BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEANNA K. LEPPERT, Claimant, v. BEAUTY MANAGEMENT, INC., Employer, and EMPLOYERS INSURANCE OF WAUSAU, Surety, Defendants.	**IC 2011-000745** **2012-009878** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed October 22, 2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted an emergency hearing in Boise on May 10, 2012. Claimant was present and represented by Bradford S. Eidam of Boise. Roger L. Brown, also of Boise, represented Employer and its Surety, Employers Insurance Company of Wausau. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on September 11, 2012.

ISSUES

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

1. Whether Claimant suffers from a compensable occupational disease.

2. Whether Claimant suffered a compensable industrial accident.

3. Whether Claimant is entitled to the cervical surgery recommended by her treating physician; and, if so,

4. Whether Claimant is entitled to total temporary disability (TTD) benefits during her period of recover therefrom, and,

5. Claimant's entitlement to attorney fees for Defendants' unreasonable denial of her claim.

CONTENTIONS OF THE PARTIES

Claimant, a hairdresser or stylist, contends that she developed a herniated disk at C6-C7 as the result of her work either as an occupational disease or as the result of a specific event involving bending over to pick up a comb. Her Surety-designated treating physician has recommended a two-level cervical fusion. Claimant seeks an award from the Commission requiring Defendants to pay for the recommended procedure as well as TTD benefits during her period of recovery. Claimant also requests an award of her attorney fees based on Defendants' unreasonable denial of her surgery.

Defendants accepted Claimant's claim regarding a right shoulder injury but contend that the *Nelson*[1] doctrine precludes recovery for her cervical condition, because she has failed to prove her documented pre-existing cervical problems were aggravated by an accident. Also, Claimant did not suffer an injury while picking up a comb, because before-and-after cervical MRIs indicate no change in her cervical condition.

Claimant counters that she has pled in the alternative; she never intended her first claim (January 5, 2011) to be construed as an accident claim, but her second claim (August 20, 2011) was for a discrete event (accident). Regarding her first claim, Claimant contends

[1] *Nelson v. Ponsness-Warren Idgas Enterprises,* 126 Idaho 129, 879 P.2d 592 (1994).

that *Nelson* does not apply pursuant to the *Sundquist*[2] decision that requires an occupational disease to have pre-existed employment with the employer from whom benefits are sought; a situation not present here. Further, her second claim involves an accident that permanently aggravated the progression of Claimant's herniated cervical disk thus contributing to the need for surgery, and also renders *Nelson* inapplicable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at the hearing.

2. Joint Exhibits 1-25, admitted at the hearing.

3. The post-hearing deposition of R. Tyler Frizzell, M.D., taken by Claimant on May 29, 2012.

4. The post-hearing deposition of Richard E. Manos, M.D., taken by Defendants on July 2, 2010.

All objections made during the course of the taking of the above-mentioned depositions are overruled.

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

FINDINGS OF FACT

Background

1. Claimant was 46 years of age and resided in Boise at the time of the hearing. She is right-hand dominant. Claimant has worked as a hairdresser/stylist since 1997. She

[2] *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 11 P.3d 135 (2005).

began her employment with Employer herein on February 9, 2005 as a stylist/store manager. As a working manager, Claimant performed hairdressing/styling, did the hiring, ordered products, scheduled, and cleaned.

2. At hearing, Claimant described in detail the various positions one must assume while performing hairdressing duties. Basically, a hairdresser is required to repetitively extend his or her arms equal to or above shoulder level and hold his or her head and neck in a static, lateral tilting position for various lengths of time. Claimant performed this type of activity eight hours a day, five days a week since she was hired.

3. Claimant sought chiropractic help in December 2010 as she had begun to experience pain, numbness, and tingling, and weakness in her right arm and hand. She was also experiencing right shoulder pain. The chiropractic treatment was not effective. Due to the busy holiday season, Claimant was not able to seek further treatment until January 5, 2011, when she informed her supervisor that she could no longer endure the pain in her right arm and that she was no longer able to work.

