

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN YOUNGBLOOD,)
)
 Claimant,)
)
 v.)
)
 WESTWARD HOSPITALITY)
 MANAGEMENT,)
)
 Employer,)
)
 and)
)
 LIBERTY INSURANCE CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

**IC 2006-529074
2007-027096**

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

February 24, 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 June 21, 2011. Claimant was present and represented by Clinton E. Miner. Kimberly A. Doyle represented Employer/Surety through the hearing. Upon Ms. Doyle’s resignation, Roger L. Brown submitted Employer/Surety’s post-hearing brief. Oral and documentary evidence was presented. The parties took one post-hearing deposition and submitted post-hearing briefs. This matter came under advisement on December 19, 2011.

ISSUES

By agreement of the parties the issues to be decided are:

1. Whether Claimant’s right shoulder full thickness rotator cuff tear was caused by either or both of his industrial accidents and, if so,

2. Whether a right shoulder surgery is reasonable.

CONTENTIONS OF THE PARTIES

Claimant contends that his right shoulder rotator cuff tear, and the resultant need for surgical repair, was caused by an industrially related motor vehicle accident (MVA) in which he was torqued to his left while his right shoulder was immobilized by his shoulder harness. Two orthopedic surgeons support Claimant's position and have recommended a surgery.

Defendants accepted the claims for both accidents but contend that Claimant did not tear his rotator cuff in his MVA, but, instead, somehow tore it at a later date. Even if a causal relationship exists, surgery would only be an option if further diagnostic studies confirm it is necessary and conservative treatment fails. Defendants base their contention on the testimony of their IME physician who cites Claimant's late reporting of his shoulder problems and his further failure to provide him with a detailed and consistent account of his body mechanics at the time of the crash. The examiner discounted Claimant's report to his chiropractor the day after the MVA about his right shoulder problem and that he continued to do so during his course of treatment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, adduced at the hearing.
2. Claimant's Exhibits 1-11, admitted at the hearing.
3. Defendants' Exhibits A-S, admitted at the hearing.
4. The post-hearing deposition of Roman Schwartsman, M.D., taken by Defendants on July 29, 2011.

All objections made during the course of Dr. Schwartsman's deposition are overruled.

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

FINDINGS OF FACT

1. Claimant was 55 years of age at the time of the hearing and resided in Eagle. Claimant began working for Employer, Western Hospitality Management, Doubletree Riverside, in September 2006 as a bellman/customer service representative. His duties included helping guests with their luggage and driving the shuttle van mainly to the airport and back.

2. On November 29, 2006, Claimant was maneuvering an empty luggage cart up some stairs and back to the front desk. After doing so, Claimant felt pain and weakness in his wrists, arms, and elbows. He received treatment consisting of anti-inflammatories and physical therapy, and was released to light duty work. Claimant's injuries from this accident resolved without residual symptoms.

3. There is no medical evidence that the above-mentioned accident caused any injury to Claimant's right shoulder and Claimant concedes as much. Based thereon, the Referee finds that Claimant's November 29, 2006 accident did not cause an injury to his right shoulder.

4. On July 12, 2007, Claimant was driving Employer's 9-10 person full-size passenger van in downtown Boise when a PT Cruiser to his immediate left, in the left turn only lane, failed to turn and went straight as Claimant was turning left. Claimant was struck behind the driver's door. The van's airbag did not deploy and he was able to drive the van back to the Doubletree Riverside. No medical personnel were called to the scene.

5. Claimant described at hearing how his body reacted to the collision:

Well, it was a pretty good shock to me. In other words, I - - I didn't know what happened. I went, my goodness, what's going on. But what happened was it - - it rotated the van very strongly to the left and it pulled me back to the driver's side door.

Q. (By Mr. Miner): And where were your hands at the time?

A. Well, they were on the steering wheel.

* * *

Q. At the scene of this accident did you experience any physical symptoms?

A. Well, I did feel some real tightness up in my right extremities and my neck . . .

Hearing Transcript, pp. 22, 24.

6. On July 13, 2007, the day following his MVA, Claimant presented to Eric Thompson, D.C., a chiropractor Claimant had seen in the past. A chart note indicates Claimant reported right shoulder pain at 9/10 on a subjective 1-10 pain scale. In the 28 following visits, ending on October 9, 2007, Claimant's right shoulder was rated on the pain scale at varying degrees, but never less than 5/10.

