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6-22-2018

### Moser v. Rosauers Supermarkets, Inc. Clerk's Record Dckt. 46004

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**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant/Appellant,

v.

ROUSAUERS SUPERMARKETS, INC.,

Defendants/Respondent.

**SUPREME COURT NO. 46004**

**AGENCY'S RECORD**

---

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

Attorney for Appellant:

MICHAEL KESSINGER  
PO BOX 287  
LEWISTON ID 83501

Attorney for Respondent:

ALAN GARDNER  
PO BOX 2528  
BOISE ID 83701

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## WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS  Miranda Moser 3416 13 <sup>th</sup> Street Lewiston, Idaho 83501  Telephone Number: 208-305-5972	CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER  Michael Kessinger GOICOECHEA LAW OFFICES, LLP PO Box 287 Lewiston, ID 83501  Telephone Number: 208.743.2313
EMPLOYER'S NAME AND ADDRESS (at time of injury) Rosauers Supermarkets Inc. PO Box 9000 Spokane, WA 99209	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Rosauers Supermarkets Inc. (per first report injury) PO Box 4367 Boise, Idaho 83711
	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE  10/09/2016
STATE AND COUNTY IN WHICH INJURY OCCURRED  State of Idaho, County of Nez Perce	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE  OF: \$ 336.00 , PURSUANT TO IDAHO CODE § 72-419
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)  Claimant was lifting and moving a 24 pack of soda past and over the scanner.	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE  Right shoulder dislocation	
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?  See issues below.	
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER  10/09/2016	TO WHOM NOTICE WAS GIVEN  Francis
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY:	
ISSUE OR ISSUES INVOLVED  1. Entitlement to medical care; 2. Entitlement to temporary total disability; 3. Extent of permanent partial impairment; 4. Entitlement to permanent disability; 5. Entitlement to total permanent disability including total disability pursuant to the odd-lot doctrine. 6. Entitlement to retraining; 7. Entitlement to attorney fees for an unreasonable denial of benefits.	
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO   IF SO, PLEASE STATE WHY.	

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)  
 St. Joseph Regional Medical Center, PO Box 816, Lewiston, Idaho 83501  
 Lewiston Orthopaedics & Outpatient Surgery, 320 Warner Drive, Lewiston, Idaho 83501  
 Valley Medical Center, 2315 8<sup>th</sup> Street, Lewiston, Idaho 83501  
 SPORT Physical Therapy, 1119 Highland Avenue, Suite 2, Clarkston, Washington, 99403

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

To be ascertained

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ Unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$ Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

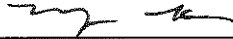
YES

NO

DATE

1/3/18

SIGNATURE OF CLAIMANT OR ATTORNEY



PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW  
 ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY  
 FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

YES  NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

YES  NO

**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of January, 2018, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

SURETY'S NAME AND ADDRESS

Rosauers Supermarkets Inc.  
 PO Box 9000  
 Spokane, WA 99209

Rosauers Supermarkets Inc. (per first report injury)  
 PO Box 4367  
 Boise, Idaho 83711

via: personal service of process

via: personal service of process

regular U.S. Mail

regular U.S. Mail

  
 Signature

**NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!**

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)



Patient Name: Miranda Moser

Address: 3416 13<sup>th</sup> Street, Lewiston, ID 83501

Phone Number: (208) 305-5972

*(Provider Use Only)*

Medical Record Number: \_\_\_\_\_  
 Pick up Copies  Fax Copies # \_\_\_\_\_  
 Mail Copies  
 ID Confirmed by: \_\_\_\_\_

**AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION**

I hereby authorize \_\_\_\_\_ to disclose health information as specified:  
*Provider Name - must be specific for each provider*

To: \_\_\_\_\_  
*Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney*

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Purpose or need for data: \_\_\_\_\_  
*(e.g. Worker's Compensation Claim)*

Information to be disclosed: \_\_\_\_\_ Date(s) of Hospitalization/Care: \_\_\_\_\_

- Discharge Summary
- History & Physical Exam
- Consultation Reports
- Operative Reports
- Lab
- Pathology
- Radiology Reports
- Entire Record
- Other: Specify \_\_\_\_\_

I understand that the disclosure may include information relating to (check if applicable):

- AIDS or HIV
- Psychiatric or Mental Health Information
- Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Miranda Moser \_\_\_\_\_ 01/03/18  
Signature of Patient Date

\_\_\_\_\_  
Signature of Legal Representative & Relationship to Patient/Authority to Act Date

\_\_\_\_\_  
Signature of Witness Title Date

ORIGINAL

ANSWER TO COMPLAINT

I.C. NO.: 2016-027914

INJURY DATE: 10-09-16

The above-named employer or employer/surety responds to Claimant's Complaint by stating:

The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

RECEIVED  
 INDUSTRIAL COMMISSION  
 2016 JAN 10 PM 2:11

CLAIMANT'S NAME AND ADDRESS Miranda Moser 3416 13 <sup>th</sup> Street Lewiston, ID 83501	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Michael Kessinger Goicoechea Law Offices, LLP P.O. Box 287 Lewiston, ID 83501
EMPLOYER'S NAME AND ADDRESS Rosauers Supermarkets, Inc. P.O. Box 9000 Spokane, WA 99209	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Rosauers Supermarkets, Inc. – Self Insured c/o Intermountain Claims P.O. Box 4367 Boise, ID 83711
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) Alan R. Gardner GARDNER LAW OFFICES P.O. BOX 2528 BOISE, ID 83701	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

IT IS: (Check One)		
Admitted	Denied	
X		1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly <input type="checkbox"/> entirely <input type="checkbox"/> by an accident arising out of and in the course of Claimant's employment.
	X	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
	X	6. That the notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
investigating	investigating	7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$_____.
X		8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant? Deny Claimant is entitled to benefits claimed under "issue or issues involved" part of the complaint.

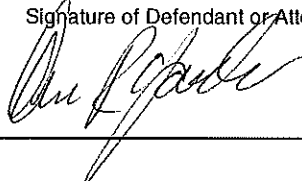
10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny all allegations of the Complaint not admitted herein.
2. Defendants deny the condition for which Claimant seeks benefits is related to any work accident, injury, or occupational disease.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.  YES  NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE: No.

Amount of Compensation paid to date			Dated	Signature of Defendant or Attorney
PPI/PPD	TTD	Medical		
			1/10/18	

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of January, 2018, I caused to be served a true and correct copy of the foregoing Answer upon:

Michael Kessinger  
Golcochea Law Offices, LLP  
P.O. Box 287  
Lewiston, ID 83501

via  personal service of process  
 regular U.S. mail

Signature 

Answer—Page 2 of 2

ORIGINAL

ALAN R. GARDNER (ISB No. 2342)  
MICHAEL G. MCPEEK (ISB No. 2436)  
GARDNER LAW OFFICE  
1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701  
Telephone: (208) 387-0881  
Facsimile: (208) 387-3501

2018 JAN 17 PM 2:11  
RECEIVED  
INDUSTRIAL COMMISSION

Attorney for **Defendants**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant,	)	<b>NOTICE OF MEDICAL EXAM</b>
	)	
v.	)	
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendants.	)	

COME(S) NOW the above-named Defendants, by and through their counsel of record, and give notice that the following medical examination will take place pursuant to Section 72-433, *Idaho Code*:

Examination will be performed by Dr. Joseph Lynch on February 5, 2018. It will occur at 12:45 P.M. (PST), at the Institute of Physical Therapy, 678 Southway Avenue, Lewiston, Idaho, 83501.

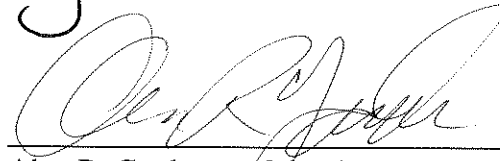
Failure to appear at the time and place noted will result in the seeking of sanctions pursuant to Section 72-434, *Idaho Code*.

6

Should you or your attorney plan to have an audio, or video recording pursuant to Section 72-433, *Idaho Code*, of the above examination, you are requested to give at least one week notice to Defendants so the physician, or physicians, may be informed and prepare for the recording accordingly.

The examinations are conducted with the physician or physicians being considered as Defendant's expert pursuant to IRCP 26 as adopted by the Idaho Industrial Commission Judicial Rules of Procedure.

DATED this 17<sup>th</sup> day of January, 2018.



Alan R. Gardner - of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants

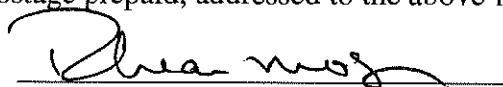
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17<sup>th</sup> day of January, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

Joseph Lynch, M.D.  
c/o OMAC  
401 Second Avenue S., Suite 110  
Seattle, WA 98104

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.



Legal Assistant

ORIGINAL

**ALAN R. GARDNER (ISB No. 2342)**  
**MICHAEL G. MCPEEK (ISB No. 2436)**  
**GARDNER LAW OFFICE**  
1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701  
Telephone: (208) 387-0881  
Facsimile: (208) 387-3501

Attorney for **Defendants**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant,	)	<b>MOTION FOR SANCTIONS</b>
	)	
v.	)	
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendants.	)	

RECEIVED  
INDUSTRIAL COMMISSION  
2016 JAN 24 PM 2:00

COME NOW the above named Defendants and move the Industrial Commission for an order imposing sanctions under section 72-434. The motion is made for the following grounds and reasons:

- 1) Section 72-434, Idaho code, reads as follows: "If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which

such failure or obstruction continues.” The section refers to “in any way obstructs an examination” by a physician or surgeon, designated by the “commission or the employer.”

Exhibit A, Claimant’s attorney’s letter to defense counsel of January 22, 2018, reiterates a prior comment that Claimant “will not be attending this scheduled examination” referencing the examination of a physician designated by the employer with Dr. Lynch on February 5, 2018, in the city of Lewiston.

Little question exists but that such a comment in fact is an obstruction of an employer scheduled examination of right under 72–434, Idaho code. The contemplated examination takes place pursuant to section 72–433, Idaho code. That section references the right of the employer for a medical examination if “requested by the employer or ordered by the Commission.”

The only requirement is that the examination be “at reasonable times and places to a duly qualified physician or surgeon” expenses are to be paid. Other provisions, not applicable at present, are set forth.

Correspondence from Claimant’s counsel seems to set forth other restrictions and provisions not found in the authorizing statute. Cases were cited which have no applicability. Defendants do anticipate a response from Claimant’s attorney. The authorities which Defendants expect Claimant to cite will be dealt with and distinguished as they are presented.

Without more, on the face of the Claimant’s attorney’s letter refusing Claimant’s attendance after the examination, and the lack of other restrictions which Claimant can actually raise, the Defendants right to sanctions is clear.

However, to the extent additional information is needed by the Commission, a brief summary of facts is presented.

Claimant is very young, but has a significant pre-existing recurring dislocation problem in the shoulder at issue. Claimant has been treating with Dr. Jelinek of Lewiston, Idaho. The doctor has become what appears to be frustrated with the condition of Claimant's shoulder such that he wished a second opinion from a qualified shoulder expert be conducted. It should be noted Defendant utilized a physiatrist, Dr. Ludwig, as an IME. The treating physician wished a second pair of eyes, (see exhibit D and exhibit B page 2) presumably from a shoulder specialist. The reference in exhibit B is a generic reference to "Seattle."

Subsequent to that time a case management nurse discussed the second opinion concept with Dr. Jelinek. Dr. Jelinek agreed that Dr. Joseph Lynch or Dr. Thomas Goodwin from Boise, both recognized shoulder specialists, would be appropriate (see exhibit C). As the standard of section 72-434, Idaho code, references reasonable times and places, there is no question but that having the expert go to Lewiston more than qualifies. In correspondence to defense counsel, Claimant's attorney has claimed the employer has somehow impeded treatment. It would seem that tendering a qualified shoulder specialist, approved by the treating doctor, and for an examination conducted in Claimant's home area, would qualify under sections 72-434 and 72-433 Idaho code. Attempts have been made by defense counsel to point out these factors and have been met by resistance.

First, it is hoped that by filing this motion, it would not be necessary sanctions to be imposed. One hopes that counsel for Claimant would recognize the benefit of the second pair of eyes desired by Dr. Jelinek. Secondly, however, should counsel pursue the clear-cut obstruction, then no question



exists but that sanctions should be imposed. Section 72-434, Idaho code, is all too often viewed as only an "IME" section. However, that language does not appear in 72-434, or 72-433, Idaho code. Indeed, it refers to both examinations initiated by the employer and also the Commission. The scope of the state statutory sections is much broader.

If the Commission deems it appropriate, Claimant should be ordered to attend. If the Claimant does not feel that is the scope of the referenced statutory sections, then the sanctions should be imposed. The sanctions present, one would hope, a barrier to conduct by attorneys or Claimants in obstructing examination which are provided for as a matter of law, in circumstances such as presented in the instant matter.

DATED this 24<sup>th</sup> day of January, 2018.



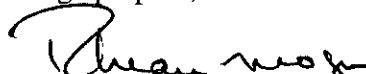
Alan R. Gardner - of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24<sup>th</sup> day of January, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.



Legal Assistant



# Goicoechea Law Offices

Lewiston - Moscow  
A Limited Liability Partnership

January 22, 2018

Gardner Law Office  
Alan R. Gardner  
PO Box 2528  
Boise, Idaho 83701

CRAIG M. YOUNG\*  
MICHAEL T. KESSINGER\*

JERRY J. GOICOECHEA  
Of Counsel

Attorneys  
and  
Counselors  
At Law

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(208) 743-8140

Website  
www.NorthIdahoAttorney.com

E-Mail  
MTKessinger@gmail.com

Tax ID#: 82-0485674

\*Licensed in  
Idaho  
&  
Washington

Via Facsimile: (208) 387-3501

RE: Our Client : Miranda Moser  
Employer : Rosauers Supermarkets Inc.  
Claim No. : BOI16-22294  
Date of Loss : 10/09/2016

Dear Mr. Gardner:

I am in receipt of your notice of medical exam dated January 17, 2018. I have already advised your client that Ms. Moser will not be attending this scheduled examination. Attached you will find the letter I sent to your client.

An injured worker does not have a legal obligation to petition for relief from an IME. Kelly v. Blue Ribbon Linen Supply, Inc., 159 Idaho 324, 36 P.3d 333, 337 (2015). If you believe good cause exists for an additional IME, please file a motion to compel with the Commission.

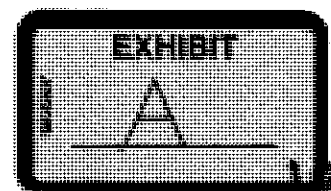
Thank you for your attention to this matter.

Sincerely,  
Goicoechea Law Offices, LLP

*Dictated by MICHAEL KESSINGER  
Stamped and sent without  
Review to avoid delay*

Michael Kessinger  
Attorney at Law

MK/jkh  
Encls. as stated



**CATALYST** Medical Group  
 320 Wainup Drive | Lewiston, ID 83501  
 (208) 746-3622 | (208) 041-3422 | Fax (208) 746-9744  
 www.lewistonortho.com  
**LEWISTON ORTHOPAEDICS**  
 Experience Your Pain Tamed

Richard J. Bannister, M.D. | Steven R. Bayon, M.D. | Christopher D. Borchers, M.D. | Timothy A. Clark, M.D. | Robert D. Fennell, M.D. | J. L. Gentry, M.D.  
 Stephen M. Howard, D.O. | Richard S. Matvey, D.O. | Doug R. Vines, D.O. | Brett J. Poirer, D.O. | Kriston T. Tibbott, M.D.

**Visit Note**

**Date of Exam:** 9/11/2017  
**Patient Name:** Miranda Moser

**Past History:**  
 See Chart for Past History

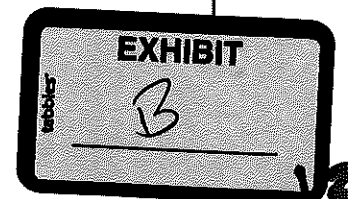
**Chief Complaint:**  
 Shoulder: Follow-up right shoulder surgery

**History of Present Illness:**  
 Shoulder: Miranda presents for follow-up ten months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly done on 11/16/16. She is attending physical therapy with Kelly at S.P.O.R.T. Physical Therapy. She had her IME last Thursday. She continues to complain of pain and instability. She had about a week-and-a-half with the shoulder back in its normal position but since then it has gone on to a subluxed position again. She doesn't feel that she is any better. She states she was using an exercise bike and felt like her left shoulder subluxed.

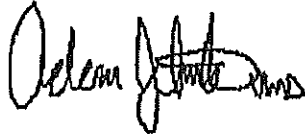
**Exam:**  
 Right shoulder: Anterior-based incision is healed nicely with no erythema or drainage. With active range of motion, shoulder flexion to 100° she does have moderate scapular winging and is laboring for this motion. She does have slight translation with anterior drawer but there is a solid endpoint. When raising the arm from a neutral to an elevated position there is a clunk noted in the shoulder. She has a positive sulcus sign on the right versus the left. Her shoulder is sitting in a pseudosubluxed position and there is no activation of the rotator cuff. There is improvement with her extension of her fingers and wrist; however, she continues to have weakness with this. Sensation intact to light touch in the axillary, radial, musculocutaneous, median, and ulnar distributions. 2+ radial pulse with capillary refill less than 2 seconds.

**Impression:**  
 RIGHT Encounter for other specified surgical aftercare

**Plan:**  
 Shoulder: Assessment:  
 1. Ten months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly with pseudosubluxation which was improved previously but is subluxed again at this point.  
 2. Normal MRI and EMG right shoulder.



Plan: At this point she still is struggling with the pseudosubluxation. This has not resolved and I am still hopeful that it will resolve over time which it typically does. However, I would like her to go to Seattle for a second opinion on her shoulder. I feel it would be important to get a second set of eyes on the shoulder and see if there is anything further that may need to be done. She is comfortable with that. I told her she must go to physical therapy as it is very important in her recovery. She recently had an IME and so I will wait for the report to review. I will have her follow up in 4-6 weeks.



Adam Jelinek, M.D.  
Electronically signed on 9/13/2017 7:47:00 AM  
9/13/17

Please note: This report was transcribed using voice recognition software. There may be grammatical, syntactical and/or typographical errors due to limitations inherent in this system. Please contact the author with any questions regarding the content of this document.



PO Box 4367  
Boise, ID 83711  
Phone: (208) 323-7571  
Fax: (208) 375-8905

December 12, 2017

ADAM JELINEK MD  
320 WARNER DRIVE  
LEWISTON ID 83501

Re: Claimant: Miranda Moser  
Employer: Rosauers Inc.  
D/Injury: 10/09/2016  
Claim #: BOI16-22294

Dear Dr. Jelinek:

Our office is the third party administrator for Rosauers Inc's self-insured workers' compensation program. Ms. Moser is a patient of yours who allegedly sustained a right shoulder injury on October 9, 2016 while lifting a 24 pack of soda as a result of her duties as a cashier.

1. Would you recommend a referral for Ms. Moser to see Dr. Joseph Lynch or Dr. Thomas Goodwin in Boise, Idaho for a second opinion?

No  Yes

If no, please explain:

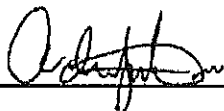
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Physician Signature:  Date: 12/13/17

We thank you for your assistance and look forward to your response. Please contact me if you have any questions.

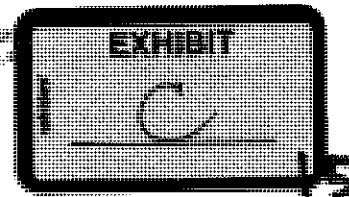
Sincerely,

INTERMOUNTAIN CLAIMS INC

Courtney Butler  
Claims Examiner  
P: (208) 323-7571 x 1214 F: (208) 375-8905

[www.intermountainclaims.com](http://www.intermountainclaims.com)

Workers Comp Locations: Boise, IDAHO • Portland, OREGON • Billings, Missoula, MONTANA • Salt Lake City, UTAH • Spokane, WASHINGTON  
Property and Casualty Locations: • Boise, Lewiston, Idaho Falls, Pocatello, Twin Falls, IDAHO • Portland, OREGON • Missoula, MONTANA • Salt Lake City, UT





320 Warner Drive  
Lewiston, ID 83501  
TEL: (208) 743-3523  
FAX: (208) 746-8741



Date of Exam: 7/10/2017

Provider: Adam Jelinek, M.D.

