

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BURT MATTEO,

Claimant,

v.

FARWEST STEEL CORPORATION,

Employer,

and

WAUSAU UNDERWRITERS INSURANCE
COMPANY,

Surety,

Defendants.

IC 2010-018820

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

FILED APRIL 5 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on September 30, 2011. Claimant, Burt Matteo, was present in person and represented by Hugh V. Mossman, of Boise. Kent W. Day, also of Boise, represented Defendant Employer, FarWest Steel Corporation (“FarWest”), and Defendant Surety, Wausau Underwriters Insurance Company (“Surety”). The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 17, 2012.

ISSUES

The issues to be decided by the Commission from evidence presented in connection with the hearing are:

1. Whether Claimant incurred a compensable occupational disease; and
2. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-448.

CONTENTIONS OF THE PARTIES

Claimant contends that his severe arthritis and degenerative labrum tears in his left shoulder are due to industrial repetitive motion activities over the 16 years he worked for Employer. He relies upon the opinion of his treating orthopedic shoulder surgeon, Erik Heggland, M.D., recorded in chart notes and letters, and an ergonomics expert, Uwe Reischle, Ph.D., to prove that his left shoulder injury is the result of a compensable occupational disease that did not manifest more than 60 days before May 21, 2010, the date on which he provided Employer with notice of his claim. Claimant also argues that the testimony of Roman Schwartsman, M.D., an orthopedic shoulder surgeon who performed an IME on February 22, 2011, supports his position.

Defendants counter that Claimant's left shoulder pathology is inconsistent with an occupational disease etiology because his right, dominant, arm does not demonstrate a similarly severe level of arthritis. In addition, medical findings indicate that Claimant's injury is more likely the result of an identifiable injury event, and not an injury that has developed over a significant time period. Further, Defendants assert that Claimant's work activities were not adequately repetitive, nor sufficiently high-loading, to establish that Claimant's injury is the result of a repetitive motion injury at work. They rely upon the testimony of Dr. Schwartsman, as well as Dr. Heggland's ultimate concurrence in Dr. Schwartsman's opinion.

OBJECTIONS

All pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition testimony of Burt Matteo, taken December 9, 2010;
2. Claimant's Exhibits 1 through 19, admitted at the hearing;
3. Defendants' Exhibits A through H, admitted at the hearing;
4. The testimony of Claimant and Uwe Reischle, Ph.D, taken at the hearing held on September 30, 2011; and
5. The post-hearing deposition testimony of Roman Schwartzman, M.D., taken October 21, 2011.

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

FINDINGS OF FACT

BACKGROUND

1. Claimant, who is right-hand dominant, was 39 years of age and residing in Kuna, Idaho at the time of the hearing. In high school, he sustained a right shoulder injury playing football that bothered him periodically. After graduating from high school, Claimant joined the Marine Corps. He was honorably discharged after suffering an injury to a lower extremity. Thereafter, Claimant returned to Idaho and did landscaping work for a short time in Sun Valley.

2. **Claimant's employment at FarWest.** In 1994, Claimant began working at FarWest. He started out in the rebar shop, where rebar from a quarter of an inch to four inches in diameter was custom-cut and/or bent to customers' specifications. The uncut rebar arrived at FarWest in lengths of 20, 40 and 60 feet. The rebar bundles were very heavy. (*See* CE 18, p.

254). An overhead crane moved the bundles between processing areas, where individuals opened them and worked with a few pieces at a time.

3. When he first started with Employer, Claimant was a laborer. His primary functions were to keep the shear line fed with rebar and to tie the custom-cut pieces into bundles with big wires like bread ties. To keep the shear line fed, Claimant would cut the straps on the rebar bundles with bolt cutters and untangle the rebar pieces by either lifting them over his head and slamming them down into the shear line, or by “flipping” them. Cl. Dep., p. 10. By “flipping,” Claimant explained, “you had to flip that like a whip, two hands at a time, and get it untangled so you could throw it down into the shear line.” Cl. Dep., p. 22.

4. Claimant was promoted to lead man quickly. In that capacity, Claimant did many jobs, as needed. He ran the crane from a remote control device attached at his belt, he ran the EVG machine, he flipped and tied rebar, and he kept things clean and organized. He also trained others on how to use the EVG machine because he had become an expert operator.

