

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS LOCKETT,)	
)	
Claimant,)	IC 03-001478
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
QUALITY ELECTRIC, INC.,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	Filed: February 11, 2005
)	
CLARENDON NATIONAL INSURANCE,)	
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on September 28, 2004. Richard S. Owen of Nampa represented Claimant. Alan R. Gardner and Dona Pike King of Boise represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 18, 2005 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the January 28, 2003 industrial accident;

2. Whether Claimant is entitled to reasonable and necessary medical care as provided by Idaho Code § 72-432; and

3. Whether Claimant is entitled to temporary partial and/or temporary total disability benefits (TTD/TPD) and the extent thereof.

The issue of Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804 was withdrawn at the time of the hearing. All other issues, including permanent impairment and disability in excess of impairment are reserved.

CONTENTIONS OF THE PARTIES

Causation lies at the crux of this proceeding. Claimant contends that the synovial cyst that developed in his lumbar spine at L3-L4 was caused by his slip and fall at work on January 28, 2003, and that he is entitled to income benefits and medical care including the surgery that was performed on October 6, 2004.

Defendants argue that Claimant sustained nothing more than a lumbar strain/sprain as a result of the January 28, 2003 slip and fall; that the synovial cyst was caused by Claimant's diffuse degenerative disc disease, his occupation, and his congenital spinal abnormalities; and that Claimant failed to carry his burden of proving that the synovial cyst was more likely than not caused by the January 2003 fall.

EVIDENTIARY ISSUES

Several evidentiary issues arose prior to, during, and after the hearing in this matter that need to be addressed preliminary to entry of a decision.

Initially, an issue arose regarding the scheduling of post-hearing depositions, and Defendants filed a motion for protective order prior to the hearing to address the scheduling

issue. All issues regarding *scheduling* of post-hearing depositions were resolved at the time of the hearing.

Claimant did note at the hearing that he did not believe he had received adequate notice from Defendants regarding the basis of the opinion of Howard Shoemaker, M.D., to be offered at the deposition, and that he reserved the right to interpose an objection if Dr. Shoemaker's testimony included undisclosed material. At the deposition, Claimant objected to Dr. Shoemaker's answering a question as to the causation of Claimant's synovial cyst on the grounds that the doctor formulated the opinion spontaneously at the deposition and this constituted an opinion impermissibly developed *after* the hearing. Claimant did not raise or argue the objection to Dr. Shoemaker's opinion in his initial briefing, and in fact cited a portion of the doctor's opinion in his brief. Claimant did revisit the objection to Dr. Shoemaker's testimony in his Reply Brief, precluding Defendants any opportunity to argue the admissibility of Dr. Shoemaker's opinion. Claimant's objection to Dr. Shoemaker's opinion at page 20 of Dr. Shoemaker's deposition is overruled. Rule 10(D)(3), J.R.P., does not prohibit an opinion developed post-hearing. Rather, it prohibits an opinion based on evidence or information *developed or obtained* post-hearing. In this case, Dr. Shoemaker properly had access to information developed at hearing in reaching his opinion, which included the reports of Howard King, M.D., and Paul J. Montalbano, M.D. It matters not when he actually formulated his opinion. Having overruled the original deposition objection, other issues including the propriety of re-raising the objection in a Reply Brief, and Defendants' subsequent filing of a Reply to Claimant's Objection to Dr. Shoemaker's Testimony are moot.

Of greater concern is a dispute over the records and deposition of Richard A. Silver, M.D., that arose as a preliminary matter at the hearing. Dr. Silver performed an independent

medical examination of Claimant at the request of Defendants. His report, dated September 13, 2004, was initially admitted at the hearing as Defendants' Exhibit 18. At the hearing, Claimant asked to be provided a copy of any letters that Defendants sent to Dr. Silver eliciting the opinions contained in the September 13 report. Defendants objected to the request claiming that the letters were privileged. The Referee ruled that Claimant "is entitled to know what the questions were and what information was provided to the doctor." Tr., p. 12.

After the hearing, Defendants filed a response to Claimant's request and indicated in that response that the questions posed to Dr. Silver had been restated *verbatim* in Dr. Silver's report.

