

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARMEN LICANO,)
)
 Claimant,)
)
 v.)
)
 COMMUNITY COUNCIL OF)
 IDAHO, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-029193

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

November 26, 2010

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls on May 19, 2010. Claimant, Carmen Licano, was represented by Paul T. Curtis, and Defendants were represented by M. Jay Meyers. No testimony was offered at the hearing because Claimant, the only scheduled witness, had not requested a translator; however, documentary evidence was admitted into the record. The parties ultimately stipulated to submit the case for decision without any live testimony before the Referee. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on September 23, 2010.

ISSUES

The issues to be decided by the Commission were confirmed by the parties in a telephone conference following the hearing and memorialized in an Order Regarding Hearing Issues entered May 20, 2010 as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident of August 8, 2008;
2. Whether and to what extent Claimant is entitled to:
 - a. Reasonable and necessary medical care as provided for by Idaho Code § 72-432;
 - b. Temporary partial and/or temporary total disability (TPD/TTD) benefits;
 - c. Permanent partial impairment (PPI) benefits;
 - d. Retraining benefits pursuant to Idaho Code § 72-450; and
 - e. Permanent partial disability (PPD) benefits;
3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant suffered a right wrist sprain/strain (“wrist injury”) on August 8, 2008, while placing 6-pound cans on an overhead shelf at Employer’s, or that she is entitled to medical care and TTD payments in relation to that injury. There is also no dispute that Claimant suffers Chronic Pain Syndrome (“CPS”), characterized by right arm pain. Claimant’s CPS was first identified at her IMEs and she has not received any treatment or benefits in relation to this condition.

Claimant contends that she is entitled to additional benefits related to residual right arm pain and a right posterior labral tear (“shoulder injury”). She argues she incurred the shoulder injury contemporaneously with her compensable wrist injury, but that it began to be painful only after wearing a wrist splint to treat the wrist injury. Claimant also seeks an award of attorney fees due to Defendants’ intentional failure to pay benefits to which she is entitled. Claimant relies upon the opinions of her treating physician assistants, as well as a Dr. Cook, to prove that

her shoulder injury was caused by the workplace accident. She seeks additional medical treatment and TTD benefits; however, if found to be at maximum medical improvement, Claimant contends she has sustained a PPI of 8% of the whole person and suffers PPD inclusive of impairment of 8%-40%.

Defendants counter that there is inadequate objective evidence of a shoulder injury and, even if Claimant does have shoulder damage, it was not caused by the industrial accident. They rely upon Dr. Knoebel to assert that Claimant's right upper extremity pain is a symptom of CPS and Somatization Disorder, which preexisted Claimant's workplace injury, for which a PPI rating of zero is appropriate.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant, taken February 9, 2010;
3. The pre-hearing deposition testimony of Matthew Merzlock, PA-C, taken March 15, 2010;
4. Claimant's Exhibits 1 through 12 admitted at the hearing;
5. Defendants' Exhibits A through K admitted at the hearing;
6. The post-hearing deposition testimony of Richard Thomas Knoebel, M.D., taken June 17, 2010;
7. The post-hearing deposition testimony of Roger Cushman, P.A., taken May 19, 2010; and
8. The post-hearing deposition testimony of Tony Roisum, M.D., taken June 17, 2010.

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

OBJECTIONS

All objections in the record are overruled.

FINDINGS OF FACT

History, Treatment and Opinions

1. Claimant was 35 years old on the hearing date and residing in Idaho Falls. She was born in Madeira, Chihuahua, Mexico, where she graduated from high school. She moved to the United States in 1990 and has maintained resident alien status since 2001. Claimant's primary language is Spanish, but she has taken ESL (English as a second language) courses and various other classes for work. She understands some English, but testified at her deposition through an interpreter. She did not testify at the hearing because no interpreter had been requested.

2. Claimant's work history primarily involves production and kitchen work. On or about August 8, 2008, she was working for Employer as a cook's helper, in a seasonal position, when she injured her right wrist. She was placing 6-pound cans on an overhead shelf when she felt a "pulling" sensation in her right wrist area, followed by pain. Claimant's Dep., p. 18.

3. Claimant's hand became more painful over the weekend. Then, when she returned to work "on a Monday" and again attempted to place 6-pound cans on an overhead shelf, she felt the same pulling sensation. Claimant's Dep., p. 19. This time, Claimant completed an injury report, and Employer sent her to obtain medical care.

4. Claimant's initial examination took place on Monday, August 18, 2008. She was examined by Matthew Merzlock, P.A., a physician's assistant ("PA") at the Community Family

Clinic, who spoke to her in Spanish. Mr. Merzlock ordered a right wrist x-ray, which identified no abnormalities. He diagnosed medial and lateral epicondylitis and prescribed icing, rest and medications, including ibuprofen and Flexeril. Mr. Merzlock also issued restrictions, which he faxed to Employer on the same day, including 5-pound limits on lifting, carrying, pushing and pulling; no pushing or pulling¹; no use of the right hand; no exposure to vibrating tools; and no more than 40 minutes per hour of repetitive hand or wrist motion.

