BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CORRINE R. VOGLEWEDE, Claimant, v. FAIR DINKUM GENUINE COMPANY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-037275** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed May 13, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on October 1, 2010. Claimant, Corrine R. Voglewede, was present in person and represented by Michael T. Kessinger, of Lewiston. Defendant Employer, Fair Dinkum Genuine Company (Fair Dinkum), and Defendant Surety, Idaho State Insurance Fund, were represented by Bradley J. Stoddard, of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 10, 2011. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

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

1. Whether Claimant suffers from a compensable occupational disease, including whether Claimant's alleged occupational disease was incurred in the course of her employment pursuant to Idaho Code § 72-439.
2. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-448.

3. Whether Claimant's condition is due, in whole or in part, to a pre-existing and/or subsequent injury/condition, including whether Claimant's claim is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).

CONTENTIONS OF THE PARTIES

Claimant argues that her bilateral carpal tunnel syndrome is an occupational disease resulting from her work at Fair Dinkum, for which she is entitled to benefits. She asserts that her condition was not manifest until October 2007 and that she gave timely notice thereof.

Defendants assert that Claimant's bilateral carpal tunnel syndrome is a pre-existing condition, that it has been ongoing since approximately 2000, that it is a non-occupational disease not causally related to her work at Fair Dinkum, and that her claim for benefits is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), for lack of an accident that aggravated a pre-existing condition. Defendants further argue that, even assuming Claimant's condition is an occupational disease, it was a pre-existing occupational disease and her claim is barred by the statute of limitations.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant and of Joseph Chapman taken at the October 1, 2010 hearing;
3. Defendants' Exhibits A through J and Claimant's Exhibit K, admitted at the hearing;
4. The post-hearing deposition of John McNulty, M.D., taken by Claimant on October 5, 2010;
5. The post-hearing deposition of Kelly McGrath, M.D., taken by Defendants on October 22, 2010.

All objections posed in Dr. McNulty's and Dr. McGrath's depositions are overruled. All objections posed in Claimant's deposition (constituting Exhibit D) are overruled except the objections posed at pages 20 and 37, which are sustained.

FINDINGS OF FACT

1. Claimant was born in North Dakota and has lived in Orofino for the past 14 years. She is right-handed. She graduated from high school in 1965 and obtained no formal education after high school.

2. Claimant worked as a secretary and receptionist for her father-in-law, who was a physician, for 15 years in North Dakota. She helped with charting and with some medical examinations and procedures. She developed loss of grip strength and had difficulty holding a pen. She underwent a very painful nerve conduction study in North Dakota that revealed ulnar neuropathy. A North Dakota physician advised that her condition could be treated by ulnar nerve surgery. Claimant declined surgery. Her symptoms resolved. She obtained a wrist splint. Claimant left North Dakota in 1993.

3. In 1996, Claimant began working at the Konkolville Motel. The Konkolville Motel is a 40-unit rural motel in Orofino with an outdoor pool, fish cleaning station, and barbeque area. Claimant was a housekeeper and cleaned motel rooms.

4. In 2000, Claimant began noticing hand and wrist pain. On June 5, 2000, she presented to family practitioner Kelly McGrath, M.D., with pain in her right and left hands. He recorded:

> She has felt in the past that she probably had carpal tunnel syndrome. A number of years ago, she had a nerve conduction study that showed ulnar neuropathy on the right. She has had worsened symptoms, but now more involving the second, third, and fourth digits on the palmar aspect. She also has similar symptoms on the left hand. They are worse when she has been working a lot and using her hands.

Exhibit F, p. 1. Dr. McGrath noted a positive Tinel's sign on the right wrist and assessed: "Probable right carpal tunnel syndrome." Exhibit F, p. 1. Dr. McGrath discussed with Claimant the trial of a night splint, which she already had at home. He suggested nerve conduction studies, but Claimant declined because her previous nerve conduction study was very painful. There is no persuasive indication that Dr. McGrath then advised Claimant that her symptoms

were work-related. Claimant testified that the night splint did not help, but she not return promptly to Dr. McGrath because her hand symptoms were intermittent rather than constant. She continued her usual work at the hotel and returned to Dr. McGrath from time to time thereafter for various medical concerns.