5. In 2005, Claimant left FarWest for reasons unrelated to his claim to take a job with BMC West driving a forklift. Neither of his shoulders were bothering him at that time. After a few months, however, Claimant grew tired of the sedentary forklift operator job and FarWest offered Claimant a new job on the structural side of the shop, which he accepted.

6. On the structural side, Claimant’s duties mainly involved operating the crane and pulling 20-foot long plates of steel off long rows of shelving, laying them on waist-height tracks and tying them in bundles. The shelving included five levels, each approximately a foot-and-a-half tall, that started at ground-level and rose to approximately eight feet at the top shelf. Claimant, who is five-foot-five, explained that the most difficult steel for him to pull was located on shelves that required him to reach above his head. Video evidence establishes that two of the

five shelves were located above Claimant's shoulder level, including the eight-foot tall shelf, which he could not have reached without assistance. Claimant pulled as much steel as he could from the shelves with each grab in order to complete his work each day.

7. In February 2007, Claimant sought treatment for pain in his right shoulder. At that time, he had "very minimal symptoms in his left shoulder." CE 14, p. 165. In January 2008, he underwent arthroscopic surgery on his right shoulder. Claimant had previously received workers' compensation benefits for medical care related to other workplace injuries, but he did not seek such benefits in relation to his right shoulder problem, which was related to his high school football injury. Nevertheless, FarWest provided Claimant with light-duty office work for an undisclosed period before returning Claimant to his regular-duty job. Claimant eventually recovered to the point where he no longer observed any right shoulder restrictions. By the end of July 2008, Claimant was experiencing significant left shoulder pain. He underwent left shoulder surgery in March 2010. Claimant lost his job at FarWest because his lifting restriction of ten pounds above his head with his left arm following surgery prevented him from performing his regular job, and FarWest had no light-duty work available. Findings related to Claimant's specific medical course related to his bilateral shoulder problems are set forth herein below.

8. After Claimant lost his job, a First Report of Injury (FROI) was filed with respect to his left shoulder injury. The May 28, 2010 FROI indicates that Claimant's last work date was March 4, 2010, and that his job at that time included operating the crane, pulling material from bins for loading and operating the burn table. It further states that Claimant was unsure of any actual injury incident, but that his FMLA leave had run out, so he filed a workers' compensation claim.

MEDICAL BACKGROUND

9. **Right shoulder history.** As noted above, Claimant had no shoulder problems as of 2005, when he left FarWest briefly to work for BMC West. In February 2007, however, he sought treatment for his increasingly painful right shoulder:

Burt Matteo is a 34-year-old man who comes in complaining about his right shoulder. He has had symptoms in this shoulder for quite some time. When he was in high school he had a foot ball [*sic*] injury to this shoulder in his sophomore and junior year. Ever since that time he does not feel that the shoulder has been completely asymptomatic and normal. He has gotten into significant symptoms in his right shoulder over the last couple years. He has very minimal symptoms in his left shoulder.

CE 14, p. 165. Claimant underwent conservative therapy for several months, then an MRI in December 2007 which evidenced both chronic and acute pathology. On January 24, 2008, Claimant underwent arthroscopic subacromial decompression, distal claviclectomy, and labral and joint debridement of his right shoulder by Jeffrey Hessing, M.D., an orthopedic surgeon. Post-operatively, Dr. Hessing diagnosed impingement syndrome with hypertrophic changes of the right AC joint and labral tearing, without full-thickness cuff pathology.

10. As of March 12, 2008, Claimant was restricted from lifting more than 20 pounds and from performing overhead repetitive activities with his right arm. At some point thereafter, as noted above, Claimant improved to the point where he no longer observed permanent restrictions as a result of his right shoulder condition.

11. **Left shoulder history.** For an undefined period, until his right shoulder improved, Claimant favored it. Consequently, he believes he used his left arm more during this period. "I was favoring my right shoulder and using my left more to do the heavy lifting, and that's when this - - my left shoulder started hurting, started to hurt more and more all the time."

Cl. Dep., p. 36.

12. On July 28, 2008, Claimant obtained treatment for increasing left shoulder symptoms. “The symptoms have been present for a number of months and are not abating.” CE 14, p. 176. Claimant was diagnosed with left shoulder impingement syndrome and, assuming the condition was similar to his prior right shoulder condition, the treating physician recommended conservative treatment.

