

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAL S. KINGHORN ,
Claimant,

v.

TBCO, LLC,
Employer,

and

TECHNOLOGY INSURANCE CO. ,
Surety,

Defendants.

IC 2016-002831

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

February 5, 2018

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 March 16, 2017. Claimant, Kal Kinghorn, was present in person and represented by Sam Johnson, of Boise. R. Daniel Bowen, of Boise represented Defendant Employer, TBCO, LLC, (TBCO) and Defendant Surety, Technology Insurance Co. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 9, 2017.

ISSUES

The issues to be decided were narrowed at hearing and are:¹

1. Whether Claimant's need for bilateral rotator cuff surgeries and related follow-up medical care was caused by the industrial accident.

¹ HT, p. 4-5.

2. Whether Claimant is entitled to temporary disability benefits; and
3. Whether Claimant is entitled to an award of attorney fees.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant suffered an industrial accident on December 31, 2015, when he fell on the ice at work. Defendants accepted the claim and provided conservative medical care. Claimant subsequently underwent bilateral rotator cuff surgery and follow-up care which he alleges was necessitated by his fall. He seeks medical benefits, temporary disability benefits, and attorney fees. Defendants assert Claimant's bilateral rotator cuff surgeries and follow-up medical care are not related to his industrial accident and he is entitled to no further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits (CE) A-R and Defendants' Exhibits (DE) 1-15, admitted at the hearing.
3. The testimony of Claimant and Andrea Jackson, taken at the hearing.
4. Post-hearing deposition testimony of: James Bates, M.D., taken by Claimant on April 11, 2017; Thomas Goodwin, M.D., taken by Claimant on May 16, 2017; and that of Jeffrey Hessing, M.D., taken by Defendants on June 1, 2017.

All pending objections are overruled and motions to strike are denied.

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

FINDINGS OF FACT

1. Claimant was born in 1957. He is right-handed. He was 59 years old and living in the Boise area at the time of the hearing. TBCO is a management company overseeing the operation of multiple Tobacco Connection and Big Smoke stores.

2. **Background.** Claimant attended high school for a time, obtained his GED, and worked in trailer manufacturing and plumbing for three years. From 1976 until 1989, he worked for the railroad as a conductor brakeman. He left the railroad due to increasing back problems. From 1990 to 1995, Claimant managed a retail gas station and convenience store. He then worked for the postal service for three years. He next managed four convenience stores for two years. He then managed a grocery store in Nampa for a year. He was then recruited and managed grocery stores in Dillingham, Dutch Harbor, and Kodiak, Alaska for two years. In 2001, Claimant returned to Boise and began working for TBCO's predecessor as a price coordinator for 12 Tobacco Connection stores. By 2015, Claimant was a District Manager for TBCO, managing 12 stores earning \$990.38 per week.

3. Claimant has a long-standing history of non-industrial orthopedic issues, including back and bilateral hip conditions. In 1992 Claimant injured his right shoulder helping his father move a fifth-wheel hitch. Claimant underwent right shoulder surgery by Steven Rudd, M.D. After recovering from the surgery, Claimant returned to his usual activities and noted no further shoulder problems for more than a decade. However, in approximately 2012, Claimant began noting recurring bilateral shoulder pain with activity. He later presented to Thomas Goodwin, M.D., who diagnosed extensive bilateral atraumatic rotator cuff tearing.

4. On October 13, 2014, Dr. Goodwin performed an open right rotator cuff repair reconstruction, acromioplasty, and right bicep tendon tenodesis. Dr. Goodwin's operative notes indicate Claimant "had a complex superior labral tear extending up in the biceps anchor. The

articular surface of a full-thickness cuff tear measuring 2.5 cm in width in the supraspinatus was debrided. His subscapularis and infraspinatus were normal. He had no chondromalacia.” DE 9, pp. 148-149.

5. By October 27, 2014, Dr. Goodwin recorded that Claimant “is quite pleased and feels his right shoulder already feels better than his left shoulder does.” *Id.*, p. 151. Recheck with Dr. Goodwin on November 18, 2014, found Claimant was “doing quite well with his right shoulder.” *Id.*, p. 152.

6. On December 19, 2014, Dr. Goodwin performed arthroscopic left rotator cuff repair, distal clavicular excision, subacromial decompression and acromioplasty, and left biceps tendon tenodesis. Claimant had a full-thickness supraspinatus cuff tear, although no measurement of the dimension of the tear was recorded. Dr. Goodwin’s operative notes show Claimant “had a high grade intra-articular biceps tear. The biceps was released ... and the superior labrum was debrided back to stable margins without the need for suture repair. His subscapularis and infraspinatus were normal.” *Id.*, p. 156.