5. Claimant's work duties at the motel changed. From approximately 2004 onward, she spent the majority of her work time doing laundry. This was more physically demanding work than housekeeping and required lifting heavy loads of wet laundry and continual use of her hands.

6. On July 2, 2004, Claimant presented again to Dr. McGrath, complaining of swelling and minimal tenderness in her right wrist and intermittent left arm pain. He diagnosed a ganglion cyst of the right wrist, "probable carpal tunnel syndrome of the right hand," and dysesthesia down the left arm, suggestive of cervical spine disease. Exhibit F, p. 9. He noted no hand weakness. No nerve conduction studies were done. There is no persuasive indication that Dr. McGrath then advised Claimant that her symptoms were work-related. Claimant continued her usual work at the hotel.

7. On October 31, 2005, Claimant presented to Dr. McGrath complaining of "radicular pain down her right arm with some numbness in her 1st through 4th digits. She notes no weakness. This is present to some extent bilaterally, worse when she drives. Repetitive motion does not seem to clearly be an exacerbating factor." Exhibit F, p. 11. Dr. McGrath assessed cervical radiculopathy suggestive of nerve root compression. He referred Claimant to orthopedist Gregory D. Dietrich, M.D., for examination of her neck. Dr. McGrath made no mention of probable carpal tunnel syndrome. There is no persuasive indication that Dr. McGrath then advised Claimant that her symptoms were work-related. Claimant continued her usual work at the hotel.

8. On November 3, 2005, Claimant underwent a cervical MRI that revealed moderately severe degenerative disc disease at C5-6 and C6-7.

9. On December 20, 2005, Claimant visited Dr. Dietrich, who recorded that Claimant

had hand numbness and tingling, that she occasionally dropped things, and that her hand pain awoke her at night. Dr. Dietrich's impression was neck pain explained by degenerative cervical disc disease and upper extremity numbness "most consistent with probable carpal tunnel syndrome." Exhibit G, p. 2. He noted that Claimant's symptoms were well tolerated and recommended non-operative treatment. There is no persuasive indication that Dr. Dietrich then advised Claimant that her symptoms were work-related. Claimant continued her usual work at the hotel.

10. On April 28, 2006, Claimant presented to Dr. McGrath complaining of right shoulder pain. He assessed subacromial bursitis and made no mention of any hand symptoms. Claimant continued her usual work at the hotel.

11. On October 25, 2006, Claimant presented to Dr. McGrath complaining of a skin lesion, varicose veins, shortness of breath, right hand numbness, and irregular heart rate. Among other things, Dr. McGrath assessed "probable carpal tunnel syndrome worse on the right than on the left." Exhibit F, p. 17. Dr. McGrath did not schedule nerve conduction testing at that time, but noted that if Claimant's hand symptoms did not improve, he would schedule nerve conduction testing. There is no persuasive indication that Dr. McGrath then advised Claimant that her symptoms were work-related. Claimant continued her work at the hotel. Claimant later acknowledged that after October 2006, her hand symptoms never went away. Exhibit D, p. 49-50.

12. By 2007, Claimant's daily work at the motel required collecting dirty laundry, scrubbing stained linens on a corrugated washboard, loading washing machines, and washing, drying, and folding sheets, hand towels, bath towels, washcloths, blankets, bedspreads, and rags. Her work duties required her to use her hands "100 percent, all day." Transcript, p. 22, l. 14.

13. Sometime prior to April 1, 2007, Claimant's hand problems began to affect her work performance. She dropped things more frequently and had persisting hand pain. Prior to April 1, 2007, Claimant mentioned her symptoms to Carol Ponozzo, then owner of the Konkolville Motel. Ponozzo and Claimant were good friends. Ponozzo believed that Claimant's hand

symptoms were work-related and told Claimant to file a workers' compensation claim. Claimant did not file a claim at that time. She continued performing her usual duties at the motel.