5. By September 2, 2008, Mr. Merzlock reported Claimant was performing her normal work responsibilities, with right wrist and elbow pain of 4-5 (on a scale of 1-10) that increased when writing. He diagnosed a right wrist sprain and continued her treatment plan, adding a recommendation for compression. He faxed a form with restrictions to Employer, including a 5-pound lifting restriction and an instruction to “[a]void repetitive active R wrist ROM.”

6. On September 10, 2008, Claimant presented with nausea, dizziness and anxiety, among other symptoms. Her responses to the Beck Depression Inventory (in Spanish) did not indicate depression or anxiety. As for her industrial injury, Claimant reported that her right wrist pain increased when working and that it had gotten so bad that she could hardly use it. Claimant was put in a sugar tong splint and shoulder sling for 4-6 weeks. Mr. Merzlock restricted Claimant from lifting more than 5 pounds and also, seemingly inconsistently, wrote, “Carmen should not use her R UE @ work.” Defendants’ Exh. A, p. A-26. There was no mention of any shoulder-related issues.

7. On September 16, 2008, Claimant was evaluated for metabolic and related issues. Lab tests were administered and Claimant was diagnosed with obesity and insulin resistance,

¹ Mr. Merzlock’s restrictions on pushing and pulling are confusing, at best.

hypertriglyceridemia, and bilateral leg edema.

8. Claimant followed up with either Mr. Merzlock or another PA at Community Family Clinic several more times through the beginning of 2009. She was never seen by a treating “physician”. Claimant’s pain increased and expanded from her right wrist, to her right forearm, to her right shoulder. Her right forearm became painful by approximately August 25, while her shoulder did not cause pain until approximately September 19, shortly after she was placed in a “sugar tong” brace to stabilize her wrist. Claimant has no history of shoulder problems.

9. Claimant testified that she felt discomfort in her shoulder at the time of the wrist injury, but did not report any shoulder symptoms until after wearing the wrist brace. Claimant recalled:

It wasn’t that bad, but I think it started getting worse when the doctor put me in this arm brace that I was wearing...And because I was ordered not to move it and I was working, that was heavy, and I felt it [sic] that it was heavy on me. And that’s when I felt more and more pain all the way up to my shoulder.

Claimant’s Dep., p. 22.

10. Claimant’s recovery was complicated by Employer’s failure to immediately recognize Claimant’s right arm restrictions, so she continued to use it at work. Her PAs’ restrictions were not always clear, but they always called for limited or no use of her right arm. On October 14, the same day on which her PA signed off on Claimant’s Job Site Evaluation with the clear caveat that she could not use her right arm for 30 days, Employer laid her off for the season.

11. On November 10, 2008, Claimant followed up with Roger Cushman, PA. He did not follow Mr. Merzlock’s instructions to refer Claimant to a specialist but, instead, discontinued her splint, continued her shoulder sling and prescribed Ibuprofen and physical therapy. He also

restricted Claimant from lifting, allowing light duty movement “as pain permits” for 4 weeks. Defendants’ Exh. A, p. A-52.

12. On November 18, 2008, Claimant met with Mr. Cushman to obtain a release for work. She also disclosed that she was unable to go to physical therapy because worker’s compensation would not cover it. She reported improvement in her wrist pain, now that she was no longer in the splint, but also remarked that she still had right shoulder pain and range of movement limitations. Mr. Cushman continued to recommend Ibuprofen for pain and instructed Claimant to follow up with Employer about her worker’s compensation coverage for physical therapy.

13. On November 24, 2008, Mr. Cushman extended Claimant’s work restrictions (“[n]o lifting right arm/hand, use as pain permits”) through December 16, 2008. Defendants’ Exh. A, p. A-6.

14. Claimant attended physical therapy from December 1, 2008 through January 20, 2009, for a total of 18 sessions following the initial evaluation. Mr. Merzlock and Mr. Cushman both recommended physical therapy earlier in Claimant’s treatment, but she declined because Surety had not agreed to pay for the visits. Upon Surety’s approval, however, Claimant attended regularly, 3 times per week, until her physical therapy benefits ran out.

15. Claimant’s right wrist, elbow and shoulder were treated with a number of modalities, including but not limited to massage, myofascial stretching, ultrasound, moist heat, electrical stimulation and trigger point release. Jay T. Ellis, P.T., a doctor of physical therapy and certified strength conditioning specialist, evaluated Claimant and managed her physical therapy regimen with the aid of several assistants.

16. On December 1, 2008, Dr. Ellis noted specific limitations in right shoulder range

of motion and strength, with pain on lifting anything over two pounds. He identified pain on palpation over a number of regions, including Claimant's subacromial bursa, but none over the rotator cuff². His history indicates Claimant's shoulder did not start hurting until after she wore the wrist brace. He also noted residual wrist and forearm symptoms, commenting that Claimant's right grip strength diminished after each squeeze. He recommended an MRI (which was done January 21, 2009) and a nerve conduction test (which was never done). His prognosis for Claimant was good with diligent work.