7. On December 31, 2014, Dr. Goodwin noted: “He feels his right shoulder is coming along gradually. He feels his left shoulder is more painful than is [sic] right shoulder was at two weeks postop.” *Id.*, p. 158. On February 4, 2015, Dr. Goodwin noted: “Kal reports his right shoulder is doing quite well and he has minimal pain. Unfortunately, his left shoulder is quite achy and he describes it more as throbbing. He does have full range of motion, but in forward flexion he had a ‘catch’ at midarc. With assistance it is much less noticeable.” DE 9, p. 159. Claimant could not afford customary supervised physical therapy and so was instructed in home exercises and stretching.

8. On March 18, 2015, Dr. Goodwin examined Claimant and recorded:

Overall he is doing quite well. He takes Norco in the morning for a variety of pain in his back and hips. Dr. Bates is his pain management physician. Kal is very pleased with his recovery at this point.

EXAMINATION: On exam today he is able to elevate and abduct to 170°, internally rotate to his upper lumbar levels. His shoulder strength is grade 4+/5. I am very pleased with Kal's recovery and will release him to followup on an as-needed basis.

Id., p. 160. Dr. Goodwin noted Claimant had recovered approximately 80-85% of normal shoulder strength and had nearly full shoulder range of motion bilaterally.

9. Claimant saw James Bates, M.D., periodically for pain management related to his back and hips. On October 29, 2015, Dr. Bates examined Claimant and found he had full range of shoulder motion bilaterally, but slow. DE 10, p. 207. Claimant reported hip, foot, and shoulder pain. On November 10, 2015, Dr. Bates examined Claimant again and noted no change in his condition. *Id.*, p. 208.

10. **Industrial accident and treatment.** On December 31, 2015, Claimant was at work walking in the TBCO parking lot between his office and TBCO's distribution office. He slipped on the ice and fell onto his back in the parking lot. Claimant testified at hearing:

I fell flat on my—hit my tail bone and fell backwards and smacked my head kind of in a whiplash effect and kind of laid there for a minute and went whoa.

Q. [By Mr. Johnson]: Okay. Do you recall did your legs come out from underneath you?

A. Yes, they did.

••••

Q. Do you recall if you had a chance to throw your arms back to brace your fall or anything of that nature?

A. When you fall I don't—I don't recall what I did, but I can't imagine that, you know, I didn't try to break my fall somehow. I just—I—fell down and I think I—I don't know. I don't know exactly what I did. I—I do know I laid there in the parking lot and went, whoa, that hurt.

HT, p. 35.

11. Claimant (CK) provided the following recorded statement to Surety's adjustor, Therese Brady (TB), on February 1, 2016—before he was represented by counsel—regarding his fall onto his back:

TB: How's your back, how are your shoulders, how's your head?

CK: My head is fine. The shoulders, I have pain but I've had pain in my shoulders for quite some time, obviously. It's kind of a radiating pain that I need to try to get an x-ray to see if it's torn again. I do know shoulder pain and that's what it feels like. My tailbone is, feels like somebody kicked me in the rear.

TB: I want you to describe to me your body mechanics as you fell.

CK: My feet went out from underneath me. I hit on my butt, which would be my tail bone, and just kind of whiplashed back until my head hit the ground, and it happened so fast.

.....

TB: Did your hands, your arms, your elbows, or anything go out extending backwards to try to catch your fall, or did you have time enough to react that way?

CK: You know, I can't honestly say. I can't imagine that my arms didn't try and break my fall but it happened very, very fast.

TB: Any pain or bruising in your elbows?

CK: No.

TB: When you got up, did you notice if you had anything on your hands, like maybe gravel or anything? I just need to verify if anything went back on your fall. I have to [sic] very precise.

CK: It's an asphalt parking lot. It was covered in ice and it had been snowing previously that morning, so no, I didn't notice anything on me.

DE 14, p. 253.

12. Claimant called a co-employee and had him verify that Claimant "had fallen right there in the handicap parking spot and made a little snow angel in [sic] parking lot there trying to get up off the ground." *Id.*, 14, p. 251.