13. On August 18, 2008, Claimant underwent an MRI with contrast of his left shoulder. It identified pathology, including soft tissue strands in the anterior capsule region, apparent disruption of the middle glenohumeral ligament, detachment of the anterior labrum from the 1 o’clock to 5 o’clock position which included a nondisplaced Bankart lesion anteroinferiorly, mild degenerative disease without encroaching osteophytes in the AC joint, anatomical evidence in the acromion that could contribute to impingement *without* evidence of rotator cuff tear or significant tendinopathy, and cartilage loss on the anterior glenoid.

14. Claimant’s symptoms in August 2008 included problems with overhead use of his left arm, and he reported that it felt much like his presurgical right shoulder. Clinically, Claimant’s pathology was mostly labral, with no history or examination suggesting instability of his labrum. His biceps anchor remained intact and his biceps tendon looked normal on MRI.

15. The treating physician again diagnosed impingement syndrome and suggested that Claimant may become a surgical candidate upon progression of his symptoms. Claimant advised that he may request more aggressive treatment if his symptoms persisted because he wished to do big game hunting in the fall, just a couple of months away.

16. In December 2009, Claimant underwent blood testing that ruled out rheumatoid arthritis. At or around this time, Claimant believed his shoulder problems were caused by osteoarthritis irrespective of his work.

17. On February 18, 2010, Claimant again sought treatment for left shoulder pain “that apparently developed primarily while at work.” CE 15, p. 193. Claimant had “sharp pain deep within the left shoulder most notably with lifting heavy objects with his elbow extended.” *Id.* Claimant still believed he had osteoarthritis in his left shoulder. Clinically, the treating physician identified a labral tear and supraspinatus tendinosis.

18. Erik Heggland, M.D., an orthopedic shoulder surgeon, evaluated Claimant’s left shoulder on February 24, 2010. He noted Claimant’s work required him “to lift and carry, stack and reach, very heavy objects all day long.” CE 15, p. 194. He also noted Claimant “may have had some injuries playing football when he was younger...[and]...[h]e has a history of having had very similar sounding pathology on the right shoulder which has done well status post an arthroscopic surgery...two years ago.” *Id.* Following examination and review of Claimant’s MRI, and in consideration of Claimant’s left shoulder history, Dr. Heggland recommended arthroscopic surgery.

19. On March 8, 2010, Claimant underwent arthroscopic debridement of a degenerative labral tear and chondromalacia in the glenohumeral joint, subacromial decompression, and Mumford procedure in his left shoulder. Postoperatively, Dr. Heggland diagnosed left shoulder impingement and acromioclavicular arthrosis with severe glenohumeral osteoarthritis and degenerative labral tears.

20. In his operative note, Dr. Heggland recorded his impression of the etiology of Claimant’s injury, suggesting that it may be work-related:

The patient is a 37-year-old who has been having pain in his left shoulder without a single trauma leading up to this. It has been developing gradually over the years as [*sic*] time working as an iron worker. At this point in time, he has had MRI, x-rays, and examination and has been found to have evidence of a labral tear and impingement with AC arthrosis and pain. He has not preoperatively been noted to have strong evidence of

significant osteoarthritis, so he was felt to be a candidate for arthroscopic repair of labral pathology and subacromial decompression and Mumford procedure.

CE 9, p. 33. This note is consistent with chart notes Dr. Heggland made throughout his treatment of Claimant, in which he was clearly suspicious of an industrial cause for Claimant's shoulder pathology.

21. Operatively, Dr. Heggland found "grade 4 chondral loss on the humeral head and the glenoid over most of the glenoid and head surface...a little bit of retained cartilage on the posterior aspect of the glenoid ...[and]...a lot of loose chondral flaps in this area...degenerative labral tearing from the inferior glenoid all the way up to the anterior glenoid and at the base of the biceps but this was not a detachment...inflammatory subacromial bursitis and arthritis of the AC joint...[and]...a little bit of an anterior acromial osteophyte." CE 9, p. 33.

