



person and represented by Robert C. Huntley of Boise. Defendant Employer, Preco, Inc., dba Preco and Santa Clara Plastics, and Defendant Surety, State Insurance Fund (SIF), were represented by Jon M. Bauman of Boise. Defendant Employer, Preco, Inc., and Defendant Sureties, American Motorists Insurance Company and American Protection Insurance Company (American) were represented by Tyra H. Stubbs of Boise. Defendant Employer, Preco Electronics and SCP Global Technologies, and Defendant Surety, Connecticut Indemnity Company (Connecticut) were represented by Eric S. Bailey of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of three post-hearing depositions, the submission of briefs, and subsequently came under advisement on February 11, 2005.

### **BACKGROUND**

Preco, Inc., was originally incorporated on January 5, 1953. The firm merged with Santa Clara Plastics (SCP) and Manufacturing Company on January 2, 1985, continuing under the name Preco, Inc. Preco, Inc., began using the assumed name SCP Global Technologies on March 31, 1999. The firm's actual name was changed to SCP Global Technologies, Inc., on October 3, 2000, and then to Saber Holdings, Inc., on June 5, 2003.

Employer is also listed as SCP Global Services, Inc., in some of the pleadings; SCP Global Services is a subsidiary of Employer. Royal & Sun Alliance is listed as the surety on the Form 1 and in some of the pleadings rather than Connecticut.

### **ISSUES**

The noticed issues to be resolved as a result of the hearing are:

1. Whether Claimant suffered a compensable occupational disease;
2. Whether Claimant complied with the notice limitations set forth in Idaho Code

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§ 72-448;

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and,

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

At hearing, Claimant withdrew the noticed injury/accident cause of action and related statute of limitation issues. (Transcript, pp. 27-28). He chose to proceed with an occupational disease cause of action.

### **ARGUMENTS OF THE PARTIES**

Claimant argues his exposure to sulfuric acid mists, a known carcinogen, while working for Employer, destroyed the quality of his life and health, disabled him from working, and in all probability, will cause him to lose his eyesight and will end his life prematurely due to his recurring cancer. He cites the medical opinion of Dr. Harrison who testified his acinic cell carcinoma was caused by his exposures to chemicals while working for Employer. Claimant further argues the testimony of the defense experts neither meets nor overcomes the testimony of Dr. Harrison, in that their testimony merely relates the fact that there have been no large-scale epidemiological studies which establish a cause-effect relationship between sulfuric acid mists and his cancer simply because his cancer is so rare. He seeks past and future medical and disability benefits.

Defendant SIF argues the testimony of Dr. Harrison is unreliable because the foundation for his conclusion is defective, his sources do not support his conclusion, his novel theory of causation is implausible and refuted by the evidence, and because his opinions are inconsistent. They further argue that the defense experts have refuted his testimony, and that Claimant has not proven his

entitlement to workers' compensation benefits since he has not demonstrated that any exposure he may have experienced caused his cancer. SIF also argues Claimant has not shown that his medical bills were directly incurred as a result of his alleged occupational disease or that the treatment rendered and costs were reasonable, and that he has failed to submit any expert testimony to support a claim for time-loss benefits.

Defendant American argues Claimant has failed to establish his acinic cell carcinoma is a compensable occupational disease. They maintain he has failed to establish his actual exposure levels to sulfuric acid mists, that he has failed to establish that exposure to sulfuric acid mists causes nasal cancer, and that he has failed to establish that exposure to sulfuric acid mists causes acinic cell carcinoma in the location in which he developed a tumor. American further argues Claimant has failed to establish any link between the other health conditions he describes and any occupational disease or industrial accident. They also argue Claimant failed to provide timely notice to Employer even though he was concerned about the health effects of his work for several years before he "discovered" some connection between his employment and his cancer. American argues Claimant has not offered any expert medical testimony regarding the reasonableness and necessity of the medical treatment he received to treat his alleged occupational disease, and that he has not offered sufficient evidence to sustain a claim for time-loss benefits. They further argue that since Claimant has not established he was incapacitated from working at any time, and since Claimant's last exposure to the chemicals he alleges caused his cancer occurred in 2000, they are not at risk and not responsible for his claim for compensation.

Defendant Connecticut argues Claimant has failed in his burden of proving a causal connection between his disease process and his work for Employer. They maintain the foundation

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for Dr. Harrison's opinion is flawed since he had no knowledge of Claimant's actual exposures, he developed his opinion prior to speaking to Claimant, he has no direct experience with this type of cancer, and the studies do not support his conclusion. Connecticut further argues, that even if a causal connection is found, they are not responsible for any benefits payable to Claimant not only because his disease was manifest and diagnosed, but also because he was actually disabled from work prior to the time they came on risk. They also argue there is no evidence any new disease process or any new distinct cancer developed after they assumed Employer's workers' compensation risk, again absolving them of liability for any benefits which might be due Claimant.

