BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUNG LE, Claimant, v. REFLOK NORTH AMERICA, INC. Employer, and HARTFORD FIRE INSURANCE COMPANY Surety/Defendants.	**IC 2016-005174** **IC 2016-019548** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED OCT 22 2021 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on May 27, 2021 in Boise, Idaho. Claimant, Dung Le, was present in person and represented by Curtis McKenzie of Salt Lake City, Utah. Defendants were represented by Jon Bauman of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on August 17, 2021 and is ready for decision.

ISSUES

As clarified at hearing, the issues to be decided are:

1. Whether Claimant is seeking to recover compensation for conditions attributable in whole or in part to a preexisting injury, condition, or infirmity, and whether claimant's compensation, if any, should be apportioned pursuant to Idaho Code § 72-406.
2. Whether Claimant failed to give notice of a change of physicians so as to comply with Idaho Code § 72-432 prior to obtaining medical care regarding his February 4, 2016 injury, and whether Claimant is responsible for payment of said expenses.

3. Whether Claimant is entitled to past or future medical benefits for the February 4, 2016 injury.

4. Whether Claimant is seeking to recover compensation for a condition or conditions resulting from a subsequent intervening cause.

5. Whether Claimant is in need of or entitled to any additional medical benefits or medical services beyond those already provided to him or on his behalf with regards to his February 4, 2016 injury.

6. Whether Claimant is entitled to any additional time loss benefits beyond those already paid to him regarding his February 4, 2016 injury.

7. Whether Claimant has any permanent physical impairment and whether Claimant has any permanent disability beyond impairment with regards to his February 4, 2016 injury.

8. Whether Claimant failed to give notice to the Employer of the March 10, 2016 injury within sixty (60) days after the accident.

9. Whether Claimant's March 10, 2016 claim is compensable.

10. Whether Claimant suffered an injury to his shoulder from an accident arising out of and in the course of employment in March 2016, and

11. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back on February 4, 2016 and injured his left shoulder on March 10, 2016, in the course and scope of employment. Claimant timely reported both injuries and is entitled to ongoing treatment for his back, past shoulder treatment, and attorney fees for Defendants' unreasonable denial of his March 10th claim.

Defendants contend they have paid for all of Claimant's accident-related low back treatment and any residuals are pre-existing in nature. Claimant did not timely report his March 10th shoulder accident, Claimant has not met his burden to show Defendants were not prejudiced by his late notice, and the shoulder injury is not work-related. Claimant has not shown entitlement to time loss benefits, permanent partial impairment, disability, or attorney's fees.

Claimant responds that Defendants had notice of his shoulder injury under the statutory

definitions of notice, accident, and injury. Further, Defendants were not prejudiced by the late notice and Defendants mischaracterized medical evidence. Claimant is entitled to time loss benefits and attorney's fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits (JE) 1-66, admitted at hearing;
3. The transcript of the hearing held on May 27, 2021;
4. The testimony of Claimant, Dung Le, taken at hearing through a Vietnamese interpreter;
5. The pre-hearing deposition of Denise Newton, taken April 23, 2021;
6. The post-hearing deposition of Rodde Cox, taken June 21, 2021.

All outstanding objections are overruled.

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 58 years old at the time of hearing. Tr. 14:14-17. Claimant was born in Vietnam and emigrated to the United States in 1983 at the age of seventeen; Claimant worked doing manicures and pedicures both before and after the subject accidents. *Id.* at 14:16-21. In 2014, Claimant began work at Reflok as a packer, which required lifting and placing 25-pound to 80-pound boxes on or between shelves, pallets, and a packing machine, with frequent overhead lifting. *Id.* at 19:2-15, 21:17-19. Claimant was promoted to quality administration at an unknown date, which involved inspecting the product. *Id.* at 21:7-14.

2. **Relevant Medical History.** Claimant presented to Richard Radnovich, DO, on April 11, 2012. JE 2:10. Claimant was seeking care after two motor vehicle accidents (MVA), one on March 15, 2012 and one on March 17, 2012. *Id.* at 17. Claimant complained of back and shoulder pain. *Id.* at 10. Dr. Radnovich prescribed Baclofen, prednisone, Norco, and a back brace. *Id.* at 11. Claimant continued to treat with Dr. Radnovich until December 31, 2012. *Id.* at 26.

3. Claimant presented to Primary Health on August 12, 2013 complaining of chronic back pain related to his March 2012 MVAs. JE 3:4. Claimant was prescribed cyclobenzaprine and instructed to follow-up with Derek Hamblin, MD. *Id.* at 5. On August 13, Dr. Hamblin examined Claimant and prescribed Norco. *Id.* at 3.

4. Claimant followed up on December 10, 2013 with Dr. Hamblin. *Id.* at 15. Claimant reported he continued to have pain in his mid-right back, which he thought was made worse by his work as a nail technician; an X-ray revealed a T11 compression fracture, and Claimant was continued on Norco. *Id.* at 16.

5. On May 5, 2014, Dr. Hamblin increased Claimant's Norco from 60 pills a month to 75 pills a month and required Claimant to sign a pain contract. *Id.* at 25.

6. On May 22, 2014, Claimant presented to Brandon Tanner, PA, at Family Health Services in Twin Falls. JE 4:3. Claimant reported he had back pain in his upper, mid, and low back and the pain was "a result of 18 years doing nails." *Id.* at 2. Claimant requested and was prescribed another Norco refill. *Id.*

7. On August 4, 2014, Claimant reported to Dr. Hamblin he was working at a new job lifting heavy items and was experiencing more back pain; Dr. Hamblin wanted Claimant to see a back specialist and suspected his work was aggravating his back pain. JE 3:90.

8. On December 1, 2014, Claimant followed up again with Dr. Hamblin; Claimant still had not seen a spine specialist and his back pain was the same. *Id.* at 127.

9. On March 4, 2015, Dr. Hamblin recorded that Claimant's thoracic MRI showed healed compression fractures at T5 and T11 and that Claimant had finally seen a spine specialist, who had prescribed a back brace and physical therapy. *Id.* at 156-157, 256. At follow-up on April 22, Claimant reported he was still wearing his back brace. *Id.* at 169.

10. On June 22, 2015, Claimant reported constant pain in his mid-thoracic spine and numbness after standing for 10-15 minutes; Claimant reported he could not lift more than 25-30 pounds due to his mid back pain. *Id.* at 270. Claimant also reported he had not started physical therapy for his back pain. *Id.* at 271.

11. On August 26, 2015, Nathan Ward, DO, noted Claimant was complaining of bilateral hand pain, which Dr. Ward strongly suspected was carpal tunnel syndrome; Dr. Ward noted Claimant had a history of inconsistent use of his pain medication and early refills. *Id.* at 288.

