IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION

ROSEMARY NORMAN,

Claimant,

v.

CLAIM NOS. 30100316910
30100303409
Workers' Compensation

STATE OF TENNESSEE,

Defendant

JUDGMENT

This matter came to be heard on March 9, 2015, before Nancy C. Miller-Herron, Commissioner, Tennessee Claims Commission, Western Division, at the Madison County Courthouse, Jackson, Tennessee. Mr. Jeffrey P. Boyd, Esq., represented Claimant. Mr. Eric A. Fuller, Esq., represented Defendant, State of Tennessee.

Claimant, Rosemary Norman, brings this action against the State of Tennessee, hereinafter referred to as Defendant, to recover under Tennessee Code Annotated § 9-8-307 (a)(1)(K), relating to workers' compensation claims by a state employee, for injuries to her back and right shoulder during her employment at West Tennessee State Penitentiary, hereinafter referred to as WTSP, in Henning, Tennessee. Claimant received injuries to her back in 2000 and her right shoulder in 2005; these claims were previously settled and included open future medical benefits. Claimant now alleges she sustained new injuries to her back and shoulder in late 2008 and early 2009. She has

received treatment for these injuries, but under the old workers' compensation claim numbers.

I.

ISSUES FOR TRIAL

The parties are in agreement that 1) Claimant's workers' compensation rate was three hundred thirty-two dollars and forty-nine cents ($332.49) and 2) Claimant is not entitled to any temporary total disability benefits.

The contested issues are: 1) whether Claimant's claims must be dismissed because she did not file them within 90 days of letters of denial sent by the State's third party administrator directly to her and not to her counsel; 2) whether proper notice was given for the alleged new injuries to Claimant's back and/or right shoulder; 3) whether Claimant, in fact, sustained new injuries to her back and/or shoulder or is suffering from a continuation of a 2000 back injury and a 2005 or 2006 shoulder injury; 4) if Claimant suffered a new injury or injuries, the degree of permanent partial disability to the body as a whole suffered by the Claimant.

II.

FACT TESTIMONY

Rosemary Norman, age 63, testified on her own behalf. Norman testified she completed grade 12, but has no higher education. (Tr., p. 21, line 20) Before being hired by the Tennessee Department of Correction, Norman worked for approximately 7 years at the Kellwood Manufacturing plant, where she sewed coats together, and for 2 years at Wal-Mart where she was the assistant deli manager. (Tr., p. 22, lines 4-20)

Norman testified she began working as a correctional officer for the State of Tennessee in August, 1999. (Tr., p. 23, lines 17-21)

Before going to work for the State, Claimant had a workers' compensation claim for carpal tunnel. She had surgery on both wrists. (Tr., p. 23, line 21- p. 24, line 11)

Claimant testified that she does work supervision in the Minimum Security Complex of WTSP, an all-male maximum security prison. She gets inmates ready for work, counts them, makes sure they get their meals and the like. (Tr., p. 25, lines 5-14) Claimant testified that the counting part of her job requires her to walk up and down steps, twice per count, at 11:00 a.m. and 3:00 p.m. (Tr., p. 26, lines 8-16)

Claimant also is required to lift because she "had to give out chemicals and stuff to inmates that cleans their rooms, or the—the units, or anything like that. . . ." (Tr., p. 26, lines 21-23) Claimant testified she sometimes has to lift the buddy jugs of chemicals over her head. (Tr., p. 27, lines 11-22) She estimated these jug can weigh 15 or 20 pounds. (Tr., p. 28, line 1) In addition, Claimant is required to carry mail in a duffel bag up and down the stairs to distribute it to the inmates. (Tr., p. 28, lines 9-17)

When asked to recount the injury to her back in 2000, Claimant said she was called by her corporal to sign a count slip. When she stepped down a step, she hit some stripper "and I went flying down and landed on my back." (Tr., p. 29, lines 7-8) Claimant stated that claim was accepted as compensable, but she did not remember receiving money on it. (Tr., p. 54, lines 4-16) Upon seeing a copy of the settlement check, Claimant testified that she recalled getting the check for almost $8,000 in compensation for her back injury. (Tr., p. 55, lines 13-15)

When asked about what happened in 2008, Claimant stated:

> I was going up the stairs and I noticed that I was having—something was going wrong, and then I heard my back give a little bit, and a pain shoved through my legs. And then by the time I got home I couldn't even get out of my car. (Tr., p. 29, lines 15-19)

Claimant said it happened on a specific date and she was not aware that the complaint says it was a gradually occurring injury. (Tr., p. 60, lines 2-19)

When asked if she had told anyone at work about this back injury, Claimant replied, "I told my Warden." (Tr., p. 29, line 24) On cross-examination, she was asked to read from the April 1, 2009 letter to the warden, which stated:

> I, Rosemary Norman, am writing to you about FMLA. I'm having a nerve block Monday the 6th, 2009, due to the—having a bulging disc, **which was a result of falling on wax stripper in the unit in 2000.** (Emphasis added.) (Tr., p. 74, lines 15-18)

Ms. Norman also said she reported the second back injury to her sergeant on the day it happened. (Tr., p. 60, lines 20-24) Claimant said she didn't have any paperwork regarding reporting the injury, but stated that Sergeant Mumford "made a trauma report." (Tr., p. 61, lines 8-9) Claimant said she signed the report but she didn't have a copy of it. (Tr., p. 61, lines 11-14)

