claimant as a shift manager and cook. When Claimant was out on leave for her surgery, Mr. Jones filled out an incident report and faxed it to the main office when a maintenance worker was burned on his shift. He did not know what, if any, medical care the worker received. Regarding Claimant, Mr. Jones recalled, "...most of the time I worked with her she was always in pain." Hearing Transcript, p. 145. It is unknown exactly when or how long Mr. Jones worked at Burger King with Claimant.

16. **Trina Thompson.** Trina Thompson worked with Claimant as an assistant manager at the Chubbuck store from November 2007 through May 20, 2008 or so. She recalled Claimant worked 65-100 hours per week; that when she first started, Claimant "was tired & burned out & needed time off"; and that even though Claimant had tried to tell Debbie Olpin more than once that "working those long hours was to [sic] hard on her body," Ms. Olpin did not reduce Claimant's hours through the time of her departure from HB Boys. Claimant's Exhibit 151. Ms. Thompson also conveyed that HB Boys stalled Claimant in obtaining an "emergency" hysterectomy, but this characterization of Claimant's condition leading to that procedure is not

supported by the medical records. *Id.* In addition, Ms. Thompson conveyed her own experiences, working at HB Boys with pain from a non-work-related condition, and her strong perception that she was treated poorly by HB Boys in that matter.

17. Ms. Thompson testified at the hearing that in May 2008, Claimant was in pain after coming down from the roof, so she told Claimant to go home. Later that day, Kenny Cortes, district manager, came in while Ms. Thompson was writing a statement about Claimant's condition. When he saw what she was doing, Ms. Thompson testified, he took the paper away from her and told her not to report the incident. As a result of this and other admonitions she says she received from supervisors, she said she did not report Claimant's "accident" to anyone. At the time, Ms. Thompson was very unhappy working at HB Boys. She testified that she had already turned in her notice, then after the roof incident, she quit. Although she does not recall the last day she worked, Ms. Thompson believed it was May 18, 19 or 20, 2008, and that whatever day it was, it was just after the roof event.

18. Before the hearing but after she quit, in anticipation of Claimant's litigation, Ms. Thompson wrote a detailed statement about her recollections of that day in May:

While working w/Kathy *before her surgery* she would end up doing lots of extra things that would put strain on her legs & her stomach. One day the broiler belt came loose & so she (Kathy) had to clime [*sic*] on the roof to fix it when she came down you could tell she was hurting really bad; so I sent her home...

Claimant's Exhibit 151 (emphasis added). The context of Claimant's statement, written in rough chronological order, tends to place the alleged roof event before Claimant's hysterectomy in February 2008, as opposed to May 2008. She wrote that Kenny Cortes came in and wanted to know why Claimant was not there but, unlike her hearing testimony, Ms. Thompson's written statement did not mention anything about Mr. Cortes taking a paper away from her or preventing her from reporting the event.

19. The evidence provided by Ms. Thompson is internally inconsistent, sometimes based upon misperceptions about Claimant's true medical condition, and colored by resentment stemming from her past history with HB Boys. The Referee finds Ms. Thompson's testimony is unreliable and, therefore, unpersuasive as to the issues under determination in this matter.

20. **Dorothy Angle.** Dorothy Angle, Claimant's mother-in-law for 25 years, also worked at the Chubbuck Burger King. She testified that Claimant "was having problems in her stomach because of a fall that she had on top of a building." Hearing Transcript, p. 135. She also testified that she observed Claimant holding her stomach and bending over when she came off the roof, and that she overheard Kenny Cortes refusing to report an injury and "yelling and screaming, using the F word and everything." Claimant's Exhibit 136. Ms. Angle helped Claimant out around the house, apparently both before and after the roof incident, because Claimant worked long hours. Ms. Angle testified that she, herself, was more or less fired around Thanksgiving 2008.

21. The Referee finds Ms. Angle's recollection of events is inconsistent with the bulk of evidence in the record on some key points. For instance, she is the only person to relate Claimant's pain to a fall on the roof. Further, Ms. Thompson, who was directly involved in the ensuing exchange with Mr. Cortes, did not testify, nor write in her report, that he yelled, screamed or used profanity. Instead, she testified that Mr. Cortes was irritated and shooed her out of the office while he called Claimant. The Referee finds Ms. Angle's testimony is unreliable and, therefore, unpersuasive as to the issues under determination in this matter.