In rebuttal, Claimant argues Defendants' contentions that he should have known of a possible causal relationship between his workplace exposures and his cancer earlier, when Employer was in a better position than an individual worker to connect the dots, should not be allowed to give rise to a specious statute of limitations defense, and that Defendants should not be allowed to now challenge medical bills entered into the record. He further argues no one would seriously contend that surgery to remove a malignant tumor is not "reasonable and necessary;" and that his periods of disability are established by testimony and the medical records.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the August 3, 2004, hearing;
2. Joint Exhibits 1 through 89 admitted at the August 3, 2004, hearing;
3. The testimony of Robert J. Harrison, M.D., M.P.H., taken at the August 26, 2004, hearing;
4. Joint Exhibits 90 through 103 admitted at the August 26, 2004, hearing;

5. The video deposition of Claimant taken by Defendant Connecticut [Defendant SIF was not represented at the deposition] on October 21, 2003;

6. The deposition of Claimant, with Exhibits 1 through 3, taken by Defendant American on July 7, 2004;

7. The deposition of Noel S. Weiss, M.D., M.P.H., Ph.D., with Exhibits A through D, taken by Defendant SIF on September 20, 2004;

8. The deposition of Harry J. Beaulieu, Ph.D., taken by Defendant Connecticut on September 22, 2004; and,

9. The deposition of David W. Eisele, M.D., taken by Defendant American on October 20, 2004.

Claimant's objections on pp. 22 and 25 of Dr. Beaulieu's post-hearing deposition are sustained; his objection on p. 23 is overruled.

Claimant's objection on p. 23 of Dr. Eisele's deposition is sustained.

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

### **FINDINGS OF FACT**

1. Claimant graduated from high school in 1973. He subsequently worked at a variety of jobs including bottling soda pop, selling paint, selling sheetrock and roofing material, and selling musical equipment. Some of the positions involved management responsibilities. Claimant attended ITT Technical Institute from 1988 until 1990, graduating with an Associates Degree in electronic engineering technology. While attending ITT, he worked nights riveting metal roof vents together. After graduation Claimant worked as a consumer electronics repair technician fixing VCRs,

camcorders, and tape decks.

2. The Idaho State Insurance Fund issued a workers' compensation policy on behalf of Preco, Inc., effective January 1, 1980. The policy was cancelled effective January 18, 1995, on behalf of Preco, Inc., dba Preco and Santa Clara Plastics.

3. Employer hired Claimant on October 13, 1992. Employer develops wet etch processing technology and manufactures equipment employing that technology in the manufacture of semiconductor wafers. This manufacturing equipment is known within the industry as a "tool." A tool is a sophisticated piece of equipment containing a series of corrosive baths in which the wafers are subjected to strong inorganic acids to etch polymers off the surface of silicon dioxide wafers. The process is computer controlled and employs robots. Tools are also referred to as wet benches and are housed in semiconductor fabrication units or manufacturing facilities called "Fabs." Fabs are also called "clean rooms." Employer's tools are manufactured in Boise.

4. Claimant was initially hired as a robotics technician to travel to customer sites and install, set-up, adjust, and do chemical calibrations of Employer's wet etch tools, and to repair and recalibrate the tools as necessary. Acids are not introduced into the tools until the installation process. Repairs including fixing chemical leaks and welding cracks where the chemicals had leaked through, and replacing acid recirculation pumps, filters, and valves as needed. His job title changed to field service engineer (FSE); the responsibilities, however, remained the same.

5. Claimant spent the first month of his employment at Employer's manufacturing facility in Boise learning how the 9200 Series wet etch tool was constructed. Deionized (DI) water was used to simulate the chemicals during the manufacturing process; chemicals were not introduced into the tools at the Boise facility.

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6. After his initial training, Claimant was sent on several occasions in late 1992 to a customer's facility in Fishkill, New York, to repair various 9200 Series benches, and then to install a new one. This was his first exposure to acids. Claimant was provided with an apron, gloves, and an open face shield while working in proximity to the acids. DI water was also available to dilute the acids prior to working on the equipment as was litmus paper to determine the presence of acids. These items were available to Claimant throughout his tenure with Employer.

7. Claimant worked on a test line in Employer's facility the first part of 1993. In March 1993, he was sent to a customer's facility in Ireland to help install 9200 Series benches at a new Fab. Over the next year and a half, approximately 20 tools were installed in the Fab. Each installation, from unloading parts off a truck, to a fully operational bench, would take six to eight weeks.

8. Claimant was exposed to acids while installing pump filters during the tool set-up process. He estimated sulfuric acid comprised 75% of the acids used in the tools.

9. American Motorists Insurance Company issued a workers' compensation policy on behalf of Preco, Inc., effective January 1, 1995. American Protection Insurance Company issued a workers' compensation policy on behalf of Preco, Inc., effective January 1, 1998. The policy remained in effect until April 1, 1999, when it was not renewed. The two sureties are affiliated.