14. On April 1, 2007, Ponozzo sold the Konkolville Motel to Fair Dinkum. Joseph Chapman is the president of Fair Dinkum, an Idaho C-corporation that currently owns the Konkolville Motel. Fair Dinkum purchased the motel, but did not purchase any liabilities of the prior owner. Fair Dinkum promptly hired Claimant. Fair Dinkum had workers' compensation insurance in place from the very first day it purchased the motel.

15. As an employee of Fair Dinkum, Claimant's duties remained largely the same: collecting dirty laundry, washing, drying, and folding laundry, scrubbing soiled linens on a corrugated washboard, sweeping, and cleaning around the outdoor pool and hot tub. Claimant estimated that she used the washboard for at least one hour daily. Chapman estimated that Claimant used the washboard approximately one hour per week. Claimant worked approximately 35 hours per week and occasionally longer during busy seasons. Both Claimant and Chapman concurred that Claimant's job duties required the constant use of her hands. During the time leading up to October 2007, there were periods of increased demand at the motel that, Claimant testified, "required us all to do more work." Transcript, p. 30, ll. 22-23.

16. On October 2, 2007, Claimant presented to Dr. McGrath, who recorded bilateral hand pain that was worse with driving or doing any repetitive motion and particularly severe over a number of years. He also noted that Clamant had significant cervical disc disease, as previously documented by MRI. Dr. McGrath assessed: "1. Bilateral hand numbness. I suspect carpal tunnel syndrome. 2. Cervical disc disease possible [sic] explaining some of the patient's symptoms, although I believe that carpal tunnel syndrome is more likely." Exhibit F, p. 23. He scheduled nerve conduction studies. There is no persuasive indication that Dr. McGrath then advised Claimant that her symptoms were work-related. Claimant continued her usual work at the hotel.

17. On October 10, 2007, Claimant underwent nerve conduction studies performed by Mark Keane, M.D., which documented severe carpal tunnel syndrome on the right side and moderate on the left. At her pre-hearing deposition, Claimant testified:

> A. I recall being told by Dr. Keane that I had carpal tunnel syndrome after the nerve conduction tests.
>
> Q. Why did you think they [the Chapmans] should be responsible for it, though?
>
> A. Dr. Keane told me it was from my work.
>
> Q. Oh, he did?
>
> A. Yes.
>
> Q. When?
>
> A. When I had the nerve conduction tests.

Exhibit D, p. 55, l. 18—p. 56, l. 1.

18. In early October, on Claimant's next scheduled work day after the nerve conduction testing by Dr. Keane, she informed Chapman of her wrist pain and asked to file a workers' compensation claim. Chapman began filling out a first report of injury form based on information Claimant provided. Claimant told Chapman that she had previously notified Ponozzo of her wrist pain before April 1, 2007.

19. On October 26, 2007, Claimant returned to Dr. McGrath, who assessed carpal tunnel syndrome with documentation by nerve conduction study. He recorded: "With regard to the issue of whether this is more likely to have occurred at work or not, I think it is more probable than not given the repetitive motion at work and the fact that her symptoms became worse when she states that there was an increased demand on shifts and activity at work." Exhibit F, p. 24.

20. On October 31, 2007, Chapman completed the first report of injury form, using dates and information that Claimant supplied to him. The report lists July 2, 2004, as the injury

date. Claimant gave Chapman this date because it was the date provided to her by the hospital in response to her inquiry about dates when she had seen Dr. McGrath for her hand symptoms.

21. Dr. McGrath had diagnosed probable carpal tunnel syndrome prior to October 10, 2007. However, no medical provider had definitively diagnosed carpal tunnel syndrome prior to that time. Prior to October 10, 2007, no medical provider had informed Claimant that her carpal tunnel syndrome was caused by her work at the motel. Prior to October 10, 2007, Claimant was never totally incapacitated from performing her work duties at the motel because of her hand symptoms.

22. On March 11, 2008, Claimant presented to Steven Boyea, M.D. Dr. Boyea noted that Claimant had a 10-year history of bilateral hand and wrist pain that had progressed to loss of grip strength and dropping items. Claimant last worked on March 31, 2008. On April 3, 2008, Dr. Boyea performed an open right carpal tunnel release. Claimant subsequently underwent further surgery.