7. On September 11, 2007, Claimant saw Edwin Clark, M.D., an orthopedic surgeon, at Dr. Thompson's request. Claimant's chief complaints at that time were left hip, low back, and left-sided neck pain. Claimant denied shoulder pain or limitation. Dr. Clark noted, "Bilateral shoulder motion is full in all quadrants." Claimant's Exhibit 7, p. 5. Dr. Clark's four diagnoses do not include any shoulder problems. In a December 20, 2007 follow-up, Dr. Clark noted that Claimant was feeling some loss of endurance in using his upper extremities, but he found no neurologic deficits. Dr. Clark discharged Claimant from his care on that date.

8. Dr. Thompson discharged Claimant from his care on October 9, 2007. However, Claimant returned to Dr. Thompson on April 14, 2008 complaining of right shoulder symptoms consistent with adhesive capsulitis or "frozen shoulder." Dr. Thompson referred Claimant back to Dr. Clark for re-evaluation.

9. On April 15, 2008, Claimant returned to Dr. Clark and reported that his neck pain was improving, but was having increased disability in the use of his right shoulder. Dr. Clark

diagnosed right shoulder impingement pain and ordered an MRI, which was accomplished on May 8, 2008.

10. On May 12, 2008, Claimant again saw Dr. Clark to discuss the results of the MRI which revealed a full thickness tear of the distal supraspinatus tendon with mild joint effusion into the subacromial and subdeltoid bursa. There was also some mild AC joint arthrosis. Because conservative treatment had failed and steroid injections would likely be ineffective, Dr. Clark referred Claimant to Jeffery Hessing, M.D., another orthopedic surgeon, for further evaluation and treatment.

11. Claimant first saw Dr. Hessing on June 3, 2008. Upon examining Claimant and reviewing his MRI, Dr. Hessing recommended a mini-open rotator cuff repair. Defendants have denied Dr. Hessing's request for that surgery.

DISCUSSION AND FURTHER FINDINGS

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. Jannson, 91 Idaho 904, 435 P.2d 244 (1967).

An accident is an unexpected, undesigned, 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, causing an injury. Idaho Code § 72-102(17)(b).

An injury is a personal injury caused by an accident arising out of and in the course of any employment covered by the workers' compensation law. Idaho Code § 72-102(17)(a).

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 558, 560-61, 511 P.2d 1334, 1336-37 (1973) (overruled on other grounds by Jones v. Emmett Manor, 134 Idaho 160 (2000)). 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).

Finally, it is well-settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to affect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). However, our Supreme Court has also held that the Commission is not required to construe facts 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

Dr. Schwartzman

12. Roman Schwartzman, M.D., an orthopedic surgeon, performed a defense-requested IME on Claimant on April 26, 2011. He reviewed medical records,¹ examined

¹ Dr. Schwartzman did not review Dr. Thompson's records until the day of his deposition.

Claimant, prepared a report and was deposed. In his report under Review of Symptoms, Dr. Schwartzman wrote:

The patient complains of pain in the right shoulder and is noted to be an inconsistent historian. When asked to circle back to certain events in the history, the patient does not consistently reproduce the events. He is evasive about the specific mechanisms of injury saying simply that he was tossed around in the van and rotated in the van after an impact directly into the center of the van. The story wanders and the patient circumspect [sic] to unrelated events. There is evidence of symptom magnification. The patient will not specifically describe his symptoms, but dwells on perceived limitations that he has as a result of his symptoms. He is unable to consistently describe the mechanism of injury despite multiple attempts to elicit a specific mechanism of injury from him. He simply states that he was spun around in the van.

Defendant's Exhibit M, p. 109E.

13. At his deposition, Dr. Schwartzman reiterated his concern that Claimant was unable to "exactly" describe the "specific" mechanism of his injury so that he, Dr. Schwartzman, could make a "definitive" explanation as to how Claimant's rotator cuff tear came about. Nor was Dr. Schwartzman able to "date" the tear. He testified that it probably occurred after the MVA, based on the MRI, but he was unable to state his opinion to a reasonable degree of medical probability. Dr. Schwartzman accused Claimant of malingering because in unrelated muscle groups, Claimant would not perform the strength testing. Dr. Schwartzman also expressed concern that Claimant's symptoms did not appear until after Claimant's termination, although there is no evidence that his termination had anything to do with his symptoms. Dr. Schwartzman also noted that the first mention of right shoulder pain in Dr. Clark's notes is almost a year post-MVA. Dr. Schwartzman speculated that the reason for that is either that Dr. Clark forgot to mention right shoulder pain in his earlier notes or that Claimant was not experiencing such pain.

14. While it is true that Dr. Clark failed to note right shoulder pain in his initial chart note, approximately two months after Claimant's MVA, he explained this omission in a July 16, 2008 letter to Claimant's then attorney, recalling that Claimant had reported shoulder pain from handling heavy luggage:

I have reviewed John's chart and I did indicate in my initial report that I had asked him regarding any acute injury to his shoulders, on the day of the original evaluation on September 11, 2007. I also recall that he indicated to me that he did have intermittent episodes of shoulder pain from lifting and handling heavy items of luggage as required by his employment as a guest service agent for Western Hospitality Management.