12. On September 23, 2015, Claimant reported his back pain was the same. *Id.* at 293. At hearing, Claimant verified he had pre-existing back pain and wore a brace prior to the industrial accident. Tr. 18:12-13.

13. **Industrial Accident – February 4, 2016.** On the date of the accident, Claimant was working both as a packer and in quality administration because of a rush order from a client in Japan; Claimant was both moving boxes and inspecting products at a rapid rate. *Id.* at 21:22-22:2 Claimant described the accident as follows: "[b]ecause I had to work really fast, I moved the pallets from the floor to the shelf repeatedly and, then, I got hurt."

14. Claimant recalled: "Well, before the 4th of February 2016, my back had some pain, but really light pain and very mild, but after that day, after I lifted the pallet it hurts really bad."

Tr. 20:9-12. Claimant testified that prior to the injury, he was not limited by his back condition or back pain in performing his job at Reflok. *Id.* at 21:2-6.

15. Claimant was referred to Primary Health, and presented to Amber Vickers, PA on February 5, 2016. JE 3:337. PA Vickers recorded "patient was at work and lifted box and hurt back. Patient does have chronic back pain this is different." *Id.* PA Vickers assessed lumbar sprain and started Claimant on cyclobenzaprine and ibuprofen. *Id.* at 338.

16. Claimant saw Stephen Martinez, MD on February 15, 2016. Dr. Martinez recorded: "sustained injury to the lumbar region while on the job. He was lifting a box filled with metal parts when he developed pain in the low back region…Denies prior back injuries of significance." *Id.* at 341. Dr. Martinez related Claimant's lumbar injury to his work on a more probable than not basis. *Id.* Claimant was restricted from lifting more than 10 pounds, pushing/pulling more than 10 pounds, and occasional bending or twisting. *Id.* at 344. Surety accepted the claim. JE 42:1.

17. On February 24, 2016, Dr. Martinez referred Claimant for physical therapy for his back. JE 3:346. At the initial evaluation at RehabAuthority, PA Marsh recorded "pt was very disinterested in whole eval. Pts pain did not seem to match what he was telling me." JE 9:2.

18. On March 2, 2016, Claimant reported to his physical therapist that "he had no more pain and wanted to be done." JE 3:353. Claimant was discharged from physical therapy. *Id.*

19. On March 7, 2016, Claimant returned for follow-up with Dr. Martinez and asked to be released to full duty and from care; he felt he was able to do all his work duties, and while he still had pain, he did not want further treatment other than a final refill of Norco and ibuprofen. *Id.* at 349. Dr. Martinez found Claimant at maximum medical improvement (MMI), assigned no impairment, and discharged Claimant from his care with no restrictions. *Id.* at 350-351.

20. **Industrial Accident – March 10, 2016.** Claimant described the March 10th

accident as follows:

> Because after my back injury my doctor told me not to lift more than five pounds, but the company still asked me to do like normally, so that day I was moving a box to the shelf, but because the box was too heavy I can't -- I couldn't handle it and, then, it fall right on my shoulder and, then, into my arm and caused a small tear on my arm.

Tr. 24:12-18. Claimant went to Denise Newton, the accounting manager. Tr. 24:20-21; Newton Depo., 5:12. Claimant testified that the Band-Aids that were available were too small to cover his cut, so Ms. Newton purchased larger ones at a pharmacy. Tr. 24:20-24. When Claimant was asked why he went to Ms. Newton after he hurt himself, he responded:

> Well, I met her and, then, I got the bandage, but after I met the doctor I went back to the company to tell her to do the work claim for me, but at that time the company was bankrupt and she told me that she didn't work there anymore and I had to see another and she helped me to file the claim.

Id. at 25:2-7. When asked a second time why he went to Ms. Newton that day, he explained it was because she was who had taken care of his back problems, and she was responsible for worker's compensation claims. *Id.* at 25:10-15. Claimant did not ask her to file a claim because "[i]t was not a bone fracture, it was only a small cut and I – it can be healed with a small plastic, so there is nothing to file for a claim." *Id.* at 52:17-21.

21. Denise Newton was deposed on April 23, 2021. Ms. Newton testified that she handled accounting for Reflok and was responsible for filing worker's compensation claims. Newton Depo. 6:6-21. Ms. Newton recalled Claimant had a "split in the skin" on his forearm that was less than half an inch. *Id.* at 9:19-10-2. Ms. Newton drove to get Band-Aids because they were out of Band-Aids in Reflok's first aid kit, and when she returned Claimant was already back at work. *Id.* at 10:20-11:4. She recalled Claimant said this type of thing happened all the time to him because his skin was thin. *Id.* at 11:19-24.

22. On March 16, 2016, Claimant called Dr. Hamblin to have his Norco prescription refilled and reported a work-related exacerbation of his back discomfort; Claimant was reminded to only get Norco from Dr. Hamblin. JE 3:354.

23. On March 21, 2016, Claimant reported numbness in his hands; Dr. Hamblin assessed carpal tunnel. *Id.* at 355-356.

24. On April 9, 2016, Claimant saw NP Eli Thornton and filled out an occupational health registration form and noted his injury was "wrist pain." *Id.* at 363. Claimant told NP Thornton he had had an injury at work a month prior and that he had pain and numbness in his hands from lifting. *Id.* at 364. NP Thornton also diagnosed carpal tunnel and restricted Claimant repetitive firm grasping, repetitive forceful twisting, hand tools, and vibrating tools. *Id.* at 365-367.[1]

25. Claimant separated from Reflok on April 11, 2016. JE 48:64.

26. Claimant returned to Dr. Martinez on April 13, 2016 and reported a recent flare up of back pain and that his previous back pain "never completely resolved"; Dr. Martinez prescribed Norco and ibuprofen, and Claimant was restricted from lifting more than two pounds. *Id.* at 368-370. Dr. Martinez also assessed Claimant's wrist pain: "[n]o falls or other acute traumatic events, but he reports that he was repetitively lifting heavy boxes at work when he developed bilateral wrist pain." *Id.* at 372. Dr. Martinez assessed a sprained wrist, related Claimant's condition on a more probable than not basis to his work and referred Claimant for EMG studies. *Id.* at 373.

[1] Claimant filed a Form 1 for a wrist injury on March 21, 2016, however, Claimant did not file a complaint in that matter. JE 52:11.

27. Claimant returned to Dr. Hamblin on April 18, 2016. *Id.* at 375. Claimant reported the Norco he was taking was not adequately controlling his chronic back pain, and Dr. Hamblin wanted to refer Claimant to a back clinic and potentially a pain management specialist. *Id.* at 377.

28. On April 26, 2016, Claimant underwent a lumbar MRI which demonstrated "mild multilevel lumbar spondylosis with no significant central spinal canal or foraminal compromise." *Id.* at 387. Dr. Martinez referred Claimant to Kevin Krafft, MD, and discontinued Claimant's prescriptions. *Id.* at 388.