At a subsequent telephone conference, Claimant again raised the issue of correspondence from Defendants to Dr. Silver, arguing that Defendants' response was inadequate and did not comply with the Referee's order at hearing. Defendants were not prepared to argue the issue, and the Referee ordered that both parties brief the issue of the discoverability of the letter to Dr. Silver.

Both parties filed briefs, and by Order dated October 18, 2004, the Referee ruled that Claimant was entitled to:

. . . all of the factual information given to Dr. Silver in requesting his opinion or opinions. This includes identification of documents and records or summaries thereof provided by Defendants to Dr. Silver, *factual representations made* to Dr. Silver, and *any assumptions, limitations or directives imposed* upon Dr. Silver.

Order on Motion to Compel, October 18, 2004, p. 2. (Emphasis added). Because a deposition of Dr. Silver was scheduled for October 22, the Referee ordered that the information be *delivered* to Claimant not later than 5:00 p.m. on Tuesday, October 19, 2004. *Id.*

Defendants filed a Notice of Compliance with the Commission at 2:28 p.m. on Tuesday, October 19, 2004. However, Claimant did not *receive* the requested materials that day because they were mailed rather than hand-delivered. Not only was Defendants' response to the

Commission's Order untimely, it did not include a copy of the letter sent to Dr. Silver, nor did it excerpt any factual representations made to the doctor, or any assumptions, limitations, or directives imposed upon the doctor as specified in the Order.

On October 21, Claimant filed a Motion to Exclude Evidence, seeking to exclude any and all evidence from Dr. Silver, including the previously admitted Defendants' Exhibit 18, and his deposition testimony. Defendants filed their response the same day. The Referee granted Claimant's motion to exclude evidence and entered her Order on October 21.

On October 26, Defendants filed motions for reconsideration, enlargement of time, and an offer of proof, together with a request for hearing on the motions by the full Commission. The motions sought reconsideration of the Order excluding evidence from Dr. Silver; in the event that the motion for reconsideration was not granted, to take the deposition of Dr. Silver to be used as an offer of proof; and an order enlarging the amount of time allowed for post-hearing depositions to allow for rescheduling of Dr. Silver's deposition. Included with the motions and supporting affidavits and memoranda was the letter written by Defendants' counsel to Dr. Silver, dated September 3, 2004 for the *in camera* review of the Commission. Claimant responded to the motions, and Defendants filed a reply to Claimant's response.

By Order filed November 5, 2004, Defendants' request for hearing was denied, as were the motions for reconsideration, enlargement of time and offer of proof for the reason that neither the Judicial Rules of Practice and Procedure nor the workers' compensation statutes provide for an appeal or reconsideration of an interlocutory order.

Claimant asks the Commission to review the September 3, 2004 letter to Dr. Silver together with the record and to include in its final order an affirmation of the Referee's Order

that excluded Dr. Silver's evidence. Defendants ask the Commission to review the letter and the record and include in its final order a repudiation of the Referee's exclusionary order.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Brian Lange taken at hearing;
2. Claimant's Exhibits 1 through 12 admitted at hearing;
3. Defendants' Exhibits 1 through 13, 16 through 17, and 19 admitted at hearing;
4. Post-hearing depositions of Dr. Shoemaker and Dr. King; and
5. The Commission's legal file.

All evidentiary objections made during the course of the depositions of Drs. Shoemaker and King are overruled.

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

FINDINGS OF FACT

1. Claimant is a journeyman electrician with twenty years of experience. At the time of the hearing, he was 37 years of age, and living in Meridian, Idaho. Claimant first plied his trade as a residential electrician in California and continued to work primarily in the residential industry until 1997. By that time, Claimant was living in Idaho and had started doing heavy industrial electrical work—primarily highway and other roadwork. Claimant worked on a number of major road projects, including the reconstruction of the Flying Wye in Ada County. The jobs required heavy lifting, digging, and working in trenches to install lighting, signals, and other electronics associated with road building.

2. The record is silent as to when Claimant began working for Employer, but it is undisputed that he was an employee on January 28, 2003, the date he slipped and fell on an icy step on Employer's premises. Claimant stopped working for Employer in the spring of 2004. The precise date that Claimant ceased working is unclear, with references to both February and April 2004.