22. At a follow-up examination on March 15, 2010, Dr. Heggland noted, "The patient's problem started to become an issue several years ago. There is no direct work-related link although one could suspect doing heavy labor could contribute to getting degenerative arthritis in the shoulder of a 37-year-old, however, it is not an official Work Comp case." CE 15, p. 196. On April 5, 2010, he wrote, "In my mind, the patient's shoulder has been affected by years of heavy work but there is no one incident that would qualify it for a Work Comp injury so right now he is just on vacation and sick leave time." CE 15, p. 197. Also on that date, Dr. Heggland noted that Claimant's left shoulder would never be "normal per se" and that he might need another surgery in the future. *Id.* On May 5, 2010, Dr. Heggland reported, "He has a long history of heavy work and other people who have had this same job have ended up with similar shoulders." CE 15, p. 198. He also memorialized his opinion that Claimant's left shoulder

condition was work-related and his plan to seek workers' compensation coverage for Claimant's medical costs:

ASSESSMENT: DEGENERATIVE JOINT DISEASE, LEFT SHOULDER. I WOULD CLASSIFY THIS AS BEING RELATED TO HIS HEAVY WORK. HE DOES NOT HAVE A WORK COMP CLAIM OPEN AT THIS TIME, HOWEVER, AND IT REMAINS TO BE SEEN IF THEY WOULD ACCEPT THIS AS A WORK COMP CLAIM.

Id. Consistent with his feeling that Claimant's work was a causal factor, Dr. Heggland also noted that he believed Claimant should look for a new line of work.

23. On May 19, 2010, Dr. Heggland reiterated his belief that Claimant's left shoulder injury was work-related and that he may need an arthroplasty in the future. Claimant's condition had recently been aggravated when he changed out some tires on his wife's car. Dr. Heggland opined that since this activity proved problematic, it also proved that Claimant would not be able to return to work at FarWest. As noted above, Claimant never did return to work at FarWest.

24. On July 26, 2010, Dr. Heggland executed a check-box letter to Claimant's attorney in which he indicated that Claimant's left shoulder injury was caused by lifting heavy steel at FarWest with pulling and twisting maneuvers involving his shoulders; that his shoulder injury is "peculiar or characteristic to employment involving heavy lifting, pulling and rotation of the shoulder joint"; and that the type of degenerative changes in Claimant's shoulder joint would not naturally progress in a patient of Claimant's age in the absence of the heavy exertional requirements of his employment. CE 15, p. 201.

INDEPENDENT MEDICAL EVALUATION

25. On February 22, 2011, Roman Schwartsman, M.D., an orthopedic shoulder surgeon, performed an IME at Surety's request. Dr. Schwartsman familiarized himself with Claimant's relevant medical records, took a medical history, and performed an examination.

26. Dr. Schwartzman concluded in his report that Claimant had significant left shoulder pathology. However, objective findings demonstrated by Claimant's 2008 MRI and his 2010 operative report authored by Dr. Heggland indicated his condition is most likely the result of an acute traumatic event, like a dislocation or a subluxation, and not repetitive motion activities. Specifically, he noted that Claimant's MRI findings of detachment of the labrum from one o'clock to five o'clock, with a nondisplaced anteroinferior Bankart lesion, are consistent with anterior dislocations associated with repetitive throwing activities. Further, Dr. Schwartzman opined that he did not have enough reliable information about Claimant's work activities to link his shoulder pathology with an industrial cause.

27. By the time of his deposition, Dr. Schwartzman had viewed the DVD of Claimant's workplace activities. In addition, he elaborated on his interview with Claimant. Dr. Schwartzman opined that the work activities illustrated by the video recording and described by Claimant were neither sufficiently repetitive, nor adequately high-loading for the type of shoulder injury Claimant sustained, to support Claimant's occupational disease theory. "The patient maintained that this was due to the repetitive stresses of his job but could not provide any specifics which would corroborate that assertion." Schwartzman Dep., p. 8. "The patient did not describe anything about his work or the nature of his work that would lead me to conclude that his shoulder was placed in an unusual or an unusually stressful position that over time would lead to the development of this type of pathology." Schwartzman Dep., pp. 9-10.

28. Dr. Schwartzman opined that the activities he observed on the video recording, including mostly waist-level work, could reasonably lead to higher incidences of back injuries, or irritation in the forearms and wrists from twisting and rolling movements; however, these movements would not lead to an increased risk for shoulder injuries.

29. On the other hand, Dr. Schwartzman has seen patients, including framers, roofers and miners, who performed certain types of repetitious work that he believed caused or accelerated arthritis. The activities that put these workers at risk included repetitive use of a pickaxe, shovel or hammer. He differentiated this type of work from what he understood Claimant's work to entail:

Those individuals would use their extremity in an overhead capacity for extended periods of time during the day. There would be a large load placed on the extremity in an overhead capacity. There are shear forces that generated on the glenohumeral joint itself in the process of swinging a hammer overhead, swinging a pickaxe.