29. On May 12, 2016, Claimant returned to Dr. Martinez's office requesting a refill of his Norco and was advised to use over-the-counter Tylenol instead; Claimant went to Dr. Hamblin's office that same day complaining of back pain, and Dr. Hamblin refilled his Norco prescription. *Id.* at 392-397. On May 26, Claimant called Dr. Martinez's office again for a Norco refill but was advised he was no longer prescribed Norco for his worker's compensation injury; Claimant then called Dr. Hamblin's office and was reminded that his prescription was refilled on May 12, and he had to make that prescription last for 30 days. *Id.* at 402.

30. On June 1, 2016, Dr. Martinez recorded that Claimant was adamant that he continued to suffer from a work-related injury to his wrist. *Id.* at 404. Dr. Martinez wrote that Claimant's EMG studies were normal, that he was at MMI without permanent partial impairment, and that his condition had resolved; if Claimant felt he needed more care, he could follow up with his primary care physician. *Id.*

31. Claimant presented to Kevin Krafft, MD, on June 6, 2016. Dr. Krafft took a history from Claimant and reviewed records and imaging. JE 11:1-5. Dr. Krafft assigned work restrictions of no lifting more than 15 pounds and no pushing/pulling more than 30 pounds and prescribed

cyclobenzaprine and meloxicam. *Id.* at 5-6. On June 23, Claimant presented to WorkSTAR's physical therapist, Brook Dummer and reported:

> he was lifting bins about 90 pounds frequently throughout the day and, as he was lifting 1 box, he had immediate pain in the right lower back and that he went to the doctor immediately. He reports he continued to work and that he attended 3-4 visits of physical therapy, and he felt better. Then he reports again in March that the same incident happened where he was lifting frequently throughout the day and then he had pain in his right back, and he has not been able to work since.

JE 12:9. PT Dummer noted Claimant gave inconsistent verbal ratings of his low back pain and despite presenting with pain at a 6/10, he reported no pain throughout the evaluation. *Id.* at 11.

32. On June 29, Claimant reported the medications did not help him and Dr. Krafft prescribed baclofen and Lidoderm. Claimant also reported left shoulder pain and weakness for the first time. *Id.* at 7-9. On July 6, Claimant again reported the medications were not helping and requested Norco. Dr. Krafft noted Claimant's left shoulder did not have full range of motion, and that physical therapy would work on his left shoulder; Dr. Krafft assigned no overhead lifting on the left side, no lifting more than 10 pounds, and no pushing or pulling more than 20 pounds. *Id.* at 10-11, 13.

33. At physical therapy on July 13, PT Dummer recorded "[c]lient demonstrated poor effort, poor motivation, and work attitude. He continues to demonstrate high illness conviction, high fear of re-injury, and somatic symptoms. He is inconsistent with his presentation of pain and verbal rating from therapist to therapist. He is showing slow progress with activity tolerance and minimal significant objective progress." JE 12:20. On July 19, Peggy Wilson, PT, recorded similar observations noting that progress was minimal, Claimant exhibited pain behaviors, was inconsistently reporting symptoms between therapists, and had moderate illness conviction. *Id.* at 23.

34. Claimant contacted Reflok in July and reported his March 10, 2016 injury. JE 38:1. The First Report of Injury (FROI) was prepared July 18, 2016 by Lynne Thielges, the claims administrator. *Id.* The injury was described as follows "EE reported that while moving a box, a box fell on his Unk [sic] shoulder and six weeks later feels hurt due to not being able to..." *Id.*

35. On July 25, 2016, Claimant saw Tyler Hudon, MD, who took over Claimant's primary care from Dr. Hamblin. *Id.* at 413. Dr. Hudon related Claimant's ongoing low back pain and Norco prescription to Claimant's T5 and T11 compression fractures and continued Claimant on Norco. *Id.* at 414.

36. Dr. Krafft saw Claimant for follow-up on August 3, 2016. JE 11:18. Claimant reported he had filed a claim for an injury where "[h]e lifted a box that fell on his shoulder and hurt his left arm." *Id.* Dr. Krafft noted his impression was that Claimant suffered a triceps strain and that there was inconsistency in Claimant's reports. *Id.* at 19.

37. On August 10, 2016, Claimant reported to Dr. Martinez he injured his left shoulder when a box fell on his outstretched forearm five months previously on March 10, 2016. JE 3:421. Dr. Martinez found Claimant had limited range of motion and referred him for a left shoulder MRI; Dr. Martinez opined that Claimant's left shoulder sprain was work related on a more probable than not basis. *Id.* at 422.

38. Surety denied the shoulder MRI, and Claimant presented to Dr. Hudon on August 15, 2016 to pursue the MRI through his health insurance. *Id.* at 425. Dr. Hudon recorded Claimant had pain when sleeping on his left side and raising his left arm above his head. *Id.* Regarding Claimant's chronic back pain, Dr. Hudon recorded "[e]ndorses radiation of pain down R leg. Concern for secondary gain in light of complaints exceeding that expected for physical exam." *Id.* Dr. Hudon referred Claimant for a left shoulder MRI, and noted this was Claimant's last refill of

Norco from him and all other refills would need to come from the spine clinic to which Claimant was previously referred. *Id.* at 426.

39. Claimant fainted at work and was admitted for syncope on August 16 and discharged on August 17; Claimant's discharge notes recorded that his syncope was multifactorial including dehydration and taking multiple medications. *Id.* at 432.

40. A WorkSTAR staffing report dated August 17, 2016 notes Claimant was scheduled for an evaluation with Dr. Calhoun on August 5, 2016, but that Claimant had not yet completed the evaluation and was currently hospitalized. *Id.* at 433-434. The next staffing report is dated August 24, 2016; the staffing team recommended discharging Claimant from the program because he had cancelled or no-showed four times for his evaluation with Dr. Calhoun. *Id.* at 448. Claimant was discharged from the program, and Dr. Krafft issued an impairment rating according to the 6th Edition of the *AMA's Guides to the Evaluation of Permanent Impairment*; Dr. Krafft noted Claimant had symptom magnification, an old compression fracture, and no neuroforaminal impingement resulting in 0% impairment. JE 11:24.

41. On August 24, 2016, Surety denied Claimant's left shoulder claim in its entirety; the notice of claim status explained that the denial was because Claimant reported the injury on July 15, 2016, and not within 60 days of the injury, March 10, 2016. JE 47:1.