THE ACCIDENT

3. At about 7:00 a.m. on January 28, 2003, Claimant left Employer's shop to start his work truck and get it warmed up. There were two steps outside the shop door. To exit the shop requires two steps up, and two steps down are necessary to enter the shop. Claimant was returning to the shop after starting his vehicle when he slipped on the top step. Claimant twisted his upper body in an unsuccessful attempt to arrest his fall, and landed on his buttocks on the bottom step. Claimant was able to walk into the building where there were other workers and reported the accident, filled out an accident form, and went home until he could seek medical care.

CLAIMANT'S PRE-ACCIDENT MEDICAL HISTORY

4. Claimant had a long history of low back complaints, dating back at least as far as 1986. Defendants' Exhibit 2, p. 007. From 1993 through 1999, Claimant made a number of visits to Boise chiropractors Knowles and Allegrezza, complaining of lumbar soreness, lower lumbar pain, constant low back pain, and low hip back pain.

5. In late December 2000, Claimant slipped on ice and fell, injuring his tailbone. He sought treatment and was diagnosed with lumbar sprain and sacral contusion.

6. In October 2001, Claimant visited the emergency room in Baker City, Oregon, complaining of left arm numbness, chest pain, and left shoulder pain. Chest x-rays were normal

and Claimant was given anti-inflammatories, which he discontinued. Later that month, Claimant saw Kate Kossler, P.A., with primary complaints of bilateral shoulder pain, and numbness in the left hand of approximately three weeks' duration. Ms. Kossler noted Claimant's medical history to include colon polyps, acid reflux, ulcers, obsessive/compulsive disorder, depression, and scoliosis. She also noted that Claimant was non-compliant with many of his treatment regimes. At the time of the visit, he also reported bilateral knee and ankle pain. Ms. Kossler diagnosed likely degenerative joint disease and rotator cuff injury.

7. On December 19, 2001, Claimant saw Eric Sandefur, D.O., upon referral from P.A. Kossler. The chart notes indicate that the initial referral was for orthopedic evaluation and consultation on multiple complaints. In addition to the shoulder and left hand complaints, the notes state:

He also states that he has a history of "severe scoliosis" of the lumbar spine and has lower thoracic and lumbar spine pain which has increased to the point where he has difficulty even standing or walking. He states that with his job he was having difficulty to where he cannot bend or twist without having severe pain.

Defendants' Exhibit 4, p. 023. Imaging studies of the cervical spine showed some degenerative changes. X-rays of the shoulder evidenced bilateral chronic shoulder impingement syndrome. Of particular interest are the results of x-ray images of the lumbar spine:

X-rays of the lumbar spine reveal degenerative disk disease and disk space narrowing at L4-L5 and L5-S1. No sclerosis and anterior osteophytic spurring. There is also some mild facet sclerosis and a mild curvature of the lumbar spine.

Claimant ultimately had surgery on both shoulders and a left carpal ligament release.

CLAIMANT'S POST-ACCIDENT MEDICAL HISTORY

8. Claimant was seen at Primary Health Occupational Medicine in Eagle approximately two hours after his slip and fall on the icy steps. Rusty Dodge, a nurse practitioner at the clinic, treated Claimant. Dodge's notes indicate that Claimant disclosed a

history of back problems and described his fall on the steps that morning. Claimant complained of pain in his low back, and tingling in his toes, but reported no radicular pain in his legs. Nurse Dodge diagnosed a back strain, prescribed a muscle relaxant, an anti-inflammatory, and pain medication and referred Claimant to Dr. Shoemaker in the same clinic.

9. Claimant returned to the clinic on January 30, and saw Dave Tomey, P.A.-C. Claimant was concerned about the onset of tingling and numbness in his right hand. On exam, Claimant was tender in the L5-S1 area and across the SI joint, but otherwise his lumbar spine was normal. He did exhibit positive signs of right carpal tunnel syndrome and his blood pressure was high. P.A. Tomey changed Claimant to a different anti-inflammatory, advised regular blood pressure checks and follow-up with Claimant's regular doctor, and advised him to keep his referral with Dr. Shoemaker scheduled for February 3. P.A. Tomey restricted Claimant to his usual work, but not at the usual pace, and limited his lifting, pushing and pulling to 20 pounds occasionally.