Claimant said after this back injury, she went to her primary care provider, Dr. Little, who sent her to Dr. Nord, who sent her to Dr. Linville. (Tr., p. 30, lines 8-9) Claimant said she treated with Dr. Linville "[a]bout six months to a year." (Tr., p. 30, line 18) She said Linville took her off from work for a while and provided her with work restrictions. (Tr., p. 30, lines 19-23) She said she gave those restrictions to the warden and to human resources. (Tr., p. 31, lines 2-3)

Claimant stated that her letter to the warden stated that she was asking for FMLA because "I was running out of time because I wasn't being paid." (Tr., p. 31, lines 19-21)

Claimant testified Dr. Linville recommended back surgery, but she chose not to have it. (Tr., p. 32, line 23- p. 33, line 4) Claimant said she still has some problems when she starts walking and her back catches. (Tr., p. 33, lines 8-11) When her back catches she feels a sharp pain shooting through her back. She also has some trouble with her legs. (Tr., p. 33, lines 14-18) Claimant explained that the cane she uses is related both to her back injury and to knee problems. (Tr., p. 33, line 24)

When asked if there is anything she could do before that she can't do now at work, Claimant stated: "I used to could run up the steps, but I can't no more." (Tr., p. 34, lines 23-24) She said that was because of both her back and her knees. (Tr., p. 35, lines 1-3)

Claimant testified that she is still required to get stuff off of shelves, to carry the mail and to go up and down steps to do the census. (Tr., p. 35, lines 4-11) She says she has to do her job because "I'm my only means of support I've got." (Tr., p. 35, lines 21-22)

Claimant testified that she injured her shoulder in 2005 and had surgery. Claimant testified that as she was about to put up mail, her foot hung on a phone cord and she tripped and fell down. (Tr., p. 47, line 21- p. 48, line 6) "And that was a torn rotator cuff also." (Tr., p. 48, line 7) Claimant said she settled that claim for $38,847.06. (Tr., p. 48, lines 23-24; p. 51, lines 11-12) After a period of recovery she returned to work. (Tr., p. 36, lines 13-18)

Claimant testified that with regard to the second injury to her shoulder,

> I was getting chemicals out of the chemical room.
> I went to reach up to get one of the chemical bottles,
> and when I went up there I felt something rip, like tear
> into that right there. (Tr., p. 56, line 22- p. 57, line 1)

When asked whether she was aware that the complaint she filed alleged a gradually occurring injury, Claimant responded, "That I don't remember either." (Tr., p. 57, line 14)

Claimant said she told Dr. Nord how she injured her shoulder and she couldn't explain why his deposition testimony has no mention of lifting a jug of chemicals as a cause of her injury. (Tr., p. 58, lines 9-12) She said she didn't know exactly what date it happened. (Tr., p. 58, lines 15-16) Claimant said she did not injure her shoulder lifting mail. (Tr., p. 59, lines 1-3) Claimant said she reported her shoulder injury to Sergeant Mumford the same day she did it. (Tr., p. 65, line 19- p. 66, line 1) She acknowledged she does not have a copy of the trauma report, though she did sign it. (Tr., p. 66, lines 2-9)

Claimant said she told the warden, Mr. Stewart, about the shoulder injury in a letter, though no copy was produced. (Tr., p. 37, lines 8-10) Claimant testified that when she also told her supervisor, Sergeant Mumford, about the shoulder problem, Mumford recommended that she go to the doctor. (Tr., p. 43, lines 10-24)

Claimant said after she told Warden Stewart, she was sent her to Dr. Nord, who did an MRI and then arthroscopic surgery. (Tr., p. 37, line 18- p. 38, line 6) Claimant said she was off work about three months, during which time she had physical therapy. She does not have full range of motion. (Tr., p. 38, lines 10-19) Claimant testified, "My strength is nothing like it used to be, and I can only reach so far up . . ." (Tr., p. 39, lines

2-3) She stated that while at work she uses her left hand more than her right hand, like when she has to do things overhead or carry a mailbag. (Tr., p. 39, lines 9-17) Claimant testified she still has pain in her shoulder, especially if she moves it certain ways. She said it definitely limits her in the way she does her job. (Tr., p. 39, line 18- p. 40, line 8) She said it would be hard for her to defend herself right now if she had to do so. (Tr., p. 40, lines 8-9) Claimant says she has certain work restrictions. She is not supposed to lift more than 10 to 15 pounds or to lift overhead or to work more than a certain number of hours in a week. (Tr., p. 41, lines 6-15)

Claimant testified that when she had the second surgery on her shoulder, she used sick days until her sick days ran out. Then she used FMLA until she could come back to work. (Tr., p. 42, lines 14-20) Claimant testified that she is still working for TDOC, and that she is making a little more than she was making in 2009. (Tr., p. 45 line 22- p. 46, line 3)

Claimant testified she did not believe her (second) December, 2009 rotator cuff surgery was related to that 2005 incident, although she acknowledged testifying in her deposition that it was. (Tr., p. 52, lines 3-19)