23. Claimant does not allege any industrial accident during her work at the motel.

24. Having observed Claimant at hearing and compared her testimony to the other evidence of record, the Referee found that Claimant has a poor memory of her past medical history and readily testified in response to many questions that she does not recall her doctor visits, but she does not dispute what the doctors recorded about those visits. The Referee found that Claimant is generally honest, but has a poor memory and is not, thus, an entirely reliable witness on all matters. The Commission finds no reason to disturb the Referee's findings on credibility.

DISCUSSION AND FURTHER FINDINGS

25. 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).

26. **Occupational disease.** Claimant alleges that her bilateral carpal tunnel syndrome constitutes a compensable 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). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) "such disease is actually incurred in the employer's employment," and (2) for a non-acute occupational disease, where "the employee was exposed to the hazard of such disease for a period of 60 days for the same employer." The 60-day period of exposure required by Idaho Code § 72-439 need not be a single continuous period. Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977). Furthermore, the law provides that:

> [w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, . . . shall be entitled to compensation.

Idaho Code § 72-437. Disablement means "the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease," and "disability means the state of being so incapacitated." Idaho Code § 72-102(22)(c). Finally, "Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefore." Idaho Code § 72-439(3). However: "Nothing in these statutes indicates an intent to require that an employer who employs an employee who comes to the

employment with a pre-existing occupational disease will be liable for compensation if the employee is disabled by the occupational disease due to an injurious exposure in the new employment." Reyes v. Kit Manufacturing Co. 131 Idaho 239, 241, 953 P.2d 989, 991 (1998).

27. In summary, under the statutory scheme claimants with occupational disease claims must demonstrate (1) that they were afflicted by a disease; (2) that the disease was incurred in, or arose out of and in the course of, their employment; (3) that the hazards of such disease actually exist and are characteristic of and peculiar to the employment in which they were engaged; (4) that they were exposed to the hazards of such non-acute disease for a minimum of 60 days with the same employer; and (5) that as a consequence of such disease, they became actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease. In the present case, Claimant's occupational disease claim for bilateral carpal tunnel syndrome must be examined in light of the above elements.

28. Disease. Drs. McNulty, McGrath, Keane, and Boyea agree, and Defendants do not dispute, that Claimant suffers from bilateral carpal tunnel syndrome.

29. Causation. 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 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).

30. Defendants vigorously deny that Claimant contracted and incurred an occupational disease from her employment at Fair Dinkum. They assert that there is no medical evidence, to a reasonable degree of medical probability, that Claimant's work activities more probably than not resulted in Claimant suffering from carpal tunnel syndrome.

31. Dr. McNulty testified for Claimant. He recorded Claimant's duties at the motel

of "housekeeping and laundry. She states she mostly worked in the laundry performing repetitious activities such as folding sheets, towels, and linen as well as scrubbing stains from pieces of laundry." Exhibit J. p. 1. He believed that Claimant worked full time at the motel. Chapman and Claimant both testified that she worked approximately 35 hours per week. Dr. McNulty further testified that: "the activities at work were on a more-probable-than-not basis, the work at the Conkelville Hotel [sic], with the repetitive use of both upper extremities, were the cause of the bilateral carpal tunnel syndrome." McNulty Deposition, p. 12, ll. 8-12. Dr. McNulty explained: "The repetitive activities—folding laundry, cleaning, housekeeping activities—were most likely the cause of her symptoms." McNulty Deposition, p. 12, ll. 23-25. Dr. McNulty affirmed that all of his opinions were expressed to a reasonable degree of medical probability. McNulty Deposition, p. 14, ll. 21-23. Dr. McNulty usually discusses repetitive activities outside of work with individuals suffering from carpal tunnel syndrome. He believed that he discussed with Claimant her outside activities. McNulty Deposition, p. 22, l. 20. His report contains no mention of such a discussion, however, so he was unable to "say for certain that I did ask her about those activities." McNulty Deposition, p. 23, ll. 9-10. Dr. McNulty testified that the magnitude of repetitive work Claimant performed at the motel would have been several times that of normal housework or other usual activities at home. McNulty Deposition, p. 25.