22. **Kenny Cortes.** Kenny Cortes, district manager, has held various management positions with HB Boys since 1996. He conducted Claimant's initial training in Twin Falls and checked in on the Chubbuck store periodically throughout Claimant's employment. Mr. Cortes

does not recall Claimant ever reporting to him that she sought emergent care for chest tightness during the period in which she was training with him at his store.

23. Mr. Cortes also did not recall going to the Chubbuck store on or about May 18, 2008 and finding Claimant had gone home, or phoning her at home. He explained that he would not do that unless he was calling to inquire about one of his own employees. Since Claimant was not his employee, he would have called and reported the event to Debbie Olpin. Mr. Cortes denied that Trina Thompson ever told him that Claimant had been involved in a workplace accident, that he ever took a piece of paper away from her, and that he tried to prevent her from reporting an accident.

24. Mr. Cortes also described the ladder inside the Chubbuck store leading to the roof. He said the rungs, bolted to a wall, are about eight inches apart. A hatch on top opens by itself onto a flat roof, and he described how he holds onto the hatch until he reaches the second stair from the top, then steps onto the roof. He did not understand why anyone would need to crawl on their belly to access the roof.

25. As to workplace injury reporting, Mr. Cortes testified:

Q. What is the company policy, or what was it in '08, about reporting injuries?

A. Our company policy is if there's a workplace safety accident, if it was a non-emergency, you call your supervisor and let them know. And then you fill out the documentation and make sure that you sent - - we have a manila envelope that has the paperwork in it. You send it with them to the hospital. We include all of our information and a drug testing form.

And if it was an emergency, then you just take care of it and make sure they got there with the packet and our information and the drug testing. Then once they come back we fill out an incident report.

Q. The manager fills it out?

A. Yes, sir.

Q. And who does the manager then send that to?

A. The manager then sends that to Debbie and our HR department in Salt Lake.

Q. Okay. And is it mandatory for all accidents to be reported?

A. Yes.

Hearing Transcript, pp. 190-191.

26. Mr. Cortes confirmed that HB Boys does not treat employee illnesses like workplace accidents. For example, they are not reported through the workers' compensation reporting procedure.

27. Mr. Cortes is a generally credible witness.

28. **Debbie Olpin.** Debbie Olpin has worked in management positions for HB Boys since 1988. HB Boys owns many franchise locations, including 54 Burger Kings, two Subways and six convenience stores. At the time of the hearing, Ms. Olpin was a managing director, which means she had an ownership interest in the company. More importantly, throughout Claimant's tenure, Ms. Olpin oversaw operations at several different locations, including the Chubbuck Burger King. Ms. Olpin also supervised Kenny Cortes. She saw Claimant once or twice each week while Claimant was working, and spoke with her on the telephone most days.

29. Ms. Olpin denied that Claimant ever reported injuring herself at work. Further, she denied awareness of any health problem Claimant may have had prior to her hysterectomy in February 2008. She specifically denied that Claimant reported any injury related to going onto the roof on or about May 18, 2008 during May, June or July of 2008, or that Claimant complained of any injuries in summer or fall of 2008. Ms. Olpin first learned that Claimant was claiming she had sustained a work-related injury when Emily Harding told her about it in late January 2009.

30. Ms. Olpin acknowledged that the Chubbuck store was troubled, with an employee turnover problem that existed during Claimant's tenure. She denies, however, that she ever required Claimant to work more than 50 hours per week, the number of hours she was hired to work. She also denied knowing any reason why Claimant would need to work 80-100 hours per week, and that Claimant complained to her about working excessive hours. She admitted that, contrary to company policy that required her to formally review Claimant's performance after six months, and again after a year, she had never conducted a performance review for Claimant.