42. On September 28, 2016, Claimant presented to Kelly Wilkinson, MD, for evaluation of his shoulder. JE 3:467. Dr. Wilkinson recorded "pain starting in March 2016 after reaching up high on a shelf felt a sudden sharp pain in his shoulder." *Id.* Claimant requested a refill of his pain medicine for his back. *Id.* Dr. Wilkinson injected Claimant's left shoulder, referred him for an MRI of his left shoulder, and prescribed Norco; Dr. Wilkinson also recorded Claimant's

thoracic spine was still painful despite three months of physical therapy and prescribed a back brace. *Id.* at 468.

43. Claimant called Dr. Wilkinson's office on October 4 regarding his MRI and a refill of his Norco. JE 3:470. Dr. Wilkinson reviewed Claimant's records and noted Norco had been prescribed for his back for some time and that she would refill Claimant's prescription only once because, per Dr. Hudon's notes, he would need to see the spine clinic or pain management for further refills. *Id.*

44. An MRI taken of Claimant's left shoulder on October 18, 2016 showed the following findings: (1) Type II superior labral anterior-posterior tear, (2) Long head biceps tendinopathy. JE 1:227. Dr. Wilkinson referred Claimant for physical therapy for his shoulder. JE 3:474.

45. Claimant returned to Dr. Wilkinson on November 21, 2016 still complaining of shoulder pain and back pain and asking for a refill of his pain medication. *Id.* at 476. Claimant received an injection in shoulder and another prescription for Norco. *Id.* at 477.

46. On November 28, 2016, Claimant saw Cyrus Vania, DO, to establish care. *Id.* at 479. Dr. Vania referred Claimant to physical therapy for his low back and refilled Claimant's Norco prescription. *Id.* at 480, 482. Dr. Vania took over as Claimant's primary care physician from Dr. Hudon and continued to prescribe Claimant Norco for his chronic back pain. See JE 3.

47. Dr. Wilkinson treated Claimant's thoracic/shoulder pain with trigger point injections in his trapezius from November of 2016 until December 2018. JE 3:512, 549, 578, 597, 609, 621.

48. Claimant presented to Jared Johnson, MD, for treatment of his shoulder on March 14, 2018. JE 18:1. Claimant reported a work accident where a box fell directly onto his shoulder.

Id. Dr. Johnson reviewed Claimant's October 2016 MRI and assessed left shoulder pain secondary to a SLAP tear/biceps tendinitis. *Id.* at 4.

49. Claimant presented to Karl Zarse, MD, on May 29, 2018, on referral from Dr. Vania. JE 19:1. Dr. Zarse noted Claimant's main complaint was chronic low back pain, that Claimant had failed medication management and physical therapy, and that they would proceed with a diagnostic medial branch block. *Id.*

50. On June 19, 2018, Claimant requested work restrictions from Dr. Wilkinson, and she assigned a 20-pound lifting restriction for his left arm. JE 3:610.

51. On June 28, 2018, Dr. Zarse recorded Claimant had no pain relief with the lumbar medial branch block (MBB); Claimant and Dr. Zarse agreed to a second MBB at the site of his old T11 compression fracture, which was where his primary axial pain was located. JE 19:8. The procedure was not authorized by Claimant's insurance, and therefore Dr. Zarse elected a lumbar ESI and refilled Claimant's pain medication. *Id.* at 11.

52. A second MRI taken July 12, 2018 found the same SLAP tear that was documented on the October 18, 2016 MRI. JE 1:253.

53. Claimant attended physical therapy for his left shoulder and mid back from July 20, 2018 until August 10, 2018 for a total of six appointments; the physical therapist recorded the injury was a box falling and hitting his left shoulder. JE 20:22-30. Claimant was discharged after he failed to attend two physical therapy appointments and refused to pay the no-show fee for the second missed appointment after the first no-show fee had already been waived for the first missed appointment. *Id.* at 31.

54. On September 11, 2018, Claimant presented to Dr. Zarse to discuss his chronic back pain and attempt to get authorization for a thoracic MBB. JE 19:14. Dr. Zarse noted he would

appeal the denial again, refilled Claimant's pain medication prescription, and referred Claimant for a urine tox screen. *Id.* at 16. Claimant's urine screen came back positive for amphetamines, negative for opiates, and positive for cocaine. *Id.* at 18. A handwritten notation appears to record Claimant was discontinued or discharged from Dr. Zarse's care thereafter. *Id.*

55. Claimant elected surgery for his SLAP tear and underwent an arthroscopy with decompression and biceps tenodesis on November 30, 2018. JE 1:268. Dr. Johnson noted the SLAP tear was "degenerative" during surgery. *Id.* at 270. Dr. Johnson referred Claimant to physical therapy for his shoulder and Claimant was evaluated on January 10, 2019; Claimant's treatment plan included attending twice a week for eight weeks. JE 23:4, 7. Claimant attended two physical therapy sessions in total, noting finances were a barrier. *Id.* at 10-25.

56. On January 31, 2019, Dr. Wilkinson discharged Claimant from her care after he no showed for three appointments. JE 3:632.

57. On March 4, 2019, Claimant requested Dr. Vania refer Claimant to a pain management specialist other than Dr. Zarse for his back pain. JE 3:636.

58. On March 6, 2019, Dr. Johnson authored a letter noting Claimant sustained a left shoulder injury in March 2016 when a box fell on his shoulder and noted Claimant "may continue to have some level of shoulder pain and weakness long term as a result of this injury." JE 18:54.

59. On March 27, 2019, Dr. Vania referred Claimant to physical therapy for his back pain. JE 3:643. On April 15, 2019, the physical therapist wrote to Dr. Vania and explained that despite their best efforts, they had been unable to schedule him for physical therapy. JE 25:1.

60. Claimant was discharged from physical therapy for his left shoulder on April 2, 2019 in a telephone encounter where he reported he was doing well and "does not need therapy anymore." JE 23:28.

61. On May 13, 2019, Claimant presented to Beth Rogers, MD, for low and mid back pain. JE 27:1. Dr. Rogers noted Claimant's pain correlated with his compression fractures at T11-T12; Dr. Rogers recommended an ESI injection and prescribed Norco. *Id.* at 4.

62. At follow-up on July 17, 2019 with Dr. Johnson, Claimant reported improvement and requested pain medication. JE 18:64.

63. On August 8, 2019, Claimant presented to the emergency room with "lower mid back pain" and explained he had run out of Norco and was not scheduled to see his primary care provider until the following week. JE 1:313. Claimant had presented to the same ER room three days earlier with the same complaint. *Id.* Mario Martinez, NP, examined Claimant and noted his pain was on the right side of his thoracic spine, consistent with his chronic compression fractures. *Id.* at 316. NP Martinez noted differential diagnoses included chronic compression fractures, drug-seeking behavior, and degenerative disk disease. *Id.* at 315. NP Martinez explained he was not willing to provide Claimant with narcotics and prescribed Lodine. *Id.* at 316.