Patient Name: Miranda Moser



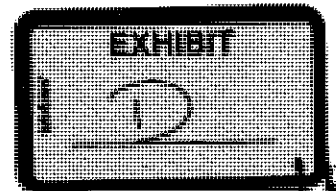
**Phone Consult:**

I spoke with Linda on the phone, Miranda's nurse case manager, regarding her shoulder. We talked for about 10 minutes. We talked about different options for her as well as my recommendation for a referral to Seattle. She asked if we could give this another month in therapy and I think it is reasonable as long as Miranda actually goes to therapy and does her exercises. If that is the case, we will give it one month and if there is still no improvement we will have her go to Seattle for a second opinion. She is comfortable with this plan. We did talk about Miranda's work status in that she quit her job.

Adam Jelinek, M.D.  
Electronically signed on 8/1/2017 11:34:21 AM  
8/1/17

Please note: This report was transcribed using voice recognition software. There may be grammatical, syntactical and/or typographical errors due to limitations inherent in this system.  
Please contact the author with any questions regarding the content of this document.

2017 AUG -4 AM 9:30  
JUNIPER-CENTRAL CLINICALS, INC



Michael T. Kessinger, Esq. - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
826 Main Street  
PO Box 287  
Lewiston, Idaho 83501  
Telephone: (208) 743-2313  
Facsimile: (208) 743-8140  
Email: mtkessinger@gmail.com

Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

I.C. No. 2016-027914

**CLAIMANT'S RESPONSE TO  
DEFENDANT'S MOTION FOR SANCTIONS  
AND CLAIMANT'S MOTION FOR  
PROTECTIVE ORDER**

FILED  
JAN 26 2018  
INDUSTRIAL COMMISSION

COMES NOW the Claimant, by and through her attorney of record, Michael Kessinger of Goicoechea Law Offices, LLP, and hereby responds to Defendant's Motion for Sanctions and moves the Commission for a protective order, as follows:

**BACKGROUND**

A history in this case is helpful, as Defendant's "brief summary of facts" is conspicuously incomplete and lacking important information.

Claimant dislocated her shoulder while working for Defendant Employer on October 9, 2016. Defendant's accepted the injury and have paid for extensive medical care, including a

**Michael T. Kessinger, Esq.** - ISBA No. 6719  
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PO Box 287  
Lewiston, Idaho 83501  
Telephone: (208) 743-2313  
Facsimile: (208) 743-8140  
Email: mtkessinger@gmail.com

Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

RECEIVED  
INDUSTRIAL COMMISSION  
2019 JAN 29 AM 11:48

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

I.C. No. 2016-027914

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DEFENDANT'S MOTION FOR SANCTIONS  
AND CLAIMANT'S MOTION FOR  
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shoulder surgery by Dr. Jelinek on November 16, 2016. See Exhibit 1 and 2 attached hereto. Following the surgery, Claimant continued to struggle with right shoulder problems. On June 30, 2017, Dr. Jelinek referred Claimant to Seattle for a second opinion. See Exhibit 3 attached hereto. On July 10, 2017, Dr. Jelinek personally reaffirmed his referral to Seattle with Defendant's nurse case manager over the phone. See Exhibit 4 attached hereto. On September 11, 2017, Dr. Jelinek again referred Claimant to Seattle for a second opinion. See Exhibit 5 attached hereto. Dr. Jelinek responded to an ICRD consultant that it was his "plan to schedule 2<sup>nd</sup> opinion UW." See Exhibit 6 attached hereto.

Instead of allowing Claimant to see a doctor at the University of Washington in Seattle for a second opinion, as requested by Dr. Jelinek, Defendant sent Claimant to an I.C. § 72-433 medical examination with Dr. Ludwig on September 7, 2017. Dr. Ludwig concluded that Claimant had reached maximal medical improvement and did not require any additional medical care as a result of the subject work injury. See Exhibit 7 attached hereto.

Defendant forwarded Dr. Ludwig's report to Dr. Jelinek. On September 18, 2017, Dr. Jelinek disagreed with Dr. Ludwig's report across the board. In addition, Dr. Jelinek wrote:

Miranda had preexisting shoulder instability she reinjured on 10/9/16. She underwent surgery by myself and was on track during the recovery process but then developed pseudosubluxation. MRI and EMG was normal. It should improve but has not fully resolved. She has not reached MMI or fully improved from the recent injury that was on the approved workers comp claim. I have requested a second opinion on the shoulder in Seattle.

See Exhibit 8 attached hereto. Instead of allowing Claimant to see a doctor in Seattle, Defendant sent a Notice of Claim Status on September 28, 2017, stating Claimant was MMI and did not need additional medical treatment. See Exhibit 9 attached hereto.

On or about October 9, 2017, Claimant retained the undersigned to represent her interests

with respect to the subject workers' compensation claim.

On December 12, 2017, Defendant sent a check box letter to Dr. Jelinek, inquiring about whether he would recommend a referral to doctors chosen by Defendant for a second opinion. Dr. Jelinek checked "Yes." See Exhibit 10 attached hereto.

On December 29, 2017, Defendant sent a letter informing Claimant it had scheduled another I.C. § 72-433 medical examination, this time with Dr. Lynch on February 5, 2018. See Exhibit 11 attached hereto. The undersigned sent a letter to Defendant explaining why Claimant would not be attending the examination. See Exhibit 12 attached hereto.

On January 10, 2018, Attorney Alan Gardner renewed the request that Claimant attend the scheduled examination. See Exhibit 13 attached hereto. The undersigned advised Mr. Gardner that Claimant would not be attending the examination based on the reasons previously set forth. See Exhibit 14 attached hereto.

On January 24, 2018, Defendant filed a Motion for Sanctions, to which this is a response.

### ARGUMENT

The provisions of Idaho Workers' Compensation Law are to be construed liberally in favor of the injured worker. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187 (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 (1996).

#### 1. Defendant cannot have it both ways.

Idaho Code § 72-433 governs employer mandated medical examinations in Idaho's workers' compensation system. I.C. § 72-433 states in relevant part:

(1) After an injury or contraction of an occupational disease and **during the period of disability** the employee, if requested by the employer or ordered by the

commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon... (emphasis added)

As set forth above, Defendant has issued a Notice of Claim Status stating that Claimant is MMI, taking Claimant out of her period of disability, and removing Claimant from the purview of a mandatory medical examination per I.C. § 73-433.

Defendant cannot both deny that Claimant is in her period of disability and, at the same time, require Claimant to attend an I.C. § 72-433 medical exam. Defendant terminated workers' compensation benefits based on Dr. Ludwig's I.C. § 72-433 examination in September 2017. Defendant issued a Notice of Claim Status indicating that Claimant is not in the period of disability. Therefore, Defendant has lost its ability to mandate an I.C. § 72-433 examination.

**2. Defendant failed to show good cause for an additional examination by Dr. Lynch.**

The Industrial Commission disapproves of repeat medical examinations without a showing of good cause:

The Commission does not condone the practice of repeated § 72-433(1) exams without a **showing of good cause**. Historically, where claimants in litigation have sought, by motion, to avoid an additional IME after one has occurred, referees have carefully considered that motion and the defendants' reasons for requesting another IME. Indeed, if a surety used the practice of requiring repeated IMEs as a means to unreasonably delay or deny benefits, Idaho Code § 72-804 sanctions would apply. (emphasis added)

Niebuhr v. Apex Construction, 2011 IIC 0066.16. The Niebuhr decision was authored by the Commission, thus setting forth direct guidance for referees, workers' compensation practitioners, and adjusters.

Idaho Code § 72-433 limits an employer to examination by "a" duly qualified physician. The statute envisions a single I.C. § 72-433 medical examiner. Contrary to Defendant's claim, they do not have a statutory right to demand repeat IMEs. See Exhibit 15 attached hereto. I.C. §

72-433 does not give Defendant carte blanche to force Claimant to attend mandatory medical examinations whenever and with whomever it sees fit. Unless the Defendant articulates, and the Commission agrees, that good cause exists for an additional Defendant-mandated examination, then Claimant is not required to attend.

The Commission has unequivocally placed the burden of showing good cause for a repeat I.C. § 72-433 exam on the Defendant. Defendant, however, has failed to set forth good cause for a second medical examination. Defendant's stated reason is that "Claimant would recognize the benefit of the second pair of eyes desired by Dr. Jelinek." If Defendant wanted to benefit Claimant, it could have approved Dr. Jelinek's five referrals to Seattle at any time during the last seven months. Instead Defendant disregarded Dr. Jelinek's referrals.

Based on timing, one can only assume that Defendant was concerned by Dr. Jelinek's disagreement with Dr. Ludwig's opinions. A treating surgeon's opinion, that is consistent with his opinions held prior to Defendant's first I.C. § 72-433 examination, does not constitute good cause for a repeat I.C. § 72-433 examination.

Dr. Jelinek is a shoulder expert. He has referred Claimant to a shoulder expert in Seattle no fewer than five times. The fact that Defendant prefers Dr. Lynch as a "shoulder expert" does not constitute good cause for a second I.C. § 72-433 exam. If Defendant wanted Claimant to see a shoulder expert, it could have allowed Claimant to see a Seattle doctor per Dr. Jelinek's repeated referrals. Alternatively, Defendant could have sent Claimant to Dr. Lynch instead of Dr. Ludwig. Defendant chose Dr. Ludwig as its I.C. § 72-433 examiner in September 2017.

Neither I.C. § 72-433 nor the Commission allow Defendant repeat medical examinations without good cause. Dr. Jelinek's disagreement with Defendant's chosen examiner does not

change the fact that Dr. Ludwig is Defendant's duly qualified physician per I.C. § 72-433.

Defendant has failed to meet its burden of showing good cause for a repeat I.C. § 72-433 exam.

**3. Defendant failed to follow the proper procedure for mandating an I.C. § 72-433 medical examination.**

The Supreme Court has established that Claimant is not under a legal obligation to petition the Commission for relief from an I.C. § 72-433 examination. Kelly v. Blue Ribbon Linen Supply, Inc., 159 Idaho 324, 36 P.3d 333, 337 (2015). The Commission has set forth the proper procedure for mandating an I.C. § 72-433 medical examination after the Claimant objects to the examination:

In a situation such as the present case, when Claimant objects to the IME demand, it is up to the Defendants to move for an additional IME, and support the motion with a showing of good cause. (Of course, nothing precludes the Claimant from moving for a protective order in such situations.) Where there is a reasonable explanation for the need for another IME, the Commission may allow such. But absent such a showing, such as in the present case, Defendants can not require the IME.

See, Exhibit 15, attached hereto.

Prior to filing a Motion for Sanctions, Defendant must move for an additional I.C. § 72-433 medical examination. Due to its contents, Claimant has treated Defendant's motion as a motion for an additional IME. Defendant's Motion, however, is procedurally improper for sanctions and lacks a showing of good cause for a second I.C. § 72-433 medical exam. Therefore, Defendant's Motion should be denied.

**4. Claimant reasonably contested Defendant's demand for an additional I.C. § 72-433 exam with Dr. Lynch.**

I.C. § 72-434 contemplates a discontinuation of benefits, when an employee

“unreasonably fails” to submit to an examination. As set forth above, the undersigned informed Defendant almost immediately that Claimant would not be attending its scheduled examination.

Claimant is not obligated to attend the examination, as Defendant has concluded that Claimant is no longer in her period of disability, Defendant already chose Dr. Ludwig as its medical examiner, Defendant has failed to set forth “good cause,” and Defendant failed to follow the proper procedure for an additional I.C. § 72-433 examination

Claimant’s reliance on the Idaho Code, the Supreme Court of the State of Idaho, and the Industrial Commission is not a sanctionable offense. Claimant reasonably refused to attend the scheduled examination.

**5. Defendant cannot substitute its favored medical examiner for the doctor to whom the treating surgeon has referred Claimant.**

Idaho Code § 72-432 requires Defendant to provide Claimant with “such reasonable medical, surgical, or other attendance or treatment... as may be reasonably required by the employee’s physician...” The Supreme Court has ruled that “an employer must pay for the costs of reasonable medical treatment required by the physician, period.” Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015).

Defendant has not provided any evidence that Dr. Jelinek’s referral is unreasonable. In fact, Defendant now seeks to obtain a second I.C. § 72-433 exam because the “The treating physician wished a second pair of eyes presumably from a shoulder specialist.” Defendant’s unreasonable and ongoing refusal to allow Claimant to go to Seattle cannot be rectified with an I.C. § 72-433 examination at the hands of Defendant’s favored medical examiner.

**6. Defendant cannot file a reply to Claimant’s Response.**

As set forth above, Defendant has the burden of establishing that “good cause” exists for

a repeat I.C. § 72-433 medical examination. Per the J.R.P., Defendant was required to set forth good cause in its motion. Defendant, however, appears to anticipate filing a reply to Claimant's Response: "Defendants do anticipate a response from Claimant's attorney. The authorities which Defendants expect Claimant to cite will be dealt with and distinguished as they are presented." Defendant Motion for Sanctions, p. 2.

J.R.P. Rule 3(F) allows for a motion and a response. Neither the Rule nor the Commission generally allow for the moving party to file a reply:

Therefore, the Judicial Rules of Practice and Procedure unambiguously anticipate that in general motion practice, the Referee or Commission may issue an order after a response is filed... The Commission notes that most general motions do not warrant the additional time delay of a reply brief, and the general practice is to facilitate prompt resolution of the matter. **Parties should be attentive in motion and response drafting to include all relevant arguments prior to filing...**

Becerra v. Liberty, 2013 IIC 0031.2-3 (emphasis added).

Certainly, where Defendant bears the burden of proof and Defendant is the moving party, Defendant cannot file a motion with the "expectation" that it will be able to deal with and extinguish Claimant's arguments as they are presented. Any attempt by Defendant to file a reply to Claimant's response should be disallowed.

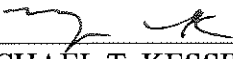
### CONCLUSION

Defendant's motion is both factually and legally insufficient. Defendant failed to meet its burden for a repeat I.C. § 72-433 examination. Defendant's Motion for Sanctions is inconsistent with Idaho Law, inconsistent with Industrial Commission procedure, and fails to set forth good cause for a second I.C. § 72-433 medical examination, let alone sanctions. Claimant has been forced to respond to Defendant's improper motion and has been forced to wait over seven months for a second opinion that Defendant now seems to concede constitutes reasonable

medical care required by Claimant's treating physician. The Commission in Niebhur held: "if a surety used the practice of requiring repeated IMEs as a means to unreasonably delay or deny benefits, Idaho Code § 72-804 sanctions would apply."

Wherefore, Claimant requests that Defendant's motion be denied, that the Commission issue a protective order from Defendant's scheduled I.C. § 72-433 examination, and that the Commission consider sanctions against Defendant pursuant to J.R.P. Rule 16 and I.C. § 72-804.

DATED this 26<sup>th</sup> day of January 2018.

  
\_\_\_\_\_  
MICHAEL T. KESSINGER  
Attorney for the Claimant

#### CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of January, 2018, a true and correct copy of the foregoing document was served upon the following individual by regular US mail:

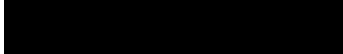
Alan R. Gardner  
GARDNER LAW OFFICE  
Post Office Box 2528  
Boise, Idaho 83701

U.S. Mail  
 Hand Delivery  
 Federal Express  
 Via Facsimile



**NOTICE OF CLAIM STATUS**

MIRANDA MOSER  
3416 13TH ST  
LEWISTON ID 83501



D/Injury: 10/09/2016  
Employer: ROSAUERS SUPERMARKETS INC

Insurance Company: Self-Insured Employer

**This is to notify you of a DENIAL or CHANGE of STATUS of your worker's compensation claim as indicated in the statement checked below:**

Other.

Effective Date:

Please be advised the above referenced workers' compensation has been accepted.

Your first payment of workers' compensation time loss benefits has been issued. The first payment check in the amount of \$499.18 covers the period from 10-17-16 through 10-30-16 while you were unable to work because of your injury. Your weekly compensation rate is based on wage information we obtained from your employer that establishes your pre-injury Average Weekly Wage to be \$277.32. Your weekly compensation rate of payment for temporary total disability (time loss) benefits is \$249.59.

Payment of the temporary total disability is made for every day of the seven-day week while you are unable to work because of your injury. No compensation will be paid to you for the first five (5) days of disability because there is a waiting period. The waiting period will be waived if either you are hospitalized overnight or are disabled for more than fourteen (14) days. Time loss checks are issued every fourteen (14) days during your period of disability. It is your responsibility to advise us when you are released to return to work, whether it be light duty or full duty.

We will also pay for medical treatment which is determined to be related to your work accident or occupational disease. Any medical treatment or referral to a medical provider which is not recommended by authorized physician may not be covered. Therefore, we require that you contact your adjuster for approval before changing physicians. Please forward any related medical bills you receive to our office.

If you have any questions regarding your claim please call our office. You are also entitled to call the Idaho Industrial Commission at (208) 334-6000 concerning your benefits or rights under the Workers' Compensation Law.

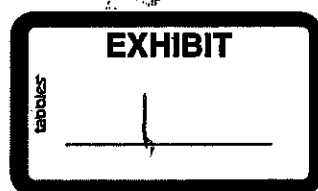
FILED

NOV 22 2016

Industrial Commission

2016 OCT 29 AM 10:29  
INTERMOUNTAIN CLAIMS, INC.  
RECEIVED  
INDUSTRIAL COMMISSION

OCT 26 AM 9:40



**Lewis & Clark Outpatient Surgery  
318 Warner Drive  
Lewiston, Idaho 83501**

**OPERATIVE REPORT**

**DATE OF PROCEDURE: November 16, 2016**

**PATIENT NAME: MIRANDA MOSER**  
[REDACTED]

**PREOPERATIVE DIAGNOSIS: Right shoulder instability, recurrent, with capsular laxity**  
**POSTOPERATIVE DIAGNOSIS: Right shoulder instability, recurrent, with capsular laxity**

**PROCEDURE PERFORMED:**

1. Right shoulder open Laterjet/coracoid process transfer
2. Right shoulder open capsulorrhaphy, anteriorly

**SURGEON: J. Adam Jelinek, MD**  
**ASSISTANT: Michael R. Nieraeth, PA-C**  
**ANESTHESIA: General**  
**ANESTHETIST: Karl Spens, CRNA**

**SPECIMENS: None**  
**COMPLICATIONS: None**  
**DRAINS: None**  
**DISPOSITION: To PACU in stable condition**

**FINDINGS:**

1. A moderate to severe amount of capsular laxity
2. Old healed bony Bankart lesion of the anterior inferior glenoid with minimal depression
3. Range of motion 170 degrees of forward elevation, external rotation of 40 degrees, internal rotation of T10
4. Grade 3+ anterior drawer, grade 1 1/2+ posterior drawer, grade 1+ sulcus sign which corrects to external rotation

**IMPLANTS:**

1. Arthrex 2.4 BioComposite SutureTak x 2, double-loaded
2. Arthrex 4 x 32 mm partially-threaded cannulated screw x 2

**INDICATIONS:** Miranda is a [REDACTED] female. She has had multiple surgeries on her right shoulder for recurrent instability. She fell recently and has had worsening and recurrent instability since her previous surgery. We talked about different options and at this point, we felt that surgical intervention would be the best option. She wished to proceed. The risks and benefits were discussed with the patient in detail including, but not limited to, the risks of anesthesia, problems with the heart or lungs related to anesthesia, infection, compromise or injury to the nerves and blood vessels, deep venous thrombosis, pulmonary embolism, pneumonia, continued pain after surgery, worsening pain or symptoms after surgery, swelling, loss of motion, need for repeat surgery, hardware failure, re-tear or failure of repair site, malunion, nonunion, and hardware pain requiring future removal.