31. As to the times Claimant gave notice that she intended to quit, Ms. Olpin testified that she did not recall the reasons Claimant provided. She said she thought Claimant was just tired of Burger King and the demands of her job when she gave notice the first time, but she did not recall any details about Claimant's reasons for giving notice the second time:

Q. And with respect to Kathy's second notice that she's leaving HB Boys, you don't remember why she put that in? You're assuming it was for the same reasons as the first one?

A. I'm assuming that. I don't remember exactly for sure. Kathy had a tendency to call on the phone in hysterics and be screaming. Then you would get faxes that she put her notice in.

Q. Did she do this more than twice?

A. Kathy would call on the phone in hysteria regularly, yes.

Q. But she provided written notices twice?

A. Yes.

Q. Okay. And you don't remember why she said she was going to leave HB Boys?

A. No.

Hearing Transcript, pp. 239-240.

32. Ms. Olpin also gave insight into the workplace injury reporting procedures at HB Boys and the Chubbuck store. She explained that it is the store manager's job to provide employees claiming workplace injuries with proper reporting forms to fill out and fax to the HR department, where they are further handled. It was also the store manager's job to explain procedures to employees and to ensure that reporting packets are available by ordering them from the main office. When the store manager incurred a workplace injury, the store manager must complete the proper form(s) and fax it (them) to the HR department, as well as notify his or her supervisor.

33. Ms. Olpin's testimony was sincere, but weakened by her general inability to recall details related to her conversations with Claimant. Further, it is curious that Ms. Olpin recalls that Claimant regularly contacted her yelling, screaming and hysterical, yet still had no idea why Claimant was unhappy and wanted to quit.

34. The Referee finds that, in May and August 2008, Claimant believed that her work was exacerbating her medical conditions and, most likely, she conveyed this belief to Ms. Olpin in or around the times on which she gave notice.

35. **Emily Harding.** Emily Harding, human resources director, has been employed by HB Boys in human resource management positions for approximately 12 years. She oversees four employees and is responsible for forwarding workers' compensation claims to HB Boys' third party administrator, among other things.

36. Ms. Harding conducted a Power Point presentation about preventable workplace accidents and proper accident reporting on May 6, 2008. Present were the store managers overseen by Debbie Olpin, who was concerned about the high number of accidents in her stores. Ms. Harding's Power Point slides are in evidence. They support her testimony that she reviewed

the workplace accident reporting policy that managers were required to follow when an employee is injured on the job, as described by Kenny Cortes in his testimony. Ms. Harding also described the reporting protocol for managers when they, themselves, were injured on the job. Ms. Harding is unaware of OSHA auditing procedures and she did not discuss them at the meeting. She has in the past been aware of stores with more than five accidents in a year, but none were ever investigated by OSHA. Ms. Olpin, Mr. Harding and Claimant were all in attendance.

37. Ms. Harding has never advised a manager not to report workplace accidents. Further, she testified that a district manager, such as Debbie Olpin, would be disciplined, up to termination, for telling their managers not to report workplace accidents.

38. Ms. Harding testified that she first learned of Claimant's workplace accident claim in January 2009, when she was informed by the company's workers' compensation insurance third party administrator.

39. Ms. Harding acknowledged that she spoke, over the telephone, to Claimant twice after she left HB Boys. The first conversation, in December 2008, was regarding COBRA insurance paperwork, and the second one, in February 2009, was about a problem Claimant had with the new store manager who replaced her. According to Ms. Harding, Claimant did not mention getting hurt at work or having hernias during the first conversation. However, during the February 2009 discussion, Claimant told her that she had incurred her injury in September 2008 after working a lot of hours.

40. Ms. Harding's initial testimony, that she did not talk to Claimant about any medical issues during their conversation in December 2008, which took place the day after Claimant's first hernia surgery, is impeached by a follow-up email she sent to Claimant that

same day. In that message, Ms. Harding provided HB Boys' Salt Lake City address and payment due dates and added, "So glad you're feeling better! Have a great Christmas! If you have any questions, please feel free to call me. Thanks for your help!" Claimant's Exhibit 155.