13. Claimant promptly called the general manager, Jim Brown, and notified him of the fall. Mr. Brown called the human resource department. Claimant testified: “I did talk to her and I - I had had shoulder pain before. I didn’t think it was necessary to go to the emergency room at that point and I was trying to push through it” HT, p. 37. Instead of improving, Claimant’s shoulder pain after the fall worsened. Approximately two weeks later he approached Employer and requested medical treatment.

14. On January 22, 2016, Jacob Kammer, M.D., examined Claimant and recorded: “Physical exam findings are consistent with rotator cuff tear.” Claimant’s Exhibit B, p. 2. He referred Claimant to his surgeon, Dr. Goodwin.

15. On March 7, 2016, Dr. Goodwin examined Claimant and recorded:

I have not seen Kal since March 18, 2015. At that time, he was doing quite well and I was quite pleased with his recovery and released him to followup on an as-needed basis.

He states he was doing well with his shoulders up until December 31, 2015 when he slipped and fell in the handicapped parking lot spot in front of his office at work landing posteriorly. He had immediate bilateral shoulder and neck and upper back pain.

....

EXAMINATION: He has generalized tenderness throughout his shoulders and rotator cuff areas. He has difficulty elevating due to pain and a sense of popping in his shoulder when he gets elevated more than about 60-70°. With slow motion he can ultimately achieve about 160° elevation and 150° abduction, but again quite painful through midrange. He can internally rotate to his lower lumbar levels. He does have bilateral rotator cuff weakness in abduction and external rotation.

DE 9, p. 161. Dr. Goodwin suspected bilateral rotator cuff re-tearing and ordered MRIs.

16. On March 22, 2016, Claimant underwent bilateral shoulder MRIs which showed large full-thickness bilateral rotator cuff re-tearing. On March 31, 2016, Dr. Goodwin reviewed the MRI results with Claimant and recommended surgical repair of the bilateral rotator cuff re-tearing.

17. On April 11, 2016, Jeffrey Hessing, M.D., examined Claimant at Defendants' request. Dr. Hessing concluded that Claimant's bilateral rotator cuff re-tearing occurred prior to his December 31, 2015 fall on the ice. Defendants then denied further medical treatment of Claimant's bilateral shoulder condition.

18. On June 8, 2016, Dr. Goodwin performed right shoulder surgery for right rotator cuff re-tearing "which was a rotator cuff repair including the skin graft augmentation." Dr. Goodwin Dep., p. 15. Claimant missed two weeks of work while recuperating from this surgery. HT, p. 46. On September 19, 2016, Dr. Goodwin performed left shoulder rotator cuff repair surgery "which involved a hemiarthroplasty for an irreparable rotator cuff situation." *Id.*, p. 15. Claimant has not worked since the date of this surgery.

19. On December 14, 2016, Dr. Goodwin completed TBCO's Fitness for Duty Certification indicating that Claimant would be unable to perform the requirements of his work from December 14, 2016 through April 1, 2017. DE O. Defendants corresponded with Dr. Goodwin and thereafter offered Claimant modified-duty work, which Claimant did not accept. TBCO terminated Claimant's employment.

20. **Condition at the time of hearing.** At the time of hearing on March 16, 2017, Claimant continued to notice persisting shoulder symptoms; however, he was improved as compared to his condition prior to his 2016 surgeries. He had participated in three sessions of physical therapy for his shoulders which Defendants voluntarily agreed to pay for without any admission of liability.

21. **Credibility.** Claimant's supervisor, Andrea Jackson, testified Claimant told her in the fall of 2015 that his shoulders were bothering him and "He said I am worried I am going to have to have surgery again." HT, p. 88. Claimant testified at hearing that he did not remember telling her any such thing. Defense counsel questioned Claimant about conversations with

Andrea Jackson and TBCO owner, Keith Weeks, wherein Claimant stated he was going to need additional shoulder surgery:

Q. ... [By Mr. Bowen]: Mr. Kinghorn, back in the fall of 2015 before you had the accident, do you recall talking to the owner of the business—what's his name?

A. Keith Weeks.

Q. Do you recall talking to him about continuing problems you were having with your shoulders?

A. Do I recall talking to him?

Q. Yes, sir. Perhaps in the context of you being at a BSU football game together?

A. I don't recall that. No.

Q. Do you recall talking to Andrea Jackson about the continuing problems you were having with your shoulders in the fall of 2015?

A. I talked to Andrea Jackson. She was my direct line supervisor. I talked to her all the time about various things. I don't recall talking to her about additional problems with my shoulders, no.