10. After the tool installations in the Fab were completed in 1994, Claimant returned to Boise for a period of time before returning to Ireland in January 1995 as a site sustaining technician maintaining the tools he had previously helped install. In this role he performed recalibrations of the equipment, upgrades, scheduled and unscheduled maintenance, and repairs. Claimant described numerous occasions of stopping acid leaks and ending up with his face shield clouded with sulfuric acid vapor to the point where he could not see through the shield. In those cases he worked between

a tank of 120 degree centigrade sulfuric acid and the tools' extract exhaust. Claimant also described numerous occasions where he welded cracks in the plastic containment plenums which surrounded the acid tanks, and in the process, sulfuric acid fumes would be produced as he melted (welded) the cracked and corroded plastic back together with a hot air gun.

11. Claimant was the sole decontamination person at the facility in Ireland during this time frame. He would decontaminate various pieces of equipment that had been exposed to acids, primarily tanks and pumps, for shipment to various facilities to be rebuilt. Claimant also described instances where he would hold a thermometer in a tank of 120 degree centigrade sulfuric acid to ensure that it was at the proper temperature. He was exposed to sulfuric acid fumes while performing both these tasks. Claimant also mentioned numerous other specific instances where he was exposed to sulfuric acid fumes while working as a site sustaining technician in Ireland.

12. Claimant was not provided with a respirator during the times he came in contact with sulfuric acid mists; his requests for a respirator were denied. His and some of his co-workers' requests to wear "Dragger tubes" were denied. These devices are used to measure chemical exposure over a period of time; this information could then be analyzed in a laboratory to determine actual exposure rates.

13. After working for approximately two years as a site sustaining technician, Claimant became the installation coordinator at a second Fab at the facility in Ireland, overseeing the installation of approximately 18 9400 Series tools. He returned to Boise in 1998.

14. Altogether, Claimant spent some five years at the facility in Ireland. He was physically at the site approximately 90% of the time during this period. The remainder of the time he spent working on 9200 Series tools as a FSE at Fabs located in Arizona, California,

Massachusetts, New Mexico, and Oregon. This work occurred between and after his stints in Ireland.

15. While in Ireland, Claimant contacted a Dr. Mary Lamb, a general practitioner in Leixlip, about his concerns over chemical exposures. She advised him that she was unaware of any health hazards associated with the exposures.

16. In early January 1999, Claimant went to Israel to help install 9400 Series tools in a new Fab. After approximately one month in Israel Claimant developed a severe nose bleed which required hospitalization for several days in order to stop the bleeding. A CT scan showed a right nasal and anterior base of the skull mass. Claimant was told he could bleed to death if future nose bleeds could not be stopped. He flew back to Boise for medical care.

17. Claimant saw Lance W. Coleman, M.D., an ENT specialist in Boise. A sinus MRI showed a mass lesion in the right nasal cavity. Dr. Coleman proceeded with a nasal biopsy which resulted in a significant amount of blood loss. Claimant's nose was packed and he was admitted to Saint Alphonsus RMC on February 17, 1999, for observation. The pathology report indicated clear cell carcinoma.

18. Claimant saw Barbara G. Anderson, M.D., at the Saint Alphonsus Cancer Treatment Center on February 24, 1999. She indicated surgical resection of the mass was warranted, and that radiation therapy entailed risks to the frontal lobe of Claimant's brain, his eyes and orbital contents, as well as his optic nerves.

19. On March 20, 1999, Matthew B. Schwarz, M.D., and Ronald E. Jutzy, M.D., performed an anterior craniotomy and right lateral rhinotomy with resection of the anterior skull base tumor. The tumor was described as being very vascular and filling the whole upper nasal

cavity. The pathology report indicated the tumor was clear cell carcinoma. On April 7, 1999, Dr. Jutzy, a neurologist, placed a subarachnoid drain in Claimant's lower back after he developed a cerebrospinal fluid (CSF) leak at the surgical site. The procedures were performed at Saint Alphonsus.

20. Claimant was totally disabled from working while hospitalized in January 1999, and during his period of recovery following the March 1999 surgical procedure. He was also totally disabled during the period he was placed on short-term disability by Employer; this began in February 1999.

21. Connecticut Indemnity Company issued a workers' compensation policy on behalf of Preco Electronics effective April 1, 1999. The policy remained in effect until January 1, 2000, when it was not renewed.

22. Connecticut Indemnity Company issued a workers' compensation policy on behalf of SCP Global Technologies effective April 1, 1999. The policy remained in effect until January 1, 2004, when it was not renewed.

23. An April 15, 1999, chart note by Dr. Schwarz, an ENT specialist, indicates Claimant's carcinoma was acinic cell.

24. On July 27, 1999, Dr. Schwarz indicated Claimant was now clear to fly out of the country and could return to work without restrictions as a FSE.