**EXHIBIT**

tabbles

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28

**DESCRIPTION OF PROCEDURE:** The patient was seen preoperatively. The correct side and site were identified and all questions were answered. The patient was then transferred to the operating room and given 1 g Ancef and general anesthesia was administered without complication. She was placed in the modified beach chair position. All prominences were well padded. She was prepped and draped in the usual sterile fashion from the fingers up to the neck.

A standard anterior based incision was created from the coracoid to the axillary crease. The incision was carried down through the skin and subcutaneous tissue. A mobile window was created medially and laterally. We dissected down through the deltopectoral interval, protecting the cephalic vein. We placed retractors and then split the coracobrachialis fascia and isolated the coracoid and conjoined tendon. We split along the medial border of the coracoacromial ligament, isolating the coracoid. We then split the pectoralis minor off of the medial aspect of the coracoid. We subperiosteally dissected off the base of the coracoid, staying right along bone. Then, we placed retractors superiorly, medial, laterally, and inferiorly of the coracoid. We then used a saw to cut the coracoid about 2 cm from its tip right into the base. We then removed bone along the medial margin. Then, we placed a 6 mm offset. We placed the guide over the top and placed two 4 mm drill holes through the coracoid. This was placed medially for later use. We then split the superior half of the subscapularis from the interval distally in an L-shaped fashion medially, but protecting the underlying capsule. The subscapularis was tagged and elevated in a 360 degree fashion. We then split the capsule in an inverted L-shaped fashion and tagged it for later repair. We dissected down to the glenoid. We used a Bankart retractor for the humeral head, and a secondary retractor along the anterior margin of the glenoid. We dissected down to the anterior-inferior margin for visualization. There was a previous bony Bankart, which was slightly depressed. There was a spur off the anterior-inferior glenoid. This was burred down with a 4 mm bur. We then thoroughly irrigated. We brought the bone plug with the 6 mm offset to the anterior-inferior margin of the glenoid. We then placed two guide pins, measured this, over-drilled, and then placed two 4 x 32 mm partially-threaded screws, securing the coracoid process to the anterior-inferior margin of the glenoid. We then took the shoulder through a range of motion. There was good stability. It was in line with the glenoid face and in good alignment overall. We placed two 2.4 mm BioComposite SutureTaks, one along the anterior-inferior margin at about 6:30, and the other at about 3:00. We then performed a capsulorrhaphy bringing the capsule, anterior and medial, shifting it about 1.5 cm. We tied these down in a horizontal mattress sutures. We then again took the shoulder through a range of motion. There was excellent stability. We again thoroughly irrigated. We repaired the subscapularis with #2 FiberWire. We took the shoulder through a range of motion and it was stable and had adequate motion. We again thoroughly irrigated. We closed the deltopectoral interval with 2-0 Vicryl. The skin was closed with 2-0 Vicryl and 4-0 Monocryl, followed by Mastisol and Steri-Strips. She was dressed with Xeroform, 4 x 4, ABD, and Medipore tape. She was placed into a Top Shelf Ultra Sling.

She was then extubated, transferred to a stretcher, and taken to the PACU in stable condition.

DD: 11/16/2016 DT: 11/16/2016  
sk/50735896

**PATIENT NAME: MIRANDA MOSER**  
**DOS: 11/16/2016**



320 Warner Drive  
 Lewiston, ID 83501  
 TEL: (208) 743-3523  
 FAX: (208) 746-8741

**LEWISTON**  
**ORTHOPAEDICS**

## Visit Note

Date of Exam: 6/30/2017  
 Patient Name: Miranda Moser

Past History:  
 See Chart for Past History

### History of Present Illness:

Shoulder: Miranda presents for follow-up 7-1/2 months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly done on 11/16/16. She continues to complain of pain and instability. She has been off work because of the pseudosubluxation and is supposed to be attending physical therapy. Her therapist states he has seen her only a handful of times since she was last in and that she cancelled all of her appointments this week.

### Exam:

Right shoulder: Anterior-based incision is healed nicely with no erythema or drainage. With active range of motion, shoulder flexion to 100° she does have moderate scapular winging and his laboring for this motion. She does have slight translation with anterior drawer but there is a solid endpoint. When raising the arm from a neutral to an elevated position there is a clunk noted in the shoulder. She has a positive sulcus sign on the right versus the left. Her shoulder is sitting in a pseudosubluxed position and there is no activation of the rotator cuff. There is improvement with her extension of her fingers and wrist; however, she continues to have weakness with this. Sensation intact to light touch in the axillary, radial, musculocutaneous, median, and ulnar distributions. 2+ radial pulse with capillary refill less than 2 seconds.

### Impression:

RIGHT Encounter for other specified surgical aftercare

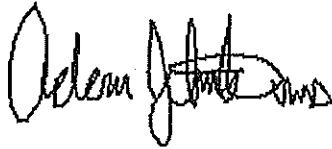
### Plan:

Shoulder: Assessment:

1. Seven-and-a-half months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly with pseudosubluxation that has not resolved over the past six weeks.
2. Normal MRI and EMG right shoulder.

Plan: At this point she still is struggling with the pseudosubluxation. She has not resolved and I am still hopeful that it will resolve over time which it typically does. However, I would like her to go to Seattle for a second opinion on her shoulder. I feel it would be important to get a

second set of eyes on the shoulder and see if there is anything further that may need to be done. She is comfortable with that. I told her she must go to physical therapy as it is very important in her recovery. I will have her follow up in 4-6 weeks.



Adam Jelinek, M.D.  
Electronically signed on 6/30/2017 4:57:42 PM  
6/30/17

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Lewiston, ID 83501  
TEL: (208) 743-3523  
FAX: (208) 746-8741

**LEWISTON**  
**ORTHOPAEDICS**

**Date of Exam:** 7/10/2017

**Provider:** Adam Jelinek, M.D.

**Patient Name:** Miranda Moser

██████████ ██████████

**Phone Consult:**

I spoke with Linda on the phone, Miranda's nurse case manager, regarding her shoulder. We talked for about 10 minutes. We talked about different options for her as well as my recommendation for a referral to Seattle. She asked if we could give this another month in therapy and I think it is reasonable as long as Miranda actually goes to therapy and does her exercises. If that is the case, we will give it one month and if there is still no improvement we will have her go to Seattle for a second opinion. She is comfortable with this plan. We did talk about Miranda's work status in that she quit her job.

Adam Jelinek, M.D.  
Electronically signed on 8/1/2017 11:34:21 AM  
8/1/17

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**CATALYST** Medical Group  
 320 Water Drive | Lewiston, ID 83501  
 (208) 743-3521 | (800) 431-3521 | Fax (208) 743-0741  
 www.lewistonortho.com  
**LEWISTON ORTHOPAEDICS**  
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*Dr. John J. Gorman, M.D. | Steven R. Payne, M.D. | Gregory D. Dietrich, M.D. | Timothy J. Fisher, M.D. | Brian D. Hovance, M.D. | J. Adam Wilbur, M.D.  
 Candice M. Klemke, PA-C | Thomas S. Moroni, PA-C | Greg R. Gray, PA-C | Brent A. Paulson, PA-C | Kristen J. Huggan, PA-C*

**Visit Note**

Date of Exam: 9/11/2017  
Patient Name: Miranda Moser

Past History:  
See Chart for Past History

Chief Complaint:  
Shoulder: Follow-up right shoulder surgery

History of Present Illness:  
Shoulder: Miranda presents for follow-up ten months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly done on 11/16/16. She is attending physical therapy with Kelly at S.P.O.R.T. Physical Therapy. She had her IME last Thursday. She continues to complain of pain and instability. She had about a week-and-a-half with the shoulder back in its normal position but since then it has gone on to a subluxed position again. She doesn't feel that she is any better. She states she was using an exercise bike and felt like her left shoulder subluxed.

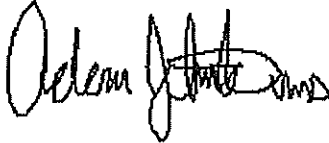
Exam:  
Right shoulder: Anterior-based incision is healed nicely with no erythema or drainage. With active range of motion, shoulder flexion to 100° she does have moderate scapular winging and is laboring for this motion. She does have slight translation with anterior drawer but there is a solid endpoint. When raising the arm from a neutral to an elevated position there is a clunk noted in the shoulder. She has a positive sulcus sign on the right versus the left. Her shoulder is sitting in a pseudosubluxed position and there is no activation of the rotator cuff. There is improvement with her extension of her fingers and wrist; however, she continues to have weakness with this. Sensation intact to light touch in the axillary, radial, musculocutaneous, median, and ulnar distributions. 2+ radial pulse with capillary refill less than 2 seconds.

Impression:  
RIGHT Encounter for other specified surgical aftercare

Plan:  
Shoulder: Assessment:  
1. Ten months status post right shoulder open Latarjet/coracoid process transfer and open capsulorrhaphy anteriorly with pseudosubluxation which was improved previously but is subluxed again at this point.  
2. Normal MRI and EMG right shoulder.



Plan: At this point she still is struggling with the pseudosubluxation. This has not resolved and I am still hopeful that it will resolve over time which it typically does. However, I would like her to go to Seattle for a second opinion on her shoulder. I feel it would be important to get a second set of eyes on the shoulder and see if there is anything further that may need to be done. She is comfortable with that. I told her she must go to physical therapy as it is very important in her recovery. She recently had an IME and so I will wait for the report to review. I will have her follow up in 4-6 weeks.



Adam Jelinek, M.D.  
Electronically signed on 9/13/2017 7:47:00 AM  
9/13/17

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9/11/17  
11:50  
JAT



### IDAHO INDUSTRIAL COMMISSION

Rehabilitation Division  
1118 "F" Street  
Lewiston, ID 83501  
(208) 799-5035 - FAX (208) 799-3482

COMMISSIONERS  
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G.L. "BUTCH" OTTER, GOVERNOR

Mindy Montgomery, Director

September 11, 2017

Adam J. Jelinek, MD  
320 Warner Dr  
Lewiston, ID 83501

RE: Miranda Moser [REDACTED]  
Date of appointment: September 11<sup>th</sup>, 2017  
VIA FAX (208) 748-8741

Dear Dr. Jelinek:

Please review the time-of-injury Job Site Evaluation form included and respond:

• Return to Work Status:

- The worker may return to the Time-of-Injury duties on \_\_\_\_\_.
- OR  - The worker may return to Modified duties on \_\_\_\_\_ adhering to the following:

*(If activity is restricted, check maximum ability)*

	Never	Rarely (less than 1%)	Occasionally (1% to 33%)	Frequently (34% to 66%)	Continuous (67% to 100%)
Lifting (Add weight #) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Push/Pull (Add weight #) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Grasping/Handling _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Climbing _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reaching Above Shoulder _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reaching Below Shoulder _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Repetitive Hand/Arm Activity _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

OR  - The worker may not return to work at this time.

Anticipated return to work date: ? plan schedule 2<sup>nd</sup> opinion uel

- Additional restrictions/ medical recommendations: \_\_\_\_\_
- Hours per day worked are restricted to: \_\_\_\_\_ Hours OR  - Are not restricted
- Restrictions listed are:  - Temporary  - Permanent

\_\_\_\_\_  
Physician Signature

9/11/17  
\_\_\_\_\_  
Date

Please sign and return this form by fax. If you have any questions, please call.

Sincerely,

*Wade Beeler*  
Wade Beeler, Consultant

(USE)

**EXHIBIT**

6

35



**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser

██████████ ██████████

**Sex:** F

**Provider:** Michael Ludwig, MD

**Visit:** 09/07/2017 10:00AM

**Chart:** MOMI000010

**Chief Complaint:** IME: right shoulder pain

**History of Present Illness:**

Consult requested by: Intermountain Claims  
Claims Adjuster: Courtney Butler  
Claim #: BOI16-22294  
Date of Injury: 10/09/16  
Employer: Rosauers Supermarkets Inc.

The claimant is here today to undergo interview and examination. They are instructed to not exceed their physical capacities during the examination. They understand that today's evaluation does not constitute a "doctor-patient relationship". The opinion formed will be provided to the requesting party and will be available at the discretion of that said requesting party.

**Claimant's description of injury:**

Miranda R. Moser is a ██████████ right-hand dominant female with a past medical history significant for multiple dislocations of her bilateral shoulders. She is being seen for a reported work injury of October 9, 2016.

She was working as a cashier at a grocery store, and as she lifted a 24 pack of soda, she felt her shoulder "dropped" with acute onset of pain localized over the lateral aspect. She states that felt like her shoulder was "out." Initial attempts to reduce the dislocation was unsuccessful.

She underwent evaluation at St. Joseph's emergency room where she underwent radiographs confirming a dislocation of the right shoulder. She was given sedatives to reduce the dislocation and was referred for orthopedic consultation.

She underwent evaluation with Dr. Jelinek who she has seen in the past for her shoulder. She was recommended to undergo a stabilization surgery which was eventually performed on November 16, 2016 due to an ongoing instability of the shoulder. She was referred to postoperative physical therapy, and states that she has had some symptoms related to pain and limited motion ever since the surgery. She also describes episodic paresthasias when she feels like her shoulder is "out."

Currently she denies that she is taking any medications for this condition. She is no longer working at her job of





**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser [REDACTED] **Sex:** F  
**Provider:** Michael Ludwig, MD **Visit:** 09/07/2017 10:00AM **Chart:** MOMI000010

Injury and states she is currently not employed. She was initially released back to a light duty capacity but then quit her position in May of 2017.

Prior to the event of 11/9/16, she claims she was "fine the last few years" without treatment or limitations.

**Med / Fam / Social History:**

PAST MEDICAL HISTORY: anemia.

The patient denies any history of prior spine problems.

The patient denies any treatment from mental health providers.

SURGICAL HISTORY: Multiple bilateral shoulder surgeries. Right shoulder arthroscopy with labral repair and capsulorrhaphy and posterior plication 3/19/12. Right shoulder Laterjet/corocoid process transfer and anterior capsulorrhaphy 11/16/16. Left shoulder anterior and posterior capsulorrhaphy 8/27/13.

**FAMILY HISTORY:**

Father's medical history is notable for being healthy.

Mother's medical history is notable for arthritis.

Siblings' medical history is notable for being healthy.

Grandparents medical history is notable for DM, CAD, cancer, arthritis.

**SOCIAL HISTORY:**

Tobacco use: None

Alcohol use: Rarely

Drug abuse history: None

Marital Status: Married

Occupation: Currently not employed. Last worked for Rosauer's in a light duty capacity May of 2017

2017 SEP 14 AM 10:38  
 MOISE  
 SHIRLEY CLARK, INC.

**Medications & Allergies:**

Current Medication & Dosage	SIG	PRN?	Indication
No Known Medications (N/A)	0	No	

Allergy	Reaction
naproxen	rash



**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser

[REDACTED]  
**Visit:** 09/07/2017 10:00AM

**Sex:** F

**Provider:** Michael Ludwig, MD

**Chart:** MOMI000010

**Review of Systems:**

- Constitutional: no fever, no chills, no unintentional weight loss.
- SKIN: no rashes, no skin infections, no pruritus.
- EYES: no cataracts, no glaucoma, no diplopia, no loss of vision.
- ENT: no ear infections, no mouth sores, no sore throat, no nasal congestion.
- Cardiovascular: no chest pain or discomfort, no edema, no irregular rhythms.
- Respiratory: no shortness of breath, no cough, no wheezing.
- GI: negative with the exception of nausea.
- GU: no hematuria, no dysuria, no difficulty voiding.
- Neurologic: negative with the exception of dizziness, tinnitus.
- MSK: negative with the exception of muscle pain, joint pain.
- Psychiatric: No depression, anxiety, or hallucinations.
- H/L/E: negative with the exception of anemia.

**Physical Exam:**

General: Alert and oriented x 3, in no acute distress, normal level of consciousness, good personal hygiene. Appears at stated age.

Gait: Normal heel and toe reciprocal pattern without footdrop or significant antalgia.

Cervical spine: cervical ROM is grossly full to AROM

Neurologic upper limb: Intact and symmetric biceps and triceps reflexes. Negative Hoffman's. No clonus. No weakness to resisted testing. Light touch and pinprick acuity are preserved.

Elbow and hand: Elbow ROM is full without effusion. Wrist flexion and extension range of motion are full, and radial and ulnar deviation are also full without complaints of pain. No evidence of ganglion is noted. Pronation and supination is intact. Manipulation of the DRUJ is non tender. - Tinels and Phalens.

Shoulder: a sulcus sign is noted, with poor deltoid definition. Incisions are well healed, without dehiscence or drainage. No long head biceps deformity is noted.

AROM right shoulder:

RECEIVED  
 2017 SEP 14 AM 9:30  
 MICHAEL LUDWIG, MD  
 OCCUPATIONAL MEDICINE



**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser



**Sex:** F

**Provider:** Michael Ludwig, MD

**Visit:** 09/07/2017 10:00AM

**Chart:** MOMI000010

Flexion: 110'  
Extension: 40'  
Abduction: 90'  
Adduction: 50'  
External rotation: 60'  
Internal rotation: 40'

**Assessment:**

**Radiographic Review:**

10/17/11 X-ray report of left shoulder showing normal findings  
07/24/13 X-ray report of left shoulder showing anterior shoulder subluxation  
08/13/13 MRI report of left shoulder appear normal  
09/23/14 MRI report of left shoulder finding no AC separation. No outlet narrowing. Tendon of the rotator cuff are intact. Mild peritendinoburstis. Small pseudocysts within the posterior aspect of the greater tuberosity. No acute Hill-Sachs injury.  
09/26/14 MRI report of right shoulder  
10/07/14 X-ray report of lumbar spine showing no abnormalities  
09/05/15 X-ray report of right shoulder finding the glenohumeral joint appears to be anteriorly dislocated  
10/10/15 X-ray report of right shoulder  
11/25/15 X-ray report of right shoulder showing dislocation reduced  
10/09/16 X-ray report of right shoulder  
05/11/17 MRI report of right shoulder  
No traumatic rotator cuff tear.