Monica Fuqua, Senior Claims Examiner for the Division of Claims Administration, testified on behalf of the State of Tennessee. Fuqua explained that Tennessee is self-insured as far as workers' compensation claims are concerned. Her office oversees the handling of these claims by a third party administrator. (Tr., p. 80, lines 9-11) Fuqua testified that she supervises the maintenance of custody of records involved in workers' compensation claims and has access to all the records for the claims. (Tr., p. 81, lines 10-16)

Fuqua testified that at the time of Claimant's accidents, injured employees would report their injuries either using an accident report or by calling a nurse at Sedgwick's call center. (Tr., p. 82, lines 3-6)

When asked whether she was able to find in Norman's records any indication she had notified her employer of any new injury, Fuqua responded: "I do not know about her employer, about West Tennessee State Penitentiary, but I do know that we did not receive notice of it." (Tr., p. 84, lines 5-7) She said the first time her office became aware of Claimant's alleged new injury was February or March of 2010 when they received a benefit review request from the Department of Labor. (Tr., p. 84, lines 8-17) When asked how her name got on one of the first reports of injury sent to the Department of Labor, Fuqua said:

> The only thing that I can remember at this point is because when those courtesy copies came in and we did not have a claim for those, I turned around and faxed those to the Sedgwick call center and had them set up a claim. (Tr., p. 85, lines 20-24)

When asked on cross-examination whether Norman was responsible for filling out the first report of injury, Fuqua responded: "We would have expected her to call the Sedgwick call center to report a claim." (Tr., p. 86, lines 18-19) Fuqua said they don't require the paperwork any longer. (Tr., p. 87, lines 7-8)

Fuqua testified that the State's last voluntary payment on Norman's back claim from July 31, 2000 was August 25, 2010. (Tr., p. 90, lines 8-10) Fuqua said the State made its first new payment after 2008 on the back claim on April 23, 2009. (Tr., p. 90, lines 11-13) The first voluntary payment Fuqua could find in her records on the shoulder claim after 2009 was May 5, 2010. (Tr., p. 90, line 21- p. 91, line 6) The last

payment Fuqua could find on the shoulder claim was November 28, 2012. (Tr., p. 91, lines 22-23)

Fuqua testified all the payments on the back and shoulder injuries were made on the old claim numbers. (Tr., p. 93, lines 8-12)

Loretta Inez Coleman, Human Resources Manager for the West Tennessee State Penitentiary, also testified on behalf of the State. Her job duties include dealing with workers' compensation claims. (Tr., p. 95, lines 5-7) Coleman testified that once she is notified an employee has been injured on the job, she contacts the employee to be sure the appropriate documentation is completed and that the employee calls the third party administrator. (Tr., p. 95, lines 12-18)

When asked if she remembered how it worked back when Sedgwick administered the claims, Coleman said it was "[p]retty much the same." (Tr., p. 96, line 2) She said she would be notified about the injury either by the employee or their supervisor. Then she would have the employee and their supervisor complete and sign an accident report form, a copy of which is maintained in the prison's files. (Tr., p. 96, lines 3-21)

When asked whether it is possible for an employee at WTSP to be injured without her knowing about it, Coleman said it would be possible if the employee contacted the third party administrator directly. (Tr., p. 97, lines 7-9)

Coleman testified that she reviewed Claimant's files and found a claim submitted in July, 2000. (Tr., p. 99, line 24- p. 100, line 2) Coleman said she did not find an indication that Claimant contacted Warden Stewart about 2008 or 2009 injuries. (Tr., p. 100, lines 3-7) Coleman testified that she found nothing in her review of Norman's files

to indicate Norman had reported the 2008, 2009 injuries to anyone at WTSP. (Tr., p. 101, lines 5-9)

On cross-examination, Coleman admitted she was aware in 2009 and 2010 that Claimant was receiving medical treatment for a back injury and a right shoulder injury. (Tr., p. 101, lines 14-19) She also acknowledged that the State was paying medical benefits for those injuries. (Tr., p. 101, lines 20-23)

Coleman was asked if it is the employee's responsibility to determine whether they have sustained a new injury or an old injury. Coleman responded:

> The employee and the claims administrator determines that. If I may say, but the employee is always aware that they need to report any new injury to their Human Resources. (Tr., p. 105, lines 5-8)

III.

MEDICAL TESTIMONY

Board certified orthopedic surgeon Keith D. Nord, M.D., testified by deposition in this cause on April 28, 2014. (Nord Dep., p. 4, lines 11-16) Dr. Nord testified that he first saw Claimant on May 29, 2009. (Nord Dep., p. 5, line 23) Nord stated Claimant previously had been treated by Dr. Huff, who performed surgery on Claimant for a "rotator cuff tear, impingement and AC arthritis." (Nord Dep., p. 6, line 5) According to Nord, at that May, 2009 appointment, Claimant reported that she was still having pain in her shoulder. (Nord Dep., p. 6, lines 14-15) Dr. Nord said Ms. Norman "noted that she had fallen in 2005 and also injured her right shoulder when she fell in the mail room at West Tennessee Penitentiary." (Nord Dep., p. 6, lines 18-20) Nord said she was also still having some coccyx pain as "she'd landed on her tailbone."