64. On August 21, 2019, Claimant presented to Paul Phail, DO. Claimant reported a long history of back pain stemming from a work injury, and a recent re-injury from carrying equipment. JE 3:670. Dr. Phail referred Claimant for an MRI which showed mild upper lumbar spondylosis and a chronic, unchanged compression fracture at T5. JE 3:669.

65. On August 29, 2019, Claimant presented to Dr. Rogers again for pain management. JE 27:22. Dr. Rogers recorded:

> note is made from the ER visit that he refused to leave a urine sample for urine drug screen and stated he had relief. This was obtained today. I don't see an indication for continued use of narcotics and he was given 50% of the normal dose and we will continue to taper him. He has not had physical therapy[.] [D]on't think at this juncture he actually is a candidate for an epidural steroid injection. He did agree to go to physical therapy for his back at St Luke's where he goes for his shoulder… Plan is to taper off Norco, Rx for Mobic given … Addendum: the patient left the office without the narcotic prescription at the taper dose. He called approximately

> 3 hours after his visit stating the Mobic wasn't working and that he needed his prescription for the narcotic.

JE 27:23.

66. Also on August 29, 2019, Claimant presented to Rodde Cox, MD, for an Independent Medical Exam (IME) at Defendants' request. JE 30:1. Dr. Cox took a history from Claimant, examined him, and reviewed medical records. *Id.* Dr. Cox recorded that Claimant denied any previous work injuries, motor vehicle accidents, or previous low back pain or shoulder pain. *Id.* at 2. Dr. Cox asked Claimant about the two MVA in March 2012 for which he treated with Dr. Radnovich, and Claimant said his car "just spun out on the road" and that he never saw a doctor for those pains. *Id.* Dr. Cox recorded several non-physiologic signs including nonanatomic sensory loss in the left upper and both lower extremities, diffuse giveaway weakness in the left upper and both lower extremities, tenderness with a superficial skin roll, and inconsistent straight leg raise. *Id.* at 18.

67. Dr. Cox diagnosed (1) mid back pain with a T5 and T11 chronic compression fractures, (2) low back pain/chronic with a longstanding history of low back pain dating back to 2012, (3) left shoulder labral tear, (4) somatic symptom disorder, (5) probable substance abuse, (6) symptom magnification, (7) psoriasis, (8) hemochromatosis. *Id.* at 19. Dr. Cox opined that Claimant's subjective complaints were not consistent with objective findings and that there was symptom magnification present. *Id.* Regarding Claimant's mid and low back, Dr. Cox noted Claimant had no objective findings on exam and was "very evasive" when discussing pre-existing back pain. *Id.* Regarding his left shoulder, Dr. Cox noted that the mechanism of injury was "odd," and Claimant had no evidence of ongoing shoulder pathology. *Id.* at 20. Dr. Cox was strongly suspicious of possible substance abuse based on the positive tox screen for amphetamines and

cocaine, and prior DUI. *Id.* Dr. Cox noted Claimant's diagnosis of psoriasis and hemochromatosis could explain his back pain because both conditions cause osteoarthritis. *Id.*

68. Dr. Cox concluded with his opinions that Claimant suffered a temporary exacerbation of his chronic low back pain and that he "may have" suffered a labral tear on March 10, 2016, but that the mechanism of injury was odd. *Id.* at 21. Dr. Cox noted Claimant did not qualify for a low or mid back impairment rating over and above what would have been Claimant's pre-injury ratings for his compression fractures and chronic low back pain. *Id.* For Claimant's shoulder, Dr. Cox assigned a 1% whole person impairment with no apportionment. *Id.* Dr. Cox opined Claimant had no restrictions related to his back or shoulder. *Id.* at 22.

69. On September 3, 2019, Claimant presented to James Whitaker, DO, for his low back pain which Claimant explained began in 2016 secondary to lifting boxes; Dr. Whitaker recorded his pain was related to his compression fractures caused by osteoporosis and diagnosed chronic pain syndrome and lumbago. JE 3:770-771. On September 11, 2019, Claimant returned, and Dr. Whitaker prescribed Norco and Claimant signed a pain contract. *Id.* at 774.

70. Claimant also saw Dr. Johnson for his shoulder on September 11, 2019. Dr Johnson declared Claimant at MMI and referred him to Mark Williams, MD for an impairment rating. JE 18:69.

71. Dr. Whitaker recorded that Claimant's September 4, 2019 tox screen was "completely negative." JE 31:7. On November 14, 2019, Dr. Whitaker again noted Claimant's tox screen was negative and sent an additional sample for testing to confirm Claimant had taken Norco the night before, as he reported to Dr. Whitaker; Dr. Whitaker wrote "I discussed that if [the urine screen] is negative it will be his one and only warning." JE 31:17. At follow-up on December 12, Dr. Whitaker noted that the follow-up screen was negative, that his tox screen that day was

negative, but that Claimant reported that he hadn't taken any Norco that day. *Id.* at 19-20. Claimant's January 16, 2020 urine screen was appropriately positive for hydrocodone. *Id.* at 29.

72. Claimant's attorney wrote to Dr. Whitaker, summarizing Dr. Cox's findings regarding Claimant's low back, and asked Dr. Whitaker whether Claimant's ongoing symptoms were wholly or partially related to his February 2016 work accident. *Id.* at 46. Dr. Whitaker responded that he was not Claimant's initially treating physician and did not have imaging studies from the time of the injury; however, Dr. Whitaker opined that based on the history Claimant gave him, at least part of his ongoing symptoms were related to his work accident. *Id.* at 48.

73. A January 21, 2021, phone record noted Claimant "said [he] hasn't had back pain for three months but it is starting back up." JE 3:740.

74. Dr. Cox's deposition was taken June 21, 2021 via videoconferencing. Dr. Cox explained his opinion that Claimant was a poor candidate for ongoing opioids was because (1) the lack of objective findings regarding an injury; (2) the tox screen showing amphetamines and cocaine; and (3) a history of DUI. Cox Depo. 14:4-13, 16:13-17. Regarding Claimant's low back, Dr. Cox reaffirmed his opinion that Claimant did not suffer impairment, or require restrictions, or require ongoing medical treatment. *Id.* at 15:17-16:12.

75. Regarding Claimant's left shoulder, Dr. Cox recalled there were no objective findings of injury and no need for restrictions. *Id.* at 17:8-16. Dr. Cox explained that a labral tear will usually result from an object falling on an outstretched arm or a jerking motion overhead, but that feasibly, a direct blow to a shoulder could cause a labral tear; an acute labral tear would hurt immediately. *Id.* at 17:21-18:20.