Q. You know, in order to maybe refresh your memory a bit, it would have been in the context of you—you perhaps wanting to go back to see a doctor, having concerns about needing more surgery, but also having concerns of avoiding the same problem that had happened with your coverage in 2014. Does that refresh your memory?

A. No.

HT, pp. 69-70.

22. Having observed Claimant and Ms. Jackson at hearing, and compared their testimony with other evidence in the record, the Referee finds that Claimant is generally a credible witness. Even assuming such a conversation with Ms. Jackson occurred; Claimant has no formal medical training or credentials. He readily acknowledged that he has had some degree of ongoing bilateral shoulder discomfort since approximately 2012. Ultimately, the most significant and persuasive evidence of Claimant's shoulder condition is the testimony of

Drs. Bates, Goodwin, and Hessing regarding Claimant's shoulders both before and after his December 31, 2015 fall. The apparent disparity in Claimant's and Ms. Jackson's recollections is inconsequential.

DISCUSSION AND FURTHER FINDINGS

23. 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).

24. **Medical care.** The crux of the issue presented is Claimant's entitlement to bilateral shoulder surgeries performed by Dr. Goodwin on June 8 and September 19, 2016.

25. Idaho Code § 72-432 provides in pertinent part:

the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

26. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

27. Claimant alleges that his 2015 accident at TBCO caused his need for 2016 bilateral shoulder surgeries performed by Dr. Goodwin. Defendants challenge whether Claimant's industrial accident caused his need for bilateral shoulder surgeries. Several physicians have opined on the issue, including Drs. Hessing, Goodwin, and Bates.

28. Dr. Hessing. Dr. Hessing, a board certified orthopedic surgeon, examined Claimant and reviewed his medical records. He testified that the records of Dr. Bates' examination of Claimant in October and November 2015 indicate Claimant had bilateral rotator cuff re-tearing at that time, thus preceding his December 31, 2015 fall on the ice at work. Dr. Hessing Depo., pp. 7-8. Dr. Hessing explained his conclusions:

I have advised the patient that he temporarily aggravated the rotator cuff disease and tearing that pre-existed in both shoulders in his fall at work last New Years eve [sic]. I doubt however any new permanent injury to his shoulders in his fall at work. I believe on a more probable than not basis that his bilateral recurrent rotator cuff tears and the labral changes present on his recent MRI arthrograms bilaterally pre-existed his 12/31/15 fall at work. I feel it is more likely that his prior rotator cuff repairs had failed at some point and that his rotator cuffs were re-torn before his fall at work. That is consistent with results of even the best shoulder surgeons in this setting. I believe this opinion is also supported by the evaluations done by Dr. Bates just within weeks of his fall at work. His examination on 11/10/15 was very similar to my present examination. He demonstrated weakness, loss of motion, and difficulty bringing his arms overhead in November 2015. That is contrary to what he reported to Dr. Goodwin when he said he he [sic] was doing well right up to the fall. I also think my opinion also [sic] supported by his recent MRI scans. They show significant retraction and atrophy of his rotator cuff musculature. This is consistent with more chronic tearing and not consistent with tears just a few months old.

DE 12, pp. 235-236.

29. Dr. Hessing elaborated during his post-hearing deposition on the March 22, 2016 MRI findings:

The MRIs revealed cuff tears that were complete involving the main tendons of the rotator cuff. And they were retracted, pulled back for, you know, several centimeters. These were not fresh tears that had happened just a month before or three months before.

These tears, they were retracted in this fashion with atrophy in the muscle bellies, have been around for a long time. Takes literally years to develop, I believe, those type of findings on MRI scan. And I would not have expected an injury three months prior to this had caused that significant changes on his MRIs.

Dr. Hessing Depo., p. 14-15.

30. Dr. Hessing also questioned the mechanism of injury. He testified:

I do not believe the mechanism of injury that he describes, falling flat on his back, would have called [sic] torsional stresses on the shoulder that would usually cause rotator cuff tears. It was a fall flat on the back. He could not tell me what stresses had been applied to his shoulders when I talked to him. Again, relating to me that he fell flat on his back. And so I would not anticipate that that's a way he would cause rotator cuff tearing in his shoulder.

Dr. Hessing Depo., p. 16.

31. On cross-examination Dr. Hessing explained his conclusion regarding how Claimant's rotator cuffs retore:

They retore. Now, that can be traumatic, it can be atraumatic. I believe they gave way, that the repairs were not successful that Dr. Goodwin did, and therefore the tears gave way, you know, and continued to have symptoms for a year. So retore can be either traumatic or non-traumatic. And I am not saying there was another injury.