**Medical Record Review:**

First report of injury prepared on 10/09/16

Lewis and Clark Orthopedic  
08/20/14 Office visit recommending MRI

Valley Medical Center  
06/19/13 Office visit recommending follow-up with Dr. Jelinek

INTERMOUNTAIN CLAIMS, INC.  
2017 SEP 14 AM 9:38  
BOISE



**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser

[REDACTED]

**Sex:** F

**Provider:** Michael Ludwig, MD

**Visit:** 09/07/2017 10:00AM

**Chart:** MOMI000010

08/07/13 Office visit recommending rotating pain medications instead of overlapping  
 08/29/14 Office visit recommending use of Tylenol instead of additional prescription for Vicodin  
 09/05/14 Office visit recommending pain medication  
 09/05/15 Emergency room visit recommending wear shoulder immobilizer and follow-up with Orthopedics  
 09/08/15 Emergency room visit recommending wear shoulder immobilizer and follow-up with Orthopedics  
 09/11/15 Emergency room visit recommending medications and follow-up with Orthopedics

St. Joseph Regional Medical Center

08/27/13 Operative report prepared by Dr. John Jelinek  
 10/10/15 Emergency room visit recommending shoulder immobilizer and follow-up with Dr. Jelinek  
 10/10/16 Emergency room visit recommending shoulder immobilizer and follow-up with Dr. Jelinek

Lewiston Orthopedics

03/07/12 Office visit recommending EMG  
 03/10/12 Phon call recommending surgical intervention  
 03/30/12 Office visit recommending physical therapy  
 07/22/13 Office visit recommending MRI  
 08/19/13 Office visit recommending surgical intervention  
 08/30/13 Office visit recommending Codman exercises  
 09/09/13 Office visit recommending physical therapy  
 10/09/13 Office visit recommending physical therapy  
 09/21/15 Office visit recommending MRI  
 09/23/15 Operative report prepared by Michael Nieraeth, PA-C  
 10/05/15 Office visit recommending surgical intervention  
 10/07/15 Office visit recommending surgical intervention  
 10/17/15 Office visit recommending surgical intervention  
 10/17/16 Office visit recommending surgical intervention  
 11/28/16 Office visit recommending physical therapy  
 12/27/16 Office visit recommending EMG testing  
 01/25/17 Office visit recommending EMG testing and physical therapy  
 03/08/17 Office visit recommending physical therapy  
 05/08/17 Office visit recommending MRI

INTERMOUNTAIN CLAIMS, INC  
 2017 SEP 14 AM 09 30  
 BOISE



**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser

[REDACTED]

**Sex:** F

**Provider:** Michael Ludwig, MD

**Visit:** 09/07/2017 10:00AM

**Chart:** MOMI000010

- 05/26/17 Office visit recommending physical therapy
- 06/07/17 Office visit recommending physical therapy
- 06/14/17 Office visit recommending tape instead of brace to hold shoulder and 4 hour work days
- 06/30/17 Office visit recommending second opinion in Seattle and continue with physical therapy
- 07/10/17 Phone consult recommending physical therapy
- 07/28/17 Office visit recommending physical therapy

**Lewis and Clark Outpatient Surgery**

- 03/19/12 Operative report prepared by Dr. J. Adam Jelinek
- 11/16/16 Operative report prepared by Dr. J. Adam Jelinek

**S.P.O.R.T. Physical Therapy**

- 12/16/16 Evaluation and treatment through 08/30/17

**Diagnosis:**

1. Recurrent right shoulder dislocations and instability, despite prior capsulorrhaphy and posterior capsule plication surgery 3/19/12. Instability persisted including a dislocation 10/10/15 with recommendations for laterjet/ corocoid process transfer surgery on examination of 10/5/15. Patient deferred surgery at that time, and was treated under this Industrial claim for natural progression of the pre-existing instability.
2. Left shoulder instability with recurrent dislocation history s/p anterior and posterior capsulorrhaphy 2013.

**Plan:**

1. Based on your review of the prior medical records as well as those records following the 10-9-16 incident at Rosauers, are you able to state with reasonable medical probability, i.e. on a medically more probable than not basis that Ms. Moser experienced a change in diagnoses pathology as a result of the 10-9-16 work place incident consistent with an injury, i.e. physical injury as defined above?

Based upon my medical review as well as her history, the presentation of recurrent dislocation would be expected given her pre-existing history had recurrent dislocations in the past. She was already diagnosed with shoulder recurrent instability and was recommended to have a more definitive surgical procedure performed following her dislocation in 2015, but she deferred this surgery. Her recollection that she was "fine for the last few years" is not supported by the medical record with imaging and surgical recommendations in 2015.

2. If yes, please describe the change in diagnostic pathology.

INTERVIEW IN CLAIMS, INC  
 2017 SEP 14 AM 11:38  
 STOP



**Idaho Occupational Medicine Group**

<b>Patient:</b> Miranda R. Moser	[REDACTED]	<b>Sex:</b> F
<b>Provider:</b> Michael Ludwig, MD	<b>Visit:</b> 09/07/2017 10:00AM	<b>Chart:</b> MOMI000010

Ms. Moser sustained another recurrent dislocation of the right shoulder while at work on 10/9/16. This is not unexpected given her prior diagnoses of instability and were likely to occur as part of the ongoing condition established prior to the event of 10/9/16.

3. Given the fact the surgery performed following the 10/09/16 industrial incident was the same surgery recommended 1 year prior to the industrial incident, are you able to state with reasonable medical probability, i.e. on a medically more probable than not basis the change in pathology described above explained the need for such surgery? Please explain.

A "change in pathology" has not been established. The recurrent dislocations were expected given her prior instability that was neglected to be corrected by deferring surgical stabilization. Despite surgery, recurrent instability often can persist and further dislocations are possible, but not due to the industrial event of 10/9/16 on a more likely than not basis.

4. At most, the industrial incident was an aggravation of her preexisting condition and our responsibility would be to return her to baseline or medical stability. Has Ms. Moser reached maximum medical improvement.

Ms. Moser has reached maximal medical improvement as of this examination 9/7/17.

5. If Ms. Moser has not reached maximum medical improvement is there any further treatment recommended related to the industrial incident on 10/09/16? If so, please specify type of treatment, frequency and duration.

Not applicable as she has reached maximal medical improvement.

6. If no further treatment is recommended and Ms. Moser has reached maximum medical improvement, is there any permanent partial disability by the "Guides to the Evaluation of Permanent Partial Impairment, 6th Edition?" Please specify and apportion the preexisting permanent partial disability?

Yes. Using the AMA Guides to the Evaluation of Permanent Impairment 6th edition, Chapter 15 for the upper extremity is utilized. Her presentation of significant motion loss leads to ROM method of calculation. Using table 15-34, flexion of 3%, extension of 1%, abduction of 3%, adduction of 0%, external rotation of 2% and internal rotation of 2% renders a ROM total impairment of 11% UEI.

INTEGRITY CLAIMS, INC.  
301 S. 4th St.  
PO Box 300  
Coeur d'Alene, ID 83814





**Idaho Occupational Medicine Group**

**Patient:** Miranda R. Moser

[REDACTED]

**Sex:** F

**Provider:** Michael Ludwig, MD

**Visit:** 09/07/2017 10:00AM

**Chart:** MOMI000010

Apportionment of this rating is attributed in its entirety to pre-existing documented recurrent dislocation and instability, with documented prior recommendation of surgical intervention. I consider her Industrial event as a natural progression of the well documented pre-existing condition. Future shoulder treatment would also be considered due to the natural history of the condition and not attributed on a more likely than not basis to any injury sustained on 10/9/16.

7. Is there any permanent physical restrictions associated with this condition? If so, please specify and discuss whether there is any change in those restrictions compared to her condition prior to the date of incident?

Physical restrictions are indicated for this condition, with over-shoulder height lifting limited to rare and not to exceed 5#. Lifting up to 20# maximal right shoulder. These restrictions are permanent and attributed to the ongoing condition of recurrent shoulder dislocations.

Please contact me with any further questions you may have.

Michael Ludwig M.D.

The above statements have been made within a reasonable degree of medical certainty and probability. The opinions rendered in this case are mine alone. Recommendations regarding treatment, work, and impairment ratings are given totally independently from the requesting agents. These opinions do not constitute per se a recommendation for specific claims or administrative functions to be made or enforced.

This evaluation is based upon the history given by the examinee, the objective medical findings noted during the examination, and information obtained from the review of prior medical records presented, with the assumption that this material is true and correct. If additional information is provided to me in the future, an additional service/report/reconsideration may be requested. Such information may or may not change the opinions rendered in this evaluation.

Medicine is both an art and a science, and although an examinee may appear to be fit to return to work, there is no guarantee that he/she will not be injured or sustain an additional new injury once he/she returns to work.

SEP 14 11 03 AM '17  
BOS  
ST. JOHNS, INC



PO Box 4367  
Boise, ID 83711  
Phone: (208) 323-7571  
Fax: (208) 375-8905

September 14, 2017

ADAM JELINEK MD  
320 WARNER DRIVE  
LEWISTON ID 83501

Re: Claimant: Miranda Moser  
Employer: Rosauers Inc.  
D/Injury: 10/09/2016  
Claim #: BO116-22294

Dear Dr. Jelinek:

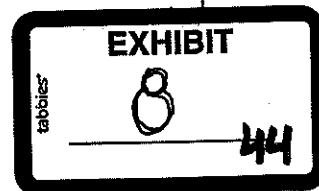
Our office is the third party administrator for Rosauers Inc's self-insured workers' compensation program. Ms. Moser is a patient of yours who allegedly sustained a right shoulder injury on October 9, 2016 while lifting a 24 pack of soda as a result of her duties as a cashier.

Ms. Moser underwent an independent medical examination with Dr. Michael Ludwig on 09/07/17. Dr. Ludwig's report is enclosed for your review. In order to proceed with this claim, we are asking that you please address the following questions based on your review of Dr. Ludwig's report.

- 1. Do you agree with Dr. Ludwig Ms. Moser's right shoulder dislocation and instability are due to a pre-existing condition, one that predated the industrial incident of 10/09/2016?  
 No  Yes
- 2. Do you agree with Dr. Ludwig Ms. Moser's right shoulder dislocation and instability are not related to the industrial incident of 10/09/2016?  
 No  Yes
- 3. Do you agree with Dr. Ludwig Ms. Moser has had no change in pathology and the recurrent dislocations are expected given her prior instability?  
 No  Yes
- 4. Do you agree with Dr. Ludwig that no further medical treatment is necessary related to the industrial incident of 10/09/2016?  
 No  Yes

www.intermountainclaims.com  
Workers Comp Locations: Boise, IDAHO • Portland, OREGON • Billings, MONTANA • Salt Lake City, UTAH • Spokane, WASHINGTON  
Property and Casualty Locations: Boise, Lewiston, Idaho Falls, Pocatello, Twin Falls, IDAHO • Portland, OREGON • Missoula, MONTANA • Salt Lake City, St. George, UTAH • Yakima, WASHINGTON

ICI BOISE RECEIVED: 2017-09-19\_08-57-34



5. Do you agree with Dr. Ludwig that Ms. Moser has reached maximum medical improvement?

No  Yes

6. Do you agree with Dr. Ludwig that Ms. Moser's impairment rating is attributed entirely to her pre-existing condition?

No  Yes

7. Do you agree with Dr. Ludwig that Ms. Moser's permanent physical restrictions are due to her pre-existing condition?

No  Yes

Remarks:

Miranda had pre-existing shoulder instability then injured on 10/9/16. She underwent surgery by myself and was on track during the recovery process but then developed pseudosubluxation. MRI and EMG were normal. It should be in progress ~~at present~~ but has not fully resolved. She has not reached max or fully improved from the recent injury that was per the approved workers comp claims. I have requested a second opinion on

Physician Signature:

*Chelapa*

Date:

9/18/17 the shoulder in Seattle

We thank you for your assistance and look forward to your response. Please contact me if you have any questions.

Sincerely,

INTERMOUNTAIN CLAIMS INC

Courtney Butler  
Claims Examiner  
P: (208) 323-7671 x 1214  
F: (208) 376-8906  
[cbutler@intermountainclaims.com](mailto:cbutler@intermountainclaims.com)

Enclosure

*Kinda Schietz, M.D.  
fax 509/924-5354*

[www.intermountainclaims.com](http://www.intermountainclaims.com)

Workers Comp Locations: Boise, IDAHO • Portland, OREGON • Billings, MONTANA • Salt Lake City, UTAH • Spokane, WASHINGTON  
Property and Casualty Locations: Boise, Lewiston, Idaho Falls, Pocatello, Twin Falls, IDAHO • Portland, OREGON • Missoula, MONTANA • Salt Lake City, St. George, UTAH • Yakima, WASHINGTON

**NOTICE OF CLAIM STATUS**

MIRANDA MOSER  
3416 13TH ST  
LEWISTON ID 83501

█ █  
D/Injury: 10/09/2016  
Employer: ROSAUERS SUPERMARKETS INC

Insurance Company: Self-insured Employer

**This is to notify you of a DENIAL or CHANGE of STATUS of your worker's compensation claim as indicated in the statement checked below:**

Other.

Effective Date:

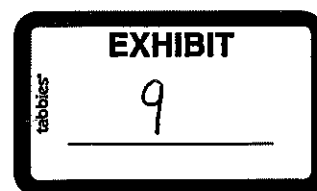
Dr. Ludwig has opined you are at maximum medical improvement without further medical treatment needed as of 9/7/17. He awarded you an 11% upper extremity permanent partial disability rating with 100% apportioned to your pre-existing condition and 0% related to your industrial incident.

See Attached Medical Report(s)

 09/28/2017  
Signature of Insurance Company Adjuster/Examiner

Courtney Butler  
Claims Examiner  
(208) 323-7571

cc: Idaho Industrial Commission





PO Box 4367  
Boise, ID 83711  
Phone: (208) 323-7571  
Fax: (208) 375-8905

December 12, 2017

ADAM JELINEK MD  
320 WARNER DRIVE  
LEWISTON ID 83501

Re: Claimant: Miranda Moser  
Employer: Rosauers Inc.  
D/Injury: 10/09/2016  
Claim #: BOI16-22294

Dear Dr. Jelinek:

Our office is the third party administrator for Rosauers Inc's self-insured workers' compensation program. Ms. Moser is a patient of yours who allegedly sustained a right shoulder injury on October 9, 2016 while lifting a 24 pack of soda as a result of her duties as a cashier.

- 1. Would you recommend a referral for Ms. Moser to see Dr. Joseph Lynch or Dr. Thomas Goodwin in Boise, Idaho for a second opinion?

No  Yes

If no, please explain:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Physician Signature:  Date: 12/13/17

We thank you for your assistance and look forward to your response. Please contact me if you have any questions.

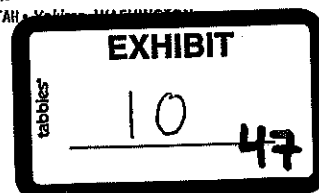
Sincerely,

INTERMOUNTAIN CLAIMS INC

Courtney Butler  
Claims Examiner  
P: (208) 323-7571 x 1214 F: (208) 375-8905

www.intermountainclaims.com

Workers Comp Locations: Boise, IDAHO • Portland, OREGON • Billings, Missoula, MONTANA • Salt Lake City, UTAH • Spokane, WASHINGTON  
Property and Casualty Locations: • Boise, Lewiston, Idaho Falls, Pocatello, Twin Falls, IDAHO • Portland, OREGON • Missoula, MONTANA • Salt Lake City, St. George, UTAH • Walla Walla, WASHINGTON





PO Box 4367  
Boise, ID 83711  
Phone: (208) 323-7571  
Fax: (208) 375-8905

December 29, 2017

MIRANDA MOSER  
C/O MICHAEL KESSINGER  
GOICOECHEA LAW OFFICES  
826 MAIN STREET  
LEWISTON ID 83501

Re:    Employer:            Rosauers Supermarkets Inc.  
      Employee:            Miranda Moser  
      D/Injury:            10/09/16  
      Surety:               Self-Insured Employer  
      Claim #:              BOI16-22294

Dear Miranda Moser C/O Michael Kessinger:

Please accept this letter as notice of an independent medical examination (IME) we have scheduled for you. The exam will take place February 5, 2018 @ 12:45 pm. Please arrive to the exam by 12:15 pm. The exam will be conducted at the office of Dr. Joseph Lynch at Institute of Physical Therapy, 678 Southway Avenue, Lewiston ID, 83501.

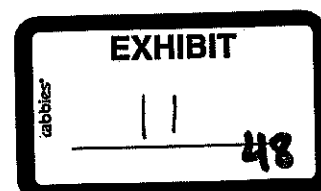
We have forwarded a complete copy of the medical records we hold in your file to Dr. Lynch in preparation for the exam.

It is important that you attend this exam as scheduled. If you are unable to attend the exam on the date listed above you must notify the undersigned immediately to avoid a late cancellation fee. If you have questions pertaining to the exam, please do not hesitate to contact the undersigned at 800-349-0373 x 1214.

Sincerely,

INTERMOUNTAIN CLAIMS, INC.

Courtney Butler  
Worker's Compensation Adjuster





# Goicoechea Law Offices

Lewiston – Moscow  
A Limited Liability Partnership

January 2, 2018

CRAIG M. YOUNG\*  
MICHAEL T. KESSINGER\*

JERRY J. GOICOECHEA  
*Of Counsel*

*Attorneys  
and  
Counselors  
At Law*

Main Office:  
826 Main Street  
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(208) 743-2313

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[MTKessinger@gmail.com](mailto:MTKessinger@gmail.com)

Tax ID#: 82-0485674

\*Licensed in  
Idaho  
&  
Washington

Intermountain Claims  
Attn: Courtney Butler  
Po Box 4367  
Boise, ID 83711

Via Facsimile (208) 375-8905

RE: Our Client : Miranda Moser  
Employer : Rosauers Supermarkets Inc.  
Claim No. : BOI16-22294  
Date of Loss : 10/09/2016

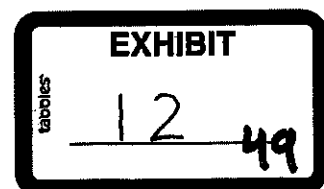
Dear Ms. Butler:

We are in receipt of your letter of December 29, 2017, regarding a medical evaluation scheduled for February 5, 2018. For the reasons set for the below, please be advised that Miranda will not be attending the scheduled evaluation.

## INTERMOUNTAIN HAS IMPEDED DR. JELINEK'S MEDICAL RECOMMENDATIONS

As you know, Dr. Jelinek referred Miranda to Seattle for a second opinion on June 30, 2017. He reiterated the referral, after consulting with your hired nurse case manager on July 10, 2017. Dr. Jelinek referred Miranda to Seattle again on September 11, 2017. Despite at least three explicit referrals to Seattle for a second opinion in June, July, and September, Intermountain refused to allow Miranda to schedule an appointment in Seattle.

Instead, Intermountain sent Miranda to an insurance medical evaluation on September 7, 2017, with Dr. Ludwig. Now, Intermountain has scheduled Miranda for a second insurance medical evaluation without



allowing Miranda to fulfill the referral of Dr. Jelinek at the University of Washington in Seattle.

### **INTERMOUNTAIN HAS NOT SET FORTH GOOD CAUSE FOR AN ADDITIONAL MEDICAL EVALUATION**

It is well-established that the Commission places the burden of establishing “good cause” on the surety prior to compelling injured workers to undergo repeat medical evaluations. Intermountain failed to set forth any good cause for the second insurance medical evaluation.

Intermountain is requesting a repeat IME less than four months after its prior IME. Since the last IME, we have not been made aware of any material changes in Miranda’s condition. If Intermountain is aware of a change in condition that would merit a second IME, please provide the additional information so that it can be considered.

### **INTERMOUNTAIN LACKS CONTEMPORANEOUS MEDICAL SUPPORT TO DENY DR. JELINEK’S REFFERAL TO SEATTLE**

Intermountain has yet to explain why the referral to Seattle has not been approved. The Commission has consistently held that sureties cannot properly refuse to abide by the recommendation of a treating physician absent a “contemporaneous medical predicate discrediting the recommended care.” Salinas v Bridge View Estates, 2016 IIC 0020 (2016); Baird v. J & R Timber Products, LLC, 2013 IIC 0005 (2013); Cooke v. Bonner Foods, Inc., 2013 IIC 0023 (2013). What is more, the Commission has established that a surety’s retroactive generation of medical support for a denial will not provide an affirmative defense or shield from an award of attorney fees. Cooke v. Bonner Foods, Inc., 2013 IIC 0023 (2013).

### **CLAIMANT INTENDS TO PURSUE TREATMENT IN SEATTLE AND ATTORNEY FEES**

Dr. Jelinek has referred Miranda to Seattle on numerous occasions. On July 10, 2017, Intermountain’s nurse case manager, and agent, altered Dr. Jelinek’s course of care with the agreement that Miranda would be allowed to go to Seattle if physical therapy failed to improve Miranda’s condition. Despite the failure to improve, Intermountain did not approve the referral to Seattle.





Intermountain refused to approve Dr. Jelinek's referral to Seattle without a reasonable ground. As such, Intermountain is responsible for Miranda's attorney fees in seeking the recommended care.

Please be advised we will be filing a complaint to obtain the recommended care, requesting an emergency hearing, and requesting attorney fees for an unreasonable denial of benefits.