76. Dr. Cox received updated records since his written report including Dr. Whitaker's notes, Denise Newton's deposition, the hearing transcript, and notices of claim status. See Cox

Depo 18-23. Based on these records, Dr. Cox changed his opinion from his written report: he no longer thought Claimant's shoulder injury was work-related. *Id.* at 24:15-25:2. Dr. Cox explained his changed opinion was because: "...the mechanism of injury seemed odd. Also, I wasn't aware at the time that the initial complaints weren't reported until several months later. And one would expect if you had a direct blow to the left shoulder that caused a labral tear, that you would have immediate pain in that area." *Id.* Dr. Cox explained his shoulder rating was still applicable, but not work-related. *Id.* at 30:10-16.

77. On cross-examination, Claimant's counsel asked Dr. Cox whether painkillers would affect how a person felt pain; Dr. Cox responded that in an opioid naïve person painkillers can dull acute pain, but in an opioid tolerant individual, such as Claimant, Dr. Cox would still expect them to feel acute pain from a labral tear. *Id.* at 34:19-35:19.

78. **Condition at Hearing.** At the time of hearing, Claimant testified that his back pain was less, so he had stopped taking Norco and was only wearing his back belt. Tr. 47:21-23. Claimant's shoulder was back to normal. *Id.* at 37:5-7.

79. **Credibility.** The Commission's findings on credibility are bifurcated into two categories, "observational credibility" and "substantive credibility." As stated in *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003):

> Observational credibility goes to the demeanor of the appellant on the witness stand and it requires that the Commission actually be present for the hearing in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing.

80. Claimant testified credibly at certain points in the hearing: Claimant did appear to have genuine difficulty with recall, but also attempted to evade questions, exaggerate, and deliberately misunderstand questions, even when the question was repeated multiple times in his

native language.

81. Claimant also lacked substantive credibility. Claimant's hearing testimony contained several representations which were directly contradicted by the record. Claimant testified that "nothing [could] limit my work" prior to the accident and that his pain was "really light pain and very mild, but after [the accident], it hurts really bad." Tr. 20:9-12. In contrast, Claimant reported to Dr. Hamblin in July 2015 that he had "constant pain" in his back and could not lift more than 25-30 pounds due to his "significant" back pain. JE 3:270. Claimant was in such discomfort prior to the industrial accident that he needed an early refill of his Norco in November 2015, just three months prior to the accident. *Id.* at 314. Claimant also testified inconsistently at hearing about whether he wore a brace prior to the industrial injury: at one point admitting he did wear a back brace prior to the injury, which is substantiated by the record, and then insisting he didn't wear any support before the accident, "even when I was hit by a car." Tr. 18:12-13; 35:10-11.

82. There are many inconsistencies between Claimant's reports to different providers as well. When discussing his two March 2012 MVAs with Dr. Cox, Claimant relayed "his car just spun out on the road… he never saw a doctor for those pains." JE 30:2 However, Claimant saw Dr. Radnovich within a month of his accident and reported to Dr. Hamblin that that he had treated with a chiropractor for four months after the accident without relief; Claimant also described one of his accidents as "hitting the guard rail going 60 MPH" to Dr. Hamblin. JE 2:10; JE 3:15. Mere lack of recall does not explain the completely different descriptions of the MVAs (to Dr. Cox, to Dr. Hamblin, or to the Referee at hearing), nor Claimant's insistence he never saw a doctor for those pains despite his presentations to both Dr. Radnovich and his report to Dr. Hamblin that he saw a chiropractor for four months.

83. Claimant's shoulder injury reports are also inconsistent between providers. Claimant reported to Dr. Krafft and Dr. Johnson that his March 10 injury involved a box falling onto his shoulder, reported to Dr. Martinez a box fell on his outstretched forearm, and reported to Dr. Wilkinson he had a sharp pain in his shoulder after reaching up high on a shelf. JE 11:19, JE 3:421, JE 3:467. Claimant denied any acute traumatic events to Dr. Martinez when discussing his wrist pain on April 13, 2016, just four weeks after the accident. The first description of a box "rolling" down his arm appears in Claimant's recitation of the accident to Dr. Cox. Again, lack of recall does not explain the different accounts of how his shoulder injury occurred or why Claimant did not mention it when treating for wrist pain with Dr. Martinez, especially if the injury was hitting his outstretched forearm as he described to Dr. Martinez.

84. Providers also suspected Claimant's credibility. PA Marsh noted that Claimant's pain did not match what Claimant was telling him at his first physical therapy evaluation. JE 9:2. PT Dummer and PT Wilson noted Claimant gave inconsistent verbal ratings of his back pain, multiple times to multiple therapists. JE 12:11, 20, 23. Dr. Krafft noted inconsistency in Claimant's reports of his shoulder injury and symptom magnification. JE 11:19, 24. Dr. Hudon recorded "concern for secondary gain in light of complaints exceeding that expected for physical exam." JE 3:425.

85. Claimant also exhibited drug seeking behavior. Claimant repeatedly asked providers for Norco when he presented to them, changed providers when a provider indicated they would no longer prescribe narcotics for him (Hudon to Vania, Zarse to Rogers, Rogers to Whitaker), and frequently ran out of his Norco before he was due for another prescription. Despite Claimant's long-term prescription to Norco, he tested negative for opiates with Dr. Zarse, but did test positive for amphetamines and cocaine; Claimant also tested negative for opiates with

Dr. Whitaker multiple times. Claimant's explanation that "[i]n Idaho it's very common that people will put the drug into your drink" is not credible considering all the other evidence of record. Tr. 45:16-18.

86. Ms. Newton's testimony was substantively credible. Ms. Newton testified via deposition and so observation credibility could not be assessed. Nevertheless, Ms. Newton's testimony is internally consistent, unlike Claimant's testimony, and tracks more closely to the evidence of record.

87. Where Claimant's testimony contradicts the medical record, the medical record will be relied upon. Where Claimant's testimony contradicts Ms. Newton's testimony, Ms. Newton's testimony will be relied upon.

DISCUSSION AND FURTHER FINDINGS

88. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937).

February 4, 2016 Injury.

89. Causation is an issue whenever entitlement to benefits is at question. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012). 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). "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). 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). A pre-existing disease or infirmity of the employee does not preclude a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

90. Defendants accepted the February 4, 2016 low back claim and paid benefits; they stopped paying benefits after Dr. Krafft declared Claimant at MMI on August 24, 2016, and maintain that Claimant's injury was a temporary exacerbation. Claimant continued to treat for his low back and demands past and ongoing medical treatment, asserting all the treatment is related to the accident. For reasons explained below, Claimant has failed to prove his low back condition was permanently aggravated or accelerated by his February 4, 2016 injury, and Claimant is not entitled to any ongoing or past medical treatment.