25. Claimant returned to work with Employer and subsequently returned to Israel in either late 1999 or early 2000 as a FSE to assist in the installation of the tools in the new Fab. Shortly after he arrived, Claimant was made the installation manager. The prior manager was replaced after complaining about chemical exposures being treated as an odor issue rather than a

safety issue; employees were experiencing physical ailments including the vomiting of blood. When the installation was approximately 80% complete, Claimant was recalled to Boise, largely because he was articulating safety concerns similar to those of the prior manager, and because breathing fumes was causing him sinus pain. Claimant was also beginning to feel concerns for his health and safety since he was experiencing a CSF leak through his nose when he went flying.

26. About this time Claimant began to suspect there was a link between his work environment and his cancer. He determined seven (including himself) of 27 FSEs who had worked for Employer for over a year had developed cancer; two later died.

27. After he returned to Boise, Employer created a new non-traveling position for Claimant as the Boise District Manager. Working with project managers, he was responsible for assigning 42 technicians to various sites for tool installations and retrofits based on the technician's availability and skill level. Claimant had no exposure to chemicals during this time period. He also became active in Employer's safety programs, and was instrumental in securing the right for technicians to wear respirators.

28. On November 13, 2000, Dr. Schwarz performed a left maxillary sinus antrostomy with polyp resection on Claimant at Saint Alphonsus. The operative notes indicate Claimant was suffering from chronic left maxillary sinusitis which had not responded to medical management, that he had a history of acinic cell carcinoma of the right skull base, and that his right skull base and medial orbit, as well as his right maxillary sinus were clear. In addition to the carcinoma, Dr. Schwarz had also been treating Claimant for his chronic sinusitis.

29. On December 3, 2001, Dr. Jutzy performed a left peroneal neurolysis after Claimant developed a foot drop. A MRI and EMG nerve conduction studies had shown an entrapped peroneal

nerve at the left knee. After the nerve was surgically relocated, Claimant's symptoms slowly resolved. While Claimant related this condition to his work duties, *i.e.*, flying to a job site with his knee against the fuselage for an extended period of time, there is no medical evidence in the record to support his assertion.

30. Claimant's employment with Employer ended on July 23, 2003. Claimant characterized it as a termination; Employer as a reduction in force. Claimant maintains he and several co-workers were terminated after questioning why a specific brand of acid pump with a high failure rate continued to be used in tools when cheaper, more reliable pumps were available. At the time his annual salary was \$50,490.44.

31. Claimant had signed a Confidentiality and Noncompetition Agreement with Employer shortly before the separation.

32. Claimant notified Employer in writing on July 23, 2003, that he believed his tumor was related to his exposure to chemicals during his employment. Maintaining older studies were flawed, he cited a recent study which showed clean room workers were four times more likely to develop brain cancer than members of the general populace in support of his allegation.

33. During his exit interview on July 24, 2003, Claimant again informed Employer he believed his cancer was due to his exposure to chemicals while working on Employer's tools. He further indicated his opinion was based on recent research he had conducted. Employer asked him to fill out an accident/illness claim form; Claimant did so.

34. Employer prepared a Form 1 on July 25, 2003; it was received by the Commission on August 5, 2003. The Form 1 indicated Claimant was diagnosed with a brain tumor on November 18, 2002, and that it was caused by exposure to chemicals. The date of diagnosis and the diagnosis itself

are handwritten while the remainder of the information on the Form 1 is typewritten; the notation “per surety” follows the diagnosis. The form used to report the claim to Royal and Sun Alliance indicated Claimant had been terminated.

35. Prior to the separation, Claimant had been playing the piano at a local church for free; he was also the musical director. After the termination, the church decided to pay him \$500.00 per month for playing. Claimant has not performed any other type of work since his separation from Employer.

36. Claimant received unemployment benefits after his separation.

37. Shortly after the separation, Claimant had a MRI to determine whether or not he should pay for medical insurance under Employer’s COBRA plan. He was concerned his cancer had returned; Dr. Schwarz had been treating him for a swelling in the right skull base region since mid-2002. An August 14, 2003, MRI showed a nodule in the ethmoid sinus at the skull base; prior biopsies had shown only acute and chronic inflammation. Dr. Schwarz noted the possibility of recurrent acinic cell carcinoma of the skull base.

38. Claimant filed a Complaint with the Commission on September 22, 2003.

39. On September 29, 2003, Dr. Schwarz and Dr. Jutzy performed a resection of what they both characterized as recurrent acinic cell carcinoma of the ethmoid sinuses and skull base at Saint Alphonsus. Specific procedures included a right lateral rhinotomy, a bifrontal craniotomy, the total resection of the acinic cell carcinoma lesion via a right ethmoid resection, and a right temporal fascial graft to the right medial orbit. The procedures were performed after an endoscopic biopsy showed the cancer had returned. The reoccurrence of the acinic cell carcinoma was confirmed in a pathology report.