10. Claimant saw Dr. Shoemaker on February 3. His description of the January 28 accident was consistent with the previous descriptions he provided on the date of injury and again on January 30. The following chart notes are of particular interest:

He has some chronic numbness along both thighs on the lateral side, which he says has been there for years.

His past medical history is very significant in that he said he has had years of back problems, and he runs through a whole litany of difficulties, which include frequent "electrical shock" sensations up and down his spine when he jumps into trenches, "his back always hurts". He had an MRI¹ in Oregon about a year ago that showed he had "deteriorating disks in both his cervical and lumbar spine". . . He said his present complaints are similar to what he has had in the past, but just more persistent.

¹ The medical records are mistaken insofar as the diagnostics, as Claimant did not have an MRI of his lumbar spine. X-rays of the lumbar spine and an MRI of the cervical spine showed degenerative changes in both the cervical and lumbar spine.

Defendants' Exhibit 10, p. 097. On exam, Claimant exhibited diffuse tenderness throughout the central spine, but with no spasm, deformities, or lower extremity weakness. Dr. Shoemaker ordered lumbar x-rays, and while the images were not optimal, Dr. Shoemaker did not note any acute changes. Dr. Shoemaker's assessment was of "[a]cute and chronic back pain, primarily lumbar in nature." His chart note regarding treatment options is informative:

At this point, the patient is not at maximum medical improvement. Within a reasonable degree of medical probability, this is work aggravated, but it should be understood that this patient gave a significant past medical history of chronic back pains with a history of MRIs showing degenerative disc disease and scoliosis, and he has had a number of years of chiropractic treatment, etc. But yet the patient continues to work in a very heavy job, and this raises serious concerns.

Id., at p. 098. Dr. Shoemaker prescribed a course of physical therapy with followup in two weeks. Dr. Shoemaker specifically noted, "[h]e will be at light duty, although he wanted to go back to full duty. We advised against this." *Id.*

11. Claimant returned to Dr. Shoemaker on February 18. He had attended only one physical therapy visit, stating he didn't have time for any more and didn't feel it was necessary. Claimant told Dr. Shoemaker "that he is feeling 100% well and is having no pain at this time. He is fully active in activities of daily living and requests a full release to return to work at full duty." *Id.* at p. 099. Dr. Shoemaker's exam was entirely consistent with Claimant's assertion that he was completely recovered—his gait was normal, he demonstrated full range of motion, had no neurological deficits, and showed no palpable focal back pain, spasm, or deformity. Dr. Shoemaker reiterated that the x-rays showed "mild scoliosis and mild L4-5 degenerative disk disease, but nothing severe, nothing acute," and released Claimant to full duty. *Id.* Claimant did not seek any additional medical care for his back for the next nine months, and did not return to see Dr. Shoemaker until more than a year had passed.

12. On November 17, 2003, Claimant saw orthopedist Alex Homaechearria, M.D., complaining of low back pain and right hip pain. On the intake form, Claimant stated that constant lower back pain was the reason he was seeking care. He also stated that he had had the low back pain for a “longtime but, 3 months worse [sic]” Defendants’ Exhibit 9, p. 067. The chart notes provide the following information regarding the history of Claimant’s complaints:

[Claimant] is a 36-year-old male who has had at least a *three-month history of worsening low back pain* and right leg pain. He does note that he has had low back pain for a number of years as well, with *no previous history of injury*.

Id. at p. 058. Emphasis added. On exam, Dr. Homaechearria identified muscular pain in the right lumbar spine, right sacroiliac joint pain with compression and provocative testing, and right lumbar radiculopathy. He recommended an MRI to look for discogenic or bony causes for nerve impingement, but recommended physical therapy for core strengthening and evaluation of pelvic alignment. Dr. Homaechearria opined that Claimant’s muscular low back pain would resolve with physical therapy and modified activity.

13. Claimant underwent his first MRI of the lumbar spine on November 24. The MRI showed:

1. Mild to moderate central spinal stenosis with early bilateral foraminal compromise at L3-L4 secondary to combination of diffuse degenerative disc disease superimposed on moderate facet hypertrophy in a patient with congenitally short pedicles and a small caliber spinal canal.

2. Early degenerative changes at the remaining levels which do not appear to result in significant spinal canal compromise or focal nerve root entrapment.

