



## **CONTENTIONS OF THE PARTIES**

Claimant contends he injured his rotator cuff and biceps tendon when he suffered a forearm contusion in a compensable accident on February 19, 2007. His biceps tendon must have partially torn at that time and progressed until it tore completely a year later.

Defendants contend the biceps tendon rupture is an obvious injury. If it had occurred in February 2007, it would have been obvious. Claimant did not complain about it until one year after the accident. The rotator cuff and biceps tendon injuries are unrelated to the accident. They have paid all benefits due Claimant.

## **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibit 1;
3. Defendants' Exhibits 1 through 9; and
4. Post-hearing deposition testimony of Richard T. Knoebel, M.D.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

## **FINDINGS OF FACT**

1. On February 19, 2007, Claimant was loading passenger luggage into the cargo bin when a coworker tried to close the cargo door. The door struck Claimant's right forearm.
2. St. Luke's emergency room in Ketchum treated Claimant that day. Examination revealed a hematoma. X-rays showed no fracture.
3. Claimant returned to the emergency room on February 24 and 26, complaining that it was not healing well. Diagnosis was amended to acute right lateral epicondylitis. On the visit on the 26th, Claimant also mentioned that the elbow pain radiated to his shoulder.

Examination revealed normal range of motion in the shoulder. Claimant was released to limited work and advised to avoid overuse of his right arm.

4. Anthony Buoncristiani, M.D., treated Claimant on referral from St. Luke's. He first examined Claimant on March 22, 2007. He also diagnosed acute right lateral epicondylitis, prescribed an elbow brace and pain relievers, and considered a possible future steroid injection.

5. On Claimant's next visit, April 29, 2007, Dr. Buoncristiani released Claimant to full-duty work. He allowed for Claimant to return "prn." Claimant did not return for care.

6. Claimant quit Employer in June 2007 to work with firefighter crews for the Forest Service. He also became self-employed reupholstering aircraft.

7. Claimant did not seek medical treatment for his right arm or shoulder for over one year.

8. Claimant visited his regular treating physician, Donald Levin, D.O., or Dr. Levin's nurse practitioner Carol Wade, on September 4, 2007, March 13, 2008, and April 9, 2008 without any recorded mention of right arm symptoms or injury.

9. On May 15, 2008, Claimant visited Dr. Levin. He complained about arm symptoms, described as "persistent" since the February 2007 accident. On examination, Dr. Levin noted the obvious proximal biceps tendon tear. He referred Claimant to Stephen Wasilewski, M.D.

10. Also on May 15, 2008, Claimant visited Stephen Wasilewski, M.D. Claimant reported that his right arm symptoms never subsided after the accident and that he first noticed the obvious biceps tear "About a month ago." After a detailed clinical examination of Claimant's arm and shoulder, Dr. Wasilewski diagnosed a right rotator cuff tear

and a proximal biceps tendon tear. In his paragraph marked “Plan” he “Based upon the history given to me today regarding the past and the injury, it appears quite likely that the injury of February 2007 was the cause of his current symptomatology.”

11. On June 11, 2008, an MRI showed the biceps tendon rupture and “moderate to severe right AC joint arthrosis” and other degenerative findings.

12. On June 18, 2008, Dr. Wasilewski examined Claimant and reviewed an MRI report. Dr. Wasilewski added right shoulder impingement syndrome to his diagnoses. Dr. Wasilewski recommended arthroscopic shoulder surgery, but Claimant deferred considering it until after wildfire season.

13. Defendants sent Claimant to Richard Knoebel, M.D., for evaluation. On September 18, 2008, Dr. Knoebel examined Claimant. He opined Claimant suffered right lateral epicondylitis in the February 19, 2007 accident, became stable by April 20, 2007, and suffered no PPI. He opined Claimant’s rotator cuff showed degeneration, tendinosis and a possible partial thickness tear from the degeneration but no acute findings. He noted that Claimant’s left shoulder also shows degeneration. He opined Claimant’s biceps tendon tear and shoulder condition were not related to the forearm injury or the accident.

#### **Prior Medical Care**

14. Claimant’s prior medical care records are sparse, with infrequent visits for required physical examinations or temporary illnesses. He had an accident in 2001 involving his right knee.

15. A February 2000 visit showed Claimant fell and struck his right arm at the elbow and jammed his shoulder. X-rays showed some degeneration, a possible rotator cuff injury and no fracture or dislocation. Claimant did not return for follow-up treatment.