91. Dr. Whitaker is the only physician who opined that Claimant's ongoing low back treatment or condition is related to his industrial accident.[2] Dr. Whitaker opined that based on Claimant's history, his injury was partially caused by his industrial accident, and specifically noted

[2] Dr. Martinez did relate Claimant's lumbar sprain to work, before referring Claimant to Dr. Krafft who later declared Claimant at MMI from his lumbar sprain with no need for ongoing treatment related to the accident; Dr. Martinez did not opine Claimant's ongoing low back symptomology was related to his industrial accident.

he did not have imaging, nor was he the initial treating physician.

92. There is no indication Dr. Whitaker considered any of Claimant's extensive pre-injury medical records[3] when he formed his opinion that Claimant's back condition was due in part to his work accident. This is particularly troublesome because Claimant has reported back pain since 2012 and because Claimant has many documented potential causes of his back condition including his 2012 MVAs, his work as a nail tech, his two compression fractures due to osteoporosis, his psoriasis, or his hemochromatosis as theorized by Dr. Cox. The lack of records review fundamentally weakens Dr. Whitaker's opinion, especially when contrasted with Dr. Cox's extensive records review.

93. Further weakening Dr. Whitaker's opinion is that, instead of medical records, the opinion relies entirely on the history of injury from Claimant. Claimant relayed to Dr. Whitaker his back pain started in 2016 and he did not inform Dr. Whitaker about his extensive pre-2016 history of back treatment. Dr. Whitaker's opinion simply lacks the required foundation to be persuasive.

94. Alternatively, Dr. Cox's opinion is well explained, well supported, and well-reasoned. Dr. Cox's opinion is more persuasive than Dr. Whitaker's because he reviewed Claimant's extensive medical history and because his observations, conclusions, and diagnoses more closely tracks with the rest of the medical record.

95. Claimant's theory of injury is an aggravation of a pre-existing condition, and Dr. Cox is the only physician in the record who thoroughly educated himself about Claimant's pre-existing condition. Dr. Cox had a holistic understanding of Claimant's low and mid back

[3] Dr. Whitaker does note that he will request Dr. Rogers' records, but the record does not show they were requested or received.

condition over time which Dr. Whitaker lacked. Dr. Cox was also able to ask Claimant questions about his pre-injury condition to differentiate between any pre-injury or post-injury symptoms. Put simply, Dr. Cox's opinion is better informed.

96. Dr. Cox's observations, conclusions, and diagnosis also more closely tracks with the rest of the medical records and the opinions expressed therein. Dr. Cox concluded that Claimant had longstanding low back pain; Claimant has complained of low back pain since at least 2012 and through 2015. See JE 3. Dr. Cox diagnosed mid back pain related to his compression fractures, a conclusion shared by every pain management doctor who treated Claimant (Dr. Hudon ¶ 35, Dr. Zarse ¶ 51, Dr. Rogers ¶ 61, Dr. Whitaker ¶ 69). Dr. Cox observed symptom magnification, which was also documented by Dr. Krafft and suspected by other providers. Dr. Cox's opinion is the more persuasive opinion of record.

97. In sum, Claimant did not meet his burden of proving his current low back condition was more probably than not caused by his work accident of February 4, 2016. Claimant suffered a temporary exacerbation of his chronic, long-standing back pain, reached MMI on August 24, 2016 with no restrictions, and is not entitled to an impairment rating relating to the accident. Accordingly, Claimant is also not entitled to time loss benefits after August 24, 2016 or permanent disability.

March 10, 2016 Injury.

98. **Notice.** Idaho Code § 72-701 provides: "No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof…"

99. It is undisputed that Claimant did not provide timely written notice of the March 10, 2016 injury as required by Idaho Code §§ 72-701 and 702. However, pursuant to Idaho Code

§ 72-704 "[w]ant or delay in giving notice shall not be a bar to proceedings...if it is shown that the employer, his agent or representative had knowledge of the injury." *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995), makes it clear that knowledge of the existence of an injury alone, without some additional knowledge that the injury is related to a work accident, is insufficient to constitute the type of actual knowledge which will relieve the injured worker of his obligation to provide written notice. In that case, the claimant alleged that on December 4, 1991, while on a business trip, she retrieved a suitcase from baggage claim and suffered a low back injury. Within two weeks she verbally advised her supervisor that "we had difficulty in Boston and that I was having problems with my back." The Court observed that this statement was ambiguous in that it might refer to a work-related injury or it might refer to discomfort unrelated to employment. It was also demonstrated that the individual to whom the claimant made this report was aware that the claimant had a history of low back difficulty. This evidence was held insufficient to demonstrate claimant's compliance with the notice provisions of Idaho Code §§ 72-701 and 702. The inquiry then turned to whether, from the conversation described above, it could be said that employer had sufficient knowledge of a work injury to excuse the obligation of written notice pursuant to Idaho Code § 72-704. Of this provision of Idaho Code § 72-704 the Court stated:

> Oral notice to the employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 677, 551 P.2d 630, 632 (1976). Here, at least some oral notice was given two weeks of the accident, and Ms. Seewald signed a notice of injury form which stated that the employer learned of the accident on December 16, 1991.
>
> The referee and Commission failed to expressly find that the employer had no knowledge of the injury. The referee and Commission did find that Murray-Donahue gave no proper *notice* under I.C. § 72-701. Nevertheless, there may be circumstances where an employer has considerable *knowledge* of an accident or injury without having received a formal written *notice*. The employer may have witnessed the accident, or otherwise been apprised of an injury. No formal notice

is required in such circumstances under I.C. § 72-704.

Murray-Donahue, 127 Idaho at 340, 900 P.2d at 1351 (emphasis in original).

100. Similarly, in *Chadwick v. Multi-State Elec., Inc,* 159 Idaho 451, 362 P.3d 526 (2015), the claimant asserted employer was provided notice when claimant informed employer he had back pain and was seeking medical treatment for it within sixty days of the accident. The claimant argued employer should have investigated his back pain after he mentioned it to see if it was related to a workplace accident. The Supreme Court categorically rejected that argument and wrote:

> Knowledge of the injury requires notice that the physical condition was caused by an accident arising out of and in the course of the claimant's employment. Thus, a claimant who complained of pain was not entitled to benefits where there was no evidence that the employer had actual knowledge of a work-related injury within the statutory time for giving notice. *Taylor,* 131 Idaho at 528, 960 P.2d at 1257. Similarly, in *Page v. McCain Foods, Inc.,* 141 Idaho 342, 109 P.3d 1084 (2005), we held that the oral notice given by a claimant to her employer was sufficient where it "provided the supervisor with knowledge of the injury *and* the source of the injury." *Id.* at 346, 109 P.3d at 1088 (emphasis added).
>
> ...
>
> Claimant contends that once Employer was aware that Claimant was seeking medical care for his back problems, Employer should have initiated an investigation to determine whether such problems were caused by an accident arising out of and in the course of his employment. Claimant cites no authority for that assertion, and it is contrary to the requirements of Idaho law that the claimant must give the employer timely notice of the accident, I.C. § 72–701, and that such notice must include the time, place, nature, and cause of the injury, I.C. § 72–702.