4. On January 5, 2011, Claimant presented to Employer's designated provider, Primary Health. She informed a physician's assistant that she was experiencing numbness and tingling into her right wrist and into all of the fingers of her right hand for the past two weeks without any traumatic event. She was diagnosed with right shoulder pain and right arm paresthesia. Claimant was not experiencing neck pain at that time. Given Claimant's symptoms of right-sided radiculopathy and reduced handgrip, a cervical MRI was recommended. Claimant faxed the medical records from this visit to Surety the same day. On January 12, 2011, Stephen Martinez, M.D., stated in a letter to Surety, "evidence

suggests that r. upper extremity overuse injury exists." Joint Exhibit 17, p. 222. Dr. Martinez related Claimant's condition as work-related.

5. On January 12, 2011, Claimant gave a recorded statement to Surety, wherein she indicated that she first noticed right arm weakness when applying color from a squeeze bottle. Claimant decided to seek medical care when she was unable to continue with a blow-drying task. Claimant further indicated that the above symptoms developed over time, rather than from a particular incident or event.

6. Surety accepted Claimant's claim and she continued to work while receiving medical treatment. The focus of her treatment eventually shifted from her accepted right shoulder claim to her cervical issues. At this point, Surety began investigating whether they should accept the cervical problem. A June 27, 2011 cervical MRI revealed a flat right paracentral C6-7 disk protrusion with potential for right C7 foraminal neurocompression, which should be clinically correlated. On June 28, Claimant's treating physician referred Claimant to Ronald Jutzy, M.D., a neurosurgeon, for evaluation and treatment.[3] Claimant saw Dr. Frizzell on July 29, 2011. At that time, Claimant was complaining of neck pain, pain radiating down into her right index finger, and weakness in her right arm. Based on Dr. Frizzell's concern that Claimant was suffering from a cervical injury, he ordered a bone scan and another cervical MRI. On August 1, 2011, Dr. Frizzell informed Surety that it was his belief that Claimant's cervical strain and possible cervical radiculopathy were related to her work and her January 5, 2011 workers' compensation claim.

[3] For reasons not entirely clear from the record, Surety did not approve that referral and, instead, referred Claimant to R. Tyler Frizzell, another local neurosurgeon. A letter from Surety to Dr. Frizzell dated July 12, 2011, stated: "I am requesting that you take over treatment." Joint Exhibit 21, p. 298.

7. On August 20, 2011, Claimant was cutting a customer's hair and dropped her comb:

> I leaned down just to pick it up. And I could not move my head. I - - it was the most scary feeling I've ever had.
>
> Q. What was that feeling?
>
> A. My muscles tightened up so bad.
>
> Q. Where?
>
> A. In my neck, in my neck and top of my shoulders on both sides. And I could not finish my haircut.
>
> Q. Before this accident, did - - were you having neck pain?
>
> A. I was having some discomfort. But my shoulders were so dominant that I don't think I realized how much was going on in my back because my shoulders were hurting so bad.
>
> Q. So you were having some neck pain before?
>
> A. Yeah.
>
> Q. And then this was much worse?
>
> A. This was all my neck. This particular incident, I felt was all in my neck. It was really excruciating pain in my neck.
>
> Q. Within a few days of that incident, did you notice any change in the symptoms in your hand, your right hand?
>
> A. I noticed that the radiating pain in my right arm and the numbness and tingling went into my entire hand. There's really no particular finger that I feel it was going. It's just the entire hand.

Hearing Transcript, pp. 88-90.

8. Claimant's pain was severe enough to cause her to seek immediate medical care from St. Luke's ER. The chart note for that visit indicates that, "She describes the pain as continuous and sharp in character and is accompanied by weakness and ongoing chronic tingling in her right arm and severe neck muscle spasms. There is no radiation." Joint Exhibit 20, p. 290. A cervical MRI accomplished on that date was read by the radiologist to reveal:

C2-3:	Normal.
C3-4:	Mild posterior endplate hypertrophy without central stenosis or foraminal narrowing.
C4-5:	Normal.
C5-6:	Disk degeneration and loss of height. Posterior endplate hypertrophy with mild central stenosis and slight cord flattening. There is mild/moderate foraminal narrowing bilaterally.
C6-7:	Disk degeneration and loss of height. Posterior endplate hypertrophy and disk complex result in mild central stenosis and midland mild cord flattening. There is mild/moderate foraminal narrowing bilaterally.

Id., pp. 292-293. Claimant was diagnosed with degenerative cervical spine disease and discharged.