32. The opinion of Dr. McNulty is adequately explained, rests upon credible evidence, and persuasively relates Claimant's bilateral carpal tunnel syndrome to her work at the motel, including her work for Fair Dinkum.

33. Dr. McGrath's note of October 26, 2007, assessed carpal tunnel syndrome with documentation by nerve conduction study and recorded: "With regard to the issue of whether this is more likely to have occurred at work or not, I think it is more probable than not given the repetitive motion at work and the fact that her symptoms became worse when she states that

there was an increased demand on shifts and activity at work." Exhibit F, p. 24 (emphasis supplied). Although Dr. McGrath referred to Claimant's condition as having "occurred at work," rather than being caused by her work, magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability—only their plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). Dr. McGrath's note reasonably conveys a conviction that Claimant's work caused her carpal tunnel syndrome.

34. Defendants question part of the basis for Dr. McGrath's note by disputing that Claimant worked more than her usual 35 hours per week due to "increased demand on shifts or activity." However, Chapman acknowledged that August 2007 was a "strong month" for the motel, the motel work increased during Lumber Jack Days in late September 2007, and Claimant worked overtime approximately two or three times for Fair Dinkum during 2007. Transcript, pp. 101-102.

35. The opinions of Dr. McNulty and Dr. McGrath relate Claimant's bilateral carpal tunnel syndrome to her work at the motel, including her work for Fair Dinkum. These medical opinions are sufficient even though they apparently attribute causation to Claimant's work at the motel, not solely to her work at the motel for Fair Dinkum.

> Idaho Code § 72-102(21)(b) defines … " '[c]ontracted' and 'incurred,' when referring to an occupational disease, shall be deemed the equivalent of the term 'arising out of and in the course of' employment."
>
> Because in Idaho's worker's compensation law the word "incurred" means "'arising out of and in the course of' employment," it is as much a reference to cause as to a particular point in time. *See I.C. § 72-102(21)(b)*. As an occupational disease develops over time, it is possible for the disease to be "incurred" by a claimant under a series of different employers before it becomes manifest. In such a situation, I.C. § 72-439(3) provides that it is the last such employer, or its surety, who is liable to the claimant.

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 456, 111 P.3d 135, 141 (2005).

36. Claimant has proven that she contracted and incurred bilateral carpal tunnel

syndrome due to her work for Fair Dinkum.

37. Peculiar hazard. Quite apart from her obligation to prove actual causation, Claimant also has the burden of proving that the hazards of the disease are "characteristic of and peculiar to" her occupation.

> The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations.

Mulder v. Liberty Northwest Insurance Co., 135 Idaho 52, 56, 14 P.3d 372, 376 (2000), quoting Bowman v. Twin Falls Const. Co., Inc., 99 Idaho 312, 323, 581 P.2d 770, 781 (1978), overruled on other grounds, DeMain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999) (emphasis in original).

38. The fact specific nature of this determination is illustrated by In Mulder v. Liberty Northwest Insurance Co., supra. In Mulder, the Commission considered the description of Mulder's job activities and expert medical evidence that such activities were peculiar risks for causing carpal tunnel and concluded that the hazards to which Mulder was exposed at work "may be distinguished from the general run of occupations in that exposure to long periods of repetitive upper extremity motions, including writing and keyboarding … are not characteristic of all occupations" but were characteristic of Mulder's work duties. Mulder, 1998 IIC 1433 p. 6. On appeal to the Idaho Supreme Court, defendants asked the Court to take judicial notice that virtually all employees drive, write, and keyboard. The Court declined to do so, and instead observed that while a great number of occupations required such activities, an equally great number did not. The Court affirmed the Commission's conclusion, finding that substantial and competent evidence supported the Commission's determination that Mulder's duties including: "exposure to long periods of repetitive upper extremity motions … [is] not characteristic of all occupations." Mulder, 135 Idaho at 57, 14 P.3d at 377.