Dr. Hessing Depo., p. 24. Dr. Hessing could not identify when the retears occurred other than to opine they occurred before Claimant's October 29, 2015 examination by Dr. Bates. Dr. Hessing Depo., pp. 25-26.

32. Dr. Hessing testified that in surgical rotator cuff repair, "Chronic wide displaced tears, several studies will document that over—up to 50 percent of those do not heal. So the failure rate is very high." Dr. Hessing Depo., p. 32. Dr. Hessing testified that the failure rate increases when the patient is a smoker, as is Claimant.² He further testified that the rotator cuff repair failure: "generally, it's—they give, they slowly start to tear, they rip, they come apart, and they slowly get larger. So it's a gradual thing that occurs over time after the repair." *Id.*, p. 32.

² Claimant has smoked approximately a pack of cigarettes a day for decades.

33. Dr. Goodwin. Dr. Goodwin was Claimant's treating surgeon for his 2014 and 2016 bilateral rotator cuff repairs. On June 24, 2016, Dr. Goodwin opined:

By history, Mr. Kinghorn was doing well with his shoulders up until December 31, 2015 when he slipped and fell in a parking lot spot in front of his office at work, landing posteriorly. Mr. Kinghorn indicated he had immediate bilateral shoulder, neck and upper back pain. I was unable to see him until March 7, 2016. At that point radiographs revealed no fractures but I suspected he had a high likelihood of further rotator cuff tears on both of his shoulders based upon his history and physical exam. MRI scans were recommended and performed and did in fact reveal retears of both of his rotator cuffs.

In answer to your questions in your correspondence it is my opinion on a more probable than not basis that the above-referenced fall occurring on December 31st, 2015, caused Mr. Kinghorn to sustain rotator cuff retears, ultimately necessitating further treatment medically and surgically.

DE G, pp. 1-2. Dr. Goodwin reaffirmed his causation opinion at his post-hearing deposition. Dr. Goodwin Depo., p. 18.

34. Dr. Goodwin testified that MRIs of Claimant's right and left shoulder in March 2016 showed "much larger tears than he had originally." Dr. Goodwin Depo., p. 14. This conclusion is supported by comparison of Dr. Goodwin's 2014 operative notes with Claimant's March 22, 2016 bilateral shoulder MRI scans. The March 22, 2016 right shoulder MRI arthrogram revealed:

There is complete, full-thickness, re-tearing of the distal the [sic] 4.6 cm of the supraspinatus tendon extending into the anterior infraspinatus tendon. The full-thickness defects [sic] measures approximately 3.8 cm in anteroposterior dimension. The retracted tendon edge lies approximately 2 cm medial to the lateral margin of the acromion. Tendon tearing propagates into the distal all 3 cm of the infraspinatus tendon as combined partial-thickness articular-surface and intrasubstance tearing.

There is the moderate supraspinatus and infraspinatus muscle belly atrophy.

DE 9, p. 167. There was no prior MRI study available for comparison; however, Dr. Goodwin's October 13, 2014 operative notes recorded "a full-thickness cuff tear measuring 2.5 cm in width"

and expressly noted no damage to Claimant's infraspinatus tendon, rather "subscapularis and infraspinatus were normal." *Id.*, pp. 148-149.

35. Similarly, the March 22, 2016 left shoulder MRI arthrogram revealed:

There is full-thickness retearing of the distal 4 cm of the supraspinatus and anterior infraspinatus tendons. The full-thickness defect measures approximately 3.6 cm in anteroposterior dimension and the retracted tendon edge lies approximately 2.3 cm on medial to the lateral margin of the acromion. Tearing propagates into the residual distal 3.7 cm of the infraspinatus tendon as combined partial-thickness, articular-surface and intrasubstance tearing.

There is moderate supraspinatus and infraspinatus muscle belly atrophy.

Id., p. 165. Again, there was no prior MRI study available for comparison; however, Dr. Goodwin's December 19, 2014 operative notes, while documenting but recording no measurements of a full-thickness supraspinatus tear, expressly noted Claimant's "subscapularis and infraspinatus were normal." *Id.*, p. 156. Thus in both shoulders, tearing had increased between 2014 and 2016 to involve the infraspinatus tendons as well as the supraspinatus tendons bilaterally.