Claimant's Exhibit 7, p. 15.

15. Dr. Schwartzman opined that Dr. Thompson's records support Claimant's causation argument because his medical records show evidence of prior right shoulder pain:

Not to a reasonable degree of medical certainty.² And the reason I state that is because the same chiropractic record for a John Youngblood indicate complaints of right-shoulder pain going back to an office visit from 7/20/2001, in which the patient subjectively rates his right shoulder pain as a 7 out of 10.

Subsequently on 10/14/2002, the patient rates his right-shoulder [sic] pain as 8 out of 10. And on 6/2 of '03 the patient, again, rates his right-shoulder [sic] pain as an 8 out of 10. So there is in the same chiropractic record documentation of right-shoulder [sic] pain going to 2001.

In light of that, I don't know what objective conclusions I can draw from the record in question for 2007.

Dr. Schwartzman Deposition, p. 27.

Dr. Clark

16. Dr. Clark also expressed that he believed Claimant's MVA was at least a cause of his right rotator cuff tear, and his related symptoms were initially masked by his other injuries:

It is my opinion that it is medically reasonable and probable that John sustained a significant injury as a result of the forces involved in the broadside motor vehicle collision, and that the pathology on a more likely than not basis was

² Dr. Schwartzman applies an incorrect legal standard. The correct standard is "probable."

present immediately following his traumatic injury; however, I believe his neck and back pain and hip pain was more severe and masked the symptoms of the right shoulder.

By John's own statement, he had some prior shoulder pain a [sic] result of his employment handling heavy pieces of luggage on a repetitive daily basis. It is medically reasonable and probable that the motor vehicle accident, if not the causative factor of the rotator cuff tear, certainly brought the rotator cuff tear to the forefront causing him to restrict his range of motion and being unable to continue to use the right shoulder as he normally did.

* * *

The logical explanation is that he sustained an injury to the right shoulder, which was masked by increasing symptoms in his neck and left upper extremity, and then with his continuing work, it was aggravated by a period of continuous trauma involved in his duties of lifting and handling luggage while delivering passengers from the airport to hotels. It remains my opinion that it is medically reasonable and probable that he sustained his initial injury at the time of the motor vehicle accident and then with continued aggravation this became extremely symptomatic on April of 2008 and now has a confirmed diagnosis by MRI of a rotator cuff tear of the distal supraspinatus with impingement pain in the right shoulder.

Claimant's Exhibit 7, pp. 16 and 18.

Dr. Hessing

17. Dr. Hessing also opined that Claimant's right rotator cuff tear is causally related to his 2007 MVA:

The patient advised me his right shoulder became very sore shortly after the accident on 7/12/07. Indeed on my review there is definite evidence in the old record that Mr. Youngblood did sustain a significant injury to his right shoulder in the motor vehicle accident on 7/12/07. I refer you to the chiropractic records that provide a complete chronological record of this patient's complaints and treatments from December of 2006 through November of 2009. There are almost 4 pages of treatments. The first mention of right shoulder pain occurs on July 13, 2007, the day after the car accident. His right shoulder complaints persist for over three months as he received chiropractic treatments. He was released from care on 10/08/07. Unfortunately, he returns for additional treatments in April of 2008 without a new injury to his arm.

After failing additional conservative treatment by Dr. Ed Clark, the patient was referred to me for definitive care of his right shoulder. My feelings and recommendations are well documented in my previous note from 6/03/08. With this new information I reiterate that it is my feeling that the most medically probable etiology of Mr. Youngblood's known right shoulder rotator cuff tear was injury in the car accident of 7/12/07. I believe his clinical course is consistent

with an acute cuff tear sustained in July 2007. His acute pain would improve over the first three or four months following injury. It is then common that he returned several months later with increasing pain and weakness as their shoulders weakened by the accident becomes overloaded.

Claimant's Exhibit 11, Dr. Hessing's June 13, 2011 letter to Claimant's counsel, p. 2.

18. The Referee finds that Drs. Clark and Hessing more reasonably explain Claimant's situation than does Dr. Schwartzman. Dr. Schwartzman demanded a detailed and specific recitation by Claimant of the exact bio-mechanical factors he experienced in the MVA in order to reach a definitive causation opinion. Such is not required or even possible in most cases, because most claimants are neither articulate, nor biomechanically aware enough to produce such a description. Here, Claimant, to the best of his ability, described to Dr. Schwartzman, and others, what happened to his body at the time of the MVA. It must be remembered that the impact was behind the driver's side door and was completely unexpected. It is unreasonable to expect someone who is faced with that situation to remember every detail about exactly what happened to each part of his or her body during the split-seconds following impact. Drs. Clark and Hessing apparently had no difficulties in reaching their respective causation opinions based upon what Claimant told them of the accident. Dr. Schwartzman's dissatisfaction with Claimant's description of his MVA is not persuasive.