39. In the present case, Claimant's work duties at the motel for Fair Dinkum exposed her to the hazards of constant and repetitive use of her upper extremities. Her laundry work required loading washing machines, lifting heavy loads of wet laundry, loading dryers, scrubbing stained linens on a corrugated washboard, and folding sheets, hand towels, bath towels, washcloths, blankets, bedspreads, and rags. As previously noted, her duties required her to use her hands "100 percent, all day." Transcript, p. 22, l. 14. Chapman acknowledged that the motel laundry work required constant use of the hands. Transcript, p. 106. The hazards of constant and repetitive use of the hands to which Claimant was exposed during her work for Fair Dinkum are characteristic of full-time laundry duties and can be distinguished from the general run of occupations in that they are not characteristic of all occupations.

40. Claimant has proven that the hazards of carpal tunnel syndrome are characteristic of and peculiar to her occupation.

41. Exposure. Claimant's six months of motel laundry work for Fair Dinkum, from April through October 2007, exposed her to the peculiar hazards, including carpal tunnel syndrome, resulting from constant and repetitive use of her hands.

42. Incapacity. It is undisputed that by approximately March 2008, Claimant was totally disabled and incapacitated from performing her usual duties at the motel due to her carpal tunnel syndrome.

43. Claimant has proven that her bilateral carpal tunnel syndrome constitutes an occupational disease, which Claimant contracted and incurred as a result of her work for Fair Dinkum.

44. **Statute of limitations.** The next issue is whether the claim is barred by Idaho Code § 72-448 for failure to give timely notice of an occupational disease within 60 days after its first manifestation or failure to timely file a claim with the Industrial Commission within one year after the first manifestation of an occupational disease.

45. Claimant asserts that she provided timely notice by notifying Fair Dinkum within a few days of being informed by Dr. Keane that she had carpal tunnel syndrome due to her work. Defendants argue that Claimant was essentially diagnosed with carpal tunnel syndrome years earlier, experienced symptoms beginning in 2000, and knew she had carpal tunnel syndrome for years before her October 2007 claim.

46. Manifestation. The timeliness of Claimant's notice of claim depends upon the date of the manifestation of her occupational disease. "The question of when a claimant's medical condition becomes 'manifest' and 'preexisting' relative to later events is a question of fact." Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 454, 111 P.3d 135, 139 (2005). Manifestation is defined by Idaho Code § 72-102(19) as "the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease." As previously noted, "occupational disease" is statutorily defined 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…employment." Idaho Code § 72-102(22)(a). Thus, manifestation in this matter is determined by a two-pronged analysis.

47. Informed by a physician. In the present case, with the benefit of the October 2007 nerve conduction studies, Dr. McNulty testified in hindsight that on a more-probable-than-not basis, Claimant suffered from carpal tunnel syndrome prior to April 1, 2007. In addressing the need for definitive nerve conduction studies for diagnosis of carpal tunnel syndrome, Dr. McNulty reviewed Claimant's medical records and opined that: "There are other possible causes for her—for arm pain. For instance, the cervical radiculopathy can cause pain in the hand and fingers so it would be helpful to rule out other causes by getting the nerve conduction study." McNulty Deposition, p. 14, ll. 13-17. He concluded:

> The diagnosis wasn't established firmly until the nerve conduction was performed on 10-10-2007. After reviewing the medical record, there is certainly "Probable carpal tunnel syndrome" listed in several different areas, but also "cervical

> radiculopathy" was listed there. So I would say it is certainly possible the carpal tunnel syndrome was present as early as 2000, but the diagnosis wasn't established until 2007.

McNulty Deposition, p. 25, l. 24—p. 26, l. 7.

48. Similarly, with the benefit of the October 2007 nerve conduction test results, Dr. McGrath testified in hindsight that Claimant has had carpal tunnel syndrome on the right since 2000 and bilaterally since October 2006. However, Dr. McGrath testified that when he diagnosed Claimant as having probable carpal tunnel syndrome prior to October 2007, he "would have told her that she probably had Carpal Tunnel Syndrome." McGrath Deposition, p. 37, ll. 12-13 (emphasis supplied). Moreover, Dr. McGrath testified that he did not recall ever telling Claimant, prior to October 26, 2007, that her carpal tunnel syndrome was caused by her work. McGrath Deposition, p. 37. Claimant also credibly testified that no medical practitioner informed her that her carpal tunnel syndrome was caused by her work prior to October 10, 2007. There is no persuasive evidence that Claimant was informed by a qualified physician prior to October 10, 2007, that the hazard of carpal tunnel syndrome was characteristic of and peculiar to her work at the motel.