41. Clearly, medical issues were discussed on December 16, 2008, and it is likely that Claimant disclosed that she had just undergone hernia surgery. However, this is insufficient to raise any inference that Claimant told Ms. Harding she believed her hernias were related to her employment. Ms. Harding persuasively testified that she would have noted it in her planner if an employee claimed a workplace injury, and she made no such note. Further, in addition to COBRA information, Ms. Harding would likely have referenced workers' compensation in her follow-up email, had Claimant advised that she believed her hernias were work-related. Moreover, no other contemporaneously recorded evidence in the record establishes that Claimant believed, in December 2008, that her hernias were work-related. Therefore, it does not necessarily follow that she would have discussed this topic, with anyone, in mid-December 2008.

42. The Referee finds Ms. Harding's testimony is more persuasive than Claimant's on the question of whether Claimant reported in December 2008 that she believed her hernias were related to a workplace accident at HB Boys in September 2008.

MEDICAL OPINIONS

43. Dr. Birkenhagen (on Claimant's behalf) and Austin Richard Cushman, M.D., a surgeon, (on Defendants' behalf) both provided opinions as to the possible etiology of Claimant's three midline hernias. Dr. Birkenhagen believed that they were most likely caused by Claimant's two forays onto the roof at work. Dr. Cushman agreed that climbing onto a roof could cause a hernia. However, he could not isolate Claimant's hernias to the May and September 2008 events because any activity that increases intraabdominal pressure could cause a

hernia. “When we do strenuous things, we tend to take a deep breath, which increases the pressure of our abdominal cavity. So when you’re straining and really grunting, that’s when - - I mean, that’s when you put the most stress on it. Simple things like coughing does just as much - - and sneezing - - but it’s all the same thing.” Dr. Cushman Deposition, p. 28.

44. Aside from their ultimate opinions, however, there was little disagreement between these physicians. The Referee finds from their deposition testimony that: (1) an abdominal hernia is not diagnosed until a palpable bulge is identified, or imaging demonstrates a breach in the abdominal wall through which tissue extrudes; (2) Claimant’s incision sites are weak spots in tissue that predisposed her to hernia onset; (3) Claimant’s hernias most likely started small and expanded with activity over time; (4) abdominal straining from multiple activities, such as (for example) walking, lifting, bowel movements, and sneezing, will further weaken incision sites over time; (5) climbing onto a roof, depending upon the body mechanics involved, may place more stress on abdominal incision sites than other activities Claimant was known to do, potentially hastening the need for hernia surgery; (6) Claimant may or may not have experienced pain with the initial tears associated with her hernias; and (7) pain from shingles could have distracted her from hernia onset pain.

45. Because the difference between Dr. Birkenhagen’s and Dr. Cushman’s ultimate opinions does not depend upon differing understandings of hernia etiology, but upon differing understandings of Claimant’s work experiences, the relative persuasiveness of their opinions must be determined upon the strength of the foundation upon which each opinion rests.

46. **Dr. Cushman.** Having only examined Claimant one time, long after the alleged events, the foundation for Dr. Cushman’s causation opinion is built primarily upon her medical

records and his acknowledgement that he really did not know just how anatomically stressful Claimant's roof trips were.

47. **Dr. Birkenhagen.** Dr. Birkenhagen treated Claimant before and after her alleged events and had significantly more contact with Claimant during those periods than Dr. Cushman. However, the foundation for Dr. Birkenhagen's opinion is weakened by the fact that he was unaware of Claimant's long history of abdominal pain, from known and unknown sources, at the times she claims onset of her hernias. This history would suggest alternate potential causes for Claimant's various onsets of abdominal pain, including the relevant events, that Dr. Birkenhagen did not rule out prior to rendering his opinion. Yet, Dr. Birkenhagen's opinion relies upon Claimant's pain complaints to isolate onset (to the extent it actually does isolate onset) to the events alleged by Claimant.

48. In addition, Dr. Birkenhagen did not explain the change in his opinion over time, from January 2009, when he opined that Claimant's hernias were unrelated to her work; to April 2009, when he opined that they were possibly due to her work; to November 2011, when he opined that they most likely were related:

Q. So are you pointing to any certain event or just the physical nature of her work?

A. I think the physical nature of her work.

Q. Okay. And day in and day out, they just kept adding up on these previously weakened incisional sites?

A. I think it's more the roof business, like I said, than anything else. If I had to pick one thing that caused this trouble, I would say making her climb on a roof.