17. Dr. Ellis set specific treatment goals, all of which, contrary to Dr. Ellis's intermittent comments that she was progressing, Claimant ultimately failed to meet. Throughout their sessions, Claimant reported pain and other symptoms ranging from her hands and fingers to her neck, pectoral and deltoid regions. He also periodically noted swelling of her fingers, hands, wrist and arm, along with shaking and guarding on strength exercises.

18. On December 22, 2008, Dr. Ellis summarized his impressions in a note to Mr. Cushman:

Physical therapy is not making a lot of progress at this time. It appears that her neck & [shoulder] pain are increasing & hand/wrist/forearm pain is improving only a little – we are working on helping her to exercise. She tolerates a little – but not much. She [has] a lot of trigger points about the [right shoulder], neck especially right upper traps & clavicle regions. She is having difficulty turning her head. Do we need to consider a specialist? – I would expect better results by now. Do we consider secondary gains & amplifications as a concern?"

² These findings are consistent with Claimant's subsequent MRI results identifying subacromial bursitis and a normal rotator cuff.

Claimant's Exh. 4-7.

19. On January 14, 2009, Claimant left a message for Mr. Cushman requesting "a letter for insurance stating her condition and [sic] is not available to work". Defendants' Exh. A, p. A-68. Mr. Cushman responded that Claimant needed an MRI before he could evaluate her for the letter she requested. A subsequent note states Surety denied benefits for an MRI and Claimant could not otherwise afford one. Mr. Cushman still declined to provide the letter, electing to defer to the "specialist" with whom Claimant had an upcoming appointment. Defendants' Exh. A, p. A-68.

20. On January 16, 2009, Dr. Ellis noted Claimant had pain and tenderness in her neck and right shoulder, arm and hand. Her fingers and hand were "tight, tender and swollen" and her arm was "swollen". Defendants' Exh. B, p. B-11. On her last physical therapy visit, on January 20, 2009, Dr. Ellis noted that Claimant's right shoulder and neck were very painful and swollen in comparison to her left. He also noted some slight improvements but did not specifically evaluate her progress against the goals he initially set.

21. Surety eventually authorized an MRI of Claimant's right shoulder and ordered an IME. The MRI, conducted on January 21 and interpreted by Peter Vance, M.D., radiologist, identified a posterior labral tear and mild subacromial bursitis, while expressly ruling out rotator cuff tears. On learning Dr. Vance's findings, Mr. Cushman referred Claimant to an orthopedic specialist for follow-up. Surety did not authorize Mr. Cushman's referral, electing to first obtain an independent medical examination ("IME").

22. On January 27, 2009, Mr. Cushman extended Claimant's restrictions "until next evaluation." Defendants' Exh. A, p. A-73.

23. **Dr. Knoebel.** On February 5, 2009, Dr. Knoebel performed an IME at the behest

of Surety. Claudia Martinez, Claimant's sister, and Maria Marquez, Claimant's friend, accompanied Claimant during the evaluation. Ms. Martinez interpreted.

24. Claimant presented with a primary complaint of right shoulder pain. Specifically, she reported right-sided neck pain, shoulder pain and pain in a diffuse glove distribution in her right arm with an intensity of 9/10. She also reported right hand numbness every other day, especially in her right index finger. She was not doing her physical therapy exercises due to the pain. Dr. Knoebel noted Claimant had an "exaggerated pain diagram." Defendants' Exh. J, p. J-3.

25. Dr. Knoebel reviewed Claimant's medical records, including her August 18, 2008 right wrist x-ray and a CD of her January 21, 2009 right shoulder MRI without contrast³. Contrary to the radiologist's findings, Dr. Knoebel determined Claimant's MRI did not conclusively diagnose a labral tear:

It is noted that the radiologist diagnosed a posterior labrale tear. The CD study review is grainy and this cannot be appreciated by this examiner. It is also not consistent with the patient's reported mechanism of injury.

Defendants' Exh. J, p. J-6. In addition, Dr. Knoebel testified that Claimant did not demonstrate clinical findings consistent with a labral tear:

...she wasn't presenting with a shoulder problem. She was presenting with diffuse pain on the right side of her upper body, and she had weakness and sensory changes, I should say...subjective complaints, which do not fit with any shoulder injury.

Knoebel Dep., pp. 35-36.

26. On examination, Dr. Knoebel noted exaggerated and inconsistent responses to clinical testing, so he administered the Spanish version of the Brief Battery for Health

³ Dr. Knoebel acknowledged that it is typically difficult to confirm a labral tear on an MRI without contrast. Defendants' Exh. J, p. J-3.