Id. at 455-56, 530-31 (underline emphasis provided, italics emphasis in original).

101. Both *Murray-Donahue* and *Chadwick* provide guidance in this matter. In those cases, statements were made by the claimants to their employers about the existence of back pain, but those statements contained no assertion of an industrial origin of the symptoms. Here, the evidence suggests that while Newton observed a small tear in the skin of Claimant's forearm,

Claimant did not describe an industrial cause of the same.[4] Indeed, when asked about the wound, he only told Newton that he has thin skin and such tears are common for him. Newton Depo. 11:19-24. While Claimant's explanation does not rule out an industrial cause, he was afforded a perfect opportunity to describe how he had just cut his arm at work. He did not do so, and the statement he did make did not give Newton actual knowledge of a work injury. Employer did not have actual knowledge of a work cause of Claimant's forearm injury that would excuse, as outlined in Idaho Code § 72-704, Claimant's delay in giving notice.

102. However, that is not the end of the inquiry. Claimant is not pursuing benefits for the forearm cut. Rather, he contends that on March 10, 2016, he was attempting to move a heavy box to an overhead shelf when it fell onto his shoulder. He claims to have suffered a shoulder injury as the result of the accident, and, incidentally, a small cut on his forearm. He did not describe a shoulder injury to Newton, nor did he describe the accident to Newton, which might have put her on notice that Claimant might have something going on aside from the small cut to his forearm. From the evidence at hand, it cannot be said that Employer, through Newton, had actual knowledge of either the accident or the shoulder injury for which Claimant is now seeking benefits. This case is unlike *Murray-Donahue* where a closer question was presented. There, employer did know about the injury, i.e. low back pain, that was later claimed to have resulted from a work accident. Here, Employer did not learn about either the accident, or the shoulder injury that is claimed to have resulted from the accident, until more than sixty days had passed.[5]

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[4] Claimant says the wound was bleeding. Newton testified that it was not. Newton Depo. 23:7-8. Newton testified that she obtained a bandage for Claimant only because she was worried about a break in the skin creating an opportunity for infection in the dusty environment of the plant. Newton Depo. 10:3-9. For the reasons set forth in treating Claimant's credibility, Newton's testimony is accepted over that of Claimant.

[5] In his brief, Claimant indicates that Defendants cannot avoid liability by arguing that they were not aware of the extent of Claimant's injuries stemming from the March 10, 2016 accident. Claimant's Opening Br., p. 11-12. Although not expressly articulated as such, Claimant appears to be arguing that the first portion of Idaho Code § 72-704 should apply to this case: "A notice given under the provisions of section 72-701 or section 72-448, Idaho Code,

103. Finally, in the absence of actual knowledge of the injury, want of notice or delay in giving notice may be excused under Idaho Code § 72-704 where it is shown that employer has not been prejudiced by such delay or want of notice. The burden of proof is on Claimant to demonstrate lack of prejudice to employer. *Murray-Donahue*, 127 Idaho at 340, 900 P.2d at 1351. Claimant failed to provide any evidence Employer was not prejudiced by the lack of notice. Indeed, the evidence tends to show that Employer was prejudiced. Employer had no opportunity to interview witnesses in a timely manner, to direct care, to get a timely opinion as to the nature of the injury which may have occurred that day, or to ensure that no further aggravation occurred.

104. Claimant's response that Employer closed the business, and it is Employer's fault that they couldn't interview witnesses misunderstands the nature of the prejudice; Employer is prejudiced because they could not interview the employees immediately after the accident. Claimant's changing description of the accident shows why that may have been important. Claimant's argument that he did not have shoulder restrictions until after he was fired, ignores the fact that Claimant continued working for Reflok for a month after he injured his shoulder and Employer was unaware of the same. Claimant's argument that he was treating for his back so it should not matter that Employer did not have notice of the shoulder injury is also nonsensical.

105. Claimant has failed to prove he reported his shoulder injury within 60 days as

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shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. ..." Claimant's argument misses the mark. Idaho Code § 72-704 is disjunctive. The section of the statute quoted above applies only if notice is properly given under Idaho Code § 72-701. It is clear from the record that, as to the March 10, 2016 accident, Claimant did not give timely written notice as required by Idaho Code §§ 72-701 and 702.

If notice is not properly given, as was the case here, then the second sentence of Idaho Code § 72-704 applies: "Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice." For the reasons addressed in paragraphs 99-102 *supra*, Employer did not have knowledge of the March 10, 2016 injury. And as described in paragraph 103 *infra*, Claimant has failed to show that Employer has not been prejudiced by such delay or want of notice.

provided for in Idaho Code § 72-701; Claimant has also failed to prove Defendants had knowledge of the same or were not prejudiced by the lack of notice. Therefore, Claimant's claim for time loss benefits, impairment, and disability are also denied.

106. **Attorney's Fees.** Claimant's argument for attorney's fees was that Defendants improperly denied Claimant's left shoulder claim. As this decision finds Defendants' denial was appropriate, attorney's fees are denied.

CONCLUSIONS OF LAW

1. Claimant is not entitled to additional medical treatment, time loss, impairment, or disability for his accepted February 4, 2016 low back injury.

2. Claimant has failed to show he gave notice of his March 10, 2016 accident within 60 days as required by Idaho Code § 72-701.

3. Claimant has failed to show Defendants had actual knowledge of the March 10, 2016 accident or were not prejudiced by Claimant's lack of notice.

4. Claimant is not entitled to medical treatment, time loss, impairment, or disability for his denied March 10, 2016 claim.

5. Claimant is not entitled to attorney's fees.

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 14th day of September, 2021.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and email upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUNG LE, Claimant, v. REFLOK NORTH AMERICA, INC. Employer, and HARTFORD FIRE INSURANCE COMPANY Surety/Defendants	**IC 2016-005174** **IC 2016-019548** **ORDER** FILED OCT 22 2021 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her 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 is not entitled to additional medical treatment, time loss, impairment, or disability for his accepted February 4, 2016 low back injury.

2. Claimant has failed to show he gave notice of his March 10, 2016 accident within 60 days as required by Idaho Code § 72-701.

3. Claimant has failed to show Defendants had actual knowledge of the March 10, 2016 accident or were not prejudiced by Claimant's lack of notice.

4. Claimant is not entitled to medical treatment, time loss, impairment, or disability for his

denied March 10, 2016 claim.

5. Claimant is not entitled to attorney's fees.

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

DATED this 21st day of October, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and email upon each of the following:

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