Schwartzman Dep., p. 12. "I've seen, in the course of my 14 years in private practice, numerous patients who were employed in metal shops, machine shops, steel fabrication shops. And I have not seen these patients for arthritis of the shoulder." Schwartzman Dep., p. 12-13.

30. Dr. Schwartzman would agree with Dr. Heggland's opinion that Claimant's condition was the result of repetitive activities at work permanently aggravating a preexisting degenerative process, but for the absence of evidence that Claimant engaged in sufficiently repetitive overhead activities implicating his left shoulder.

31. Dr. Schwartzman further opined that Claimant's objective findings of significantly greater left shoulder pathology than right shoulder pathology is inconsistent with a repetitive motion injury, particularly given that Claimant is right-hand dominant. "The reality of it is, if he is working in an overhead capacity, he would have to be working with both arms in an overhead capacity. And there's nowhere near the amount of arthritis in the right shoulder as there is in the left shoulder." Schwartzman Dep., p. 21. Accordingly, Dr. Schwartzman concluded that Claimant's left shoulder injury must be due to some significant traumatic event.

Along those lines, he discounted Claimant's belief that he used his left shoulder more, subjecting it to increased risk, during the months following his right shoulder surgery:

From a professional standpoint, I would tell you that people's hand dominance is so firmly set that they're simply unlikely to do that. People don't change their hand dominance and their ability to do things with a contralateral limb late in adult life. I can't think of a single example of somebody who changed hand dominance in adult life.

Schwartzman Dep., p. 35.

32. Dr. Schwartzman also opined that some pulling motions, such as pull-starting a lawn mower, or extended periods of handsaw use, could lead to shoulder problems. However, he did not believe that Claimant's work entailed these activities repetitively. Based on the video recording, he opined that pulling metal in the structural department involved the whole body, taking stress away from the shoulders. As for flipping rebar, Dr. Schwartzman opined that this work is performed at waist level, so it would not pose an increased risk of shoulder injury.

33. Dr. Schwartzman ultimately opined that Claimant suffered an acute injury event, the details of which have not been reported. In addition, he opined that Claimant's risk for shoulder injury at FarWest is not distinguishable from the general run of hard physical labor jobs.

DR. HEGGLAND'S RESPONSE TO THE IME REPORT

34. On or around March 3, 2011, Dr. Heggland received Dr. Schwartzman's IME report. Notwithstanding his prior opinion that Claimant's shoulder problems were work-related, Dr. Heggland, on March 22, 2011, wrote to Claimant's attorney that "on technical grounds I agree with the IME." CE 15, p. 182. He further explained that he was unable to support his prior medical opinion on a more-probable-than-not basis:

I had mentioned to Mr. Matteo that, in my opinion, his shoulders were probably aggravated, accelerated or possibly even caused by his heavy

work in the steel industry; but, I think I made it clear to him last time I saw him that it would be very difficult without an injury date and previous track record of reporting injuries at work, to correlate his shoulder problems with his work on a more certain than not medical basis.

CE 15, p. 182. He went on to say that “typically if a patient comes in with this degree of osteoarthritis, which is not terribly common, they are usually miners, ranchers, farmers or may be even power lifters who have had a great deal of stress and strain to their shoulders.” *Id.* Dr. Heggland also acknowledged that it is highly unusual for a 37-year-old to manifest such extreme osteoarthritis and that a Charcot-type process¹ due to a cyst in the spinal cord could be at work here. However, he ruled this out because he had no findings to support that diagnosis.

35. In that same letter, however, Dr. Heggland also wrote that he believed Claimant’s work *was* a significant contributing factor: “I have sympathized with Mr. Matteo that I have little doubt that his work was a significant contributing factor even if he had some predisposing factors related to his Chiari malformation, etc., but I thought I made it clear that I could not really make the connection directly to this being a work comp issue.” *Id.*

36. In his closing paragraph, Dr. Heggland confirmed the ambiguity he expressed in the body of his opinion letter with respect to the work-relatedness of Claimant’s left shoulder injury: “To summarize, as much as I wish I could disagree with Dr. Schwartzman’s evaluation of Mr. Matteo’s situation; I, unfortunately, would have to agree that it is not possible to connect in the context of medical certainty that Mr. Matteo’s problems are caused by his work even though, in my opinion only, this is quite likely, which I think is a different standard.” CE 15, p. 182.