36. Dr. Goodwin testified that MRI scanning is generally not so precise as to date a rotator cuff tear—whether it be a matter of months or substantially more. He explained:

The MRI can give dimensions of tears, quality of tissue, atrophy of muscles, degree of cartilage damage, and shed some light on those issues, but they can't date specifically as to whether this occurred on one month versus another month versus one year versus another year.

There's [sic] some findings that take a while to propagate in terms of atrophy of muscles and things like that on an MRI scan, but you can't really put a date on as to when things really took place based upon the MRI scan findings.

We refer to acute injuries, chronic injuries, I've seen people that have an MRI scan within a week of an injury and they have tendon tears that are large, and other people have an MRI scan that's a year later for the same mechanism of injury and those tendon tears look the same.

You can't really put a date on when these tendons or cartilage or muscles were injured very specifically at all.

Dr. Goodwin Depo., p. 59.

37. Concerning the mechanism of Claimant's rotator cuff injury from his fall on December 31, 2015, Dr. Goodwin testified that over the course of years of practice, he was not aware of a person conscious while falling over backwards "not trying to protect themselves [sic] in some manner." *Id.*, p. 55. He opined that whether Claimant threw his arms abruptly upward or forward when he lost his balance and began to fall backwards, and/or thrust his hands beneath or behind him to brace his landing on his buttocks, Dr. Goodwin believed the fall caused the bilateral re-tearing of Claimant's rotator cuffs. Dr. Goodwin Depo., p. 54.

38. Dr. Bates. James Bates, M.D., is board certified in physical medicine and rehabilitation. Dr. Bates testified that he began managing Claimant's chronic hip, back, and shoulder pain in December 2014. Dr. Bates examined Claimant on October 29, 2015 and November 10, 2015.

39. On October 3, 2016, Dr. Bates opined that Claimant's bilateral rotator cuff re-tears were caused by his December 31, 2015 fall on the ice at TBCO. He reported:

[I]t is my opinion, on a more probable than not basis, that injuries and conditions of Mr. Kinghorn's shoulders occurred on 12/31/2015. The injury in question to Mr. Kinghorn's shoulders do [sic] not predate the clinic visit of November 10, 2015. The examination of Mr. Kinghorn's shoulder in October and November of 2015, is significantly different than how I interpret the exam that is listed on January 22, 2015[sic],³ at the Saint Alphonsus Occupational Medicine Clinic, also very different than Dr. Goodwin's evaluation of Mr. Kinghorn on March 7, 2016. From March 30, 2015 until November 10, 2015 Mr. Kinghorn reported minimal discomfort of the shoulders and there was only minimal restriction of shoulder movement. That is significantly different from the physical finding after 12/31/15, the clinical presentation provided by Dr. Goodwin at the clinic visit of 3/7/2016 is quite similar to his presentation at the next time I saw Mr. Kinghorn, and that was June 2, 2016 as he was preparing for his right shoulder surgery.

³ At his post-hearing deposition, Dr. Bates affirmed that the 2015 date was a typographical error. Dr. Bates Depo., p. 11.

Therefore, I concur with Dr. Goodwin's opinion and statement that Mr. Kinghorn's symptoms and the re-tear of his rotator cuffs are related, on a more probable than not basis, to the fall that occurred on December 31, 2015, and that this fall and rotator cuff re-tears necessitated further treatment.

DE H, p. 5. Dr. Bates reaffirmed his causation opinion in his post-hearing deposition. Dr. Bates Depo., pp. 14-15.

40. Critical to Dr. Bates' opinion was his examination of Claimant on October 29, 2015, which found full shoulder range of motion and good function bilaterally. Dr. Bates Depo., pp. 16 and 18. Dr. Bates' examination of Claimant on November 10, 2015—approximately six weeks before his fall—found no change in his shoulder condition. *Id.*, p. 19. This was in marked contrast to Claimant's shoulder examination as recorded by Dr. Kammer on January 22, 2016, which showed limited shoulder range of motion, limited function, and pain consistent with bilateral rotator cuff re-tears. DE B, p. 2.

41. Weighing the medical opinions. Although Dr. Hessing questioned the mechanism of injury because Claimant could not describe the shoulder stress he experienced in the December 31, 2015 fall, Claimant consistently testified that the fall happened so fast he was unsure of what he did, but he could not imagine that he did not attempt to brace or otherwise protect himself with his arms and hands to break his fall. Furthermore, Dr. Goodwin testified that in his many years of clinical experience, humans falling backwards do not simply fall over flat like a tree without trying to protect themselves in some way: "The falling ponderosa is not my experience of how people fall." Dr. Goodwin Depo., p. 56.