Dr. Nord said he recommended that Claimant have an MRI to see if she had changes to the right shoulder and that she continue the permanent restrictions previously placed by Dr. Huff. (Nord Dep., p. 7, lines 11-17) Nord said after a rotator cuff injury it is easy to reinjure it again. (Nord Dep., p. 8, line 10) Dr. Nord said the MRI showed "new tearing, including the labrum, as well as the rotator cuff." (Nord Dep., p. 9, lines 10-11) Dr. Nord opined that the findings on the MRI were likely caused by Claimant's carrying around 50 pound bags of mail. (Nord Dep., p. 10, lines 1-2)

Dr. Nord did a second surgery on Claimant's shoulder on December 31, 2009. He said he found that "[t]he labrum actually was intact. The biceps was intact, except for some minor fraying. The rotator cuff had a large tear." (Nord Dep., p. 10, lines 12-14)

Dr. Nord saw Claimant for her shoulder on April 30, 2010, when she reported that she "had had a bit of dull, aching pain." (Nord Dep., p. 11, lines 12-14) He recommended physical therapy and prescribed hydrocodone for pain. (Nord Dep., p. 11, lines 13-15)

When Claimant returned to see Dr. Nord at the end of May, 2010, she reported shoulder pain and said "her strength and range of motion actually had been decreasing gradually." (Nord Dep., p. 11, lines 22-23) Dr. Nord said he found she had reasonable range of motion, "but it wasn't normal." (Nord Dep., p. 12, line 4) Dr. Nord gave her an injection in her shoulder and recommended that she continue with exercises. (Nord Dep., p. 12, lines 5-7)

When Claimant returned in July, 2010, her motion had improved, but she was still in some pain. (Nord Dep., p. 12, lines 8-11) He recommended physical therapy, but

Claimant reported her PT had not been approved by workers' compensation the last time he ordered it. (Nord Dep., p. 12, lines 14-15) Dr. Nord said he put her on "restricted duty, eight-hour days, advance shooting as tolerated." (Nord Dep., p. 12, lines 20-22)

Claimant returned on October 29, 2010 and Nord kept her on eight-hour days. In February, 2011, Claimant reported a lot of pain in her lower arm. Nord prescribed an anti-inflammatory. In June, 2011, she reported pain radiating down toward her elbow. Dr. Nord said she would be considered to have chronic pain. (Nord Dep., p. 13, lines 14-18)

Dr. Nord opined that as of January 9, 2012, Claimant had a six percent (6%) impairment to the body as a whole. (Nord Dep., p. 14, lines 6-7) When asked whether it was an acute or a chronic injury, Nord opined that it

> was a combination, but it was more of an acute injury. Because anytime, like I mentioned, the rotator cuff having previously been operated on, places it at increased risk of future tearing, and that's essentially what happened in this situation. (Nord Dep., p. 14, lines 11-15)

Dr. Nord went on to say that "the chronic portion part that looked like Dr. Huff had operated on pretty much had healed, but it pulled off in different areas." (Nord Dep., p. 14, lines 17-19)

When asked whether he took Dr. Huff's 2006 permanent partial impairment rating into account when he assigned the 6% rating, Dr. Nord testified, "Mine is not in addition to his, if that is what you are asking." (Nord Dep., p. 15, lines 20-21) Nord explained, "A rotator cuff torn once versus a rotator cuff torn twice doesn't increase the impairment." (Nord Dep., p.16, lines 7-8)

Dr. Nord conceded that the only actual date of injury that is noted in Claimant's medical file is November 23, 2005. (Nord Dep., p. 19, lines 13-16) He said he thought he applied the 5th Edition of the AMA Guides to her 2005 injury. (Nord Dep., p. 17, lines 5-7)

Dr. Nord further testified that the range of motion findings by Dr. Dalal were nowhere close to what he found throughout the course of treating her "and there's no reason it should have gotten that much worse." (Nord Dep., p. 21, lines 8-10)

Dr. Nord said that he had the date of injury as November, 2005 on his form because "her initial injury that was the authority for me to take care of her was from 2005." (Nord Dep., p. 22, lines 21-22) Nord stated what he treated was something new. (Nord Dep., p. 23, lines 5-7)

Douglas A. Linville, II, M.D., a Diplomate of the American Board of Orthopedic Surgery, testified by deposition on May 28, 2014. (Linville Dep., p. 7, lines 3-4) Dr. Linville testified that he saw Rosemary Norman on March 4, 2009, on a referral from Dr. Carl Huff. (Linville Dep., p. 7, lines 15-19) Dr. Linville said she complained "of back pain, buttock and leg pain." (Linville Dep., p. 8, lines 2-3) Linville went on: "The patient stated that she fell on the job in the year 2000, specifically stated she fell down a number of steps because she slipped on wax; this was at work." (Linville Dep., p. 8, lines 6-9)

Dr. Linville went on to say that "it's my understanding that there were two separate falls, and that's why I kind of take issue." (Linville Dep., p. 8, lines 18-20) Dr. Linville testified that the intake form dated February 27, 2009 (which Norman filled out)

indicated that the onset of symptoms was December 29, 2008. The form also states she didn't know what started the pain. (Linville Dep., p. 8, line 23- p. 9, line 6)