¹ Charcot joint refers to progressive neuropathic degeneration of a weight-bearing joint, the onset of which is usually insidious. It is often referred to in the setting of “Charcot foot,” which commonly results from diabetic neuropathy. Claimant previously underwent brain surgery to correct symptoms associated with a malformation in his brain known as a Chiari formation which had caused him symptoms including headaches and electrical jolting in his body. Dr. Heggland was acknowledging the unproven possibility that Claimant could have some sort of neuropathic predisposing factor for his shoulder pathology.

37. On April 6, 2011, Dr. Heggland wrote a second letter to Claimant's attorney, attempting to clarify his opinion. Dr. Heggland again could not say, on a more probable than not basis, that Claimant's shoulder problems were caused by his work. However, he did opine that Claimant's "shoulder problems were accelerated and/or aggravated by his work but not caused by his work." CE 15, p. 181. "I have strong suspicions that if one were able to go back and track the status of his shoulders over time, one could establish causation but I cannot do that retrospectively on a more probable than not basis." *Id.* He went on to disagree with Dr. Schwartsman to the extent he opined that shoulder dislocations are the primary cause of full thickness cartilage loss.

ERGONOMICS EXPERT

38. Uwe Reischl, Ph.D., professor of health sciences at Boise State University, is an ergonomics expert. In addition to his Ph.D., Dr. Reischl also holds a medical doctorate degree; however, he has never been a practicing physician. At the outset of the hearing and in his June 5, 2011 letter to Claimant's attorney, Dr. Reischl sets forth some opinions about medical causation of Claimant's workplace accident; however, on cross-examination at the hearing, he clarified that he did not purport to offer any medical opinions in this case. A review of Dr. Reischl's *curriculum vitae* reveals that, since he obtained his Ph.D. in environmental health sciences in 1972, he has been a prolific publisher of scholarly articles, a co-author of one book, a presenter at various conferences, a developer of various measurement and other tools to improve health and increase safety, and a professor of various subjects, among other accomplishments. His professional and research interests include international public health, heat stress physiology as it applies to occupational health, and human factors engineering and ergonomics.

39. Dr. Reischl did not specifically define ergonomics or how his expertise in that field is pertinent to this case. On its website, the United States Department of Labor Occupational Safety and Health Administration (OSHA) defines ergonomics:

Ergonomics is the science of fitting workplace conditions and job demands to the capabilities of the working population. Effective and successful "fits" assure high productivity, avoidance of illness and injury risks, and increased satisfaction among the workforce. Although the scope of ergonomics is much broader, *the term here refers to assessing those work-related factors that may pose a risk of musculoskeletal disorders and recommendations to alleviate them.*

40. The Referee finds Dr. Reischl is qualified to testify as an expert in ergonomics. However, to the extent that Dr. Reischl may be qualified to opine on issues regarding medical causation, the opinions of Drs. Heggland and Schwartzman are more persuasive because they are each practicing orthopedic shoulder surgeons who have formally examined Claimant. Moreover, Dr. Reischl represented at his deposition that he was not testifying as a medical expert; therefore, Defendants did not cross-examine him in this regard. Therefore, only Dr. Reischl's opinions as to factors in Claimant's workplace that may pose a risk of shoulder injury are admissible. In developing his opinions, Dr. Reischl drew a number of medical conclusions. To the extent that these conclusions are supported by Dr. Heggland or Dr. Schwartzman, they may establish foundation for his ergonomics opinions.

41. Prior to preparing his opinion, Dr. Reischl reviewed Claimant's records related to his right shoulder surgery in 2008 and his left shoulder surgery in 2010, the video recording of Claimant's workplace (Exhibit 4) and Claimant's deposition. He also spent about an hour with Claimant on May 27, 2011, in which Claimant described his pain symptoms and Dr. Reischl evaluated Claimant's mobility, as well as his pain in his shoulders, hips, knees and feet. Dr. Reischl assumed, as per Claimant, that his day-to-day activities were more intense than those

depicted in the video recording. There is sufficient basis in the record to support this assumption.

42. Dr. Reischl did not evaluate Claimant's work environment. Based upon his background and experience evaluating work environments similar to that which he understood to exist at FarWest, Dr. Reischl concluded that Claimant's left shoulder pathology was the result of cumulative repetitive trauma from "[e]xcessive loading or...high loading on the arms, elbows, shoulders, and neck as a result of having to perform the functions described by Mr. Matteo." Tr., p. 87.