Dr. Birkenhagen Deposition, pp. 49-50.

49. Dr. Birkenhagen went on to describe his understanding that Claimant was regularly climbing ladders and that she had "complained bitterly...on multiple occasions." *Id.* at

51. “Whenever she saw me, whenever she was doing that. She was totally stressed out. She was getting more and more hostile because she was being asked to do more and more physical things, and then she developed hernias.” *Id.* The problem with this testimony is that it implies Claimant made these complaints contemporaneously with her alleged accidents, when, in fact, she did not. Dr. Birkenhagen did not treat Claimant during the relevant onset period. Mr. Hill did, and he opined, at Claimant’s request, that there was only a possible causal relationship with her work activities. He believed Claimant lacked insight into the situation. Dr. Birkenhagen, on the other hand, did not see Claimant between January 3, 2008 and December 2, 2008, when he first saw her regarding her hernias.

50. Even if Claimant had contemporaneously reported her relevant workplace allegations, this does not assist her case. In that scenario, Dr. Birkenhagen’s January 2009 opinion, that Claimant’s hernias were not related to her work, would be squarely inconsistent with his subsequent opposing opinion. It is more consistent with the balance of evidence in the record, and therefore more likely, that Dr. Birkenhagen changed his causation opinion after April 2009 based upon new information provided by Claimant about climbing on the roof at work.

51. Another problem with his opinion is that Dr. Birkenhagen believed Claimant was regularly required to climb ladders in the presence of significant pain, whereas the record does not support this supposition. There is no estimate as to how often Claimant needed to repair the exhaust fan belt, but it does not appear from the record to be a daily, or even weekly, activity. Moreover, Claimant testified that there were occasions on which she climbed to the roof without any pain.

52. Dr. Cushman unhesitatingly (and refreshingly) agreed that Dr. Birkenhagen was in a better position to observe Claimant’s hernias. “My insight is based primarily on his insight.”

Dr. Cushman Deposition, p. 27. However, there is no medical evidence from which it could be concluded that the appearance of Claimant's hernias during surgery evidenced either the time or means of causation. Therefore, Dr. Birkenhagen's advantage in this regard does not amount to a stronger basis for his causation opinion.

53. In this case, more contact with Claimant does not amount to a better-founded causation opinion. Dr. Birkenhagen failed to consider relevant factors in Claimant's medical history and also relied on factual allegations about Claimant's workplace activities that are not supported by the record. As such, Dr. Birkenhagen's causation opinion lacks credibility and is unpersuasive.

ACCIDENT/INJURY

54. The term "accident" is a term of art under Idaho law, and is defined at I.C. § 72-102(18)(b) as follows:

"Accident" means 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.

In meeting her burden of proof, Claimant need not identify, with any great specificity, the time when and place where the accident occurred. All that Claimant is required to do is to reasonably locate the occurrence of the accident in time and place. Here, Claimant has alleged that the injurious event took place at some point in time in May 2008 and/or in September 2008. These assertions, if true, would be sufficient to meet Claimant's burden of reasonably locating the time and place of the accident.

55. Further, Idaho case law makes it clear that an accident can occur when a claimant is engaged in the usual and ordinary tasks of the employment when the employee's ability to resist injury is overcome by those tasks. See *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002); *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005). For example, in

Spivey, the claimant proved that an accident, evidenced by a “pop” in her shoulder, occurred when she reached across a conveyor belt; and in *Page*, the accident was demonstrated by a “grabbing” in the claimant’s knee when she stood up from a chair.

56. Here, Claimant contends that the ladder climbing activities in which she was engaged at some point in May 2008 and/or September 2008 constitute an accident. Defendants do not dispute that occasional ladder climbing was a usual and ordinary task of Claimant's employment.