Dr. Linville testified that on March 4, 2009 he reviewed an MRI taken on January 7, 2009. He said it was his impression that "the patient had degenerative spondylolisthesis with central right greater than left foraminal stenosis with a small paracentral disc protrusion at L2-3 on the right side." (Linville Dep., p. 9, line 24- p. 10, line 3) Dr. Linville also reviewed an EMG study from February 19, 2009 which showed L5 radiculopathy. (Linville Dep., p. 11, lines 3-4)

Dr. Linville opined that the cause of Claimant's symptoms was the fall in 2000. (Linville Dep., p. 12, lines 8-11) On cross-examination, Dr. Linville testified that a second fall in December, 2008, where she slipped on a wax floor "could very well have created the onset of symptoms in a previously asymptomatic back." (Linville Dep., p. 13, lines 19-22) Dr. Linville further opined that he did not believe the L2-3 likely was the source of Claimant's pain. (Linville Dep., p. 14, lines 5-6)

Dr. Linville testified that he recommended Claimant do some physical therapy. When she came back on May 14, 2009, "she had no physical therapy but had had some injections done at a pain clinic." (Linville Dep., p.14, lines 20-21) He said her diagnosis was "degenerative spondylolisthesis with sciatic and back pain aggravated by on-the-job injury." (Linville Dep., p. 15, lines 7-9) He said the document so indicating was copied to Dr. Huff and to workers' comp. (Linville Dep., p. 15, lines 10-12)

Dr. Linvillle testified that he saw Norman again in September, 2009. She reported that she had had some physical therapy, but she had not gotten any better. (Linville Dep., p. 15, line 19- p. 16, line 9) When Linville saw her in April, 2010,

Claimant reported she had been doing something in physical therapy about a week earlier when she felt a sudden pain in her back and leg. Linville prescribed physical therapy and an epidural. (Linville Dep., p. 17, line 15- p. 18, line 1)

Dr. Linville testified that he did not have an opinion as to whether Claimant had a permanent impairment for the lumbar spine injury he treated. He said the 6th Edition of the AMA Guides require range of motion which are not documented in Claimant's records. (Linville Dep., p. 18, lines 15-21)

Dr. Linville conceded that his records lump two possible falls together. He explains:

> There was a comment of an injury in the year 2000, and in December of 2008 there was an injury which is listed on the intake sheet. So there is an indication that there were two separate incidents separated by eight years. (Linville Dep., p. 22, lines 18-22)

Dr. Linville was then asked whether he had any way of knowing "if this claimed December 2008 injury either resulted in an anatomical impairment or further aggravated her degenerative condition." (Linville Dep., p. 24, lines 14-17) He responded: "That's correct." (Linville Dep., p. 24, line 18)

Apurva R. Dalal, M.D., who is board certified by the American Board of Orthopedic Surgery and the American Board of Independent Medical Examiners, testified by deposition on July 11, 2014. Dr. Dalal testified that he has been certified to interpret the fifth and sixth editions of the AMA Guides. (Dalal Dep., p. 6, lines 10-15)

Dr. Dalal testified that he first saw Claimant on May 21, 2012 and that he did an extensive review of her medical records. (Dalal Dep., p. 7, lines 13-20) Dr. Dalal

testified that Claimant sustained her injury when she tripped over a phone line in November, 2006. (Dalal Dep., p.8, lines 16-19)

Dr. Dalal testified that he calculated Ms. Norman's impairment rating according to the 6th Edition of the AMA Guides. He stated that with regard to her shoulder injury, "looking at Table 15-34, page 475, due to loss of range of motion of her shoulder, she qualified for fourteen percent impairment rating to the right upper extremity." (Dalal Dep., p. 10, lines 19-22) He said with regard to her back he assigned a "seven percent impairment rating as a whole." (Dalal Dep., p. 10, lines 23-24) Dr. Dalal opined that the combined rating was "fourteen percent of the body as a whole." (Dalal Dep., p. 11, lines 1-2)

Dr. Dalal was asked by Claimant's counsel to assume she was back at work and putting containers of chemicals into an overhead cabinet on a repetitive basis. He was asked if this could have caused the problem with her shoulder for which she was treated in 2009. He responded: "It is the kind of injury that would result in a rotator cuff tear, yes." (Dalal Dep., p. 12, lines 19-21)

With regard to her back injury, Dr. Dalal was asked to assume Claimant repetitively walking up and down steps during which "she felt her back go out and felt numbness and tingling and what she described as a loss of use of her lower extremities." (Dalal Dep., p. 13, lines 4-6) He was asked if the aforementioned "could have caused the medical treatment she required in 2009—" (Dalal Dep., p. 13, lines 9-10) Dalal responded: "Yes. This is something which would cause aggravation. Going up and down stairs would aggravate problems with the back." (Dalal Dep., p. 13, line 23- p. 14, line 3)

When asked whether any date of injury other than 2006 is mentioned in his report, Dalal replied, "Not that I recall." (Dalal Dep., p. 17, line 10) When asked whether it mentions lifting chemicals, Dalal replied, "No, sir." (Dalal Dep., p. 17, line 13) When asked whether Claimant mentioned injuring her shoulder firing a weapon or lifting a mailbag, Dalal indicated she did not. (Dalal Dep., p. 19, lines 10-16)

Dr. Dalal stated that he did not know the impairment assigned for the 2000 injury at L4-L5 or if she was assigned one. (Dalal Dep., p. 18, lines 20-24) Dr. Dalal said he could not remember the impairment rating Claimant was assigned after her first shoulder surgery. (Dalal Dep., p. 19, line 22)

Dr. Dalal said he used the 6th Edition of the Guides because of a 2010 law that required that edition be used regardless of the date of injury. (Dalal Dep., p. 21, lines 6-9)

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the testimony of those whose depositions were introduced for proof, the arguments of counsel and, indeed, the entire record as a whole. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact.