Sincerely,  
Goicoechea Law Offices, LLP

Michael Kessinger  
Attorney at Law

# GARDNER LAW OFFICE

P.O. Box 2528 ♦ Boise, Idaho 83701 ♦ (208) 387-0881 ♦ FAX (208) 387-3501

---

January 10, 2018

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

Re: Insured: Rosauers Supermarkets, Inc.  
Claimant: Miranda Moser  
D/Injury: 10-09-16  
[REDACTED] [REDACTED]  
Claim: BOI16-22294  
IC No.: 2016-027914  
Our File: 2536-1070

Dear Mr. Kessinger

I have been assigned the defense of this matter following the complaint you filed on behalf of Miranda Moser before the Idaho Industrial Commission.

I have reviewed the file. We will be responding to your pleadings and, indeed, you may have received our answer by the time you receive this letter.

I reviewed your letter of January 2, 2018, with some concern. I note you have cited several cases in support of your position. You have represented that 72-432 and 72-433 have certain provisions.

You have made many assumptions as to the action proposed by the employer. The cases you note have no applicability to the current circumstances. Indeed, the Salinas case was our case which went on to the Supreme Court, so I am familiar with all aspect of that case.

Sections 72-432 and 72-433 provide that evaluations are a matter of right on the part of the employer and surety. There is no "good cause" showing that is necessary. All that is noted in that section is reasonable time and place requirement. These statutory sections are not limited to "independent medical evaluations." The mandate for a claimant to attend evaluations where it is an employer selected physician also takes into consideration

Alan R. Gardner ♦ Michael G. McPeek

[agardner@gardnerlaw.net](mailto:agardner@gardnerlaw.net)  
[mmcpeek@gardnerlaw.net](mailto:mmcpeek@gardnerlaw.net)



EXHIBIT

tabbles

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furnishing an injured worker appropriate care. Please do not construe this to say that Dr. Jelinek has recommended any inappropriate care. However, he has approved Dr. Lynch for a second opinion. I have attached his note dated December 13, 2017, for your review.

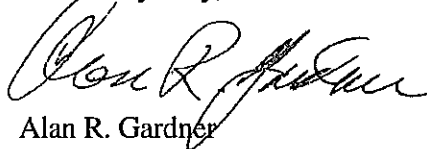
You may not be aware of the fact that Dr. Jelinek has indicated to the surety that his concerns for a second opinion would be handled either by a referral to Seattle or Boise. Indeed, the clinic the company is tendering for the second opinion includes Dr. Lynch. He has been approved by Dr. Jelinek for the second opinion. Enclosed is a response to a question pertaining to this very issue where Dr. Jelinek has specifically approved Dr. Lynch. You will note the inquiry is not for an independent medical evaluation, but for a second opinion.

I note you have opted for an aggressive approach on this examination. However, please note that the presence of Dr. Lynch in Lewiston is actually an accommodation for your client so that travel is not necessary. I am acquainted with the clinic in which Dr. Lynch is associated. I would note Dr. Goodwin is in the same clinic and is considered one of the better shoulder physicians in the state.

I would encourage you to refrain from your aggressiveness. Keep in mind that 72-435 does contain a suspension of proceeding sanction and suspension of benefit section. I hope that you will reconsider your position so that the aggressiveness will not need to escalate as well on the defense. It is apparent your client has a long-standing problem with shoulder dislocations. She appears to have sustained an injury at work. She has sustained difficulties subsequent to that time including, I note in the records, subsequent activity related incidents. I believe the mutual goal is to determine, first of all, what is going on with Claimant's shoulder, and what solutions might be proposed. I believe this is what Dr. Jelinek contemplated.

Please have your client attend the scheduled examination so that both parties may have further clarification.

Yours very truly,



Alan R. Gardner

ARG:rem

Enclosure

Cc: Wanda Roberson

Jamie Haun

Alan R. Gardner ♦ Michael G. McPeek

[agardner@gardnerlaw.net](mailto:agardner@gardnerlaw.net)

[mmcpeek@gardnerlaw.net](mailto:mmcpeek@gardnerlaw.net)





**INTERMOUNTAIN**  
CLAIMS INC.

PO Box 4367  
Boise, ID 83711  
Phone: (208) 323-7571  
Fax: (208) 375-8905

December 12, 2017

ADAM JELINEK MD  
320 WARNER DRIVE  
LEWISTON ID 83501

Re: Claimant: Miranda Moser  
Employer: Rosauers Inc.  
D/Injury: 10/09/2016  
Claim #: BO116-22294

Dear Dr. Jelinek:

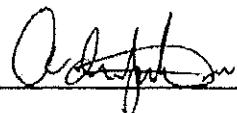
Our office is the third party administrator for Rosauers Inc's self-insured workers' compensation program. Ms. Moser is a patient of yours who allegedly sustained a right shoulder injury on October 9, 2016 while lifting a 24 pack of soda as a result of her duties as a cashier.

- 1. Would you recommend a referral for Ms. Moser to see Dr. Joseph Lynch or Dr. Thomas Goodwin in Boise, Idaho for a second opinion?

No  Yes

If no, please explain:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Physician Signature:  Date: 12/13/17

We thank you for your assistance and look forward to your response. Please contact me if you have any questions.

Sincerely,

INTERMOUNTAIN CLAIMS INC

Courtney Butler  
Claims Examiner  
P: (208) 323-7571 x 1214 F: (208) 375-8905

[www.intermountainclaims.com](http://www.intermountainclaims.com)

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ICI-BOISE

DEC 13 2017

54



# Goicoechea Law Offices

Lewiston – Moscow  
A Limited Liability Partnership

January 22, 2018

Gardner Law Office  
Alan R. Gardner  
PO Box 2528  
Boise, Idaho 83701

Via Facsimile: (208) 387-3501

RE: Our Client : Miranda Moser  
Employer : Rosauers Supermarkets Inc.  
Claim No. : BOI16-22294  
Date of Loss : 10/09/2016

Dear Mr. Gardner:

I am in receipt of your notice of medical exam dated January 17, 2018. I have already advised your client that Ms. Moser will not be attending this scheduled examination. Attached you will find the letter I sent to your client.

An injured worker does not have a legal obligation to petition for relief from an IME. Kelly v. Blue Ribbon Linen Supply, Inc., 159 Idaho 324, 36 P.3d 333, 337 (2015). If you believe good cause exists for an additional IME, please file a motion to compel with the Commission.

Thank you for your attention to this matter.

Sincerely,  
Goicoechea Law Offices, LLP

*DICTATED BY MICHAEL KESSINGER  
Stamped and sent without  
Review to avoid delay*

Michael Kessinger  
Attorney at Law

MK/jkh  
Encls. as stated

CRAIG M. YOUNG\*  
MICHAEL T. KESSINGER\*  
  
JERRY J. GOICOECHEA  
*Of Counsel*

*Attorneys  
and  
Counselors  
At Law*

Main Office:  
826 Main Street  
P.O. Box 287  
Lewiston, ID 83501

Lewiston  
(208) 743-2313

Moscow  
(208) 882-3561

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(208) 743-8140

Website  
[www.NorthIdahoAttorney.com](http://www.NorthIdahoAttorney.com)

E-Mail  
[MTKessinger@gmail.com](mailto:MTKessinger@gmail.com)

Tax ID#: 82-0485674

\*Licensed in  
Idaho  
&  
Washington



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHERI WELLS,

Claimant,

v.

TARGET CORP.,

Employer,

and

INDEMNITY INS. CO. OF N. AMERICA,

Surety,

Defendants.

IC 2013-001075

**ORDER DENYING DEFENDANTS'  
MOTION TO COMPEL CLAIMANT'S  
ATTENDANCE AT MEDICAL  
EXAMINATION AND PROHIBITING  
DEFENDANTS FROM DEMANDING  
ADDITIONAL IME WITHOUT  
JUSTIFICATION**

**FILED**

**JAN 05 2015**

INDUSTRIAL COMMISSION

On December 22, 2014, Defendants filed a motion seeking an order compelling Claimant to attend a fourth IME. Three times previously, Defendants required Claimant to attend an examination by Timothy Doerr, M.D., a physician of Defendants' choosing. Each time there was an appropriate reason for the examination, and Claimant complied with the demand.

Most recently, Defendants discovered a different physician, Dennis Chong, M.D., who presented at a recent seminar on the subject of CRPS, a condition of which Claimant complains. As a result of that presentation, Defendants would like Dr. Chong to examine Claimant. Defendants believe they have a right to demand Claimant to submit to this examination over Claimant's objection. They argue I.C. § 72-411(1) allows them basically an unlimited number of IMEs. Failure to submit puts Claimant at risk of suspension of benefits under I.C. § 72- 434.

Claimant disagrees with this assessment, and exhaustively examined the issue in her response brief filed January 2, 2015. The analysis included cites to authority. Her arguments are



generally accurate.

It is uniformly held at the Commission that Defendants are not allowed to demand - as a matter of right - repetitive IMEs, without good cause shown. Contrary to Defendants' claim, they do not have a statutory right to demand repeat IMEs, either with the same physician or with a different one. This, of course, is different than a panel examination, where multiple disciplines examine a claimant as part of a single IME. Also, not on the table today is the situation where claimant has multiple medical issues, and those various issues are examined separately by physicians with a specialty in each particular relevant medical field. Nor does today's ruling impact repeat IMEs when a claimant's condition materially changes, or her treating doctors modify their opinions and diagnosis.

In a situation such as the present case, when Claimant objects to the IME demand, it is up to the Defendants to move for an additional IME, and support the motion with a showing of good cause. (Of course, nothing precludes the Claimant from moving for a protective order in such situations.) Where there is a reasonable explanation for the need for another IME, the Commission may allow such. But absent such a showing, such as in the present case, Defendants can not require the IME. Nothing in this ruling precludes Defendants from using Dr. Chong as an expert, just from conducting an IME without showing the need for such an examination in light of the facts of this case.

Based upon the foregoing, IT IS HEREBY ORDERED that Defendants' Motion to Compel Claimant's Attendance at Medical Examination is DENIED, and Defendants may not demand Claimant submit to an additional IME in this matter without an appropriate order from the Commission, or Claimant's acquiescence.

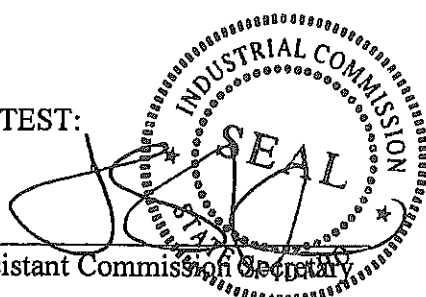
**ORDER DENYING MOTION TO COMPEL - 2**

DATED this 5th day of January, 2015.

INDUSTRIAL COMMISSION

Brian Harper  
Brian Harper, Referee

ATTEST:

The seal of the Industrial Commission is circular with a dotted border. Inside the border, the words "INDUSTRIAL COMMISSION" are written in a circle at the top, and "STATE OF IDAHO" is written at the bottom. In the center, the word "SEAL" is written in large, bold letters. A signature is written across the seal.  
Assistant Commissioner Secretary

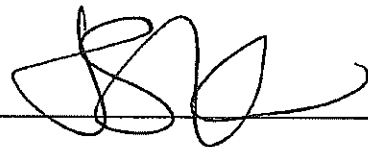
**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of January, 2015, a true and correct copy of the foregoing **ORDER DENYING MOTION TO COMPEL** was served by regular United States Mail upon each of the following:

DANIEL LUKER  
PO BOX 6190  
BOISE ID 83707

SUSAN VELTMAN  
1703 W HILL RD  
BOISE ID 83702

jsk

A handwritten signature in black ink, appearing to be "JSK", written over a horizontal line.



**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Self-Insured Employer,

Defendants.

IC 2016-027914

**ORDER ON DEFENDANTS' MOTION  
FOR SANCTIONS AND CLAIMANT'S  
MOTION FOR PROTECTIVE ORDER**

**FILED**

**FEB 07 2018**

INDUSTRIAL COMMISSION

On January 24, 2018, Defendant filed what it termed a Motion for Sanctions for Claimant's refusal to attend an upcoming Idaho Code § 72-433 examination. However, within the body of the motion, Defendant also asked the Commission to order Claimant to attend the examination.

On January 26, 2018, Claimant filed her Response to Defendant's Motion for Sanctions, as well as a Motion for Protective Order. Therein, Claimant sought an order denying Defendant's motion, an order protecting Claimant from Defendant's scheduled Idaho Code § 72-433 examination, and a request for the Commission to impose JRP 16 and/or Idaho Code § 72-804 sanctions or attorney fees, respectively.

Both sides included written arguments and exhibits as part of their motions. Several issues were identified in briefing. A telephone conference was held on February 5, 2018 with counsel for both parties attending. The issues were discussed.

One item of concern brought up at the telephone conference was the fact that Claimant has been out of contact with her counsel for approximately two weeks, and despite repeated efforts

by counsel, Claimant has not been located. Discovery directed to Claimant is outstanding. This Order assumes Claimant will be located in the near future as compliance with this Order relies on Claimant's presence, and her continued absence could impede this matter and subject Claimant to additional motions.

Being fully advised in the premises, IT IS HEREBY ORDERED as follows:

1. Claimant's Motion for Protective Order is DENIED;
2. Defendant's Motion for Sanctions is GRANTED to the extent it seeks an Order from the Commission requiring Claimant's presence at an Idaho Code § 72-433 examination, to be scheduled for Lewiston at a time mutually available to both parties and Dr. Joseph Lynch or Dr. Thomas Goodwin;
3. Both parties' requests for sanctions from opposing party are DENIED.

DATED this 7th day of February, 2018.

INDUSTRIAL COMMISSION

Brian Harper  
Brian Harper, Referee

ATTEST  
  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of February, 2018, a true and correct copy of the foregoing **ORDER ON DEFENDANTS' MOTION FOR SANCTIONS AND CLAIMANT'S MOTION FOR PROTECTIVE ORDER** was served by regular United States Mail upon each of the following:

MICHAEL KESSINGER  
PO BOX 287  
LEWISTON ID 83501

ALAN GARDNER  
PO BOX 2528  
BOISE ID 83701



---

jsk

ALAN R. GARDNER (ISB No. 2342)  
MICHAEL G. MCPEEK (ISB No. 2436)  
GARDNER LAW OFFICE  
1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701  
Telephone: (208) 387-0881  
Facsimile: (208) 387-3501

2018 FEB -7 PM 2:11  
RECEIVED  
INDUSTRIAL COMMISSION

Attorney for **Defendants**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER, ) I.C. No. 2016-027914  
)  
Claimant, ) **SECOND NOTICE OF MEDICAL EXAM**  
)  
v. )  
)  
ROSAUERS SUPERMARKETS, INC., )  
)  
Employer, )  
Self-Insured, )  
Defendants. )

---

COME(S) NOW the above-named Defendants, by and through their counsel of record, and give notice that the following medical examination will take place pursuant to Section 72-433, *Idaho Code*:

Examination will be performed by Dr. Joseph Lynch on April 2, 2018. It will occur at 9:00 A.M. (PST), at the S.P.O.R.T. Physical Therapy, 328 Warner Dr., Lewiston, Idaho, 83501.

Failure to appear at the time and place noted will result in the seeking of sanctions pursuant to Section 72-434, *Idaho Code*.

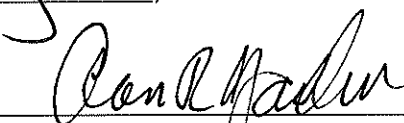
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Should you or your attorney plan to have an audio, or video recording pursuant to Section 72-433, *Idaho Code*, of the above examination, you are requested to give at least one week notice to Defendants so the physician, or physicians, may be informed and prepare for the recording accordingly.

The examinations are conducted with the physician or physicians being considered as Defendant's expert pursuant to IRCP 26 as adopted by the Idaho Industrial Commission Judicial Rules of Procedure.

DATED this 7 day of February, 2018.

  
\_\_\_\_\_  
Alan R. Gardner - of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants

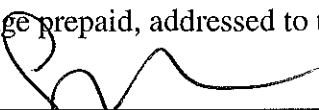
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7<sup>th</sup> day of February, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

Joseph Lynch, M.D.  
c/o OMAC  
401 Second Avenue S., Suite 110  
Seattle, WA 98104

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

  
\_\_\_\_\_  
Legal Assistant

**Michael T. Kessinger, Esq.** - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
826 Main Street  
PO Box 287  
Lewiston, Idaho 83501  
Telephone: (208) 743-2313  
Facsimile: (208) 743-8140  
Email: mtkessinger@gmail.com

FILED  
FEB 15 2018  
INDUSTRIAL COMMISSION

Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

I.C. No. 2016-027914

JRP 15 PETITION FOR DECLARATORY  
RULING ON I.C. § 72-433

COMES NOW the Claimant, by and through her attorney of record, Michael Kessinger of Goicoechea Law Offices, LLP, and hereby petitions the Commission for a declaratory ruling pursuant to JRP 15.

**1. Issue to be decided.**

Can the Industrial Commission or an employer compel a claimant to attend an I.C. § 72-433 medical examination without first establishing that claimant is within her "period of disability"?

**2. There is an actual controversy over the construction of I.C. § 72-433.**

JRP 15 PETITION FOR DECLARATORY RULING ON I.C. § 72-433 - Pg. 1

**Michael T. Kessinger, Esq.** - ISBA No. 6719  
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Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

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**2. There is an actual controversy over the construction of I.C. § 72-433.**

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INDUSTRIAL COMMISSION

Defendant in the above-entitled matter filed a Motion for Sanctions on January 24, 2018, to compel Claimant to attend an I.C. § 72-433 medical examination. Defendant's Motion did not allege or argue that Claimant was in her "period of disability." On January 26, 2018, Claimant filed Claimant's Response to Defendant's Motion for Sanctions and Claimant's Motion for Protective Order. The documents provided to the Commission with Claimant's Motion established a dispute with respect to whether Claimant was in her "period of disability." Defendant had previously declared Claimant medically stable based on an I.C. § 72-433 medical examination. In a Notice of Claim Status, Defendant wrote: "Dr. Ludwig has opined you are at maximum medical improvement without further medical treatment needed as of 9/7/17." See Claimant's Response to Defendant's Motion for Sanctions and Claimant's Motion for Protective Order.

On February 7, 2018, the Commission issued an Order compelling Claimant to attend an I.C. § 72-433 medical examination at the Defendant's behest. The Commission's Order failed to find that Claimant remained in her "period of disability." See Order on Defendants' Motion for Sanctions and Claimant's Motion for Protective Order.

**3. Claimant's interests are directly affected by the Commission's application of I.C. § 72-433.**

The Commission ordered Claimant to attend an I.C. § 72-433 medical examination, from which she had sought a protective order. Mandating Claimant's attendance at a specific time and place to be seen by a doctor selected by an adverse party affects Claimant's interest. The very purpose of the proposed examination is to determine Claimant's entitlement to workers' compensation benefits. Claimant's interests are directly affected by the Commission's Order regarding I.C. § 72-433.




4. **SUPPORTING MEMORANDUM.**

Please see Claimant's attached Memorandum in Support of JRP 15 Petition for Declaratory Ruling on I.C. § 72-433.

WHEREFORE, Claimant respectfully requests that the Industrial Commission provides a ruling on the applicability of I.C. § 72-433 when Defendant has not alleged and the Commission has not determined whether Claimant is in her "period of disability."

Claimant further requests that this case be held in abeyance, including the enforcement of the Commission's Order on Defendants' Motion for Sanctions and Claimant's Motion for Protective Order, during the pendency of the Petition currently before the Commission.

DATED this 15<sup>th</sup> day of February 2018.

  
\_\_\_\_\_  
MICHAEL T. KESSINGER  
Attorney for the Claimant

CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of February, 2018, a true and correct copy of the foregoing document was served upon the following individual by regular US mail:

Alan R. Gardner  
GARDNER LAW OFFICE  
Post Office Box 2528  
Boise, Idaho 83701

U.S. Mail  
 Hand Delivery  
 Federal Express  
 Via Facsimile

**Michael T. Kessinger, Esq.** - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
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Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

I.C. No. 2016-027914

CLAIMANT'S MEMORANDUM IN  
SUPPORT OF JRP 15 PETITION FOR  
DECLARATORY RULING ON I.C. § 72-433

COMES NOW the Claimant, by and through her attorney of record, Michael Kessinger of Goicoechea Law Offices, LLP, and hereby submits Claimant's Memorandum in Support of JRP Petition for Declaratory Ruling on I.C. § 72-433.