Improvement 2 (BBHI2), a test designed to identify whether psychological issues are impeding physiological improvement. Dr. Knoebel is not a psychologist and he did not assess Claimant's responses. It was graded by some unidentified person or computer at the "BBHI location." Knoebel Dep., p. 30. It is unknown, based upon the record, whether the test was normed to a population raised in Mexico, as was Claimant. Dr. Knoebel testified that the results:

...suggested a somatoform disorder with diffuse unexplained pain symptoms associated with high levels of anxious affect. Her pain was noted to be psychological in nature, most likely. She was noted to have an exaggerated perception of disability.

Defendants' Exh. J, p. J-6.

27. Dr. Knoebel diagnosed Claimant with:

- 1) Diffuse, nonspecific right forequarter pain without correlating objective findings;
- 2) Obesity, deconditioning and multiple medical problems; and
- 3) Psychosocial factors with somatization predominant in the patient's current presentation.

Defendants' Exh. J, p. J-6. He further found Claimant had reached maximum medical improvement (MMI) by February 5, 2009, with no resulting permanent impairment, and no indications for restrictions or vocational rehabilitation. With respect to causation, Dr. Knoebel wrote:

The patient's presentation is that of a chronic pain syndrome. This is a biopsychosocial condition. The patient [sic] somatoform disorder is a large component. This is a personality disorder not reasonably secondary to her industrial incident and pre-existing...

The patient's current complaints are not reasonably related to her reported work activity, which was simply reaching overhead with 6 pounds. The patient initially had wrist pain. This subsequently migrated proximally and her main complaint currently is shoulder pain. This is not consistent with the mechanism of injury or initial presentation. There is no indication of a permanent medical impairment or functional disability on an industrial basis.

Defendants' Exh. J, p. J-7.

28. Dr. Knoebel's report states that he conducted his IME in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition* ("AMA Guides, 6th Ed.").

29. To the extent Claimant may have been confused about Dr. Knoebel's role as an IME physician, she should not have been after February 2, 2009. On that day, Valerie Fitte, Industrial Commission rehabilitation consultant, explained to Claimant through her sister, an interpreter, that Dr. Knoebel would only refer her to a treating physician if her claim was deemed compensable.

30. Based upon Dr. Knoebel's opinion, Surety denied further medical treatment. Due to a lack of worker's compensation benefits, medical insurance or other means of payment, Claimant was unable to obtain further treatment for her right upper extremity symptoms after February 9, 2009.

31. On February 24, 2009, after reviewing Dr. Knoebel's IME report, Mr. Cushman notified Surety that he disagreed with Dr. Knoebel's findings, notwithstanding his previous note that he would defer to a specialist concerning Claimant's treatment. Thereafter, Dr. Knoebel confirmed his opinions after being advised of Mr. Cushman's dissent.

32. **Dr. Cook.** Claimant underwent another IME, at the behest of her attorney, on or about May 26, 2009. This IME was performed at Allied Healthcare, PLLC in Idaho Falls by Gary L. Cook, M.D., a physician whose specialty and background were not disclosed in these proceedings, and whose deposition was not taken. Claimant and Defendants each submitted a version of Dr. Cook's report as an exhibit in the record, with no objections, but they are different versions. It appears as if the only substantive differences are that Defendants' version contains an extensive footnote regarding the extent to which MRIs without contrast are useful in

diagnosing labral tears that Claimant's version does not, and Claimant's version is signed, whereas Defendants' is not.

33. Ms. Martinez and Elena Contreras, Claimant's friend, accompanied Claimant during the evaluation. Ms. Martinez interpreted.

34. Claimant presented with right shoulder pain (7/10 during use; 3-4/10 constantly) and other symptoms including neck pain, right hand numbness and weakness, right arm pain, anxiety and depression. In contrast to her deposition testimony and the relevant medical treatment records, Dr. Cook's report indicates that Claimant's onset of her wrist *and* shoulder pain occurred with the industrial accident.

35. Dr. Cook administered clinical strength and range of motion testing, as well as the Rand 36 Item Health Survey⁴ ("Rand Survey"). Although Dr. Cook reported that Claimant scored 0% on the Rand Survey in terms of problems with role limitations due to emotional health, general emotional well being, energy/fatigue, and social functioning, he nevertheless opined:

The patient has extreme anxiety issues over her future ability to work with a disability. She is depressed regarding the future. She is divorced, with two dependent children. She has an immediate family which provides her with some assistance with daily living and emotional support. She is terrified of becoming incapable of caring for or supporting herself. She has little or no interest in her usual hobbies and recreational pursuits. She finds herself awakening at night with panic attacks she describes as "extreme and intense."

Defendants' Exh. I, p. I-3. He also found significant loss of strength and range of motion in Claimant's right shoulder, and loss of grip strength in her right hand, as compared with measures for her left side. Dr. Cook appreciated no significant shoulder instability and noted that he could

⁴ The Rand Survey is a health survey developed to assess medical outcomes. There is no foundation for this test, or Dr. Cook's qualifications to interpret the results, in the record.

not reliably assess Claimant's Compression Rotation Test result because of her voiced pain and guarding. Also with respect to strength testing, Dr. Cook noted Claimant had significant giveaway weakness and diminished right grip strength. He noted "...grimacing, pain behaviors, and audible groans." Claimant's Exh. 8-9.