49. Claimant was not informed by a qualified physician until October 10, 2007, that she suffered bilateral carpal tunnel syndrome due to her work at the motel. At no time prior to October 10, 2007, was Claimant ever informed by a qualified physician that she had an occupational disease.

50. Claimant's knowledge. Claimant testified that she did not know she had carpal tunnel syndrome and did not know that her work at the motel caused her carpal tunnel syndrome until she was so informed by Dr. Keane on October 10, 2007. Transcript, pp. 39-40. Defendants note that Claimant worked as a secretary and receptionist to a physician for 15 years and imply that Claimant therefore knew her hand symptoms constituted an occupational disease. Claimant is not a licensed or certified medical practitioner. Although she was aware of the existence of a condition known as carpal tunnel syndrome prior to 2000, her testimony and presentation

at hearing did not indicate any particular medical sophistication or expertise. Arguably, if Claimant were medically sophisticated, she would not likely have delayed so long in obtaining definitive medical treatment for her hand and wrist symptoms.

51. Defendants also assert that Claimant knew she had an occupational disease because Claimant acknowledged that Ponozzo told her to file a workers' compensation claim before Ponozzo sold the motel to Fair Dinkum. The record confirms that prior to April 1, 2007, Claimant advised Ponozzo, then owner of the motel, of her hand symptoms. Ponozzo believed that Claimant's hand symptoms were work-related and told Claimant to file a workers' compensation claim. Ponozzo's belief does not equate to Claimant's knowledge. Claimant did not file a claim at that time, but continued performing her usual work at the motel. Defendants argue that Claimant knew she had an occupational disease but chose not to file a claim against Ponozzo because Claimant and Ponozzo were good friends. However, it is undisputed that Ponozzo had workers' compensation insurance as required by law and that she encouraged Claimant to file a claim while Ponozzo owned the motel. Claimant's failure to file a claim at that time, in spite of her friend's encouragement, is consistent with and reasonably corroborates her testimony that she did not know that her condition was carpal tunnel syndrome and did not then know that it was caused by her work at the motel. [1]

52. Defendants further assert that Claimant knew she had an occupational disease long before October 31, 2007, because she listed July 2, 2004, as the injury date on the First Report of Injury filed in October 2007[2] and October 25, 2006, as the date of injury or manifestation of occupational disease on her *pro se* Workers' Compensation Complaint.[3]

[1] In addition to the fact that no medical practitioner had related Claimant's condition to her work prior to April 2007, Claimant would likely have had no viable claim against Ponozzo because Claimant was never incapacitated by her carpal tunnel syndrome during the time she worked at the motel for Ponozzo.

[2] The First Report of Injury also states: "This report shall not be evidence of any fact stated herein in any proceeding in respect of the injury, illness or death on account of which this report is made."

[3] Her First Amended Workers' Compensation Complaint, filed after she retained counsel, asserts October 10, 2007, as the date of injury or manifestation of occupational disease.

Claimant was unfamiliar with the legal definitions of occupational disease and manifestation when she completed those documents. At most, the dates in her First Report of Injury and pro se Workers' Compensation Complaint establish that Claimant had recurring hand symptoms before her employment with Fair Dinkum and may have believed that some of the motel work she performed aggravated her symptoms. Her knowledge of symptoms was also established when she sought medical care for her hand symptoms in June 2000, July 2004, October 2005, December 2005, and October 2006, all while working for Ponozzo and prior to the conclusive diagnosis of carpal tunnel syndrome confirmed by nerve conduction testing in October 2007.