9. Claimant followed-up with Dr. Frizzell on August 25, 2011. At that time, Dr. Frizzell had available the results of the bone scan, EMG, and the June and August cervical MRIs. The August 11, 2011 bone scan showed increased activity at C6-7 that Dr. Frizzell interpreted to be the likely cause of Claimant's cervical spine symptoms. The EMG of Claimant's right arm was normal indicating the absence of significant radiculopathy. The August 20, 2011 cervical MRI revealed, "Disk degeneration, mainly at the C5 - - 6 and 6 - - 7 levels. Mild central stenosis and mild cord flattening. There is mild/moderate foraminal narrowing bilaterally." Joint Exhibit 21, p. 308. Dr. Frizzell noted that the August MRI showed a progression of the disk protrusion as well as some cord flattening, as compared to the June 2011 MRI. Dr. Frizzell recommended:

> She remains symptomatic. I think she would benefit from an anterior approach to decompress the C6-7 level with anterior cervical diskectomy, fusion and plating. She also has spondylitic degenerative pathology at C5-6, which is not work related but would need to be addressed at the same surgical setting. In short, I think she would benefit from a two-level anterior cervical diskectomy, fusion and plating C5-7.

Joint Exhibit 21, p. 310.

10. Even though the physician to whom Surety referred Claimant related the need for his recommended surgery to Claimant's work activities, Surety, nonetheless, requested yet another causation opinion. They chose Richard Manos, M.D., an orthopedic surgeon, who saw Claimant one time only on October 4, 2011. He examined Claimant and reviewed medical records and diagnostic studies. Claimant reported to Dr. Manos that her main problem was that she was beginning to drop things while hairdressing due to a lack of dexterity in her right hand.

11. Dr. Manos diagnosed pre-existing cervical spondylosis at C5-C6, not work-related. Further, "In regard to her right C6-C7 disk herniation, this appears to be at least acute from her injury and therefore I agree with Dr. Frizzell that this is in all likelihood an injury related problem" and, after reviewing Claimant's job description, "I do believe that her right C6-C7 disk herniation is probably a direct result of her head being kept in the bent position." Joint Exhibit 22, pp. 330-331. Dr. Manos further agreed with Dr. Frizzell that a two-level fusion from C-5 to C-7 is reasonable and necessary, and comes with a good prognosis that would allow Claimant to return to hairdressing after about 12 weeks of recovery. As Claimant was not at MMI, Dr. Manos did not assign a permanent partial impairment rating.

12. Seeking clarification of Dr. Manos' opinion regarding whether he was referring to an accident or an occupational disease in rendering his opinions, Surety then

explained to Dr. Manos the "Nelson defense" and pre-existing conditions. Surety then supplied Dr. Manos with a one-page record from Eric Thompson, D.C., indicating that Claimant had complained of "neck" pain 12 occasions between September 8, 2008 and June 15, 2011. *See,* Joint Exhibit 15. Based on his review of Dr. Thompson's record, Dr. Manos authored an addendum to his original report on November 15, 2011, wherein he indicated that Claimant had initially informed him that she had no prior treatment for her neck and Dr. Thompson's record clearly demonstrates pre-existing neck problems. "Therefore, I would opine that her current work-related injury that she claims from 01/05/11 is not acute. This all likely represents an occupational disease secondary to repetitive motion which is not considered work-related." Joint Exhibit 22, p. 335.

Preinjury Medical History

13. Claimant has a history of neck pain/discomfort going back to at least February 2001. On or about February 5, 2001, Claimant presented at the St. Luke's emergency room with the following complaints:

> Patient states neck pain started Jan 2/01. Felt like she slept wrong. Pain slowly [increased]. [Patient] went to chiropractor. Pain not improving. Pain is dull achiness [with] shooting pains to shoulder.

Joint Exhibit 13, p. 116,

14. Claimant was evaluated by Thomas Haga, M.D., who recorded the following history and presenting complaints on the occasion of the February 5, 2001 visit:

> A 35-year-old female who states that for the last month she has had left lateral neck pain. She works as a hairdresser so she works above her hands quite a bit, and she has done this for quite some time. Last month she has additionally taken the job as a waitress, so she is carrying a cocktail tray at about shoulder length. She denies any injury. This is the only possible source of the new pain, and she has tried home symptomatic treatment. She continues to do both of these jobs. She has iced it and used ibuprofen and has actually seen a chiropractor, but without any success at relief of her

> discomfort. She now presents here for evaluation. She denied any weakness or paresthesias. No previous problems.

Joint Exhibit 13, p. 118.