57. There is evidence in the record that Claimant lifted her grandchild on occasion and that such activity could cause or contribute to a hernia. However, whether or not Claimant's employment resulted in a greater exposure to hernia-hastening activities than she experienced apart from her employment is immaterial to whether the alleged work-related mishap/event involved in this case constitutes a compensable accident. See *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002); *Vawter v. United Parcel Services, Inc.*, IC 2010-000114 (2011). In *Vawter*, the issue before the Commission was whether the claimant’s low back injury resulted from a cause that could be said to “arise” out of his employment. Relying on *Spivey, supra*, the Commission ruled that since the risk to which Claimant was exposed was a risk created by his employment, the accident (the claimant felt a “pop” in his back when he bent to tie his shoelace) was one which arose out of Claimant’s employment. Application of that rule to the facts of this case yields the same result; the alleged accident occurred as a result of a risk of injury to which Claimant was exposed by virtue of her employment, notwithstanding that Claimant might have been exposed to similar risks apart from her employment. Next, it must be determined whether the claimed accidents actually occurred as alleged.

58. Claimant was determined, above, to lack credibility. Therefore, where her testimony is not corroborated by other reliable evidence in the record, her assertions will not be accepted. Here, the only evidence that Claimant was on the roof on either August 31 or September 1, 2008 are Claimant's testimony and the FROI she completed in January 2009. In addition, the evidence of her related physician visits demonstrates she had an acute illness involving symptoms not related by the physician testimony to her hernias. Therefore, the Referee finds inadequate evidence from which to conclude that Claimant suffered a workplace accident on or around August 31 or September 1, 2008.

59. Similarly, the only evidence supporting Claimant's contention that she was on the roof on or around May 18, 2008 consists of testimony from Claimant, her mother-in-law and Trina Thompson, all of whom were determined to be unreliable witnesses, as well as the FROI she completed in March 2009, and Trina Thompson's undated written statement. Although the testimony of these witnesses is highly suspect, the Referee declines to find that Claimant did not climb to the roof on or around May 18, 2008.

60. Still, this claim fails even though the Referee gives Claimant the benefit of the doubt on whether she climbed to the roof on May 18, 2008. In *Vawter*, medical causation was conceded. Medical causation, however, is the central dispute in this matter. Therefore, conceding that the alleged "accident" in this case actually occurred, Claimant nevertheless bears the burden of establishing that the accident is responsible for causing the three midline hernias with which Claimant was diagnosed in November 2008 and January 2009.

61. In addressing the question of causation in this case, both Dr. Birkenhagen and Dr. Cushman testified that Claimant's incisional hernias most likely began small and grew over time. Further, these hernias likely would not have appeared in the absence of her prior non-work-

related surgeries. Therefore, pivotal issues include ascertainment, to a reasonable degree of medical probability, of whether and when Claimant's ladder climbing permanently exacerbated any of her preexisting incisional weaknesses by either causing tears in her abdominal wall, or stretching those tears.

62. **Hernia #1.** Characterized by Dr. Bruneau in February 2008 as a small umbilical hernia, this hernia was present but of little concern, before both of Claimant's alleged workplace accidents. By November 17, 2008, however, hernia #1 had grown to surgical proportions. The medical evidence in the record, including CT scan evidence from February 2009 and November 2009, suggests that this hernia grew over the time Claimant was employed at HB Boys; however, despite multiple examinations by physicians, no hernia was identified while Claimant still worked there, even though she was examined on several occasions around and after May 18, 2008. Recall, however, that even though no physician had palpated this hernia, it nevertheless existed as of November 17, 2008, as demonstrated by CT imaging. Given that this was a slow-growing hernia, that Claimant had only stopped working two weeks prior to diagnosis, and that the record evidences no abnormal hernia-inducing activity during those two weeks, it is likely that workplace activities contributed to the development of this hernia.

63. However, the evidence is insufficient to establish that this hernia was the result of an incisional weakness exacerbated by roof climbing on either alleged date. Dr. Birkenhagen speculated that ladder climbing was the most strenuous activity in which Claimant participated, and that it most likely contributed to her hernias every time she ascended to the roof. This is based upon Claimant's retrospective recounting, when her agenda was to make HB Boys pay, which is not reliable. Her contemporaneous medical records do not identify roof climbing as a significant event. Further, in her deposition testimony, Claimant explained that when Debbie

Olpin asked after her alleged May 2008 accident what could be done to improve her work experience, she replied not that she wished to be relieved of ladder climbing, but that she sought reduction in her work hours.