53. Claimant's situation herein is somewhat similar to that described in Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005). There the Court stated:

> Precision argues that because Sundquist suffered from pain prior to coming to work for Precision, the Industrial Commission was wrong to find that Sundquist's occupational disease was not a preexisting condition. ….
>
> An occupational disease exists for the purposes of the worker's compensation law when it first manifests. ….
>
> …. [M]anifestation … is defined as "the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease." Ch. 274, § 1, 1997 Idaho Sess. Laws 799, 802. This definition is subjective. The employee must know that he has an occupational disease or have been so informed by a qualified physician. In addition, the knowledge required is that he has an occupational disease, not that he has symptoms that are later diagnosed as being an occupational disease. Knowledge of symptoms is not synonymous with knowledge the symptoms are caused by an occupational disease. Boyd v. Potlatch Corp., 117 Idaho 960, 793 P.2d 192 (1990).

Sundquist, 141 Idaho 453-454, 111 P.3d 138-139. As the Court noted, the statutory definition is subjective—"when an employee knows"—not when the employee reasonably should have known.

54. Claimant was clearly aware of hand and wrist symptoms long before she was employed by Fair Dinkum and even understood that some of her work activities at the motel aggravated her symptoms. However, as in Sundquist, knowledge of symptoms does not equate to

knowledge of an occupational disease. Claimant relied on her doctors to diagnose and inform her of her medical condition and its cause. Claimant was not definitively informed by any of her doctors that she had carpal tunnel syndrome until October 10, 2007. More importantly, none of her doctors informed her that her carpal tunnel syndrome was work-related until October 10, 2007. Claimant's knowledge that she had an occupational disease coincided with Dr. Keane's October 10, 2007 diagnosis thereof.

55. Thus, Claimant did not know she had an occupational disease prior to October 10, 2007, when Dr. Keane informed her that her carpal tunnel syndrome was caused by her work. The date of the manifestation of Claimant's occupational disease, as defined by statute, was no earlier than October 10, 2007. Claimant's occupational disease claim is not barred by the statute of limitations set forth in Idaho Code § 72-448.

56. **Pre-existing condition and Nelson.** The final issues are whether Claimant's complaint seeks benefits for a pre-existing condition and whether it is barred for lack of an accident aggravating her pre-existing condition. Under Idaho law, aggravation of a pre-existing condition is not compensable unless the aggravation is by an industrial accident. Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), Konvalinka v. Bonneville County, 140 Idaho 477, 95 P.3d 628 (2004). Defendants assert that Claimant's claim is barred by Nelson and DeMain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999). Claimant readily acknowledges that she suffered no industrial accident at Fair Dinkum and pursues her claim as an occupational disease. However, Claimant cites Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), and argues that Nelson does not apply because Claimant's bilateral carpal tunnel syndrome was not a pre-existing disease relative to her employment at Fair Dinkum.

57. In DeMain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999), the Court stated: "The essence of Nelson is that a preexisting occupational disease is just like

any other preexisting condition. For a current employer to be liable for the aggravation of the condition, there must be an accident." DeMain, 132 Idaho at 784, 979 P.2d at 658.

58. In Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005), the Court addressed the Nelson doctrine stating:

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

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

59. The essence of the Court's holding in DeMain is that Nelson applies to a pre-existing condition whether or not it is an occupational disease. The essence of the holding in Sundquist is that when the pre-existing condition is an occupational disease, Nelson does not apply if that occupational disease was not manifest, as defined by statute, prior to the claimant's starting work with the employer from whom benefits are sought.

60. In the present case, Claimant's occupational disease of bilateral carpal tunnel syndrome was not manifest prior to commencing her employment with Fair Dinkum on April 1, 2007, and is not barred by Nelson.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven that she contracted and incurred the compensable occupational disease of bilateral carpal tunnel syndrome due to her employment at Fair Dinkum.

2. Claimant has proven that her occupational disease claim is not barred by Idaho Code § 72-448.

3. Claimant's occupational disease claim for bilateral carpal tunnel syndrome is not barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).

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

IT IS SO ORDERED.

DATED this _13th_____ day of ___May_____, 2011.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R. D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___13th_____ day of ___May_____, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501-0287

BRADLEY J STODDARD
PO BOX 896
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db

__/s/_____