Dr. Haga diagnosed Claimant as suffering from an acute left trapezius strain. He recommended that she avoid lifting cocktail trays in her waitressing job.

15. On February 8, 2001, Claimant contacted St. Luke's to request that the condition for which she was evaluated on February 5, 2001 be documented as having been caused by the repetitive demands of her work. On or about February 18, 2001, Claimant contacted St. Luke's again to discuss referral for MRI evaluation and requesting a work release. A follow-up note of February 19, 2001 reflects that Claimant's chart was reviewed, and failed to demonstrate that a referral for an MRI was had ever been made, or that Claimant had been released from work.

16. Records of the Industrial Commission reflect that Claimant filed a first report of injury with the Industrial Commission for the condition that led her to seek treatment at St. Luke's in early February 2001. The claim was filed against Regis Corporation, Claimant's then employer. The injury date was identified as February 5, 2001, and the mechanism of injury was described as "repetitive motion." (*See* J. Ex. 2, p. 6).

17. The records of Eric L. Thompson, D.C., reflect that Claimant treated with Dr. Thompson on approximately seventeen occasions between December 3, 2003 and December 13, 2010, inclusive. Dr. Thompson's records are brief and telegraphic, but from his notes it is possible to discern that among Claimant's complaints during the aforementioned time period were complaints of neck pain, sometimes rated as being quite severe. On or about December 13, 2010, Dr. Thompson's records reflect that Claimant

apparently presented for the first time with radicular type complaints going down into her right arm and middle finger. (*See* Joint Exhibit 15, p. 159).

DISCUSSION AND FURTHER FINDINGS

Occupational Disease

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code §72-102(22) which defines occupational diseases and related terms as follows:

> (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
>
> (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.
>
> (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

> When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his

disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

Lastly, Idaho Code §72-439 provides:

> An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.

18. In his deposition, Dr. Frizzell testified as follows regarding his opinion that Claimant suffers from an occupational disease:

> Q. (By Mr. Eidam): Do you have an opinion, Doctor, to a reasonable degree of medical probability what caused her C6-7 right-sided disk herniation?
>
> A. I think it was the frequent motion from her occupation.
>
> Q. As a hair stylist?
>
> A. Yes.
>
> Q. Why don't you explain, if you could, in response to a few different questions how you got there.
>
> First of all, how have you gained knowledge of what a hair stylist does?
>
> A. From my clinical experience.
>
> Q. And in what way? By observation, or - - well, let me back up.
>
> Have you had occasion to see other patients who have had cervical spine problems who are hair stylists.
>
> A. Yes.
>
> Q. Okay. And is that at a higher frequency than you would otherwise see from people who do other types of work?
>
> A. It does tend to be a higher frequency.
>
> Q. Okay. It's just something you've noticed in your clinical practice?
>
> A. Yeah, just my clinical experience.
>
> Q. And why is that? What is it about what they do?
>
> A. They do frequent reaching out with their arms keeping them extended. They do frequent head movements such as flexion/extension, lateral tilting, which appears to be more frequent than say, someone that does not work as a cosmetologist.

Q. In this case, Ms. Leppert described in great detail at the hearing what it was that her job required. One of the things is that she works with her hands stretched in front of her at least two feet to three feet throughout a six-hour shift, five days a week. And that at times, if someone has long hair, her hands might be elevated up above her shoulders as well.

Is that the type of reaching that you have in mind?

A. Yes.

Q. And she also has occasion to, in the course of doing a haircut, tilting her head, I guess laterally is how I would think of it. It's her ear pointing down towards - - moving down towards her shoulder. For instance, she would tilt it to the right to do the right side of a head of hair to do a haircut.

It might be - - she might have it in that position for 5 or 10 minutes at a time to do that side of a head. And then she would do the other side the same way, moving her ear on the left side to her left shoulder.

Is that the lateral tilt that you're talking about?

A. Yes. That is lateral tilting.

Q. She would have occasion to do anywhere from 5 or 6 haircuts to 10 haircuts or more a day five days a week where she would do that for that length of time.

Is that significant in your mind as far as creating the risk of this having a disk herniation in the cervical spine?

A. Yes.

Q. What is it about that movement? Is it just holding it there for a long time or is it doing it throughout the day? Or how would you describe the risk that's created?