**BACKGROUND**

Defendant in the above-entitled matter filed a Motion for Sanctions on January 24, 2018, to compel Claimant to attend an I.C. § 72-433 medical examination. Defendant's Motion did not allege or argue that Claimant was in her "period of disability." On January 26, 2018, Claimant filed Claimant's Response to Defendant's Motion for Sanctions and Claimant's Motion for Protective Order. The documents provided to the Commission with Claimant's Motion

CLAIMANT'S MEMORANDUM IN SUPPORT OF JRP 15 PETITION FOR DECLARATORY RULING ON I.C. § 72-433 - Pg. 1

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established a dispute with respect to whether Claimant was in her “period of disability.” Defendant had previously declared Claimant medically stable based on an I.C. § 72-433 medical examination. In a Notice of Claim Status, Defendant wrote: “Dr. Ludwig has opined you are at maximum medical improvement without further medical treatment needed as of 9/7/17.” See Claimant’s Response to Defendant’s Motion for Sanctions and Claimant’s Motion for Protective Order.

On February 7, 2018, the Commission issued an Order compelling Claimant to attend an I.C. § 72-433 medical examination at the Defendant’s behest. The Commission’s Order failed to find that Claimant remained in her “period of disability.” See Order on Defendants’ Motion for Sanctions and Claimant’s Motion for Protective Order.

#### **STANDARD OF REVIEW**

When interpreting the Workers’ Compensation Act, the Commission must liberally construe the Act’s provisions in favor of the employee in order to serve the humane purpose for which it was promulgated. Reese v. V-1 Oil Co., 141 Idaho 630, 633, 115 P.3d 721, 724 (2005); Davaz v. Priest River Glass Co., 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994).

Idaho’s Workers’ Compensation Act is a creature of statute. The Supreme Court of the State of Idaho has consistently held that when there is a not a statutory basis in workers’ compensation law to support an action, the action will not be upheld. Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014). Simpson v. Louisiana-Pacific Corp., 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000). Statutory interpretation begins with the literal language of the statute. Paolini v. Albertson’s, Inc., 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). The Commission should interpret a statute as a whole, and words should be given their plain, usual,

and ordinary meanings. Id. When the statutory language is unambiguous, the Commission must give the plain meaning of the statute effect, and the Commission need not consider rules of statutory construction. Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). The Commission must give effect to all the words and provisions of the statute, so none will be void, superfluous, or redundant. AmeriTel Inns, Inc. v. Pocatello-Chubbuck Auditorium Dist., 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008). Without finding that the requisite elements of a statute exist, the Commission lacks statutory authority to act. Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 283, 207 P.3d 1008, 1014 (2009).

## ARGUMENT

### **1. I.C. § 72-433 limits the employer's and the Commission's authority to order a medical examination to the period of disability.**

I.C. § 72-433 reads in pertinent part as follows:

SUBMISSION OF INJURED EMPLOYEE TO MEDICAL EXAMINATION OR PHYSICAL REHABILITATION. (1) After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon... (Emphasis added)

The statute explicitly allows for the employer to request or the Commission to order an examination “during the period of recovery.” The Commission must give effect to the words of the statute. It is a general principle of statutory construction that the Commission must assume that “during the period of disability” is not mere surplusage. Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 283, 207 P.3d 1008, 1014 (2009). Neither the Commission nor an employer can ignore the “period of disability” language without

inappropriately rendering a provision of the statute void. AmeriTel, 146 Idaho at 204.

Therefore, an employee must be in her period of recovery for the employer or the Commission to compel an I.C. § 72-433 medical examination.

The phrase “during the period of disability” is to be given its plain, usual, and ordinary meaning. Industrial Commission and Supreme Court cases use “period of disability” synonymously with the “period of recovery.” Period of disability describes the period of time in which Claimant is receiving temporary disability benefits or in the “period of disability” per I.C. § 72-426. Brooks v. Duncan, 96 Idaho 579, 532 P.2d 921 (1975); Brown v. Brigham Young Lodge, 2009 IIC 0499.10 (Sept. 2009); Granger v. Blue Cross of Idaho, 2010 IIC 0347.5 (July 2010); Melendez v. Conagra Foods/Lamb Weston, 2015 IIC 0038 (Aug. 2015). The “period of disability” is a finite period of time, during which the employer can mandate and the Commission can order a medical evaluation.

A finding that the employee is within the period of disability is a prerequisite for the statute to apply. Without finding that the requisite element exists, the Commission lacks statutory authority to act. Wernecke, 147 Idaho at 286. When the Commission acts without a statutory basis, its action will not be upheld. Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014). Simpson v. Louisiana-Pacific Corp., 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000).

Per the plain language of I.C. § 72-433, the Commission must determine that the employee is within her period of disability prior to mandating an I.C. § 72-433 medical examination. Absent the requisite finding that the employee is within the period of disability, the employee cannot be compelled to attend a medical examination.

**2. The burden is on the employer to establish that the employee is within the period of disability pursuant to I.C. § 72-433.**

The Court has held that the legislative intent of I.C. § 72-433 is to protect the injured worker with respect to medical examinations by employer-selected physicians. Hewson v. Asker's Thrift Shop, 120 Idaho 164, 167, 814 P.2d 424 (1991). The Court has also indicated that it is the employer's burden to prove that an injured worker is required to attend an I.C. § 72-433 examination. Id. at 168.

The Court's interpretation of I.C. § 72-408, a more oft-litigated code section, is instructive in the current case. I.C. § 72-408 discusses a "period of recovery." As set forth above, the Court and the Commission have treated the phrase "period of recovery" and "period of disability" synonymously. I.C. § 72-408 reads: "Income benefits for total and partial disability during the period of recovery... shall be paid to the disabled employee." Emphasis added. The Supreme Court has held with respect to I.C. § 72-408: "The burden is on Claimant to establish through expert medical testimony the extent and duration of the disability in order to recover income benefits for such disability." Sykes v. C.P. Clare and Co., 100 Idaho 761, 605 P.2d 939 (1980). It is only reasonable that I.C. § 72-433 be interpreted similarly. The burden is on the employer to establish through expert medical testimony that the employee is in the period of disability in order to mandate a medical examination.

As set forth above, an employer may only utilize I.C. § 72-433 to compel a medical examination "during the period of disability." To demand a medical evaluation, the employer must allege and establish that the employee remains in her period of disability. In turn, the Commission must find that the employee remains in her period of disability to order an I.C. §


72-433 medical examination. Without a finding by the Commission that the employee is in her period of disability, neither the Commission nor the employer may properly demand an I.C. § 72-433 medical examination.

### CONCLUSION

I.C. § 72-433 unambiguously requires that an injured employee be within her "period of disability" for the employer to request, or the Commission to order, a mandatory medical evaluation. The burden is on the employer to prove that the employee remains in her period of disability before the Commission can mandate an I.C. § 72-433 medical examination.

WHEREFORE, Claimant petitions the Commission to issue a ruling that neither the employer nor the Commission can mandate a medical evaluation per I.C. § 72-433 without first establishing that the employee is within her "period of disability."

DATED this 15<sup>th</sup> day of February 2018.

  
\_\_\_\_\_  
MICHAEL T. KESSINGER  
Attorney for the Claimant

### CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of February, 2018, a true and correct copy of the foregoing document was served upon the following individual by regular US mail:

Alan R. Gardner  
GARDNER LAW OFFICE  
Post Office Box 2528  
Boise, Idaho 83701

U.S. Mail  
 Hand Delivery  
 Federal Express  
 Via Facsimile

ALAN R. GARDNER (ISB No. 2342)  
 MICHAEL G. MCPEEK (ISB No. 2436)  
**GARDNER LAW OFFICE**  
 1410 West Washington - 83702  
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 INDUSTRIAL COMMISSION

Attorney for **Defendants**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant,	)	<b>RESPONSE TO CLAIMANT'S PETITION</b>
	)	<b>FOR AND MEMORANDUM IN SUPPORT</b>
v.	)	<b>OF DECLARATORY RULING</b>
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendants.	)	

COMES NOW the above named Defendant and for response to Claimant's Petition For and Memorandum in Support of Declaratory Ruling, state as follows:

**I**

**IMPROPER PROCEDURE**

Claimant's declaratory ruling request is inappropriate for two reasons. First, it is no more than an attempt to accomplish an interlocutory and intra agency appeal. Neither procedure is recognized by the Workers' Compensation code, or procedural regulations.

When a ruling is made by a referee, no provision in the Idaho Judicial Rules of Procedure provides for an appeal to the Commission. At most, a request for reconsideration can be made under

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72-718, Idaho Code. That provision only allows reconsideration after the issuance of a final decision.

**72-718. Finality of commission's decision.** A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

No discussion is needed to illustrate that the ruling of the referee in this matter dated February 7, 2018, dealt only with the issue of Claimant's Motion for Protective Order in response to the Defendant's Motion for Sanctions for Claimant's obstruction to the conducting of a 72-433, Idaho Code, medical examination. There was no motion to compel attendance filed by Defendant. The Commission is referred to this Defendant's response to that Claimant's motion in the instant proceeding.

Presumably, having no legal basis to do an intra agency appeal, Claimant has opted for an attempt at a "second bite of the apple" by utilizing the declaratory ruling procedure. Defendant submits that such procedure is inappropriate in the instant matter as an issue of fact is presented as to the applicability of 72-433, Idaho Code. See Bonner General Hospital, Inc. and Liberty Northwest Insurance Corp. vs Rose R. Pincetti, I.C. No. 2010-031621. See also Becerra vs Scarrow, dba Scarrow Dairy Farms, I.C. No. 2011-022751, for a discussion illustrating the distinction between declaratory rulings and reconsideration.

In Bonner General Hospital, supra, the Commission stated as follows:

JRP 15, Declaratory Rulings, provides a mechanism by which an interested party may apply to the Industrial Commission for rulings “on the construction, validity, or applicability of any workers’ compensation statute, rule, regulation or order.” (See, JRP 15(A)). The petitioner must demonstrate that an “actual controversy” exists over the construction, validity, or applicability of the rule or statute in question. (See, JRP 15(C)). The Commission is free to decline to make a ruling on a petition when it appears that there is no actual controversy or there exists some other good cause why a declaratory ruling should not be made. (See, JRP 15(F)(4)).

We decline to rule on the petition because we believe it fails to articulate an actual controversy over the construction or validity of the applicable statute, in this case I.C. §72-433 [\*3]. Rather, what is at issue in this matter is the factual question of whether Respondent was entitled to a protective order (*Emphasis added*).

Claimant argues the term “period of disability” is a basis for focusing on the interpretation of a statute as required for a declaratory ruling, JRP 15F. The adequacy of this will be discussed, infra.

See introductory paragraph of JRP 15C:

Whenever any person has an actual controversy over the applicability of a statute, rule, or order, that person may file a Commission, subject to the following requirements...

However, just as discussed in Bonner General Hospital, an issue of fact exists as to the appropriateness of the Claimant’s resistance to the tendering by the instant Defendant of an evaluation by a shoulder specialist approved by the treating physician. Claimant was to be seen in Lewiston, over an initial referral by the treating physician to an unnamed physician at the University of Washington. That issue of fact is discussed by the referee in the ruling in the Order on the Motion for Sanctions and Motion for Protective Order. That information is readily available and will not be repeated here.

Thus, this Defendant submits the use of a Declaratory Ruling is inappropriate as procedurally misplaced, and not meeting the elements of the JRP 15 language as to what can be considered in a declaratory ruling procedure, as no matter what else, an issue of fact is presented.

## II

### STATUTE NOT AMBIGUOUS

Claimant argues that 72-433, Idaho Code, and its reference to “period of disability” means only temporary total or perhaps permanent total disability. The argument includes borrowing a phrase from 72-408, Idaho Code, -- (“period of recovery” 72-408, Idaho Code). This statutory section is a compensation rate section for total disability, permanent or temporary.

Additionally, section 72-423, Idaho Code, also references disability, in this case a permanent disability. That particular section does appear to contemplate all types of disability. Most significant is that 72-433, Idaho Code, does not specify a “temporary disability.”

## III

### PURPOSE OF SECTION 72-433, IDAHO CODE

When one considers the reasons for an employer requested evaluation under 72-433, Idaho Code, Claimant’s position, restricting it to only temporary disability, be it total or partial, would limit that section to a much greater degree than it was obviously intended.

For example, it is frequently argued that it is only an independent medical evaluation section. It is certainly used for that. However, the language refers to a broader use, i.e. “if requested by the employer or ordered by the Commission.” The question arises as to what circumstances would be conducted and appropriate outside of the IME frame of reference.

Imagine a claimant, perhaps not represented or even in litigation, who stubbornly refuses to seek evaluation or even treatment for further recovery from an injury. This section gives the employer, or even the Commission, authority to mandate an examination to assess what might be necessary, and to recommend treatment. This would not be only in a temporary total scenario.

Most likely, an independent medical evaluation, perhaps for purposes of determining an impairment, even where there is no true conflict, would appropriately use this section.

Section 72-433(3), Idaho Code, refers to retraining. One would think that a third paragraph in a section of the code would continue the thought of the whole section. It is interesting to see the case of *Sund vs Gambrel*, 127 Idaho 3; 896 p2d 329, for an illustration of a fact pattern where medical assessments would be essential to separate out impairments and disabilities from different injuries. This is another example of when the need for medical evaluation, for whatever reason, might require the use of a mandated examination under 72-433, Idaho Code.

Interestingly enough, in the case of *Sykes vs CP Clare and Company*, 100 Idaho 761, 605 p2d 939, a case centered around the determination of disability, including permanent partial disability, Justice Bistline of the then Supreme Court, after verbally spanking the surety, noted that the surety under section 72-433(1), Idaho Code, could have evaluated the Claimant to disprove the existence of a disability stating:

Thus, the employer may not only require the employee to submit to a physical examination to determine the extent and duration of an alleged disability but, should the employee decide to select his own physician, the employer-designated physician is neither barred from visiting with the injured employee nor from determining whether a disability exists.

Thus, at least one Supreme Court decision hints that it is more than a temporary disability that would allow an evaluation under section 72-433, Idaho Code.

Physicians are the underlying source of evidence in virtually every aspect of a workers' compensation case. Certainly, assessing both temporary disability or permanent disability would open the door to an evaluation under 72-433, Idaho Code, so that the surety, who perhaps has no serious communication with the treating physician, can have an independent assessment. If needed, such a party could actually furnish care by utilizing the mandate of 72-433, Idaho Code. Even the definition section of the code, 72-102, Idaho Code, subparagraph (11), only defines the term "disability" as "for purposes of determining total or partial temporary disability income benefits."

Why section 72-102 (11), Idaho Code, then refers to permanent impairment is not clear, but for purposes of the instant matter, that reference supports a broader definition than that which is put forth by Claimant in the instant case.


#### IV

#### SUMMARY

It is thus pragmatically clear that the need for examination by an employer, who may need the independent input for an evaluation of and for furtherance of care in the case, needs that input not only for temporary disability, but for permanent disability and medical causation. It is also clear that the term disability as utilized in 72-433, Idaho Code, has no limitation or qualification to temporary disability or total disability. Indeed, there is no limitation on the type of disability that might be presented. Medical evaluations are a necessity on all aspects of claims for workers' compensation benefits. Even if a declaratory ruling is an appropriate procedure, the statutory provision in the instant matter is clear. As noted in the original proceeding on the Motion for Sanctions and Motion for Protective Order, if one looks at Claimant's complaint, it is obvious that all types of disability benefits are sought. Thus, evaluations would play a role in assessing disability of any kind or nature

pragmatically, or statutorily. There is no limitation to only temporary disability in the language of 72-433, Idaho Code, as it refers to a "period of disability."

DATED this 21 day of February, 2018.

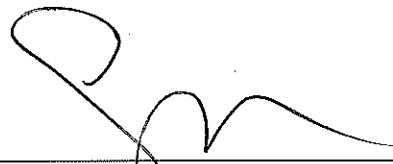
  
\_\_\_\_\_  
Alan R. Gardner -of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of February, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

  
\_\_\_\_\_  
Legal Assistant

Michael T. Kessinger, Esq. - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
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Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MÖSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

I.C. No. 2016-027914

CLAIMANT'S REPLY IN SUPPORT OF JRP  
15 PETITION FOR DECLARATORY  
RULING ON I.C. § 72-433

INDUSTRIAL COMMISSION

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FILED

**1. Controversies over the construction of a statute and the validity of an order are both properly addressed by a JRP 15 petition for declaratory ruling.**

Defendant's argument that Claimant's motion is procedurally inappropriate is misplaced. Defendant characterizes Claimant's motion as an "interlocutory" or "intra agency appeal." Defendant asserts that "When a ruling is made by a referee, no provision in the Idaho Judicial Rules of Procedure provides for an appeal to the Commission." Defendant's position is patently mistaken. Claimant has not filed an appeal that violates the rules but has filed a JRP Rule 15 Petition for a Declaratory Ruling.

A look at JRP 15 is instructive. The rule begins: "The Commission provides this format for rulings on the construction, validity, or applicability of any workers' compensation statute,

Michael T. Kessinger, Esq. - ISBA No. 6719  
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15 PETITION FOR DECLARATORY  
RULING ON I.C. § 72-433

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**1. Controversies over the construction of a statute and the validity of an order are both properly addressed by a JRP 15 petition for declaratory ruling.**

Defendant's argument that Claimant's motion is procedurally inappropriate is misplaced. Defendant characterizes Claimant's motion as an "interlocutory" or "intra agency appeal." Defendant asserts that "When a ruling is made by a referee, no provision in the Idaho Judicial Rules of Procedure provides for an appeal to the Commission." Defendant's position is patently mistaken. Claimant has not filed an appeal that violates the rules but has filed a JRP Rule 15 Petition for a Declaratory Ruling.

A look at JRP 15 is instructive. The rule begins: "The Commission provides this format for rulings on the construction, validity, or applicability of any workers' compensation statute,



rule, or order.” Emphasis added. The Rule continues:

C. Contents of Petition.

Whenever any person has an actual controversy over the construction, validity or applicability of a statute, rule, or order, that person may file a written petition with the Commission, subject to the following requirements:

1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
2. The petitioner must allege that an actual controversy exists over the construction, validity, or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition...

JRP 15. Emphasis added. JRP 15 explicitly recognizes that the construction of a statute is properly addressed in a JRP 15 petition. Moreover, JRP 15 explicitly recognizes that the validity of an order is properly subject to a JRP 15 petition. Defendant’s position is inconsistent with the plain language of JRP 15. Claimant’s JRP 15 petition is properly before the Commission.

**2. An issue of fact must exist for a JRP 15 motion to be proper.**

Defendant argues that an “issue of fact exists,” which precludes a JRP 15 petition. Again, Defendant is mistaken. An issue of fact does not preclude a JRP 15 petition but is a prerequisite for filing a JRP 15 petition. As set forth above:

2. The petitioner must allege that an actual controversy exists over the construction, validity, or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition...

JRP 15. Emphasis added. Pursuant to the plain language of the rule, the petition “must allege that an actual controversy exists” and that the petitioner has “an interest that is directly affected by the statute.” An underlying issue of fact is required for a JRP 15 petition.

One of the cases cited by Defendant, Pincenti v. Bonner General Hosp., Inc., 2010-031621 (Aug 2015), is instructive and supports Claimant’s Petition.<sup>1</sup> The employer in Pincenti sought an order to conduct an IME per I.C. § 72-433. After the referee denied the motion for an IME, the petitioner sought to have the Commission overturn the referee’s decision. The employer took issue with the referee’s findings of fact and filed a JRP 15 petition. The Commission found this was an improper petition for a declaratory ruling, as the petitioner failed to “articulate an actual controversy over the construction or validity of the applicable statute...”