19. Equally unpersuasive is Dr. Schwartzman's concern that Claimant failed to mention his right shoulder problems until "almost a year" after the MVA. Dr. Schwartzman's testimony in this regard is soundly refuted by the history recorded by Dr. Thompson following the accident. Claimant's Exhibit 6, page 7 is Dr. Thompson's records beginning July 13, 2007, the day following the MVA. The record is a flow chart with blank columns to be filled in as treatment is rendered. In handwriting across the top, the chart reveals Claimant was being seen for Neck, Right Shoulder, Right Wrist, Right Elbow, and Right Hand problems on July 13.

Claimant rated his right shoulder pain at a 9 on a 1-10 pain scale. Dr. Schwartzman's testimony that Dr. Thompson's records do not change his causation opinion lacks merit in that his referring to some past right shoulder complaints³ completely ignores the issue of Claimant's supposedly late reporting. When considering Claimant's complaints to Dr. Thompson, his own testimony that he experienced right shoulder pain to varying degrees since the MVA, and Dr. Clark's assertion that he remembered Claimant complaining of right shoulder pain when he first saw him and that he could have forgotten to note that,⁴ all lead to the conclusion that Claimant promptly reported his right shoulder pain. For Dr. Schwartzman to ignore this casts doubt on the accuracy and objectivity of his opinions. Of further concern is Dr. Schwartzman's inability to relate Claimant's torn rotator cuff to any other cause or causes besides the MVA.

20. The Referee finds that Claimant sustained a torn rotator cuff in his July 12, 2007 MVA.

Proposed surgery

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 (or will be) reasonable. See *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

³ Claimant acknowledged that he had some right shoulder problems in the past, but had received no treatment therefor since 2003.

⁴ Dr. Thompson's note just four days prior to his initial visit with Dr. Clark indicates right shoulder pain at 5/5 and remained at that level the day after. Therefore, it is not likely that Claimant would not have complained to Dr. Clark of right shoulder pain on September 11, 2007.

Here, because the proposed care is prospective, the *Sprague* guidelines are not readily applicable. To determine whether the surgery recommended by Drs. Clark and Hessing is reasonable, the Referee must determine, inter alia, whether the surgery is likely to be efficacious. Richan v. Arlo G. Lott Trucking, 2011 IIC 0008 (2011). In other words, if the rotator cuff repair surgery is likely to improve Claimant's condition, then it is "reasonable."

21. Defendants argue that even if causation is established, the surgery recommended by Drs. Clark and Hessing is not reasonable according to Dr. Schwartzman. He opined that he would "characterize the tear a little more thoroughly" before embarking on a surgical course. Basically, Dr. Schwartzman would, after Claimant's failure at conservative treatment, order another MRI to determine the size of the rotator cuff tear, and proceed from there. Dr. Schwartzman did not indicate that surgery was, per se, unreasonable. Therefore, Defendants' argument lacks sufficient evidentiary support in the record.

22. The Referee finds that the proposed surgical repair recommended by Drs. Clark and Hessing is reasonable. There is nothing in the medical evidence to suggest that the proposed surgery would not improve Claimant's condition. And, it is unlikely Drs. Clark and Hessing, two highly competent orthopedic surgeons, would recommend such an approach if they believed it would cause Claimant more harm.

CONCLUSIONS OF LAW

1. Claimant has proven that his right shoulder rotator cuff tear is causally related to his July 12, 2007 industrial motor vehicle accident.

2. Claimant has proven that the surgery recommended by his treating physician is reasonable.

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 __15th__ day of February, 2012.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __24th__ day of __February__, 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:

CLINTON E MINER
4850 N ROSEPOINT WAY STE 104
BOISE ID 83717

ROGER L BROWN
PO BOX 6358
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Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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**IC 2006-529074
2007-027096**

ORDER

Filed February 24, 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 proven that his right shoulder rotator cuff tear is causally related to his July 12, 2007 motor vehicle accident.
2. Claimant has proven that the surgery recommended by his treating physician is reasonable.

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

DATED this __24th__ day of __February__, 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 __24th__ day of __February__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLINTON E MINER
4850 N ROSEPOINT WAY STE 104
BOISE ID 83717

ROGER L BROWN
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_____/s/_____