A. Based on my experience, both.

Q. And would it be both the length of time and the number of times?

A. Yes.

Q. Okay. Frequency and duration, then?

A. Correct.

Q. Okay. She talked about having to do the same tilt when she would administer hair color and having to hold hair up on the sides of heads so that she could get to the very roots, she would have to keep her head tilted in doing that. That might be as long as 25 minutes to do an entire head of hair to color it.

> Is what I have described, does that fit your assumptions as to what one does as a hair stylist that creates a risk of developing a cervical disk herniation?
>
> A. Yes.
>
> Q. And that's something that's distinguishable from other types of work?
>
> A. Yes.

Dr. Frizzell Deposition, pp. 22-26.

19. Regarding the "comb incident" that prompted the need for the August 20, 2011 MRI, Dr. Frizzell testified that there was some progression of the disk protrusion at C6-7. He also testified that he would have brought Claimant to surgery based on the results of the June 2011 MRI alone.

20. On cross-examination, Dr. Frizzell discussed Dr. Thompson's records revealing that Claimant complained to him of neck pain between 2008 and 2011. Dr. Frizzell testified that the symptoms of which she was complaining to Dr. Thompson were not indicative of a herniated disk at C6-C7 because she did not have radiating pain into her right arm. Dr. Frizzell testified that it was not until the June 2011 MRI that it was known for certain that Claimant had suffered at least a disk protrusion. However, Dr. Frizzell also testified that the first time Claimant's medical records indicate that she was experiencing right-sided radiculopathy was a December 13, 2010 handwritten entry by Dr. Thompson indicating, "r arm to middle finger." *See,* Joint Exhibit 15, p. 159.

Dr. Manos:

21. As indicated above, Dr. Manos had originally related Claimant's herniated disk at C6-C7 to her work activities until he was provided chiropractor Thompson's records. He then changed his mind based on Claimant's failure to inform him of prior neck pain. Dr. Manos mistakenly believed that Claimant was alleging an *accident* in January

2011 rather than an occupational disease, and thought her herniated disk was caused by that accident. It was not until he was "educated" by three of Surety's employees that he learned the "law of *Nelson*" and that an accident was required to establish compensability for the aggravation of an underlying condition or disease. Dr. Manos conceded that Dr. Thompson's December 13, 2010 note is indicative of a C6-C7 disk herniation at that time. While not able to attribute a cause of Claimant's disk herniation, Dr. Manos testified that the duties performed by a hairdresser could certainly cause such an injury. His concern was that there are a lot of innocuous, non work-related reasons people herniate disks. He agrees with Dr. Frizzell that Claimant is in need of corrective surgery. However, he curiously ends the addendum to his report (after reviewing Dr. Thompson's records) as follows: "Therefore, I would opine that her current work-related injury that she claims from 01/05/11 is not acute. This all likely represents an occupational disease secondary to repetitive motion, which is not considered work-related." Joint Exhibit 22, p. 335.

22. The Referee finds that Claimant suffers from a compensable occupational disease. She has established that:

* She is afflicted by a disease, that is, a herniated cervical disk at C6-C7.

* Her job duties as a hairstylist created an undue risk for the development of a cervical herniated disk that was characteristic of and peculiar to her employment, in that the conditions of her job resulted in a hazard which distinguishes it in character from the general run of occupations. *See Denoma v. Holman Transportation Services*, 2011 IIC 0092 (12/1/2011).

* Her herniated cervical disk was incurred in, and arose out of, her employment with Employer.

* Her last injurious exposure to the hazards of developing a herniated cervical disk occurred while she was employed by Employer and, finally,

* She suffered disablement in that she was eventually unable to continue with her occupation pending the recommended surgery.

The foregoing proof was adduced through the testimony and records of both Drs. Frizzell and Manos.

Does *Nelson* apply?

Defendants argue that because Claimant's claim of January 5, 2011 did not allege or prove an accident, and because Claimant has documented symptoms of neck pain/discomfort over a period of many years prior to January 2011, she is clearly seeking workers' compensation benefits for a preexisting condition that was aggravated by something other than a discrete accident, and therefore, her claim is barred by the rule of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). Claimant counters by arguing that *Sundquist v. Precision Steel and Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005) bars application of the rule of *Nelson* to these facts because the disease for which benefits are sought, i.e. the C6-7 disk lesion, developed entirely within the ambit of her employment by Beauty Management, Inc.

23. Under Idaho law, aggravation of a pre-existing condition is not compensable unless the aggravation is by an industrial accident. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004).