42. The difference between Dr. Goodwin's and Dr. Hessing's interpretation of the age of Claimant's bilateral rotator cuff re-tears based on the March 22, 2016 MRIs is starkly contrasting. Dr. Hessing opined that the 2016 MRIs showed retracted tendon tears and muscle belly atrophy which would have required more than three months to develop and thus Claimant's

bilateral rotator cuff retears predated his December 31, 2015 fall on the ice at work. He opined that such retracted tears and rotator cuff muscle belly atrophy: “Takes literally years to develop.” Dr. Hessing Depo., p. 15.⁴ Significantly, Dr. Hessing expressly opined that the retears must have predated Claimant’s October 29 and November 10, 2015 examinations by Dr. Bates. *Id.*, p. 24. This conclusion is directly undermined by Dr. Bates’ testimony that his examinations of Claimant in October and November 2015 did not suggest bilateral rotator cuff re-tearing and his express conclusion that the re-tearing must have “occurred after November 10, 2015.” Dr. Bates Depo., p. 22.

43. In support of his conclusion, Dr. Hessing opined that the October and November 2015 examination notes of Dr. Bates are similar to Dr. Goodwin’s March 7, 2016 examination notes of Claimant which indicate bilateral rotator cuff re-tearing. However, neither Dr. Bates nor Dr. Goodwin concurred in Dr. Hessing’s interpretation of their own notes or each others’ notes. Dr. Bates’ interpretation of his own examination notes from October 29, 2015, November 10, 2015, and his comparison of his own examination results of Claimant with Dr. Goodwin’s March 7, 2016 examination notes is more persuasive than Dr. Hessing’s interpretation of those notes. Similarly, Dr. Goodwin’s interpretation of his own examination notes from March 7, 2016, and his comparison of his own examination results of Claimant with Dr. Bates’ October 29, 2015 and November 10, 2015 examination notes is more persuasive than Dr. Hessing’s interpretation of those notes.

⁴ The medical experts were not asked and did not discuss whether the rotator cuff muscle belly atrophy noted in Claimant’s March 2016 MRIs may have been at least in part pre-existing and persisted because Claimant was unable to obtain customary supervised physical therapy after his 2014 bilateral rotator cuff repair surgeries; thus while the atrophy may have been long-standing, the re-tearing may have been more recent. Nor were the medical experts asked to address whether tendon retraction would be accelerated in the case of abrupt re-tearing of one-year old repairs of preexisting long-standing rotator cuff tears.

44. The conclusions of Drs. Goodwin and Bates are more persuasive than those of Dr. Hessing. Claimant has proven that his 2015 industrial accident caused bilateral shoulder pathology resulting in his need for medical treatment therefore, including bilateral shoulder surgery by Dr. Goodwin in 2016.

45. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability" for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

46. In the present case, Claimant seeks temporary total disability benefits from June 8 through approximately June 21, 2016, and from September 19, 2016, through the date of the March 16, 2017 hearing and continuing until he reaches medical stability.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 18

47. Dr. Goodwin performed right shoulder surgery for right rotator cuff re-tearing on June 8, 2016. Dr. Goodwin released Claimant from work from June 7-26, 2016. DE 9, p. 179. Claimant testified he was actually off work for “two weeks right on the button” while recuperating from this surgery. HT, p. 46. On September 19, 2016, Dr. Goodwin performed left shoulder rotator cuff repair surgery which involved a left shoulder hemiarthroplasty. On December 14, 2016, Dr. Goodwin completed TBCO’s Fitness for Duty Certification indicating that Claimant was unable to return to work full-time without restrictions and continued to be unable to perform the physical requirements of his work from December 14, 2016 to April 1, 2017. CE O. Thereafter Defense counsel corresponded with Dr. Goodwin about possible modified duty work within Claimant’s restrictions.

48. By letter dated January 11, 2017, Dr. Goodwin responded to Defendants’ offering “of a very sedentary position for Kal that would not involve any lifting of product.” DE 9, p. 195. Dr. Goodwin opined:

Based upon my exam of his shoulder December 14th, both right and left shoulders, I feel that he could do a sedentary job, including at this point I would feel comfortable with him driving to and from stores. I would not recommend he do any lifting with the right arm more than ten pounds from floor to waist height, nothing more than five pounds from waist to chest height and nothing more than two pounds overhead. In regards to his left arm, he can use that for tabletop computer work but he is not to do any lifting, pushing or pulling with his left arm more than five pounds from floor to waist height, two pounds from waist to chest height, and no lifting without assistance over his shoulder height on the left.