Id. at p. 064. Claimant saw Dr. Homaechearria on December 1, 2003 to review the MRI and reassess his progress. The doctor noted that Claimant attended only one session of the prescribed physical therapy, was not doing his home exercises, and was working full time at his regular job without modification. Dr. Homaechearria referred Claimant “back to physical therapy and have emphasized strongly the need for physical therapy secondary to his high demand of strength at

his very physical job.” *Id.* at p. 060. The doctor further advised that Claimant would “need advanced physical therapy and will need to work very hard at obtaining any strength that will provide adequate protection at his workplace.” *Id.* Dr. Homaechearria noted that three-quarters of the forty-minute appointment was spent discussing Claimant’s diagnosis and treatment options, including oral corticosteroids, epidural steroid injections, and the possibility of surgical intervention. Claimant did not seek further treatment from Dr. Homaechearria at that time.

14. In February 2004, two months after his last visit to Dr. Homaechearria, Claimant returned to see Dr. Shoemaker. He told Dr. Shoemaker that the pain he experienced from the January 2003 slip and fall never really went away and gradually worsened until he eventually went to see Dr. Homaechearria. On exam, Dr. Shoemaker found Claimant diffusely tender across the lumbar spine, and noted reduced range of motion and bilateral symmetrically suppressed reflexes in the lower extremities. Dr. Shoemaker also had an opportunity to review the results of the November 2003 MRI. Dr. Shoemaker diagnosed chronic mechanical low back pain with diffuse degenerative disk disease. Dr. Shoemaker opined that, “[w]ithin a reasonable degree of medical probability the patient’s current complaints are medically reasonably work related given the heavy nature of his job.” *Id.* at p. 100. Dr. Shoemaker did not believe that Claimant’s problem could be helped by surgery but that it could be addressed through physical therapy. He doubted, however, that Claimant would be able to return to the same level of activity that his current job demanded. Dr. Shoemaker prescribed physical therapy and imposed work restrictions, limiting Claimant to only occasional lifting over 20 pounds and only occasional pushing or pulling up to 40 pounds. The medical records show only one additional visit to Dr. Shoemaker in May of 2004. There are no chart notes in the record documenting this visit and the Occupational Medicine Report is mostly illegible and provides little further

information as to Claimant's status.

15. On June 1, 2004, Claimant returned to Dr. Homaechearria for "further evaluation and treatment." Defendants' Exhibit 9, p. 073. Claimant stated that he had a home exercise program. No inquiries were made as to whether Claimant was compliant or consistent with the program. Claimant also confirmed that he had had an industrial accident on January 28, 2003.² On exam, Claimant exhibited "limited forward flexion and extension and side bending secondary to significant *muscular pain*." *Id.* at p. 073. (Emphasis added). He also exhibited an antalgic gait, and some neurological deficits bilaterally in the lower extremities. Claimant was advised to continue with the home exercise program, and was given prescriptions for Prednisone, muscle relaxant, and pain medication, and told to return in two weeks.

16. Claimant returned to Dr. Homaechearria as requested on June 16. He reported that the Prednisone did not help, and that his pain was now most severe in the left leg. Claimant was taking the muscle relaxant, but had run out of the pain medication and had not been using any prescription pain control in the preceding days. Dr. Homaechearria scheduled Claimant for a transforaminal epidural steroid injection at the left L3-L4 levels. He also prescribed Neurontin. The steroid injection was performed on June 24.

17. When the steroid injection provided no relief, Dr. Homaechearria referred Claimant to Dr. King, an orthopedic surgeon in the same practice. Claimant saw Dr. King on July 12, 2004. The history noted in the medical record identifies the onset of Claimant's complaints to be the January 28, 2003 fall. This is the first time that Claimant mentioned the fall to anyone in that medical practice. No mention is made of Claimant's long history of low back

² Dr. Homaechearria had been unaware of the industrial accident until May 2004 when counsel for Defendants inquired whether the doctor was aware that Claimant had a slip and fall at work in January 2003.

pain. On exam, Claimant exhibited normal spinal alignment and no obvious deformity, though he tended to list slightly to the right and forward. He had reduced range of motion when forward bending, and his lumbar spine was tender to light palpation. Claimant's reflexes were generally normal bilaterally, and where absent, were absent bilaterally. Dr. King expressed concern about the quantity of medication that Claimant was using and suggested that Claimant see Michael McClay, M.D., to manage some of his emotional issues concerning his back, and Robert Friedman, M.D., for pain management. Dr. King also ordered another MRI of Claimant's lumbar spine.