A. Statute of Limitations

Under § 9-8-402, Tenn. Code Ann., when a claim is denied, the Division of Claims Administration must notify the Claimant of the reasons for the denial and of his or her right to file a claim with the claims commission within 90 days of the date of the

denial notice. Defendant's counsel argues that because denial letters were sent to Claimant directly in June, 2010, and no claim was filed within 90 days of the date on the notice, these claims must be dismissed. However, in June, 2010, Claimant was represented by counsel. Rule 5.02, *Tennessee Rules of Civil Procedure* provides that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney. . ."

In *Wester v. Childress,* 625 S.W.2d 710 (Tenn. 1981), the Tennessee Supreme Court addressed the issue of whether Tennessee Rule of Civil Procedure 53.04 (1), which requires that notice of filing of a Master's report be sent to all parties, requires that when a party is represented by an attorney the notice of the filing of the report be made upon the attorney. The Court held that it did since to hold otherwise "would place upon the client the burden of taking action on his own behalf after having retained counsel to represent his interests." 625 S.W. 2d at 711.

In the case at bar, to allow a notice of denial sent to a represented Claimant and not her counsel to effectively end the case would be unconscionable and would unquestionably run afoul of the *Tennessee Rules of Civil Procedure.* (*See* T.R.C.P. 5.02) The Commission, therefore, **FINDS** that Claimant did not receive adequate notice in June, 2010, and that the 90 day deadline was not triggered by the correspondence sent directly to Claimant and not to her counsel. Defendant's motion to dismiss this claim because it was not filed within the statute of limitations is, accordingly, **DENIED.**

B. Notice

Under Tennessee law, injured employees are required to give or cause to be given to their employer written notice of a work-related injury. No such written notice is

required where the employer had actual notice of the accident. Failure to provide such notice within 30 days after the accident can make the injury non-compensable unless the employee has a reasonable excuse for his or her failure to provide notice. § 50-6-201, Tenn. Code Ann.

It is the position of the State of Tennessee that it had no notice that Claimant had sustained a new injury to either her shoulder or her back. Instead, state officials thought they were providing lifetime medical care for earlier injuries Claimant sustained to her shoulder and back. In support of its position, the State points to Claimant's letter to Warden Stewart in which she asks to be placed on leave because of an injury she sustained to her back in 2000. (Tr. Ex. 4) The State further avers that Claimant cannot claim she did not know that her injuries were new injuries when she now is claiming she suffered acute injuries on specific dates. The State notes that the original Complaint filed in this cause alleged gradually occurring injuries, not the acute injuries claimed at trial.

Claimant seems to be making contradictory claims regarding notice. First, she insists she told her sergeant about both injuries immediately after they occurred and that trauma reports were prepared which she signed. (Tr., p. 61, lines 8-14) However, Claimant has not been able to produce a copy of a trauma report and, according to Ms. Coleman, whose testimony was extremely credible, there are no trauma reports on either of the new injuries in her personnel files at WTSP. (Tr., p. 101, lines 5-9)

While arguing that she, in fact, did recognize and report the new injuries in writing, she also concedes that when she wrote the warden to ask for leave, she told him her back injury was covered by workers' compensation and related it to her 2000

claim. But Claimant insisted that as a lay person, she could not be expected to know whether her symptoms related back to her old injuries or were the result of the new work-related injuries. She insists that the medical proof in this case establishes that she sustained new injuries, including a complete rupture of her rotator cuff which was not there when she had surgery on her shoulder in 2006.

The truth appears to be, and the Commission **FINDS**, that since her injuries were both to body parts which had been previously injured, she was very confused about which part to attribute to the prior claim and which to the new events. And each time she gave a medical history to a health care provider, she began with the first injury. Perhaps the most forthright testimony regarding this issue came from Dr. Nord who testified that he had the date of injury as November, 2005 on his form because "her initial injury that was the authority for me to take care of her was from 2005." (Nord Dep., p. 22, lines 21-22) Nord also stated that what he actually treated was something new. (Nord Dep., p. 23, lines 5-7)

Under Tennessee law, the Courts have often excused delayed notice if an employee was not aware of the seriousness of his condition or that it stemmed from work. *See, e.g. Banks v. United Parcel Service,* 170 S.W.3d 556 (Tenn. 2005). The Courts also have given additional latitude to employees who have difficulty remembering names, places and sequences of events, like the plaintiff in *Livingston v. Shelby Williams Industries,* 811 S.W.2d 511(Tenn. 1991), who did not relate his back trouble to work until a post-surgery discussion with his physician.