64. Even if ladder climbing was the most strenuous activity Claimant engaged in, it cannot be determined by a preponderance that any particular ladder climbing event constituted either the initial tear or the "last straw" that converted hernia #1 from a condition requiring no treatment to one requiring surgery. Even though Dr. Birkenhagen and Dr. Cushman agreed that ladder climbing likely contributed to the weakening of her incision sites and the hastening of her need for surgery, this does not establish that Claimant suffered a compensable accident on either given date. The record is insufficient to establish any reliable symptomatology with which to reasonably place in time any injury suffered by Claimant. Claimant's retroactive allegations of abdominal pain with ladder climbing, even if credible, are insufficient to establish such pain was related to any hernia, let alone hernia #1, rather than some other preexisting condition.

65. Dr. Birkenhagen opined that every time Claimant climbed the ladder at work, she further weakened her incision sites or, in the case of hernia #1, her preexisting small hernia. This opinion is based wholly upon Claimant's description of climbing the ladder at work, which is contradicted by Kenny Cortes' description. This evidence establishes that there are many ways to climb onto a roof, and neither physician who opined in this case actually observed Claimant climbing the ladder. Further, Claimant's description, as determined above, is not reliable. As a result, Dr. Cushman's opinion that climbing onto the roof could potentially have exacerbated Claimant's condition on any given occasion, but did not necessarily do so on the occasions in question, is more persuasive than Dr. Birkenhagen's more narrow opinion. Claimant has failed to prove that she exacerbated hernia #1 every time she climbed the ladder.

66. Given the absence of reliable symptom onset evidence and the possibility that Claimant's hernias were caused by non-work-related events, Dr. Cushman's ultimate opinion is more persuasive than Dr. Birkenhagen's. The Referee finds Claimant has failed to prove by a preponderance that hernia #1 was permanently exacerbated by a workplace accident on or about May 18, 2008 or August 31 or September 1, 2008.

67. **Hernia #2.** This ventral hernia was first identified by CT scan on November 17, 2008. No physician had previously diagnosed it, so its actual onset date cannot be determined with certainty. The same analysis for hernia #1 applies to hernia #2, with the added complexity that there is a possibility that hernia #2 did not even exist during Claimant's tenure at HB Boys. The Referee finds Claimant has failed to prove by a preponderance that hernia #2 was permanently exacerbated by a workplace accident.

68. **Hernia #3.** This ventral hernia, near the other two, was not diagnosed until January 3, 2009, when it was palpated by Mr. Hill. Given the extensive hernia workup Claimant underwent in this area prior to diagnosis of hernia #3 which revealed no evidence of this hernia; the evidence in the medical record that before this hernia was diagnosed, Claimant's pain resolved for a time after her initial hernia repair, then returned after she walked in the mall; the fact that it was located on an incisional site from her 1997 laparoscopic surgery; and no medical opinion establishing why this hernia, if it were due to her workplace activities, was not identified previously; the Referee finds Claimant has failed to prove to a reasonable medical probability that hernia #3 was the result of permanent exacerbation of a preexisting condition due to her work at HB Boys.

69. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that her hernias are the result of a workplace accident.
2. All other issues are moot.

RECOMMENDATION

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

DATED this 16th day of November, 2012.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 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:

JONATHAN W HARRIS
266 W BRIDGE ST
BLACKFOOT ID 83221

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

ge

Gena Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHERINE GILLARD,

Claimant,

v.

HB BOYS, LLC.,

Employer,

and

AFFINITY INSURANCE

Surety,

Defendants.

**IC 2009-007073
2009-000471**

ORDER

Filed November 21, 2012

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 recommendation 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 her hernias are the result of a workplace accident.
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 __21st__ day of __November__, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st__ day of __November__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JONATHAN W HARRIS
266 W BRIDGE ST
BLACKFOOT ID 83221

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

ge

/s/