18. Claimant had a repeat MRI on his lumbar spine on July 14. On July 20, he returned to Dr. King. The doctor advised Claimant that the most recent MRI showed a large facet synovial cyst at L3-4 on the right. The MRI report indicated that the cyst was severely restricting the spinal canal and pinching the sac. Dr. King advised that treatment options included facet injections or surgery and referred Claimant to Dr. Montalbano for a second opinion.

19. Claimant saw Dr. Montalbano, a neurosurgeon, on July 28. The doctor examined Claimant and reviewed the recent MRI. He agreed with the radiologist's report regarding the synovial cyst at L3-4 with resulting facet incompetence and anterolisthesis at that level. Dr. Montalbano also ordered a lateral flexion/extension study of Claimant's lumbar spine to determine if there was any instability in the adjacent levels. Those images showed no instability and no evidence of a compression injury. Dr. Montalbano recommended surgical resection of the cyst together with L3-4 decompression, fusion, and instrumentation.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

20. There is no dispute that Claimant slipped and fell at work on January 28, 2003. There is no dispute that Claimant suffered some injury as a result of that fall, and his initial treatment by Primary Health and Dr. Shoemaker was paid as a workers' compensation claim. What is at issue here is whether the synovial cyst that was first apparent in the July 2004 MRI was caused by the January 2003 fall.

Burden of Proof

21. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). The Referee finds that Claimant has failed to carry his burden of proving, to a reasonable degree of medical probability, that the synovial cyst was caused by the January 2003 industrial injury. The reasons for this finding are discussed below.

Medical Opinions

22. **Dr. King.** Drs. King and Shoemaker both offered substantive opinions as to the cause of Claimant's synovial cyst. Dr. King offered his opinion on causation in a letter to Claimant's counsel dated August 19, 2004:

[Claimant] was involved in an industrial injury and hurt his back on January 28, 2003. Since that time [Claimant] has had persisting symptoms. It is my belief that he injured his spine and injured the L3-4 facet joints. As time has evolved he has developed a large synovial cyst.

[Claimant's] condition is very unusual for a person of his age and it makes me believe that the industrial injury has aggravated the facet joints. With the degenerative changes he has developed an early synovial cyst.

Claimant's Exhibit 9. In his deposition, Dr. King was subjected to rigorous questioning by both parties regarding his causation opinion. At bottom, Dr. King's opinion is based on his belief that absent some traumatic event, one would not normally exhibit markedly degenerated facet joints or develop a synovial cyst at the relatively young age of 37. Dr. King freely admits that such an etiology is possible without trauma, but opines that such etiology would be uncommon or unusual. "It isn't something that's natural for a 37 year old." King Depo., p. 12. While it may be unusual, the record is quite clear that Claimant had an unusual medical history. Claimant's father suffered from degenerative disc disease. Claimant himself had a long history of low back complaints even before he started working in an extremely physical job in 1997. Lumbar x-rays taken in 2001 in Oregon showed that Claimant already had diffuse degenerative disc disease. The MRI done in November 2003 showed "moderate central spinal stenosis with early bilateral foraminal compromise *at L3-L4 secondary to combination of diffuse degenerative disc disease superimposed on moderate facet hypertrophy in a patient with congenitally short pedicles and a small caliber spinal canal.*" Defendants' Exhibit 9, p. 064. (Emphasis added.)

One of the issues thoroughly explored in Dr. King's deposition was the time it would take a synovial cyst to develop from a traumatic injury. This was of particular interest since there was no evidence of the cyst in November 2003, ten months post-accident, while the cyst was prominent in the MRI done in July 2004. Dr. King indicated that usually such cysts developed over a long period of time, but some could develop more quickly than others. He noted that it

was unusual to have a pre-cyst MRI for comparison purposes. Dr. King's explanation sheds no light on this question because it provides no point of reference for measuring "a long period of time," or what "quickly" might mean in comparison.