43. Dr. Reischl's "medical" opinion is not consistent with Dr. Schwartzman's opinion, in which Dr. Hegglund concurred. Dr. Reischl's June 2011 letter to Claimant's attorney indicates that Claimant's left shoulder injury is a "'classic' case of cumulative repetitive trauma...seen frequently in the steel industry." CE p. 255. Further, "The heavy and repetitive activities performed by Mr. Matteo at Far West [*sic*] Steel are characteristic of job activities associated with cumulative trauma injuries such as those experienced by Mr. Matteo." *Id.*

44. Rather than describing the peculiarities of Claimant's workplace that increased his exposure to heavy and/or high-loading activities and, in turn, his risk for shoulder injury, Dr. Reischl simply affirmed Claimant's counsel's suggestion that Claimant's activities included "repetitive heavy lifting of steel products, repetitive pulling at or near shoulder height of heavy steel products, repetitive bending and twisting of heavy wire, and ...a flipping activity where he would hold onto heavy lengths of rebar and jerk them up to loosen them from bundles." Tr., pp. 87-88. By repetitive, Dr. Reischle meant more than half of the day.

CLAIMANT'S CREDIBILITY

45. Claimant's testimony and demeanor at the hearing, as well as the evidence in the record, establishes that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

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

OCCUPATIONAL DISEASE

The Idaho Workers' Compensation Law defines an "occupational disease" as "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" Idaho Code § 72-102(22)(a). Further, Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where "such disease is actually incurred in the employer's employment."

In proving causation, Idaho case law recognizes compensability for "aggravation" of an underlying disease, but only when such aggravation results from an industrial accident. *See*, for example, Nycum v. Triangle Dairy Co., 109 Idaho 858, 712 P.2d 559 (1985); Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994); and Konvalinka v. Bonneville County, 140 Idaho 477, 478-479, 95 P.3d 628, 629-630 (2004). An "accident" is "an unexpected, undersigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs and which can be reasonably located as to time when and place where

it occurred.” I.C. § 72-102 (18) (b). Proof of hard work, pain at work, or a series of “mini-traumas” is insufficient to establish an industrial accident. See *Konvalinka and Nelson* (a series of mini-traumas is insufficient to prove an accident); *Nycum* (hard work does not constitute an accident); and *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003) and *McGee v. J. D. Lumber*, 135 Idaho 328, 17 P.3d 272 (2000) (proof of pain is insufficient to establish an accident).

Medical testimony to a reasonable degree of medical probability is required to prove a causal connection between the medical condition and the occupational exposure which allegedly caused it. *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). The Idaho Supreme Court has held that no special verbal formula is necessary when a doctor’s testimony plainly and unequivocally conveys his conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.2d 211 (2000).

46. In summary, a claimant with an occupational disease claim must demonstrate that he was afflicted by a disease that was actually incurred in his relevant employment; and, if causation rests upon proof that the occupational disease constitutes a permanent aggravation of a preexisting condition, then that the disease was triggered by a workplace accident. If this causation criteria is met, then the claimant must also prove that the hazards of such disease actually exist and are characteristic of and peculiar to the claimant’s employment. In the present case, Claimant’s occupational disease claim for his left shoulder injury must be examined in light of the above elements.

47. **No accident.** The parties agree that Claimant did not suffer a workplace accident, but that he did suffer significant shoulder pathology, as described above, while working at

FarWest. Therefore, as a threshold matter, he must establish that his left shoulder injury was the result of an occupational disease that manifested during his employment at FarWest.

48. **Causation: Injury actually incurred at FarWest.** Although Dr. Heggland struggled at length with the question of whether Claimant's left shoulder injury was work-related, he ultimately did not plainly and unequivocally convey that it was. This conclusion is not based upon Dr. Heggland's apparent difficulty with the necessary standard of medical probability, but with his failure to identify any medical basis connecting Claimant's left shoulder injury with his work throughout the entire period in which he speculated that such a connection could exist. Dr. Heggland's opinions are conclusory and internally inconsistent and, therefore, are unpersuasive.