36. Dr. Cook agreed with Dr. Knoebel's CPS diagnosis. However, he disagreed that Claimant's pain symptomatology constitutes an inadequate basis for a PPI or PPD rating:

Indeed, if her current symptoms/diagnosis did not fall within a Regional Grid assignment, an alternative assessment could be made using ROM criteria or a Pain-Related Impairment (PRI) system on a stand-alone basis. [*AMA Guides*, 6th ed., 3.3b, pg. 39]

Claimant's Exh. 8-6.

37. Ultimately, Dr. Cook assessed a PPI rating taking only Claimant's shoulder condition into consideration. He relied on the labral tear diagnosis to arrive at a rating for Claimant's upper extremity permanent impairment of 8%, which he converted to 5% of the whole person, then reported on the next line as 8% of the whole person.

38. He also opined that Claimant's reasonable probability of requiring future surgery or medical treatment is greater than 51%; however, his laundry list of probable future treatment does not differentiate between treatment related to the industrial accident and unrelated treatment. Among the items on this list, Dr. Cook recommended treatment for hypertension and that Claimant should "Consider consultation with an orthopedist to determine if she is a candidate for surgical repair of her labral tear." Claimant's Exh. 8-8. The latter recommendation appears inconsistent with Dr. Cook's assessment that Claimant is at MMI, given her desire for further treatment.

39. Dr. Cook's report states that, like Dr. Knoebel, he conducted his IME in

accordance with the *AMA Guides, 6th Ed.*

40. Dr. Cook's report suffers from a number of ambiguities and deficiencies. For example, in addition to those touched upon, above:

- a. He clearly opines that labral tears are associated with overhead repetitive lifting activities, yet his opinion⁵ on whether the industrial accident caused Claimant's tear is muddled by imprecise language that leaves one guessing as to the operative facts that led him to his conclusion:

There is a clear relationship between the "injury" and the subjective/objective findings as indicated in the review of the records, the individual's stated history and the physical exam findings. Labral tears are associated with overhead, repetitive lifting motions.

Defendants' Exh. I, p. I-7. What "injury"? Which subjective/objective findings? How has a relationship been established?;

- b. In the Introduction section, Dr. Cook advises that he examined Claimant on May 26, 2009 but, in his Total Temporary Disability Section, he asserts that May 12, 2009 is the "present" date through which Claimant is totally temporarily disabled; and
- c. Repeatedly throughout his report, Dr. Cook indicates that additional treatment may improve Claimant's condition, even though he found her to be at MMI on February 5, 2009 or May 12, 2009. (See, for example, Claimant's Exhibits 8-4 and 8-7 under the headings "Work Capacity" and "Vocational Rehabilitation").

Claimant's Present Condition

41. As to her present condition, at her deposition Claimant seemed more concerned about her right hand area pain than her right shoulder pain. When asked by opposing counsel what she wanted Surety and Employer to know about her case, Claimant responded:

Well, basically, that whole life of mine has changed because of this, and also my hand hurts a lot and I want, please, to help me with this, and help me pay for this because I'm not able to pay for this.

⁵ Defendants do not dispute that Dr. Cook opined that Claimant's shoulder pain was caused by the industrial accident.

Claimant's Dep., p. 28. Claimant also described a conversation she had with Employer in 2009 about her need for medical care:

...And I told him that my hands will continue hurting at that time. And I told them that—again, that my hand was hurting...

Claimant's Dep., p. 29. When asked by her own attorney about her shoulder, Claimant responded that she has pain, but when asked to describe her shoulder pain, Claimant again drifted into a discussion of her hand pain:

There's some days in which I cannot stand the pain, and I am not able to do anything with my arm. And if I try to do something, then it's worse the next day, and I get swollen.

Before I was able to write stories with my hand, now I have to take breaks in order to do that. Speaking or using the phone, I was also able to do it without any problems, now if I'm doing that I have to take breaks also for me to finish putting make-up on.

I used to sleep on my right side at night, and now I'm not doing that...I wake up because of the pain and start hurting.

Claimant's Dep., p. 31-32. Again, Claimant's attorney questioned her about her shoulder pain, and she responded that she has pain every day, some days worse than others.

Claimant's Credibility

42. A claimant's credibility is generally at issue in a workers' compensation proceeding. Here, the scrutiny is heightened because the record indicates a number of incidents tending to demonstrate that Claimant's pain and distress reports may be exaggerated and, therefore, unreliable. The Referee finds Claimant's testimony is generally credible, but addresses some relevant issues, below.