Dr. King did not see Claimant until eighteen months after his industrial accident. At the time he first saw Claimant, he did not have the benefit of Dr. Shoemaker's treatment records, and in fact, did not have Dr. Shoemaker's treatment records at the time he tendered his causation opinion on August 19, 2004. Dr. King's opinion was based on his exam, the medical records from Dr. Homaechearria and Claimant's self-reported history. The Referee finds this problematic in several respects.

One concern is Claimant's credibility. On February 18, 2003, Claimant reported to Dr. Shoemaker that he was 100% symptom free. Dr. Shoemaker's exam on that day was consistent with Claimant's statement that he was completely recovered from the January 28 fall, and Dr. Shoemaker determined that Claimant was at maximum medical improvement with no permanent impairment. Thereafter, Claimant did not seek any medical care for nine months. When he did seek care from Dr. Homaechearria he gave an incomplete history. Claimant did not report the January 2003 accident, or that he had a long history of low back problems dating back at least to the early 1990s, or that x-rays of his lumbar spine showed degenerative disc disease as early as 2001, or that Dr. Shoemaker had expressed serious concern about Claimant's continued heavy industrial electrical work, or that Claimant had generally been non-compliant with treatment regimes designed to improve the musculature supporting his spine. In fact, he told Dr. Homaechearria that the current symptoms he was experiencing had started about three months previously (which would have been mid-August 2003), and had progressively gotten worse. Claimant told Dr. King about the January 28, 2003 slip and fall, but neglected to mention the

long history of low back problems. It was quite some time later that Claimant asserted that, in fact, he had *never* recovered from the January 2003 fall and that his pain had steadily gotten worse from that time forward, and that he had misrepresented his condition to Dr. Shoemaker so he could return to work. This explanation is inconsistent with Claimant's statement to Dr. Homaechearria that the back pain stated to get worse in August 2003, as well as with Claimant's work history—Claimant continued to work at his regular job without modification until sometime in early 2004.

That Dr. King did not review Dr. Shoemaker's records is also of concern. Much of the information withheld by Claimant was available in those medical records. Although Dr. King stated in his deposition that this new information did not change his opinion, it certainly undercuts the basis of his opinion—that such a cyst would be unusual in a person of Claimant's age.

23. **Dr. Shoemaker.** When Claimant first sought medical care for his industrial injury, he received a referral to Dr. Shoemaker, an occupational medicine specialist. At the outset of the treatment, there was little question that Claimant's complaints were related to the industrial accident and Dr. Shoemaker so opined in his chart note of February 3, 2003. Defendants' Exhibit 10, p. 098. Dr. Shoemaker subsequently released Claimant from care, and did not see him again for over a year. When Claimant returned to Dr. Shoemaker in March 2004, he told Dr. Shoemaker that the pain from the January 2003 fall never went away, and gradually worsened. This was contrary to what he told Dr. Homaechearria. Dr. Shoemaker noted that Claimant's complaints were "medically reasonably work related given the heavy nature of his job." *Id.* at p. 100. Note that Dr. Shoemaker did *not* relate Claimant's current complaints to the January 2003 accident, but rather to the *type* of work in which Claimant was

engaged. This is consistent with the concerns he expressed the previous year.

In late March and early April 2004, prior to the MRI that revealed the synovial cyst, Dr. Shoemaker responded to a request from Surety seeking an opinion on the causation of Claimant's low back complaints. In a letter dated April 5, 2004, he opined that the initial injury of January 28, 2003 was a temporary exacerbation of Claimant's pre-existing low back problems and that the temporary exacerbation had resolved by mid-February, 2003. He also expressed his opinion that Claimant's underlying problem was his pre-existing degenerative low back condition. Dr. Shoemaker noted that Claimant's regular work (but not his industrial accident) would certainly aggravate this underlying condition.

At his deposition, Dr. Shoemaker reviewed his treatment of Claimant following his January 2003 slip and fall until his release the following month. He reiterated that Claimant had no neurological findings in January and February of 2003, and that Claimant had a chronic degenerative back problem, the fall resulted in a strain, and that Claimant recovered.

By the time Dr. Shoemaker was deposed, Claimant had been diagnosed with the synovial cyst at L3-4. Dr. Shoemaker was asked his opinion on what caused the cyst. The following colloquy occurred:

Q. (By Claimant's counsel) . . . Dr. King has indicated that this cyst developed because of abnormal motion at the facet joints. Do you agree or disagree with that?