24. In *DeMain v. Bruce McLaughlin Logging,* 132 Idaho 782, 979 P.2d 655 (1999), the Court stated: "The essence of *Nelson* is that a preexisting occupational disease is just like any other preexisting condition. For a current employer to be liable for the aggravation of the condition, there must be an accident." *DeMain*, 132 Idaho at 784, 979 P.2d at 658.

25. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005), modifies the rule of *Nelson* where the pre-existing condition is occupational in origin. In *Sundquist* the Court stated:

> The Nelson doctrine provides that a claimant seeking compensation for the aggravation of a *preexisting condition* must prove his injuries are attributable to an accident that can reasonably be located as to the time and place it occurred. .... The Nelson doctrine does not apply to *all* cases where there is an occupational disease, only in those where the claimant's occupational disease *preexisted* employment with the employer from whom benefits are sought. ….
>
> An occupational disease exists for the purposes of the worker's compensation law when it first manifests. ….
>
> For an occupational disease to be a pre-existing condition under the holding in Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), there must have been a prior manifestation of the disease.

Sundquist, at 453-454, 111 P.3d 138-139 (emphasis in original). The Court then concluded: "Because Sundquist's occupational disease was not manifest prior to his employment with Precision, it was not a preexisting condition relative to that firm." *Id.*, at 456, 111 P.3d 141.

26. The essence of the Court's holding in *DeMain* is that *Nelson* applies to a pre-existing condition whether or not it is an occupational disease. The essence of the holding in *Sundquist* is that when the pre-existing condition is an occupational disease, *Nelson* does not apply if that occupational disease was not manifest, as defined by statute,

prior to the claimant's starting work with the employer from whom benefits are sought. *Voglewede v. Fair Dinkum Genuine Co.*, 2011 IIC 0026.

27. In the instant matter, Claimant's date of manifestation for the current occupational disease claim was probably no earlier than sometime in January 2011, following her initial visit to Primary Health.

28. It is clear, however, that Claimant suffered from complaints of neck pain for at least ten years prior to the date of manifestation of her occupational disease. It is also clear that these complaints predated her employment by Beauty Management, Inc., and therefore constituted a pre-existing condition. As developed in *Sundquist, supra*, where the preexisting condition is, itself, occupational in origin, the rule of *Nelson* will not apply unless the preexisting occupational disease was manifest prior to Claimant's employment by Beauty Management, Inc. As developed above, the evidence clearly establishes that in February 2001, Claimant presented for evaluation at St. Luke's with complaints of neck and shoulder pain which both she and her physician related to the demands of her work either as a hairstylist (for an earlier employer), or as a cocktail waitress. The records generated in connection with the February 2001 work-up for Claimant's complaints are sufficient to establish that Claimant's condition was, at that time, "manifest" for purposes of Idaho Code § 72-102(19). However, what is the nature of the condition that was "manifest"? The record reflects that Claimant's complaints were thought to represent a trapezius strain. Nothing in the St. Luke's records, and nothing in Dr. Thompson's notes, suggests that Claimant suffered from injury or disease of the cervical spine prior to the date of her employment by Beauty Management, Inc. In short, the record does not reflect that Claimant's preexisting occupational disease, i.e. her suspected trapezius strain, has

anything to do with the development of her current cervical spine condition. It cannot be said that Claimant's current condition is one which is the product of the aggravation of a preexisting condition by the demands of her employment at Beauty Management, Inc. Therefore, the rule of *Nelson* does not apply to bar Claimant's occupational disease claim. Accordingly, the Referee finds the Claimant has proven that she suffers a compensable occupational disease involving the C6-7 level of her cervical spine. Claimant is entitled to all workers' compensation benefits referable to that disease, including the two level cervical fusion recommended by Dr. Frizzell.

Accident of August 20, 2011

29. In view of the Referee's conclusion concerning the compensability of the January 5, 2011 occupational disease claim, it is perhaps less important to consider the compensability and sequelae of the August 20, 2011 accident. However, the evidence establishes, and the Defendants do not seriously dispute, that the comb dropping incident described by Claimant does constitute an accident as defined at Idaho Code § 72-102(18). Moreover, the evidence demonstrates that Claimant suffered additional injury to her cervical spine as a consequence of that accident. Claimant described an immediate worsening of her symptomatology, and subsequent MRI evaluation of her cervical spine, as compared to a June 2011 study, demonstrated interval worsening of her C6-7 lesion. From this, the Referee concludes that Claimant did suffer a compensable accident/injury on August 20, 2011. However, because Dr. Frizzell testified that he would have brought Claimant to surgery for treatment of her cervical spine prior to the August 20, 2011 accident, the Referee concludes that all benefits payable to Claimant for treatment of her cervical spine condition are payable under the January 5, 2011 occupational disease claim.