43. There is persuasive evidence in the record that Claimant exaggerated her disability upon examination by Dr. Knoebel. He noted a spurious loss of grip strength consistent with poor effort, an exaggerated pain diagram, and marked pain behaviors of facial grimacing,

extremely slow and guarded movements, and moaning. Dr. Cook noted similar findings. In addition, her Beck Depression Inventory (“BDI”) scores on September 10, 2008 did not indicate depression or anxiety, even though she presented with symptoms of nausea, dizziness and anxiety.

44. The *AMA Guides, Sixth Ed.* cautions physicians against being automatically dismissive when evaluating the impact of aberrant pain behaviors, noting:

The appearance of symptom exaggeration can be created by fear or by having learned that certain actions or positions provoke pain...Excessive or exaggerated pain behaviors can be a response to feeling discounted or mistrusted, so that one must emphasize symptoms to persuade the physician of their reality. Anyone might dramatize a problem in an effort to have it taken seriously. Thus, symptom magnification can be an iatrogenic phenomenon that occurs when patients feel mistrusted or poorly cared for.

AMA Guides, 6th Ed., p. 39. Further, it is unknown whether the BDI was standardized to a population raised in Mexico, as was Claimant, or how the results were evaluated. Claimant’s language skills made it necessary for her to communicate, during the IME, through an interpreter. Further, by the time she saw Dr. Knoebel, she had been through a significant amount of difficulty in trying to obtain care and Employer’s compliance with her restrictions. Under these circumstances in particular, in combination with the objective MRI findings and evidence of edema in Claimant’s right hand, fingers and shoulder, the Referee finds inadequate evidence to establish that Claimant’s exaggerated pain behaviors were intentionally deceptive.

45. In addition, Claimant’s recollection of dates was occasionally inconsistent with information in the record from contemporaneously maintained documents. The Referee does not find that such instances demonstrate dishonesty or ill intentions on Claimant’s part. Nevertheless, where Claimant’s testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the

Referee will adopt the date referenced in the document as being more reliable.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Causation

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967).

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

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an

industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. *Larsons, The Law of Worker's Compensation*, § 13.

Right Shoulder: Labral Tear/Bursitis

46. There is no dispute that Claimant suffered an industrial accident resulting in a right wrist sprain and medial epicondylitis ("right wrist sprain/strain"); however, Claimant seeks additional benefits related to her right shoulder pain. Defendants argue this pain is unrelated to her industrial injury.

47. Claimant testified at her deposition, on February 9, 2010, that her right shoulder felt uncomfortable after she injured her wrist on August 8, 2008, and that it became increasingly painful after wearing a sugar-tong wrist splint for 6 weeks. Thereafter, Dr. Vance, radiologist, identified a labral tear and bursitis in Claimant's right shoulder on her January 21, 2009 MRI. Claimant continued to have right shoulder, wrist, arm, hand and finger pain at the time of her deposition.

48. No one has alleged or opined that Claimant's right shoulder bursitis was caused by the industrial accident. However, Claimant alleges that her right labral tear was.

49. In January 2009, Mr. Cushman refused to provide Claimant with an excuse for work, electing to defer to the opinion of the orthopedic specialist Claimant was scheduled to see. The Referee finds this was an admission that Mr. Cushman believed he was less qualified to

render an assessment of Claimant's right arm symptoms than an orthopedic specialist. The Referee agrees, and finds Mr. Cushman's opinions carry less weight than those of Dr. Knoebel, a known orthopedic surgeon. The Referee further finds Mr. Cushman's opinions are inadequate to overcome those of Dr. Cook, a physician. Although Dr. Cook's credentials are unknown, he is, at a minimum, a physician whose qualifications to render opinions in this case have not been affirmatively proven to be lacking.

50. Dr. Cook relied upon Dr. Vance's opinion to establish the presence of a right labral tear and opined that this injury is consistent with repetitive overhead lifting. He did not elaborate on the type, intensity or frequency of such repetitive lifting required to tear a labrum, nor analyze how Claimant's actions in placing an unknown number of 6-pound cans on an overhead shelf fit this criteria. Though imprecise, the language in Dr. Cook's report establishes that he opines Claimant's labral tear was caused by the industrial accident.

51. Dr. Knoebel disagreed with Dr. Vance, opining that Claimant's January 21 MRI did not demonstrate a labral tear at all. He said the CD images he viewed were too grainy. Dr. Knoebel also disagrees that simply reaching overhead would have caused a labral tear, which is more consistent with falling on an outstretched arm. In addition, he disputes that Claimant could have incurred a labral tear without significant pain.

52. Even assuming that Claimant's right labrum was ever torn, she has failed to meet her burden of proving that this condition was caused by the industrial accident. Dr. Knoebel's opinion as to the mechanism of injury is more credible than Dr. Cook's. As a known orthopedist familiar with Idaho's worker's compensation system, Dr. Knoebel is knowledgeable and experienced with shoulder injuries; whereas, Dr. Cook's qualifications are unknown. In addition, a significant portion of Dr. Cook's opinions and findings lack foundation, are

inaccurate, fail to provide relevant or useful insight, or are otherwise flawed.