## DISCUSSION AND FURTHER FINDINGS OF FACT

16. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

### Causation

17. The claimant in a worker's compensation case has the burden of proving an injury caused by an accident arising out of and in the course of employment. The proof must establish a probable, not merely a possible, connection between cause and effect to support the contention that the claimant suffered a compensable injury. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982); *Vernon v. Omark Industries*, 115 Idaho 486, 767 P.2d 1261 (1989). Moreover, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973); *Bowman v. Twin Falls Construction Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). "Magic words" are not required. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). A claimant is required to prove by a preponderance of the evidence that a claimed injury was caused by a compensable accident. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559 at 563, 130 P.2d 1097 (2006).

18. Here, Claimant has Dr. Wasilewski's opinion that his right shoulder condition and torn biceps tendon are related to the accident. However, Dr. Wasilewski expressly noted that he relied upon Claimant's self-reported history as the basis for his opinion. Dr. Levin's

record of visits between Dr. Buoncristiani's release for full work in April 2007 and Dr. Wasilewski's May 2008 examination does not support Claimant's testimonial recollection of continuing symptoms or of the history of such which he reported to Dr. Wasilewski.

19. Dr. Levin's May 15, 2008 note does not suggest that Dr. Levin opined that the right shoulder condition and biceps tendon tear were related to the accident. At best, the note indicates that Claimant reported and believed that they were related.

20. The long history of Commission hearings repeatedly demonstrates that a layperson's understanding of a physician's comments is often mistaken. Claimant's testimony about what he understood Dr. Levin to say does not substitute for evidence of Dr. Levin's opinion. *See, Dean, supra.* The record does not show Dr. Levin opined about causation. Even if, *arguendo*, Dr. Levin was mistakenly supposed to have voiced an opinion that a causal relationship existed, that opinion would be inconsistent with his intervening examinations. Claimant's obvious deformity from the biceps tendon rupture surely would have been noted by Dr. Levin if it were present on the April 9, 2008 visit or earlier. Dr. Buoncristiani did not see Claimant after April 2007. He did not opine about any matter in contention at hearing.

21. Dr. Knoebel had the full record of Claimant's medical history. He was in a better position than Dr. Wasilewski to address causation. Dr. Knoebel well explained his relevant examination findings and basis for his opinion. Claimant's right shoulder condition is degenerative and unrelated to the accident. Claimant's biceps tendon tear was acute in May 2008 and not related to the February 2007 accident. He opined Claimant suffered no PPI and needed no restrictions or future medical care as a result of the February 19, 2007 accident.

### **Medical Care**

22. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1).

23. Defendants provided treatment through the date of medical stability. Claimant does not claim he is entitled to medical care benefits for the period between April 20, 2007 and May 15, 2008. Claimant failed to show he is entitled to medical care benefits beginning May 15, 2008 or for future medical care benefits.

### **Temporary Disability**

24. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. Idaho Code § 72-408, *et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

25. Claimant does not assert that Defendants failed to pay TTD benefits in 2007. Rather, he seeks them for 2008 and in the future if surgery is allowed.

26. Claimant was not in a period of recovery for any injury related to the compensable accident after April 20, 2007. He is not entitled to additional TTD benefits.

### **Permanent Impairment**

27. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

28. No physician has provided permanent restrictions or a PPI rating for any injury related to the accident. Claimant failed to prove he is entitled to PPI.

29. Without PPI, permanent disability and apportionment issues are moot.

**CONCLUSIONS OF LAW**

1. Claimant's right shoulder condition and biceps tendon rupture are not related to the compensable accident of February 19, 2007;

2. Claimant failed to show he is entitled to any benefits for these conditions.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

**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 16<sup>TH</sup> day of September, 2011.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary db



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

JAMES HERBERT,	)	
	)	
Claimant,	)	<b>IC 2007-011467</b>
v.	)	
	)	
SKYWEST AIRLINES, INC.,	)	<b>ORDER</b>
	)	
Employer,	)	
and	)	
	)	<b>FILED SEP 23 2011</b>
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA,	)	
	)	
Surety,	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 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’s right shoulder condition and biceps tendon rupture are not related to the compensable accident of February 19, 2007.
2. Claimant failed to show he is entitled to any benefits for these conditions.

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

DATED this 23<sup>RD</sup> day of SEPTEMBER, 2011.

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 23 RD day of SEPTEMBER, 2011, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

JAMES HERBERT  
P.O. BOX 2406  
HAILEY, ID 83333

ERIC S. BAILEY  
P.O. BOX 1007  
BOISE, ID 83701

db

/S/ \_\_\_\_\_