TTD Benefits

Defendants are statutorily liable for TTD benefits during Claimant's period of recovery in the event she wishes to proceed with surgery. While a determination of the amount of those benefits is not presently ripe for determination, Claimant seeks an order from the Commission establishing the proper rate of TTD benefits in the event such benefits are eventually paid.

30. Dr. Frizzell took Claimant off work effective October 12, 2011 pending surgery. Because Claimant's wages were a combination of salary and commission, Idaho Code § 72-419(4)(a) applies. According to Claimant's unrefuted calculations found at pages 12 and 13 of her brief, TTD's should be calculated at 45% of the state average weekly wage.

Attorney Fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

31. After having accepted Claimant's shoulder claim, Surety denied her neck claim based on the "*Nelson* defense" and the addendum to Dr. Manos' report after being contacted by Surety and supplied with Dr. Thompson's one-page report. A Surety representative testified that staff reviews each medical record before payment thereon is made. From January 5, 2011 forward, the medical records are replete with references to Claimant's neck and her cervical radiculopathy. Inquiry was made to Dr. Frizzell (the physician to whom Surety directed Claimant's care) regarding the relationship of Claimant's cervical condition and her work activities, and he found the requisite

connection. Surety also paid for two cervical MRIs. Notwithstanding Dr. Frizzell's opinion, Surety retained Dr. Manos for yet another causation opinion. When Dr. Manos agreed with Dr. Frizzell, Surety decided it was time to "educate" him regarding pre-existing conditions and Idaho law in that regard. This they did by providing Dr. Manos with Dr. Thompson's record and also providing their understanding of the *Nelson* case. Based thereon, Dr. Manos reiterated his opinion that Claimant was suffering from an occupational disease, but that the same was not work-related per *Nelson* and Claimant's pre-existing neck condition.

32. It is clear from the record that, while Surety accepted the January 5, 2011 claim initially, they believed they were only obligating themselves for a right shoulder injury. When it became apparent that they may also be obligated to pay for a cervical fusion surgery recommended by their own designated physician, Surety began grasping at straws to find a way out of such a situation. *Sundquist* had been decided for at least five years before Surety's meeting with Dr. Manos regarding the *Nelson* defense, and Liberty was a named defendant in that case. If Surety is going to "educate" a physician on the state of Idaho workers' compensation law, they should at least provide accurate information. They did not do so here.

33. The Referee finds that Surety unreasonably denied this claim and Claimant is awarded attorney fees for such wrongful denial.

CONCLUSIONS OF LAW

1. Claimant has suffered a compensable occupational disease.

2. Claimant is entitled to the cervical fusion as recommended by her treating physician.

3. Claimant is entitled to TTD benefits during her period of recovery at 45% of the state average weekly wage.

4. Claimant is entitled to an award of attorney fees for Surety's wrongful denial of this claim.

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 __12th___ day of October, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __22nd___ day of __October___, 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:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

ROGER L BROWN
PO BOX 6358
BOISE ID 83707-6358

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEANNA K. LEPPERT, Claimant, v. BEAUTY MANAGEMENT, INC., Employer, and EMPLOYERS INSURANCE OF WAUSAU, Surety, Defendants.	**IC 2011-000745** **2012-009878** **ORDER** **Filed October 22, 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 suffered a compensable occupational disease.

2. Claimant is entitled to the cervical fusion as recommended by her treating physician.

3. Claimant is entitled to total temporary disability (TTD) benefits during her period of recovery at 45% of the state average weekly wage.

4. Claimant is entitled to an award of attorney fees for Surety's wrongful denial of this claim. Claimant shall file within (20) days, an affidavit and/or brief in support of his request for attorney fees, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13 684 P. 2d 990 (1984).

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

DATED this __22nd___ day of __October___, 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 __22nd__ day of __October__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

ROGER L BROWN
PO BOX 6358
BOISE ID 83707-6358

ge _/s/_____