The Commission **FINDS** that Claimant's confusion about whether to attribute her symptoms to the past accidents or to the new was a reasonable excuse for her failure to give written notice to her employer within 30 days.

C. Causation

With regard to Claimant's contention that she sustained a new injury to her shoulder, Claimant testified that it occurred while she was lifting chemical jugs. Her treating physician, Dr. Nord, has no reference in his records to the chemical jugs. He does, however, opine that her injury was both gradual and acute. He underscores several workplace tasks such as carrying mailbags and shooting which could have caused the rotator cuff tear. (Nord Dep., p. 9, line 18- p. 10, line 2) It is notable that all of the possible causes for the acute and gradual injury to her shoulder appear to have happened at work.

Dr. Nord did a second surgery on Claimant's shoulder on December 31, 2009. He said he found that "[t]he labrum actually was intact. The biceps was intact, except for some minor fraying. The rotator cuff had a large tear." (Nord Dep., p. 10, lines 12-14) Dr. Nord went on to say that "the chronic portion part that looked like Dr. Huff had operated on pretty much had healed, but it pulled off in different areas." (Nord Dep., p. 14, lines 17-19)

Thus, the findings of Claimant's treating physician, Dr. Nord, corroborated Claimant's claim that she suffered a new injury to her shoulder at work. The Commission **FINDS** that Claimant has so proven by a preponderance of the evidence.

With regard to her back injury, Claimant testified that her pain began in December, 2008, when she was walking down some steps at work and felt a pop in her

back. She stated that by the time she got home she could hardly get out of her car. (Tr., p. 29, lines 18-19) When she filled in the intake sheet at Dr. Linville's office, she said her pain began on December 29, 2008. (May, 28, 2014 Dep. of Dr. Linville, Ex. 3) However, when asked on the intake sheet "What started the pain (or problem)," her response is "Don't Know."

Dr. Linville opined that the cause of Claimant's symptoms was the fall in 2000. (Linville Dep., p. 12, lines 8-11)

Dr. Linville then was asked to assume Claimant was going to testify "that the 2000 fall was where she fell down some steps and . . .that the 2008 incident was where she slipped on wax on the floor. . ." (Linville Dep., p. 13, lines 10-13) Linville testified that "those two incidents separately could very well have created the onset of symptoms in a previously asymptomatic back."

However, that is not what Claimant testified to. Instead, Claimant testified that:

> I was going up the stairs and I noticed that I was having—something was going wrong, and then I heard my back give a little bit, and a pain shove through my legs. And then by the time I got home I couldn't even get out of my car. (Tr., p. 29, lines 15-19)

Dr. Linville also testified that he had no way of knowing if the claimed 2008 injury resulted in anatomical impairment or further aggravated Norman's degenerative condition. (Linville Dep., p. 24, lines 13-18)

Dr. Dalal, who did an independent medical examination on Claimant, was asked to assume Claimant was repetitively walking up and down steps during which "she felt her back go out and felt numbness and tingling and what she described as a loss of use of her lower extremities." (Dalal Dep., p. 13, lines 4-6) He was asked if the

aforementioned "could have caused the medical treatment she required in 2009—" (Dalal Dep., p. 13, lines 9-10) Dalal responded: "Yes. This is something which would cause aggravation. Going up and down stairs would aggravate problems with the back." (Dalal Dep., p. 13, line 23- p. 14, line 3)

There simply was not enough evidence in this record to make a finding that Claimant sustained a second injury to her back. First, the hypothetical presented to Dr. Dalal is the only medical testimony which seems to support Claimant's claim of a second back injury. And that hypothetical posed to Dalal seems to be directed to a repetitive injury rather than an acute injury she described. Moreover, and more generally, the Commission did not find Claimant's own testimony to be terribly credible or reliable. It was not clear whether that was because she was confused or something more. The Commission therefore **FINDS** that Claimant has not proven by a preponderance of the evidence that the additional back pain and problems experienced by Claimant since December, 2008 are the result of the alleged incident in December, 2008. Instead, the Commission **FINDS** the additional back pain and problems experienced by Claimant were the result of her fall in 2000. The Commission would note that all of the attendant medical bills for Claimant's back pain should be paid under the original workers' compensation claim.

D. Permanent Partial Disability

According to § 50-6-102 (2):

> "AMA Guides" means the 6th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, American Medical Association, until a new edition is designated by the general assembly in accordance with § 50-6-304(d)(3)(C). The edition that is in effect on the date the employee is injured is the edition that shall be applicable to the claim;

In Tennessee, the 6th Edition of the Guides became effective for injuries occurring on or after January 1, 2008. For Claimant's injuries, the law requires the application of the 6th Edition of the AMA Guides therefore, since the injuries allegedly occurred in 2008 and 2009.