It is Claimant’s position that I.C. § 72-433 requires a finding that a claimant is within her “period of disability” prior to mandating a medical evaluation. Claimant’s Petition does not present an issue of fact but, instead, proposes that the Commission failed to find a requisite fact. Unlike Pincenti, where the petitioner simply disagreed with the Commission’s conclusion, the case presently before the Commission presents an actual controversy regarding the Commission’s construction of I.C. §72-433 and consequently the validity of the Commission’s Order.

**3. Claimant and Defendant agree that § 72-433 is not ambiguous.**

Claimant agrees with Defendant that I.C. § 72-433 is not ambiguous. The statute unambiguously requires an injured worker to be in a “period of disability” for an employer or the Commission to mandate a medical examination.

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<sup>1</sup> Becerra v. Scarrow Dairy Farms, 2011-022751 (April 2013), which Defendant cited, is not instructive in the case presently before the Commission and is not addressed.

**4. 72-433 allows for a mandated medical evaluation during all periods of disability.**

Black's Law Dictionary defines "period" as "any point, space, or division of time." [www.thelawdictionary.org/period](http://www.thelawdictionary.org/period). Contrary to Defendant's argument, the "period of disability" cannot properly be construed to mean the remainder of a claimant's life. A "period," by definition, constitutes a duration of time with a beginning and an end. The period during which Defendant can mandate a medical examination is unequivocally limited to "the period of disability."

**a. Temporary total disability**

Temporary total disability and temporary partial disability is the period of disability that coincides with the "period of recovery." I.C. § 72-408. It is beyond question that an employer can mandate a medical examination per I.C. § 72-433 while an injured worker is in her period of recovery.

**b. Deemed period of disability per I.C. § 72-426.**

An employer can also mandate a medical examination while an injured worker is receiving permanent disability benefits. I.C. § 72-426 uses the exact same phrase as I.C. § 72-433, namely "period of disability." The code section seems to indicate that while the injured worker is not technically in a period of disability while receiving disability benefits, the time frame during which claimant receives disability benefits "shall be deemed a period of disability." Since I.C. § 72-426 deems an injured worker to be within a "period of disability" when entitled to disability benefits, then an employer or the Commission can properly mandate a medical examination during that period.

The periods of temporary disability or permanent disability are the only periods of disability identified by Title 72. If an employer is paying an injured worker any type of disability benefit, then I.C. § 72-433 allows a mandated medical examination. If an employer is not paying

disability benefits, then the Commission must find that an injured worker is within her actual “period of disability” or a “deemed period of disability” prior to mandating a medical examination.

**5. Defendant fails to provide authority for its position.**

Defendant fails to cite legislative history, statutory authority, or statutory interpretation by the Supreme Court of the State of Idaho or the Idaho Industrial Commission to support its position that an injured worker can be forced to attend a medical examination per I.C. § 72-433 without a finding that the injured worker is within her “period of disability.”

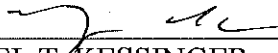
**6. The Order on Defendants’ Motion for Sanctions and Claimant’s Motion for Protective Order of February 7, 2018, is invalid because it fails to comply with I.C. § 72-433.**

Much like Defendant in the present case, the defendant in Wernecke argued that Wernecke was “attempting an impermissible collateral attack of the Commission’s order...” The Court held that the Commission has no authority or jurisdiction to act “If the Commission does not make the requisite findings...” Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 285, 207 P.3d 1008, 1016 (2009). Without the requisite findings, “the Commission lacked statutory authority to approve the Agreement and its order purporting to do so is void.” Id. The Court ruled that “Orders by an administrative agency which authorize something prohibited by the statute are not merely erroneous, but are void.” Despite Defendant’s statements to the contrary, the Court unmistakably ruled that a void order can be attacked at any time and in any proceeding. Wernecke, fn. 10.

The Commission failed to make a finding that Claimant was within her period of disability prior to mandating an I.C. § 72-433 medical examination. A finding that an injured worker is within her “period of disability” is a requisite element of I.C. § 72-433. Without a finding that Claimant was within her period of disability, the Order is void.

WHEREFORE, Claimant renews her petition that the Commission issue a ruling that neither the employer nor the Commission can mandate a medical evaluation without first establishing that the injured worker is within her "period of disability." Furthermore, Claimant requests a finding per JRP 15 that the Order on Defendants' Motion for Sanctions and Claimant's Motion for Protective Order of February 7, 2018, is invalid.

DATED this 2<sup>nd</sup> day of March 2018.

  
\_\_\_\_\_  
MICHAEL T. KESSINGER  
Attorney for the Claimant

CERTIFICATE OF SERVICE

I hereby certify that on this 2<sup>nd</sup> day of March, 2018, a true and correct copy of the foregoing document was served upon the following individual by regular US mail:

Alan R. Gardner  
GARDNER LAW OFFICE  
Post Office Box 2528  
Boise, Idaho 83701

U.S. Mail  
 Hand Delivery  
 Federal Express  
 Via Facsimile

**Michael T. Kessinger, Esq.** - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
826 Main Street  
PO Box 287  
Lewiston, Idaho 83501  
Telephone: (208) 743-2313  
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Email: mtkessinger@gmail.com

Attorney for the Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Employer,  
Defendant.

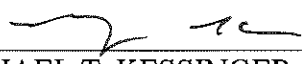
I.C. No. 2016-027914

CLAIMANT'S RESPONSE TO  
DEFENDANT'S SECOND NOTICE OF  
MEDICAL EXAM

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COMES NOW the Claimant, by and through her attorney of record, and gives notice that she will not be attending the I.C. § 72-433 medical examination scheduled for April 2, 2018. Claimant filed a Rule 15 Petition for Declaratory Ruling that is currently pending with the Commission. Said Petition disputes the validity of the Order of February 7, 2018, compelling Claimant's attendance at Defendant's 72-433 exam.

DATED this 19<sup>th</sup> day of March 2018.


  
\_\_\_\_\_  
MICHAEL T. KESSINGER  
Attorney for the Claimant

CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of March, 2018, a true and correct copy of the foregoing document was served upon the following individual by regular US mail:

Alan R. Gardner  
GARDNER LAW OFFICE  
Post Office Box 2528  
Boise, Idaho 83701

U.S. Mail  
 Hand Delivery  
 Federal Express  
 Via Facsimile

  
\_\_\_\_\_  
SIGNATURE

ORIGINAL

ALAN R. GARDNER (ISB No. 2342)  
MICHAEL G. MCPEEK (ISB No. 2436)  
GARDNER LAW OFFICE

2018 MAR 23 PM 2:09

1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701  
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Facsimile: (208) 387-3501

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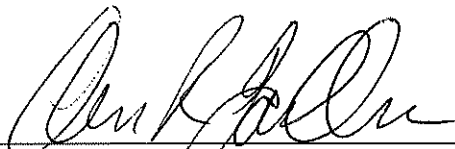
Attorney for **Defendants**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant,	)	<b>NOTICE OF CANCELLATION OF</b>
	)	<b>MEDICAL EXAM</b>
v.	)	
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendants.	)	

COME(S) NOW the above-named Defendants, by and through their counsel of record, and give notice that, as Claimant's counsel has declined to allow his client to attend the exam, the medical examination scheduled with Dr. Joseph Lynch on April 2, 2018, has been cancelled.

DATED this 22nd day of March, 2018.



Alan R. Gardner - of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants



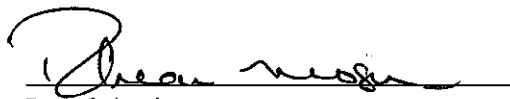
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of March, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

Joseph Lynch, M.D.  
c/o OMAC  
401 Second Avenue S., Suite 110  
Seattle, WA 98104

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

  
\_\_\_\_\_  
Legal Assistant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,  
Claimant,

v.

ROSAUERS SUPERMARKETS INC.,  
Employer/  
Self-Insured,  
Defendants.

**IC 2016-027914**

**ORDER ON PETITION FOR  
DECLARATORY RULING**

**FILED**

APR 04 2018

INDUSTRIAL COMMISSION

**INTRODUCTION**

On February 15, 2018, Claimant filed her Petition for Declaratory Relief pursuant to JRP 15. Claimant contends that she cannot be required to attend an Idaho Code § 72-433 exam without it first being established that Claimant is in a “period of recovery,” as required by Idaho Code § 72-433. Claimant contends that until there is a finding that Claimant is in a period of temporary or permanent disability, she cannot be required to attend such an exam. Defendants respond now that the statute should not be so narrowly construed.

**STATEMENT OF FACTS**

Claimant suffered an accident on October 9, 2016. While lifting a 24-pack of soda, she suffered a dislocation of her right shoulder. The claim was accepted by Employer, even though Claimant had a pre-existing history of recurrent instability of the right shoulder. On November 16, 2016, Claimant underwent surgery by J. Adam Jelinek, M.D., to address recurrent capsular laxity of the right shoulder. Claimant continued to suffer from “pseudosubluxation” after this procedure. In June of 2017, Dr. Jelinek recommended that Claimant be seen by an unidentified physician in Seattle, possibly at the University of Washington, for a second opinion.

Instead of authorizing the request for referral, Defendants arranged for Claimant's evaluation by Michael Ludwig, M.D., who saw Claimant on September 7, 2017. Dr. Ludwig noted Claimant's well-documented pre-injury history of right shoulder dislocation. He noted that the surgery performed by Dr. Jelinek in November 2016 had actually been recommended for Claimant approximately one year prior to the industrial accident. He believed that Claimant's October 9, 2016 right shoulder dislocation was simply a likely consequence of her pre-existing condition. At most, the industrial accident aggravated Claimant's pre-existing condition, but she had returned to her pre-injury baseline by the time of Dr. Ludwig's examination. Dr. Ludwig did not believe that Claimant required any further medical care by reason of the industrial accident. He gave Claimant an 11% upper extremity impairment apportioned entirely to Claimant's documented pre-existing condition. He gave Claimant certain permanent limitations/restrictions to protect the right shoulder, but, again, attributed these limitations/restrictions to Claimant's pre-injury condition.

Dr. Jelinek disagreed with many of Dr. Ludwig's conclusions, and continued to lobby for a referral for a second opinion in Washington state. Eventually, however, he acceded to Surety's suggestion that Claimant be seen for such a second opinion by either Joseph Lynch, M.D., or Thomas Goodwin, M.D. Surety attempted to arrange for Claimant's evaluation by Dr. Lynch in Lewiston. Claimant objected to Defendants' request for a second Idaho Code § 72-433 exam, signifying her intention not to attend such an exam.

On or about January 24, 2018, Defendants filed their "Motion for Sanctions" seeking, *inter alia*, the Commission's Order requiring Claimant's attendance at Defendants' IME. Claimant filed a response in opposition dated January 29, 2018, arguing that since Defendants' first IME physician, Dr. Ludwig, had pronounced Claimant medically stable, there was no basis

for another Idaho Code § 72-433 exam because Defendants could no longer assert that Claimant was in a period of disability. A telephone conference was held by the Referee on February 5, 2018, following which the Referee, without much elaboration, entered an Order requiring Claimant's attendance at a second Idaho Code § 72-433 exam to be held as proposed by Defendants. Thereafter, on February 7, 2018 Defendants noticed a second Idaho Code § 72-433 exam by Dr. Lynch, to be held on April 2, 2018.

Shortly after these things happened, Claimant filed the aforementioned Petition for Declaratory Relief, arguing that absent a determination that she is within a period of disability, Claimant cannot be required to attend an Idaho Code § 72-433 exam such as to subject Claimant to the penalties identified at Idaho Code § 72-434.

Pursuant to JRP 15, the Commission may entertain a Petition for Declaratory Ruling where it is demonstrated that an "actual controversy" exists over the construction of a statute which directly affects the interests of the Petitioner. Here, Claimant has identified Idaho Code § 72-433 as the particular statute over which she claims there is a controversy. She further claims to have an interest which is directly affected by the statute, i.e., if she is correct in her interpretation of the statute, then she cannot be made to attend the exam and cannot suffer the consequences of failing to attend. Claimant's arguments in this regard are developed in her memoranda of February 20, 2018 and March 5, 2018.

Defendants filed a February 21, 2018 response, in which they disputed that Claimant must be in a period of disability before she can be asked to attend an Idaho Code § 72-433 exam.

The Commission concludes that the issue raised by Claimant is an appropriate subject for a Petition for Declaratory Ruling under JRP 15; the issue raised by Claimant appears to be one

of first impression, the resolution of which will be of benefit not only to the parties to this proceeding, but to other practitioners as well.

### DISCUSSION

Idaho Code § 72-433 gives to Employer and the Commission the power to request of an injured worker that she submit at “reasonable times and places” for examination by a physician or surgeon of the Defendants’ or Commission’s choice. The statute provides in pertinent part:

After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon. The employee shall be reimbursed for his expenses of necessary travel and subsistence in submitting himself for any such examination and for loss of wages, if any. For purposes of this section, the reimbursement for loss of wages shall be at the employee’s then current rate of pay if the employee is then working; otherwise, such reimbursement shall be at the total temporary disability rate. Reimbursement for travel expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided, however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip distance of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel. (Emphasis supplied).

Idaho Code § 72-433(1). An injured worker’s obligation to cooperate with such an exam is enforced by the provisions of Idaho Code § 72-434 which provides:

If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee’s right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues. (Emphasis supplied).

Idaho Code § 72-434. The right conferred upon Defendants and the Commission pursuant to Idaho Code § 72-433 is not unfettered. Such an exam must take place at a reasonable time and place. This may mean, depending on the facts of a particular case, that Defendants are not

entitled to repetitive Idaho Code § 72-433 exams. *Pincenti v. Bonner General Hospital, Inc.*, 2016 IIC 0049 (2015).

However, the reasonableness of the exam by Dr. Lynch is not challenged on this basis. Rather, Claimant argues that as a prerequisite to requiring Claimant to attend an Idaho Code § 72-433 exam, it must be demonstrated that Claimant is in a “period of disability” per the unambiguous language of Idaho Code § 72-433. In her opening brief, Claimant argues that the term period of disability is the equivalent of “period of recovery,” as used in Idaho Code § 72-408. Therefore, Claimant argues that it must be demonstrated that Claimant is in a “period of recovery” and has not reached medical stability before she may be ordered to attend an Idaho Code § 72-433 exam. In her reply brief, Claimant acknowledges that the term “period of disability” encompasses not only periods of temporary disability, but periods of permanent disability as well. However, she continues to take the position that it is only during periods in which Claimant is receiving either temporary or permanent disability benefits that she can be required to attend an Idaho Code § 72-433 exam. If Claimant is not receiving disability benefits at the time of an Idaho Code § 72-433 exam, Claimant argues that before such exam can take place, the Commission must find that Claimant is entitled to disability. (*See* Claimant’s reply brief at 4-5).

Claimant’s argument depends on the proposition that the statute is unambiguous; that the phrase “period of disability” obviously means “while receiving disability benefits.” Some of the terms found in Idaho Code §72-433 are statutorily defined. Some are not. In such cases, the Commission is bound to apply the plain and ordinary meaning to the words in a statute:

Statutory analysis must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. This Court interprets statutes according

to their plain, express meaning and resorts to judicial construction only if the statute is *ambiguous, incomplete, absurd, or arguably in conflict with other laws*. Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language. An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous.

*State v. Neal*, 159 Idaho 439, 444, 362 P.3d 514, 519 (2015)(internal citations omitted, emphasis added). The term “period of disability” is not defined. Claimant argues that it must refer to the time period within which disability benefits are being paid. “Disability” is defined. Per Idaho Code § 72-102(11) the terms is defined as follows:

(11) "Disability," for purposes of determining total or partial temporary disability income benefits, means 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 in section 72-430, Idaho Code.

Therefore, for purposes of temporary disability, “disability” means an accident caused decrease in wage earning capacity.<sup>1</sup> The “period of disability,” for purposes of an injured worker’s entitlement to temporary disability benefits, would be the period during which he has suffered a decrease in his wage earning capacity. Therefore, the argument goes, a prerequisite to an employer’s ability to order an I.C. §72-433 exam, is proof that Claimant is in a period of decreased wage earning capacity. However, as Claimant has recognized, disability may be temporary or permanent. Permanent disability is, by definition, a permanent condition:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

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<sup>1</sup> Idaho Code § 72-102(11) is not a model of clarity. Though ostensibly treating the definition of temporary disability, i.e. disability which occurs during a period of recovery, it references the contribution of PPI and Idaho Code § 72-430 criteria, factors generally recognized as being relevant to assessing permanent, not temporary, disability.

Idaho Code § 72-423. Idaho Code § 72-426 specifies that permanent disability shall be paid for a finite period as a percentage of the “whole man.” However, as the definition of permanent disability makes clear, a permanent disability is necessarily one which is a lifetime impediment to employment; otherwise, it would not be “permanent.” Suppose that an injured worker suffers a work-related knee injury which requires a total knee arthroplasty. Claimant’s case is adjudicated, and he is eventually found entitled to a 40% disability rating which is paid out over a period of 200 weeks following his date of medical stability. Let it further be supposed that ten years later, Claimant’s physician recommends that he is in need of a revision surgery for his TKA. By this time, his permanent disability has long been paid, and the statute of limitations has long since run on any further claim for disability associated with his right knee injury. In this example, Claimant would evidently have us conclude that Defendants would not be entitled to require Claimant to be seen by a physician of their choosing to evaluate whether Claimant does need a TKA revision, and if so, whether the same is related to the original industrial accident. We are urged to conclude that this result must follow because at the time of Claimant’s need for a TKA revision he could no longer be said to be in a period of disability since he is no longer being paid disability benefits.

We find this argument untenable in view of the statutory definition of permanent disability, from which flows the conclusion that one’s permanent disability does not evaporate after the periodic payment of a disability award is completed. Therefore, we reject Claimant’s argument that it is only during the period that an injured worker is actually receiving temporary or permanent disability benefits that Surety has the right to require the injured worker’s attendance at an I.C. §72-433 exam.



Claimant has recognized that it will frequently be the case that an employer desires to require a claimant's attendance at an Idaho Code § 72-433 exam where there has yet been no determination by the finder-of-fact that claimant has a compensable condition, much less an entitlement to medical care and temporary/permanent disability. This case perfectly illustrates the problem. Notwithstanding that the Defendants have accepted the subject claim, a dispute exists over the extent and degree to which Claimant's ongoing problems are causally related to the subject accident. There has been no Commission determination as to whether or not Claimant's need for future care is related to the accident. There has been no Commission determination as to whether or not Claimant is medically stable, and if so, whether she is entitled to disability. There has been no Commission determination as to whether or not Claimant, if in a period of temporary disability, is temporarily disabled because of the work accident. Indeed, one of the objectives of Idaho Code § 72-433 is to allow Employer the opportunity to obtain medical opinions necessary to investigate defenses to a claim and to assist the Commission in sorting out these issues. To say that the Commission must first make a determination on the question of whether Claimant is in a period of temporary or permanent disability before Defendants are entitled to require Claimant's attendance at an Idaho Code § 72-433 exam puts the cart before the horse, and would make Idaho Code § 72-433 exams largely pointless.

It gets more problematic than that. Following Claimant's argument, Idaho Code § 72-433 also anticipates that Defendant's right to require an exam is dependent on there first being an injury or occupational disease. "Injury" is a term of art, and means personal injury "caused by an accident." Idaho Code § 102(18). "Occupational disease" is a term of art and refers to a disease that is casually related to Claimant's employment, the hazards of which are characteristic of and particular to that employment. Idaho Code § 72-102(22). In any case, Claimant bears the burden

of proving all elements of an accident/injury or occupational disease. Accepting Claimant's argument would mean that before Employer would be allowed to obtain a medical opinion addressing the cause of a claimed "injury" or "occupational disease," the Commission would have to first determine that Claimant suffered an "injury" caused by an accident, or that she had an "occupational disease" related to her employment, and that she suffered related disability. The statute is not in the disjunctive.