53. In addition, Claimant's failure to report shoulder pain until approximately 6 weeks following the industrial accident, describing its initial onset as "discomfort," is inconsistent with the high intensity of pain to be normally expected when one's labrum is torn, according to Dr. Knoebel. Furthermore, there is no medical evidence in the record to establish that wearing a sugar-tong splint under the conditions described by Claimant could cause a labral tear. Finally, there is no medical evidence to prove that Claimant had a pre-existing labral tear that was subsequently aggravated by either the industrial accident or the wrist splint.

54. Claimant has failed to establish by a preponderance of evidence that she suffered a right labral tear or right shoulder bursitis as a result of her industrial injury.

Somatization Disorder

55. Dr. Knoebel diagnosed Claimant with Somatization Disorder based upon test results that he was not qualified to evaluate. Further, he could not explain how Claimant's responses were evaluated and no one else has opined that Claimant suffers from this condition.

56. The Referee finds inadequate evidence in the record to establish that Claimant has Somatization Disorder.

Residual Right Arm Pain

57. Both Dr. Knoebel and Dr. Cook opined that Claimant has right arm pain due to CPS. However, she has never received treatment. Dr. Cook referenced the *AMA Guides, 6th Ed.* to support his position that CPS is ratable; however, he opted not to rate Claimant's CPS, relying instead upon the evidence of shoulder pathology to support his PPI opinion. Dr. Knoebel opined that Claimant's CPS was pre-existing and, therefore, was not caused by the industrial accident. Claimant's PAs never suspected CPS.

58. The evidence in the record establishes that Claimant's pain symptoms attributed to CPS first manifested soon after her wrist injury, in a pattern radiating outward from her wrist, and remained localized to her right upper extremity. As such, the Referee is convinced that Claimant suffered some residual right arm pain as a result of her wrist injury, and finds this pain is a natural and compensable consequence of her industrial accident.

Maximum Medical Improvement

59. Dr. Knoebel found Claimant reached MMI as of February 5, 2009. Dr. Cook agreed with Dr. Knoebel's opinion, then also found her to be at MMI as of May 12, 2009. Nevertheless, the text of Dr. Cook's report makes it apparent that he believes further treatment may improve Claimant's CPS. Dr. Cook's report fails to demonstrate that he was familiar with the legal concept of MMI and how it relates to a claimant's eligibility for either future medical benefits or a PPI rating.

60. At her deposition, Claimant continued to have pain, particularly in her right forearm when writing or holding a telephone receiver, and also in her shoulder. Her most recent medical records indicate she had diffuse pain from her right hand to her neck, accompanied by swelling.

61. Dr. Knoebel did not address the question of whether Claimant's residual right arm pain is stable because he opined that it was not caused by the industrial accident. Dr. Cook recommended that treatment by an occupational medicine specialist and a mental health care provider would help alleviate Claimant's pain and resultant work difficulties.

62. Claimant has never been evaluated for her residual right arm pain symptoms, yet there is unchallenged evidence in the record that treatment may improve Claimant's condition. Further, Claimant seeks treatment for her pain symptoms. Under these circumstances, the

Referee finds Claimant's residual right arm pain symptoms related to her compensable wrist injury have not yet reached MMI.

63. The question of whether Claimant's shoulder injury has reached MMI is moot.

Reasonable Medical Care

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

64. The parties agree that Claimant is entitled to the medical care benefits paid through February 5, 2009. Further, Claimant has not incurred any additional treatment costs since that date. Her only relevant condition found not to be at MMI as of February 5, 2009 is her residual right arm pain from her wrist injury. Therefore, the only question is whether Claimant is presently entitled to future reasonable medical care for her pain.

65. Dr. Cook recommended follow-up treatment with Stewart Curtis, D.O., an occupational medicine specialist, for management and/or treatment related to her industrial injury, as well as mental health counseling to improve her coping skills related to her pain issues.

66. The problems with Dr. Cook's report are described, above. Nevertheless, his recognition that treatment could result in improvement in Claimant's pain level and functionality is persuasive, particularly in light of Dr. Knoebel's silence on this topic⁶.

67. The Referee finds Claimant is entitled to additional reasonable and necessary medical care to treat her right arm pain from her industrial wrist injury pursuant to Idaho Code § 72-432.

Temporary Total Disability

68. Idaho Code §§ 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled. Here, Claimant continued to work, with pain, from the date of her industrial injury until October 14, 2008, when her work restrictions became clear to Employer and she was laid off. Surety paid time loss benefits from October 14, 2008 until February 5, 2009.

69. Claimant's only relevant condition that was not at MMI after February 5, 2009 is her wrist-related right arm pain. She returned to her seasonal position with Employer, doing the same job, for the 2009 season. She planned to return for the 2010 season if she were rehired. Although Claimant's overall wages decreased from 2007 through 2009, her wages from Employer remained roughly the same over all three seasons. Claimant testified that she did not tell prospective employers about her condition, yet she still was unable to obtain offers for work

⁶ Dr. Knoebel opined Claimant's CPS was not caused by the industrial accident, so he never reached the question of whether treatment could improve Claimant's pain.

during the off-season as she had received in the past. Claimant testified that she would have worked if she had been hired for additional jobs.