With regard to the shoulder, Dr. Nord testified that Claimant had a 6% permanent partial disability to the body as a whole as a result of the injury to her shoulder. (Nord Dep., p. 14, lines 6-7) He testified that he used the 5th Edition of the AMA Guides to come up with the impairment rating. (Nord Dep., p. 17, lines 5-7) When asked whether he took Dr. Huff's 2006 permanent partial impairment rating into account when he assigned the 6% rating, Dr. Nord testified, "Mine is not in addition to his, if that is what you are asking." (Nord Dep., p. 15, lines 20-21) Nord explained, "A rotator cuff torn once versus a rotator cuff torn twice doesn't increase the impairment." (Nord Dep., p.16, lines 7-8)

Dr. Dalal testified that he did his impairment rating according to the 6th Edition of the AMA Guides because of his belief that Tennessee required using the 6th Edition. (Dalal Dep., p. 21, lines 6-9) Dr. Dalal testified that, according to the 6th Edition of the AMA Guides, with regard to her shoulder injury, "looking at Table 15-34, page 475, due to loss of range of motion of her shoulder, she qualified for fourteen percent impairment rating to the right upper extremity." (Dalal Dep., p. 10, lines 19-22) He said that with regard to her back he assigned a "seven percent impairment rating as a whole." (Dalal Dep., p. 10, lines 23-24) Dr. Dalal opined that the combined rating was "fourteen percent to the body as a whole." (Dalal Dep., p. 11, lines 1-2)

Unfortunately, no testimony was elicited from Dr. Dalal (or any other testifying expert for that matter) regarding whether and how an evaluating physician is required to apportion an impairment rating between a current and prior injury under the 6th Edition of the AMA *Guides*.

The parties have stipulated that Claimant has a workers' compensation rate of three hundred thirty-two dollars and forty-nine cents ($332.49). The Commission considered the testimony of the physicians, especially Dr. Dalal, who testified that he used the 6th Edition of the AMA Guides in his rating, as well as Claimant's age, education, skills and her capacity to work at the kinds of work available in her disabled condition. Tenn. Code Ann. § 50–6–241; *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn.1990). The Commission **FINDS** that Claimant sustained a nine percent (9%) permanent partial disability to the body as a whole as a result of the second injury to her shoulder and is entitled to compensation in the amount of eleven thousand nine hundred sixty-nine dollars and sixty-four cents. ($11,969.64).

E. Future Medical Benefits

The Commission **FURTHER FINDS** that Claimant should be awarded all future reasonable and necessary medical expenses connected with his employment related injury.

F. Attorney's Fees

The Commission further **FINDS** that the Claimant's attorney, Jeffrey Boyd, Esq., is entitled to receive twenty percent (20%) of the judgment in attorneys' fees and that Mr. Boyd's fee was earned as the result of good and valuable services provided to Claimant.

G. Social Security Amortization

The Commission **FURTHER FINDS** that Claimant desires a finding with regard to lifetime amortization for Social Security purposes and exclusive of Defendant's interests. Notwithstanding the method and timing of payment to the Claimant as above and pursuant to Tenn. Code Ann. § 50-6-207(6), the Commission affirmatively **FINDS** Claimant, was 57 years old on the date of injury and, according to the mortality tables contained in Volume 13 of the *Tennessee Code Annotated*, has an expectation of 29.01 years of life remaining, or 348.12 months, from the date of accident. The sum of all permanent partial or total benefits, paid or payable to Claimant, excluding attorney's fees and medical costs, is nine thousand five hundred seventy-five dollars and seventy-one cents ($9,575.71). Accordingly, the amortized monthly benefit received by the Claimant for the sole purpose of calculating any set-off of any Federal Social Security disability award is twenty-seven dollars and fifty-one cents ($27.51) per month and represents future income replacement. This paragraph is intended for Federal Social Security purposes only and not for any other purpose, including, but not limited to, disability retirement benefits from the Tennessee Consolidated Retirement System, pursuant to § 50-6-207, Tenn. Code Ann.

Claimant's motion for commutation of the award is granted, it being found that commutation of the award is in Claimant's best interest.

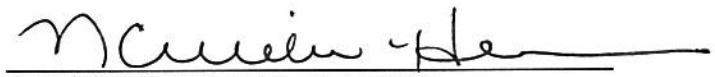
IT IS ORDERED that, Claimant, Rosemary Norman, is awarded compensation for a nine percent (9%) permanent partial disability to the body as a whole in the amount of eleven thousand nine hundred sixty-nine dollars and sixty-four cents ($11,969.64), which shall be paid in a lump sum.

IT IS FURTHER ORDERED that Claimant is entitled to all future reasonable and necessary medical expenses connected with her employment related injury.

IT IS FURTHER ORDERED that Claimant's attorney, Jeffrey Boyd, Esq., is entitled to a fee for his professional services to Claimant in the amount of twenty percent (20%) of the award, or two thousand three hundred ninety-three dollars and ninety-three cents ($2,393.93) which shall be paid in a lump sum pursuant to T.C.A. § 50-6-229 (a).

Costs of this cause are taxed pursuant to T.C.A. § 9-8-307 (d).

IT IS SO ORDERED.



NANCY C. MILLER-HERRON
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed by first class U.S. mail, postage prepaid, electronically transmitted, or hand-delivered to:

Mr. Jeffrey P. Boyd, Esq.
1269 N. Highland Avenue
P.O. Box 3539
Jackson, TN 38225

Mr. Eric A. Fuller., Esq.
Assistant Attorney General
Civil Rights & Claims Division
P.O. Box 20207
Nashville, Tennessee 37202

on this 5th day of June, 2015.

Paula Merrifield

PAULA MERRIFIELD, CLERK
Tennessee Claims Commission