Furthermore, we conclude that if Idaho Code §72-433 means what Claimant says it means, it is in conflict with the related provisions of Idaho Code § 72-434, which defines the penalties for failure to submit to a reasonable request for an Idaho Code § 72-433 exam. That statute specifies that an injured worker who unreasonably refuses to submit to an Idaho Code § 72-433 exam shall suffer the suspension of her right to "prosecute any proceedings under this law." Claimant argues that until it is determined by the finder of fact that an injury produced by an accident has occurred and that Claimant has suffered temporary/permanent disability as a result, no right to an Idaho Code § 72-433 exam exists. In other words, after Claimant proves her case, Defendants may ask Claimant to submit to an exam. This is inconsistent, and in conflict, with the provisions of Idaho Code § 72-434, which clearly anticipates that exams may take place before a hearing on the merits, or similar determination, takes place. Otherwise, there would be no point to the penalty of suspending Claimant's right to prosecute her claim.

In the recent Supreme Court of *Melton v. Alt*, 163 Idaho 158, 408 P.3d 913 (2018), the Court reversed a district court's finding of ambiguity because the district court considered the probate code 'as a whole' in finding one statute ambiguous. The Court explained:

*Idaho Code section 15-3-111 specifically references 15-3-108; therefore, it makes sense to read the statutes together. Alternatively, Idaho Code section 15-3-111 makes no mention of Idaho Code section 15-3-803; therefore, it does not make sense to read the statutes together. This Court is reluctant to insert words into a*

statute that the Court believes the legislature left out, be it intentionally or inadvertently. The legislature has provided no indication that Idaho Code sections 15-3-111 and 15-3-803 are related, other than the fact that they both address the general topic of probate.

*Id.* at 919 (internal citations omitted, emphasis supplied).

Even though Idaho Code § 72-433 fails to specifically reference Idaho Code § 72-434, and even though Idaho Code § 72-434 fails to specifically reference Idaho Code § 72-433, a casual perusal of the statutes will satisfy the reader that they are interrelated, and that it “makes sense” to read the statutes together.

Further, while “permanent disability” is defined in the Act, the term “period of disability,” upon which Claimant relies in support of his interpretation of I.C. §72-433, is not. The term does, however, appear here and there in the Act, but in a context which lends no support to Claimant’s arguments. As previously noted, per I.C. §72-426, an injured worker’s disability is calculated against the “whole man,” defined as a “period of disability” of 500 weeks. For example, if an injured worker’s disability is assessed at 30% of the whole man, he will receive 150 weeks (500 x 30%) of benefits at 55% of the average state weekly wage. While Claimant’s individualized “period of disability” is 150 weeks, I.C. §72-426 lends no support to the proposition that Claimant’s permanent disability lasts for only 150 weeks. As noted above, this would be completely contrary to the definition of “permanent disability” contained in I.C. §72-423.

The term “period of disability” also makes an appearance in I.C. §72-316. That section provides that if benefits have been paid during a “period of disability,” which were not due and payable when made, surety may deduct such overpayments from income benefits yet owed. This statute anticipates a surety’s voluntary payment of benefits prior to any Commission determination of Claimant’s actual entitlement to those benefits. It may turn out, following a

Commission determination on Claimant's entitlement to benefits, that surety has overpaid certain benefits to Claimant. In such cases, that overpayment can be applied to shorten the period during which disability is paid. This is all to the good of the system; where it is unclear that Claimant is entitled to certain benefits, surety should nevertheless be encouraged to pay those benefits and will be more willing to do so if it is understood that overpayments may be recovered. The term "period of disability" as used in the statute cannot refer to a period of time for which there exists a Commission determination of an injured worker's disability status. It clearly refers to a period of time during which there has yet been no judicial determination of Claimant's entitlement to disability benefits.

At the end of the day, the reading of the statute urged by Claimant is altogether nonsensical, and would deny employers the opportunity to investigate fundamental components of a Claimant's entitlement to benefits until Claimant is found entitled to these benefits by the Commission. Only after there has been judicial confirmation that an injury or occupational disease occurred and that Claimant is entitled to temporary/permanent disability would Employer be allowed to undertake a medical evaluation intended to help it defend the Claim, at which time such an undertaking would be pointless. Such a construction would hamstring any defense to a claim for benefits, perhaps impermissibly, since it seems tantamount to a denial of due process or equal protection.

We recognize that abuses of Idaho Code § 72-433 exams occur from time to time, and if they do, such issues can be addressed by the Referee, as they were in this case. However, it cannot have been the intention of the legislature to require that the question of whether Claimant has suffered an "injury" or "occupational disease," or is temporarily or permanently disabled, be adjudicated before Defendants are allowed to conduct the examination(s) that they feel are


necessary to defend exactly those claims. Such a strange interpretation of the statute would yield an indefensible result. Employers must have timely access to an injured worker in order to promptly investigate a claim, and to defend cases in litigation.


Because we find the statute ambiguous, we apply rules of statutory construction to ascertain the legislature's intent; "[i]n interpreting a statute, it is [the Commission's] duty to ascertain and give effect to legislative intent by reading the entire act, including amendments." *St. Luke's Magic Valley Reg'l Med. Ctr., Ltd. v. Bd. of Cty. Comm'rs of Gooding Cty.*, 149 Idaho 584, 588, 237 P.3d 1210, 1214 (2010).

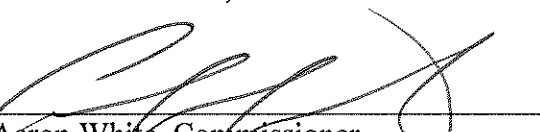
Considering the provisions of Idaho Code § 72-433 in light of Idaho Code § 72-434, we conclude that following the claim of an accident/injury or occupational disease, an employer may require a claimant's attendance at a medical exam per Idaho Code § 72-433.

DATED this 4<sup>th</sup> day of April, 2018.

INDUSTRIAL COMMISSION

  
Thomas E. Limbaugh, Chairman

  
Thomas P. Baskin, Commissioner

  
Aaron White, Commissioner

ATTEST:   
Assistant Commission Secretary

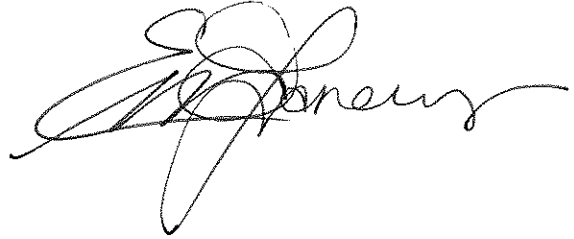


**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of April, 2018, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER  
PO BOX 287  
LEWISTON ID 83501

ALAN GARDNER  
PO BOX 2528  
BOISE ID 83701

A handwritten signature in black ink, appearing to read "Alan Gardner", written in a cursive style.

**ALAN R. GARDNER (ISB No. 2342)**  
**MICHAEL G. MCPEEK (ISB No. 2436)**  
**GARDNER LAW OFFICE**  
1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701  
Telephone: (208) 387-0881  
Facsimile: (208) 387-3501

2018 APR 20 PM 1:44

RECEIVED  
INDUSTRIAL COMMISSION

Attorney for **Defendants**

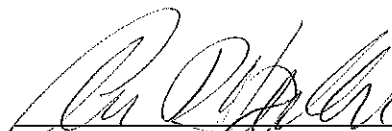
**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant,	)	<b>REQUEST FOR TELEPHONE</b>
	)	<b>CONFERENCE</b>
v.	)	
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendants.	)	

---

COME NOW the above-named Defendants, by and through their attorney of record, and hereby request a telephone conference to discuss resolution of issues pertaining to the evaluation by Dr. Lynch which was the subject matter of a recent declaratory ruling.

DATED this 20 day of April, 2018.

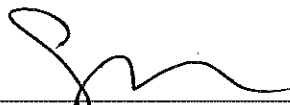
  
\_\_\_\_\_  
Alan R. Gardner - of the firm  
**GARDNER LAW OFFICE**  
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of April, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

  
\_\_\_\_\_  
Legal Assistant



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS, INC.,

Self-Insured Employer,

Defendants.

IC 2016-027914

NOTICE OF TELEPHONE  
STATUS CONFERENCE

FILED

MAY 01 2018

INDUSTRIAL COMMISSION

A telephone status conference will be initiated and conducted by Referee Brian Harper, pursuant to the Judicial Rules of Practice and Procedure under the Workers' Compensation Law, on **May 7, 2018, at 9:00 a.m. Pacific Time (10:00 a.m. Mountain Time).**

Michael Kessinger may be reached at 1 (208) 743-2313.

Alan Gardner may be reached at (208) 867-2755.

If there are any changes to these numbers, please contact us immediately. You may do this by calling the Industrial Commission at 334-6069.

All parties shall be ready to proceed at the scheduled time for conference. Sanctions may be imposed against any party not prepared or not participating.

DATED this 1<sup>st</sup> day of May, 2018.

INDUSTRIAL COMMISSION

*for* Michael Powers  
Brian Harper, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of May, 2018, a true and correct copy of the foregoing **NOTICE OF TELEPHONE STATUS CONFERENCE** was served by facsimile transmission upon each of the following:

MICHAEL KESSINGER  
*Fax No.: 1 (208) 743-8140*

ALAN GARDNER  
*Fax No.: (208) 387-3501*



---

jsk

Michael T. Kessinger, Esq. - ISBA No. 6719  
GOICOECHEA LAW OFFICES, LLP  
826 Main Street  
PO Box 287  
Lewiston, Idaho 83501  
Telephone: (208) 743-2313  
Facsimile: (208) 743-8140  
Email: mtkessinger@gmail.com

 ORIGINAL

Attorneys for the Claimant/Appellant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER ,  
Claimant/Appellant,

v.

ROSAUERS SUPERMARKETS, INC.,  
Employer,  
Surety,  
Defendant/Respondent.

IC NO.: 2016-027914

Supreme Court No. 46004

**NOTICE OF APPEAL**

RECEIVED  
INDUSTRIAL COMMISSION  
2018 MAY -3 AM 10:53

TO: THE ABOVE-NAMED RESPONDENT, ROSEAUERS SUPERMARKETS, INC., by and through its attorney of record, Alan Gardner, P.O. Box 2528, Boise, Idaho, AND THE CLERK OF THE STATE OF IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Miranda Moser, appeals against the above-named Respondent to the Idaho Supreme Court from the Industrial Commission's Order on Petition for Declaratory Ruling entered in the above-entitled proceeding on April 4, 2018, Chairman Thomas E. Limbaugh presiding.
2. Appellant has a right to appeal to the Idaho Supreme Court, and the Order described above is an appealable order pursuant to I.A.R. 11(d).

NOTICE OF APPEAL

FILED - ORIGINAL  
MAY - 3 2018  
SUPREME COURT  
COURT OF APPEALS

3. Preliminary statement of the issues on appeal pursuant to I.A.R. 17(f):
  - a. Whether the Industrial Commission erred in concluding that Respondent could require an I.C. § 72-433 medical examination without first establishing that Appellant is within her period of disability.
4. There is no hearing transcript in the above-entitled matter, as the Industrial Commission's ruling was a Declaratory Ruling issued prior to hearing.
5. The Appellant requests that the following documents be included in the agency's record in addition to those automatically included under Rule 28 I.A.R.:
  - a. Respondent's Motion for Sanctions;
  - b. Claimant's Response to Defendant's Motion for Sanctions and Claimant's Motion for Protective Order;
  - c. Industrial Commission Order on Defendants' Motion for Sanctions and Claimant's Motion for Protective Order of February 7, 2018;
  - d. Appellant's JRP 15 Petition for Declaratory Ruling on I.C. § 72-433;
  - e. Respondent's Response to Claimant's Petition for and Memorandum in Support of Declaratory Ruling;
  - f. Claimant's Reply in Support of JRP 15 Petition for Declaratory Ruling on I.C. § 72-433; and
  - g. Industrial Commission Order on Petition for Declaratory Ruling.
6. The undersigned certifies that:
  - a. The Industrial Commission has been paid the estimated fee of \$100.00 for preparation of the agency record, pending computation of the actual fee;

- b. The appellate filing fee of \$94.00 has been paid; and
- c. Service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 1<sup>st</sup> day of May 2018.

GOICOECHEA LAW OFFICES, LLP

  
\_\_\_\_\_  
Michael Kessinger  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of May 2018 I caused to be served a true and correct copy of the foregoing document was served on the following parties via US Mail:

ALAN R. GARDNER  
GARDNER LAW OFFICE  
P.O. Box 2528  
Boise, Idaho 83701

[ X ] U.S. Mail  
[ ] Hand Delivery  
[ ] Federal Express  
[ ] Via Facsimile

  
\_\_\_\_\_  
MICHAEL KESSINGER  
Attorney for the Appellant

111

RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS

2018 MAY -3 PM 2:05

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MIRANDA MOSER,

Claimant/Appellant,

v.

ROSAUERS SUPERMARKETS, INC.,

Defendant/Respondent

SUPREME COURT NO. 46004

CERTIFICATE OF APPEAL

Appeal From: Industrial Commission, Thomas E. Limbaugh,  
Chairman, presiding

Case Number: IC 2016-027914

Order Appealed from: Order on Petition for Declaratory Ruling, filed April  
4, 2018.

Attorney for Appellant: Michael T. Kessinger, Esq.  
PO Box 287  
Lewiston, ID 83501

Attorney for Respondents: Alan R. Gardner  
PO Box 2528  
Boise, ID 83647

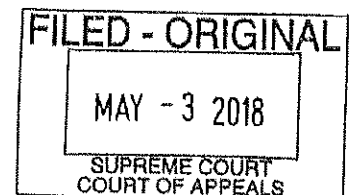
Appealed By: Claimant/Appellant Miranda Moser

Appealed Against: Defendant/Respondent Rosauers Supermarkets, Inc.

Notice of Appeal Filed: May 3, 2018

Appellate Fee Paid: \$94.00 to Supreme Court and  
\$100.00 to Industrial Commission  
Checks were received.

CERTIFICATE OF APPEAL – (MIRANDA MOSER) - 1



Name of Reporter:


No hearing has been held on this matter.

Transcript Requested:

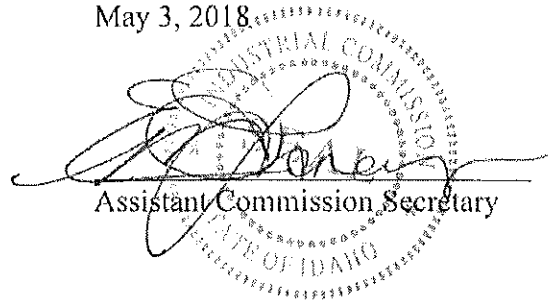
Standard transcript has not been requested.

Dated:

May 3, 2018



Assistant Commission Secretary



**CERTIFICATION OF APPEAL**

I, Emma Landers, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing are true and correct photocopies of the Notice of Appeal and Order on Petition for Declaratory Ruling, and the whole thereof, in IC case number 2016-027914 for Miranda Moser.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 3<sup>rd</sup> day of May, 2018.

  
Assistant Commission Secretary

Supreme Court No. 46004



**ALAN R. GARDNER (ISB No. 2342)**  
**MICHAEL G. MCPEEK (ISB No. 2436)**

**GARDNER LAW OFFICE**  
1410 West Washington - 83702  
Post Office Box 2528  
Boise, Idaho 83701

Telephone: (208) 387-0881  
Facsimile: (208) 387-3501  
Email: agardner@gardnerlaw.net  
Email: mmcpeek@gardnerlaw.net

2018 MAY 11 PM 4:42

RECEIVED  
INDUSTRIAL COMMISSION

ORIGINAL

Attorneys for **Defendant/ Respondent**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIRANDA MOSER,	)	I.C. No. 2016-027914
	)	
Claimant/Appellant,	)	<b>REQUEST FOR ADDITIONAL</b>
	)	<b>RECORD</b>
v.	)	
	)	
ROSAUERS SUPERMARKETS, INC.,	)	
	)	
Employer,	)	
Self-Insured,	)	
Defendant/Respondent.	)	

TO: THE ABOVE-NAMED APPELLANT, MIRANDA MOSER; HER ATTORNEY:

Michael T. Kessinger  
Goicoechea Law Offices, LLP  
P.O. Box 287  
Lewiston, Idaho 83501

AND THE CLERK OF THE INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN, that the Respondent in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the reporter's

transcript or the agency's record in addition to that required to be included by the I.A.R. and the notice of appeal:

1. Reporter's transcript: None.
2. Agency's Record: Inclusion of following additional records:
  - a. Notice of Medical Exam filed January 17, 2018;
  - b. Motion for Sanctions filed January 24, 2018 and Exhibits A through D which accompanied that Motion and were attached thereto, if those Exhibits have not already been included in the record in response to Appellant's designation in her Notice of Appeal to inclusion of the Motion for Sanctions in the agency record [see Notice of Appeal, paragraph 5.a.];
  - c. Second Notice of Medical Exam filed February 7, 2018;
  - d. Claimant's Memorandum in support of JRP 15 Petition for Declaratory ruling on I.C. §72-433 dated February 15, 2018;
  - e. Claimant's Response to Defendant's Second Notice of Medical Exam dated March 19, 2018;
  - f. Notice of Cancellation of Medical Exam filed March 23, 2018;
  - g. Request for Telephone Conference filed April 20, 2018; and
  - h. Notice of Telephone Conference filed May 1, 2018.
3. Exhibits: Exhibits A through D to Defendant/Respondent's Motion for Sanctions filed January 24, 2018 if those Exhibits have not already been included based upon Appellant's designation in the Notice of Appeal [see Notice of Appeal, paragraph 5.a.] or based upon Respondent's Request for Additional Record [see paragraph 2.b. above].

4. I certify that a copy of this request was served upon the clerk of the Industrial Commission and upon all parties required to be served pursuant to Rule 20 I.A.R.

DATED this 11<sup>th</sup> day of May, 2018.



Michael G. McPeck

**GARDNER LAW OFFICE**

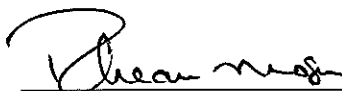
Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11<sup>th</sup> day of May, 2018, I caused a true and correct copy of the foregoing to be served upon:

Michael Kessinger  
Goicoechea Law Office, LLP  
P.O. Box 287  
Lewiston, ID 83501

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.



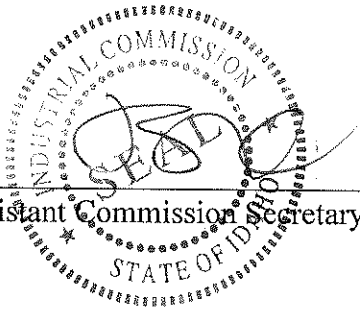
Legal Assistant

**CERTIFICATION OF RECORD**

I, Jennifer Komperud, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 46004 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that this submission includes all exhibits offered or admitted in this proceeding as attached to relative documents. No additional exhibits will be lodged with the Supreme Court and there is no Reporter's Transcript.

DATED this 22<sup>nd</sup> day of June, 2018.

  
Assistant Commission Secretary

**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

MIRANDA MOSER,

Claimant/Appellant,

v.

ROUSAUERS SUPERMARKETS, INC.,

Defendants/Respondents.

**SUPREME COURT NO. 46004**

**NOTICE OF COMPLETION**

---

TO: STEPHEN W. KENYON, Clerk of the Courts;  
Michael Kessinger for Appellant; and  
Alan Gardner for Respondents.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. Mail upon each of the following:

Attorney for Appellant:

MICHAEL KESSINGER  
PO BOX 287  
LEWISTON ID 83501

Attorney for Respondents:

ALAN GARDNER  
PO BOX 2528  
BOISE ID 83701

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight (28) days from the date of this Notice in which to file objections to the Clerk's Record, including requests for corrections, additions or deletions. In the event

**NOTICE OF COMPLETION (MIRANDA MOSER - 46004) - 1**

no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight (28) day period, the Clerk's Record shall be deemed settled.

DATED at Boise, Idaho, this 22<sup>nd</sup> day of June, 2018.