40. Claimant returned to Saint Alphonsus on October 24, 2003, with CSF rhinorrhea. Dr. Schwarz removed the packing from the September 29<sup>th</sup> surgery, debrided the paranasal sinuses, and Paul J. Montalbano, M.D., placed a lumbar drain to stop the rhinorrhea. Claimant was discharged after one week with no further sign of CSF rhinorrhea.

41. Atlantic Mutual Insurance Company (Atlantic) issued a workers' compensation policy on behalf of SCP Global Technologies, Inc., effective January 1, 2004. The policy was in effect at the time of the hearing in this matter. Atlantic is not a party to this matter.

42. Claimant returned again to Saint Alphonsus on February 6, 2004, where Dr. Schwarz and Dr. Jutzy performed a bifrontal craniectomy with wound debridement and bifrontal sinus exenteration. Claimant had developed swelling in his scalp; a culture showed a Serratia infection. His devitalized bifrontal bone flap was removed.

43. In a Affidavit dated February 23, 2004, Dr. Jutzy opined, based upon a reasonable degree of medical probability, Claimant's three tumors were caused by his exposure to chemicals in the workplace while working for Employer. He specifically cited the welding of vessels, valves, and pipes used to contain sulfuric acid, and working over tanks of sulfuric acid heated to 120 degrees centigrade which gave off fumes. Dr. Jutzy noted the medical literature established that sulfuric acid fumes and mists are carcinogenic agents. He further noted, that in addition to the tumors resected in 1999 and 2003, Claimant now had an inoperable brain tumor. The Affidavit was prepared at Claimant's request.

44. Dr. Jutzy's 2003 and 2004 notes indicated Claimant was exposed to high levels of acid while working for Employer.

45. In an Affidavit dated March 12, 2004, Alice M. Forsythe, M.D., opined Claimant's

September 29, 2003, surgery was to remove his recurrent acinic cancer, that he had discussed the need for radiation therapy with David A. Koeplin, M.D., but that the therapy was on hold due to an infection, that his cancer was slow growing, and that due to the slow growth, he could expect to live at least four years, although his cancer was potentially curable. The Affidavit was prepared at Defendant American's request.

46. A course of antibiotics followed the February 6th surgery. After the infection resolved, Dr. Jutzy performed a bifrontal methyl methacrylate cranioplasty on March 17, 2004; Claimant was given a prosthetic forehead to replace the removed bone. Radiation therapy followed with Dr. Koeplin; it ended just before the hearing.

47. Claimant deposed Harry J. Beaulieu, Ph.D., on July 20, 2004. Dr. Beaulieu had been retained by Defendant Connecticut as an expert witness. He is the president, senior scientist, and owner of Industrial Hygiene Resources, a Boise firm which has conducted industrial hygiene surveys for Employer and various semiconductor manufacturers. Dr. Beaulieu opined that although Claimant incurred low-level intermittent exposures to sulfuric acid while working around Employer's tools, his cancer was in the wrong place, *i.e.*, epidemiological studies showed sulfuric acid mist generates laryngeal cancer, not the sinus cancer Claimant suffered from.

48. At hearing, Robert J. Harrison, M.D., M.P.H., testified on Claimant's behalf. He is a professor of occupational medicine at the University of California at San Francisco, and the chief occupational epidemiologist for the state of California, supervising a team of 15 individuals who conduct epidemiological studies. These studies have included toxic chemical exposures and cancer effects. Dr. Harrison has diagnosed and treated over 50 individuals who have been exposed to chemicals in Silicon Valley clean rooms; his practice has encompassed some 20 years. He stated the

state of California has determined inorganic acid mists containing sulfuric acid are carcinogenic. Dr. Harrison further stated, that when welding plastic with high heat, and the heat comes in contact with acid, the acid vaporizes.

49. Dr. Harrison stated, that when inorganic acid mists including sulfuric acid are breathed into the body, the mist first passes the mucous membranes of the nose, then the upper nasal cavities, then past the larynx, and then down into the lungs. He further stated the highly soluble mists are in immediate contact with the lining of the respiratory tract and are immediately dissolved into the mucous layer of the respiratory tract. Dr. Harrison indicated the mechanism of respiratory cancers from these mists is the direct contact the chemical has on the cells of the respiratory tract. He then opined, to a reasonable degree of medical probability, that Claimant's cumulative exposure to chemicals while working for Employer caused his acinic cell cancer. The chemicals he cited were sulfuric acid, hydrofluoric acid, phosphoric acid, and isopropyl alcohol. Dr. Harrison then opined none of the last three chemicals standing alone would have caused Claimant's nasal cancer, but in combination with strong inorganic mists containing sulfuric acid, they could. He also opined there was no causal relationship between Claimant's smoking and his exposure to second-hand smoke and his nasal cancer.