A. He said that it occurred from abnormal movement?

Q. Yes. At the facet joint and L3-4.

A. I would be more inclined to think it – I mean, in general, I tend to agree with that statement. But it does sound like it's the wear and tear, degenerative process that I was assuming it was, you know, in my opinions previously. I mean, it does appear to be a wear and tear. I'm not sure about whether it's due to abnormal motion or just repetitive motion, but . . .

Q. What about the general degenerative joint disease that causes the development of this kind of a cyst, Doctor? Why, why does that happen? You said that you think, generally speaking, degenerative problems would cause this cyst. I'd like to know why you say that.

A. Well, we see cysts in joint locations throughout the body, ganglion cysts, baker cysts in the knee—that [sic] cysts where synovial sacs or areas of fluid become weakened from repetitive motion and degenerative change, that then that area of fluid can – like an innertube that has a weak spot, when you put pressure in it, it pops out on one side or it becomes deformed.

That's my general pathophysiological explanation of these degenerative cysts that occur all over the body, particularly around joint activities.

Q. Dr. King has indicated, and let me represent this to you, that it is very unusual for this kind of a cyst to develop in someone as young as Mr. Lockett.

Do you have any basis to disagree with Dr. King on that?

A. No.

Shoemaker Depo., pp. 27-28. Basically both doctors agree that the cyst resulted from a problem at the L3-4 facet joints. Dr. Shoemaker attributes the problem to the degenerative disc disease and repetitive motion, while Dr. King attributes it to an acute traumatic injury resulting from the January 2003 fall. Interestingly, neither physician discusses Claimant's congenitally small spinal canal or his shortened pedicles as part of the cause, even though the structural defects combine to significantly reduce Claimant's disc space, as was noted by the first MRI report.

24. Both physicians are equally credible. Dr. Shoemaker acknowledged that he didn't have a lot of first-hand experience in *treating* lumbar synovial cysts, but his explanation of the general pathophysiology of degenerative cysts demonstrated he understood what could cause them. But knowing what caused them, Dr. Shoemaker could not state to a reasonable medical certainty whether Claimant's cyst was caused by the degenerative condition or a traumatic incident.

Dr. King has more experience in treating such cysts as he sees them more often in his practice, in part because his practice is more focused on the spine. Ultimately, Dr. King should

have been able to make the most convincing case for causation, but the best he could do was to return to his belief that a synovial cyst in an individual Claimant's age was unusual. In light of Claimant's unusual medical history, this position is just not persuasive.

But not every question of causation can be answered with the requisite level of medical probability required by *Langley*, no matter how qualified the opiner. The Referee believes that this is one of those instances. Neither physician stated their opinion to a reasonable degree of medical probability, and neither defended his opinion with the confidence usually seen in these matters. Determining causation, under the best of circumstances, can be a difficult assessment, and this is an extremely close case. Neither physician can be faulted for failing to make a persuasive case on causation to a reasonable medical probability when either cause is equally likely given the facts and circumstances of this case.

MEDICAL CARE AND TEMPORARY TOTAL DISABILITY (TTD) BENEFITS

25. Because the Referee finds that Claimant has failed to carry his burden of proving that his synovial cyst was caused, more likely than not, by his industrial accident, the issues of Claimant's entitlement to medical care and income benefits are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to carry his burden of proving that his synovial cyst was caused, more likely than not, by his industrial accident.
2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 7th day of February, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653-0278

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701-2528

djb /s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS LOCKETT,)	
)	
Claimant,)	IC 03-001478
)	
v.)	ORDER
)	
QUALITY ELECTRIC, INC.,)	
)	
Employer,)	Filed: February 11, 2005
)	
and)	
)	
CLARENDON NATIONAL INSURANCE)	
COMPANY,)	
)	
Surety,)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to carry his burden of proving that his synovial cyst was caused, more likely than not, by his industrial accident.
2. The Commission declines the invitation to review the letter from Defendants to Dr. Silver. Regardless of the content of the letter, Defendants failed to comply with the

Referee's October 18, 2004 Order. The Referee's Order of October 21, 2004 excluding all evidence from Dr. Silver is affirmed.

3. All other issues are moot.

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

DATED this 11th day of February, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
James F. Kile, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653-0278

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701-2528

djb

/s/ _____