70. There is no expert opinion in the record addressing the likely reasons for Claimant's reduction in work.

71. Claimant has failed to prove that she is entitled to time loss benefits related to her industrial accident after February 5, 2009. Her residual right arm pain from her wrist injury had not reached MMI by that date; however, the record does not demonstrate that this condition prevented her from working.

PPI/PPD

“Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and on specialized activities of bodily members. Idaho Code § 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 Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a

determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

72. Claimant's shoulder pathology was found unrelated to her industrial injury.

73. Dr. Knoebel opined, without opposition, that Claimant suffered no permanent impairment as a result of her industrial wrist injury. However, this condition has not reached MMI, so PPI and PPD ratings are premature.

74. The Referee finds Claimant is entitled to a 0% PPI/PPD rating in relation to her right labral tear/right shoulder bursitis. These issues are reserved with respect to her compensable wrist injury.

Retraining

75. Claimant seeks retraining benefits. Idaho Code § 72-450 provides that income benefits may be paid to an individual who is receptive to and in need of retraining in another field, skill, or vocation in order to restore her earning capacity. Claimant has proposed no alternative vocation and no specific course of training, and has not established that she is receptive to retraining or that retraining would increase her wage earning capacity. The claimant

has not established that she is entitled to an award of retraining benefits under § 72-450, Idaho Code.

Apportionment

76. Idaho Code § 72-406 provides for apportionment of benefits where a Claimant's industrial injury was worsened by a pre-existing or subsequent condition. There is inadequate evidence of any such relevant condition in the record. Therefore, the issue of apportionment is moot.

Attorney Fees

77. Idaho Code § 72-804 provides that if the Commission determines that the employer contests a claim for compensation made by an injured employee without reasonable ground or the employer neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee the compensation provided by law or without reasonable ground discontinued compensation as provided by law, the employer shall pay reasonable attorney fees in addition to the compensation provided by law.

78. Claimant argues that Defendants unreasonably contested her claim based on the fact that Surety denied coverage for treatment of her right shoulder pain by an orthopedic specialist. Even though Mr. Cushman referred her to an undesignated orthopedic specialist, Defendants sent her for an IME first, then denied further coverage based upon the results of that IME. The Referee finds that Defendants acted within their right to investigate the claim to determine whether they were liable for coverage by sending Claimant for an IME when they did. Defendants were not required to provide medical care on the authority of Mr. Cushman's referral once Dr. Knoebel opined no further treatment related to the industrial accident was warranted.

79. The evidence presented does not establish that Defendants acted unreasonably. There is no basis for an award of attorney fees in this case.

80. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has proven her right wrist sprain, medial epicondylitis and related right arm pain symptoms were caused by the industrial accident of August 8, 2008.

2. Claimant has failed to prove that her right labral tear or right shoulder bursitis were caused by the August 8, 2008 industrial accident.

3. Claimant has proven that she is entitled to reasonable and necessary medical care for her right wrist sprain, medial epicondylitis and related right arm pain symptoms.

4. Claimant has failed to prove that Defendants are liable for benefits related to her right labral tear or right shoulder bursitis.

5. Claimant has proven that she is entitled to TTD benefits from October 14, 2008 until February 5, 2009.

6. Claimant has failed to prove that she is entitled to PPI or PPD benefits for her right labral tear or right shoulder bursitis.

7. Claimant has failed to prove she is entitled to retraining benefits.

8. Claimant has failed to prove she is entitled to attorney fees under Idaho Code § 72-804.

9. Issues pertaining to PPI and PPD related to Claimant's compensable wrist injury are reserved.

10. 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 24 day of November, 2010.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of November, 2010, 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:

PAUL T CURTIS
598 NORTH CAPITAL
IDAHO FALLS ID 83402

M JAY MEYERS
P O BOX 4747
POCATELLO ID 83205

jkc

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARMEN LICANO,)	
)	
Claimant,)	IC 2008-029193
)	
v.)	
)	
COMMUNITY COUNCIL OF)	
IDAHO, INC.,)	
)	
Employer,)	ORDER
)	
IDAHO STATE INSURANCE FUND,)	
)	November 26, 2010
Surety,)	
)	
Defendants.)	
_____)	

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

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

1. Claimant has proven her right wrist sprain, medial epicondylitis and related right arm pain symptoms were caused by the industrial accident of August 8, 2008.
2. Claimant has failed to prove that her right labral tear or right shoulder bursitis were caused by the August 8, 2008 industrial accident.

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of November, 2010, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

PAUL T CURTIS
598 NORTH CAPITAL
IDAHO FALLS ID 83402

M JAY MEYERS
P O BOX 4747
POCATELLO ID 83205

jkc

/s/ _____