50. Claimant has smoked on and off since he was a teenager in high school. He was also exposed to second-hand smoke from his parents while growing up. Claimant stopped smoking for an extended period of time in his twenties and thirties, but started again while living in Ireland with chain smoking co-workers. Claimant had stopped smoking again by the time of the hearing.

51. At his post-hearing deposition, Noel S. Weiss, M.D., Ph.D., testified on Defendant SIF's behalf. He is a professor of epidemiology at the University of Washington. Dr. Weiss opined

the data was inadequate to demonstrate exposure to sulfuric acid mists had the capacity to give rise to nasal cancer. He further opined nasal cancer was relatively rare, that studies did not show any increase in risk for nasal and sinus cancers, but that nasal and sinus tissue seemed to be more resistant to cancer for unknown reasons than laryngeal tissue. Dr. Weiss opined causal connections should be determined through epidemiological studies. He acknowledged, however, that there was evidence which pointed to the plausibility of the hypothesis of a causal connection between nasal cancer and sulfuric acid mists. He cited a number of instances where occupational factors, such as exposure to wood dust, nickel, and chromium, caused nasal cancer; that sulfuric acid was known to be an irritant to nasal tissue, that irritation was known to predispose inflammation, and that inflammation in many parts of the body could give rise to cancer; and that sulfuric acid mists were very likely to cause cancer elsewhere in the respiratory tract. Dr. Weiss then added, that simply because exposure to sulfuric acid mist could predispose an individual to laryngeal cancer, it did not guarantee or even necessarily imply that it would predispose that individual to tumors of the nasal cavities and sinuses.

52. Dr. Weiss also opined that there was no reason smoking could cause nasal cancer.

53. At his post-hearing deposition, Dr. Beaulieu, an industrial hygienist, opined Claimant's job responsibilities with Employer would have brought him in contact with sulfuric acid mists. He differentiated the exposure levels between maintenance workers, like Claimant, who had the potential for exposure, and the actual tool operators, who had little, if any, exposure to the mists. Dr. Beaulieu indicated that there were established occupational exposure limits for sulfuric acid designed to protect workers from the potential of developing laryngeal cancer. He opined that in general, in the late 1970s, he considered some of the exposure levels maintenance people

experienced to be excessive, whereas five years ago, the exposure levels were more stringent than the established exposure values. Dr. Beaulieu further opined Claimant was not exposed to any chemicals during his work with Employer in levels that would result in his developing sinus cancer. He acknowledged the procedures of some companies call for draining tanks of sulfuric acid prior to maintenance being performed in order to limit exposure and protect the worker, that if a worker has a perception of being exposed to a chemical, that would rationalize controlling exposure, and that he had never been in either the New York, Ireland, or Israel sites Claimant had worked at.

54. At his post-hearing deposition, David W. Eisele, M.D., testified on Defendant American's behalf. He is a professor of otolaryngology at the University of California San Francisco. Dr. Eisele indicated acinic cell carcinoma is a type of salivary gland carcinoma arising in salivary gland tissue, and that the only potential causative factor he was aware of was exposure to radiation. He further indicated he had never seen or heard of a patient with the type of tumor Claimant had, and that a very rare tumor did not lend itself to epidemiologic study. Dr. Eisele indicated he could find no link between the type of cancer Claimant had and sulfuric acid mists in the literature search he conducted. He further indicated one would expect increased exposure to a known carcinogen would result in an increased risk, but that a dose response curve is variable.

55. Dr. Eisele opined, to a reasonable degree of medical probability, that there was no evidence to suggest epidemiologically that development of Claimant's very rare tumor in the ethmoid sinus was related to exposure to sulfuric acid, and that there was no evidence of an occupational exposure of chemicals as a causative factor in the development of acinic cell carcinoma in that location.

56. Claimant has lost his sense of smell and has a limited sense of taste. His vision has

deteriorated to the point where he has trouble reading. These problems are related to his surgeries. He has also suffered a profound loss of hearing at higher frequencies and has constant tinnitus. This loss goes back to Claimant's stay in Ireland. There is no evidence in the record that it is work-related.

57. The National Toxicology Program's (NTP) Tenth Report on Carcinogens stated occupational exposure to strong inorganic mists containing sulfuric acid is *known to be a human carcinogen*, based on sufficient evidence of carcinogenicity from studies in humans that indicate a causal relationship between exposure to strong inorganic acid mists containing sulfuric acid and human cancer. (Emphasis in original.) The Report further states that occupational exposures to strong inorganic acid mists containing sulfuric acid are specifically associated with laryngeal and lung cancer in humans. The Report cites the World Health Organization's International Agency for Research on Cancer (IARC) as a source.

58. The National Institute of Environmental Health Services (NIEHS), in a listing of occupational carcinogens, stated there was strong evidence to support a causal connection between cancer in the nasal cavities and paranasal sinuses and individuals involved in the manufacture of isopropanol alcohol using the strong acid process. The strong acid process uses sulfuric acid.