• • • •

I am hoping that funds be made available for Mr. Kinghorn to pursue some supervised physical therapy for his more recently operated on left shoulder. I believe that is a true necessity for him to optimize his recovery on the left.

Id., pp. 195-196.

49. On January 11, 2017, TBCO made an offer of light duty work to Claimant pursuant to Dr. Goodwin’s authorization. HT, p. 74. Claimant desired physical therapy to

facilitate healing; however, Defendants denied physical therapy at that time. Claimant did not accept the offer of light-duty work, desiring to commence physical therapy before returning to work.⁵ TBCO terminated Claimant's employment. Defendants later approved the physical therapy ordered by Dr. Goodwin, but only after TBCO had already filled Claimant's position.

50. Claimant has proven he is entitled to total temporary disability benefits for a period of two weeks commencing with his June 8, 2016 right rotator cuff surgery and from the time of his September 19, 2016 left rotator cuff surgery until January 11, 2017, when Defendants offered him light duty work within Dr. Goodwin's restrictions.

51. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

⁵ The parties do not dispute that the offer of light duty work was likely to continue throughout Claimant's period of recovery. Dr. Goodwin's restrictions on Claimant's return to work were not conditioned upon his completing physical therapy, only that he believed it necessary to optimize Claimant's recovery. Under the first prong of *Maleug*, Defendants made a reasonable and legitimate offer of employment within Claimant's restrictions, which employment was likely to continue through Claimant's period of recovery, and which Claimant refused.

52. In the present case, Claimant asserts entitlement to attorney fees for Defendants' unreasonable denial of benefits. Claimant notes that Defendants denied medical care in reliance on Dr. Hessing's opinion. Dr. Hessing's opinion has been found unpersuasive, but is not unreasonable. Claimant had long-standing preexisting bilateral rotator cuff conditions and underwent pre-accident bilateral rotator cuff surgeries as a smoker with a limited probability of success. Claimant's original bilateral rotator cuff tears were atraumatic. The tendon retraction and muscle belly atrophy documented on the 2016 MRIs prompted a legitimate controversy over when Claimant suffered rotator cuff re-tearing. Claimant has not proven that Defendants contested his claim for benefits unreasonably.

53. Claimant has not proven Defendants' liability for attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven his December 31, 2015 industrial accident caused bilateral shoulder injury and his need for bilateral shoulder surgery by Dr. Goodwin in 2016.

2. Claimant has proven he is entitled to total temporary disability benefits for a period of two weeks commencing with his June 8, 2016 right rotator cuff surgery and from the time of his September 19, 2016 left rotator cuff surgery until January 11, 2017, when Defendants offered him light duty work within Dr. Goodwin's restrictions.

3. Claimant has not proven Defendants' liability for attorney fees.

4. Claimant is entitled to the payment of medical expenses incurred in connection with Claimant's bilateral shoulder injuries, which have been denied by Surety. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), these medical expenses shall be reimbursed at 100% of the invoiced amounts incurred between the date of Defendants' denial and the date of this decision.

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 __12th____ day of January, 2018.

INDUSTRIAL COMMISSION

____/s/_____
Michael E. Powers, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __5th__ day of __February_____, 2018, 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:

SAM JOHNSON
405 S 8TH ST STE 250
BOISE ID 83702-7100

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

g e

Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAL S. KINGHORN ,

Claimant,

v.

TBCO, LLC, ,

Employer,

and

TECHNOLOGY INSURANCE CO. ,

Surety,

Defendants.

IC 2016-002831

ORDER

February 5, 2018

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 his December 31, 2015 industrial accident caused bilateral shoulder injury and his need for bilateral shoulder surgery by Dr. Goodwin in 2016.
2. Claimant has proven he is entitled to total temporary disability benefits for a period of two weeks commencing with his June 8, 2016 right rotator cuff surgery and from the time of his September 19, 2016 left rotator cuff surgery until January 11, 2017, when Defendants offered him light duty work within Dr. Goodwin's restrictions.
3. Claimant has not proven Defendants' liability for attorney fees.
4. Claimant is entitled to the payment of medical expenses incurred in connection with Claimant's bilateral shoulder injuries, which have been denied by Surety. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), these medical expenses shall be reimbursed at