49. Claimant argues that Dr. Schwartzman's medical causation opinion, when applied to his *actual* work activities (rather than those Dr. Schwartzman presumed from the video recording), supports a finding that his left shoulder condition was caused by his work. Relevantly, Dr. Schwartzman opined that Claimant could incur shoulder problems if he "spends two-thirds of his day with his arms *above* shoulder level lifting heavy loads." Schwartzman Dep., p. 32 (emphasis added). He clarified that he was only referring to activities *above* shoulder level. "With my arm at shoulder level, I have not moved my shoulder...It's when I become [*sic*] up and above the shoulder level that the problem begins. Because the restraints of the shoulder and the muscles that move the shoulder are now at a mechanical disadvantage. The ball of the shoulder is likely to shear in the socket in that position. That's why we see this injury in power lifters." Schwartzman Dep., p. 33.

50. The problem with this argument is that Claimant has failed to prove that he engaged in sufficiently taxing overhead work for even half of his average workday. During the period in which his left shoulder problems began, Claimant did do overhead work, pulling

various lengths of steel off of shelves. However, he only pulled steel part of the day. He also ran the crane and performed other tasks as needed. Further, when Claimant was pulling steel, only one shelf above his head was reachable. Three shelves were below shoulder-height, and one was approximately eight feet tall. It is unknown how materials from the eight-foot shelf were accessed, but the evidence in the record does not establish that Claimant reached up to pull steel off this shelf. Accordingly, of the time Claimant spent pulling steel, most of it was spent pulling below shoulder level.

51. Further, after Claimant pulled the steel off of a shelf, he worked with it at waist-level, tying it and attaching it to the crane, which he operated to move the bundle elsewhere. As such, his steel-pulling was interrupted with various periods of waist-level work. Thus, although Claimant performed shoulder-level work throughout the workday, the record does not establish that he was required to perform above-shoulder work with the steady, continuous pace associated with other repetitive motion activities previously determined by the Commission to constitute an occupational disease. *See, Voglewede v. Fair Dinkum Genuine Company, IC 2007-037275, filed May 13, 2011.*

52. Claimant also urges the Commission to adopt Dr. Reischl's opinion to support a finding of medical causation. The Referee declines to make such a recommendation because, as determined above, Dr. Reischl did not purport to offer a medical opinion. Even if he did, his opinion must yield to those of Drs. Heggland and Schwartzman who, as practicing orthopedic shoulder surgeons who have thoroughly examined Claimant, are both more qualified to medically assess Claimant's shoulder condition.

53. Although no cause for Claimant's left shoulder pathology was identified by Dr. Schwartzman, Dr. Heggland did not dispute his opinion that Claimant's objective findings are more consistent with an acute traumatic injury than one developed over a long period of time

through a repetitive motion activity. Claimant argues that his left arm symptoms developed due to overuse sometime after February 2007 and before late July 2008, notwithstanding time off work and time working a light-duty office job in winter/spring 2008 while he recovered from his right shoulder surgery. During this period, the primary overhead work Claimant did was pulling steel periodically from the overhead shelf. The evidence in the record is insufficient to establish such activity was sufficiently repetitive to constitute the occupational shoulder disease he claims. Also, it is doubtful from the record that Claimant could effectively pull steel overhead one-handed. Therefore, it is likely that he got help, during the times when he had to pull from the overhead shelf, until his right arm was functional again. Claimant may have used his left arm more while his right shoulder was recovering. However, the evidence in the record is insufficient to establish that such increased use was in the form of repetitive overhead motion activities at work.

54. Claimant has failed to prove his left shoulder injury was the result of an injury actually incurred at FarWest. Therefore, his claim is barred.

55. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his left shoulder injury was the result of an injury actually incurred at FarWest; therefore, his claim is barred.

2. All other issues are moot.

RECOMMENDATION

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

DATED this 16TH day of March, 2012.

INDUSTRIAL COMMISSION

/S/ _____
Michael E. Powers, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5TH day of APRIL, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BURT MATTEO,

Claimant,

v.

FARWEST STEEL CORPORATION,

Employer,

and

WAUSAU UNDERWRITERS INSURANCE
COMPANY,

Surety,

Defendants.

IC 2010-018820

ORDER

FILED APRIL 5 2012

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

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

1. Claimant has failed to prove his left shoulder injury was the result of an injury actually incurred at FarWest; therefore, his claim is barred.
2. All other issues are moot.

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

DATED this 5TH day of APRIL, 2012.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
Thomas P. Baskin, Commissioner

/S/ _____
R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5TH day of APRIL, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

HUGH MOSSMAN
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BOISE ID 83702

KENT W DAY
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ge

/S/ _____