59. Both the NIEHS and the NTP are under the U. S. Department of Health and Human Services.

60. Claimant has been determined to be 100% disabled by the Social Security Administration.

61. Claimant's testimony regarding the circumstances surrounding his exposures to sulfuric acid mist and his safety concerns is un rebutted. He is a credible witness.

## DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Occupational Disease.** The Idaho Workers' Compensation Law defines an "occupational disease" as "a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, . . . ." Idaho Code § 72-102 (21) (a). The Law further provides that "[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his [or her] disablement as hereinafter limited, the employee, . . . shall be entitled to compensation." Idaho Code § 72-437. "Disablement" means "the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease," and "disability means the state of being so incapacitated." Idaho Code § 72-102 (21) (c). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) "such disease is actually incurred in the employer's employment," and (2) where "the employee was exposed to the hazard of such disease for a period of 60 days for the same employer." Idaho Code § 72-439 further provides, that "[w]here compensation is payable for an occupational disease, the employer, or the surety on the risk for employer, in whose employment the

employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.”

Thus, under the statutory scheme, a claimant must demonstrate (1) that they were afflicted by a disease; (2) that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which they were engaged; (3) that they were exposed to the hazards of such disease for a period of 60 days with the same employer; (4) that the disease was incurred in, or arose out of and in the course of their employment, and (5) that as a consequence of such disease, they become actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease. In addition, 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). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974).

Claimant argues his acinic cell cancer, which he characterizes as an occupational disease, was caused by his exposure to sulfuric acid mists while working for Employer. He described numerous instances of working over heated sulfuric acid baths where his face shield would mist over. He also described numerous instances where he melted or welded plastic components together with a hot air gun; the components had previously been in contact with sulfuric acid. Claimant maintained the heat caused the acid residue to vaporize, and that he was exposed to these vapors. His testimony regarding his exposures is un rebutted.

The gravamen of Defendants’ defense is that there are no studies casually linking exposure to sulfuric acid mists to acinic cell cancer occurring in the sinuses. They are correct. Defendants then argue, that since there are no studies demonstrating an increased risk, Claimant’s cancer could not

have been caused by his workplace exposures. This circular argument fails to address the uniqueness of Claimant in his work environment. Moreover, one of the reasons there are no studies is the fact Claimant's cancer is so rare that any study would be statistically meaningless. Dr. Eisele indicated it was the only case he had ever heard of, and that he was unable to find reference to a similar case during a literature search.

Sulfuric acid mist is a known carcinogen, and has been classified as such by several governmental entities. There are epidemiological studies linking exposure to sulfuric acid mists to an increased risk of laryngeal and lung cancer. Dr. Harrison described the effect direct chemical contact had on the mucous layers of the respiratory tract, and opined Claimant's cumulative exposure to chemicals while working for Employer caused his acinic cell cancer. Despite disagreeing with Dr. Harrison's opinion, Dr. Weiss opined it was a reasonable hypothesis to advance, and that there could well be a causal relationship. He did not support Dr. Harrison's opinion because he did not believe there was adequate evidence to support it; there was simply inadequate data to demonstrate an increased risk of nasal cancer.

Dr. Eisele opined, that as a general rule, one would expect an increased exposure to a known carcinogen to cause an increased risk. He qualified his response by indicating medical science did not understand the correlation, *i.e.*, the dose response curve, between the level of exposure and the contracting of cancer among individual patients.

Dr. Beaulieu gave two opinions on causation: that epidemiological studies did not support causation since Claimant's cancer was in the wrong place, and that Claimant's exposure levels were insufficient to cause cancer. As Defendants correctly point out, the actual exposure levels are unknown. Moreover, Dr. Beaulieu is not a physician; his medical opinions carry no weight. His

exposure studies also have little value. The study showing minimal fumes were given off when welding plastic is meaningless here; the plastic was virgin, it had never been exposed to acids.

Defendants have also raised several other arguments. They maintain Claimant's tumors could have been caused by either his exposure to second-hand smoke as a child, or by his own smoking during his teen-age years and his smoking later in life. Dr. Weiss and Dr. Harrison, however, both opined there was no connection. Defendants further maintain the amount and times of Claimant's exposures to chemicals in the workplace were not measured; the inference being without a demonstrated high level of exposure, there can be no causal connection. This argument has little merit in light of Dr. Eisele's comments on dose response curves. Defendants also maintain Claimant's father had cancer; the inference being he was genetically predisposed to the same type of cancer. While there was discussion as to whether Claimant's father had jaw, mouth, or salivatory gland cancer, there is no medical evidence in the record to verify either the type of cancer or the actual location of the cancer, and whether Claimant was predisposed to the same. This argument is speculative at best. These arguments, and Defendants ad hominem attacks on Dr. Harrison, are nothing more than red herrings.

Dr. Jutzy opined Claimant's tumors were caused by his exposure to chemicals in the workplace. He specifically cited sulfuric acid fumes and mists.

Based on the record before the Commission, and the weight of the medical evidence, the Referee finds Claimant suffers from an occupational disease, acinic cell cancer of the nasal cavity, and that the disease was actually incurred during his employment with Employer. Dr. Jutzy and Dr. Harrison both offered opinions in support of causation to a reasonable degree of medical probability. Dr. Eisele and Dr. Weiss would not causally link Claimant's exposure to sulfuric acids

mists to his cancer due to the lack of epidemiological studies; studies which do not exist due the rarity of Claimant's cancer. The rarity with which a disease occurs results from the fact that some people with the same or similar amount of exposure will develop the disease, whereas others will not. The rarity of Claimant's cancer, and any peculiarity of his contracting the disease, as compared to other workers, should not bar his claim if the disease can be shown to be work-related. He has done that through the opinions of Dr. Harrison and Dr. Jutzy. The Referee notes this finding only applies to Claimant under the specific circumstances of this case.

In *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978), the Idaho Supreme Court construed the phrase "characteristic of, and peculiar to" to mean that the conditions of employment must result in a hazard which distinguishes it in character from the general run of occupations. 99 Idaho at 323, 581 P.2d at 781, overruled on other grounds. Applying the test set forth in *Bowman*, the Referee finds Claimant's exposure to sulfuric acid mists constitutes a hazard which is not a characteristic of all occupations. The Referee further finds Claimant, as a long time employee of Employer, was exposed to these hazards for a period greater than 60 days.

As Defendant Connecticut correctly points out in its brief, Claimant was totally disabled from working for Employer while he was hospitalized in Israel during January 1999, when he was placed on short-term disability in February 1999, and while recovering from his March 1999 surgery. The Referee finds Claimant was totally disabled when he was hospitalized in January 1999.

The Referee finds the statutory requirements have been met, and that Claimant has demonstrated that he incurred an occupational disease while working for Employer. Thus, the Referee concludes Claimant has incurred a compensable occupational diseases, acinic cell cancer of the nasal sinus.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 25**

Although there was only one employer, liability for Claimant's compensation must be assigned among the sureties involved in this matter. In such situations, Idaho Code § 72-439 (3) provides that the surety on the risk for Employer, in whose employment the employee was last injuriously exposed to the hazard of the occupational disease, shall be liable. Citing analysis in *Larson's Workers' Compensation Law*, Defendant Connecticut asserts the determination of the last injurious exposure is obvious: the date of disability. They further assert once a claimant is disabled as a consequence of an occupational disease, a second disability occurring under a different surety will be chargeable to the first surety if the second disability is a recurrence of the first.

In *Peckham v. Producer's Lumber Company*, 116 Idaho 675, 678, 778 P.2d, 778, 800 (1989), the Idaho Supreme Court held that a surety is potentially liable for compensation if (1) the surety insured the employer within one year to the date employee suffered total incapacitation from a disease other than silicosis; (2) injurious exposure occurred during the employment of the employee by the employer and while the surety insured the employer; and (3) the employee is totally incapacitated from performing the employee's work in the last occupation in which the employee was injuriously exposed to the hazards of the occupational disease that caused the employee's total incapacity. The surety's actual liability depends upon the factual findings made by the Commission as to when injurious exposure occurred and when total incapacity occurred. *Id.*, 116 Idaho at 679, 778 P.2d at 801.

The Referee previously found Claimant was injuriously exposed during his employment with Employer, and that he was totally incapacitated in January 1999. Thus, under *Peckham*, American Protection Insurance Company, Employer's Surety from January 1, 1998, until April 4, 1999, is liable for Claimant's medical and time-loss benefits.

2. **Statute of Limitations.** Idaho Code § 72-448 (1) provides in pertinent part that unless written notice of the manifestation of an occupational disease is given to the employer within 60 days after its first manifestation, . . . , and unless claim for workers' compensation benefits is filed with the Industrial Commission within one year after the first manifestation, all rights of the employee to workers' compensation due to the occupational disease shall be forever barred. Manifestation, under Idaho Code § 72-102 (18), means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

Claimant notified Employer in writing on July 23, 2003, that he believed both his original tumor, and his recurrent tumor, were related to his exposure to chemicals while working for Employer. He cited his own research after realizing several of his co-workers had also developed cancer despite Employer's reassurances that there was no connection. The following day, he verbally informed Employer that he believed his cancer was due to his exposure to chemicals while working on Employer's tools. Employer asked him to fill out an injury/illness claim form; Claimant did so. On July 25, 2003, Employer prepared a Form 1; it was filed with the Commission on August 5, 2003. The first competent medical authority to opine Claimant's tumors were caused by his exposure to chemicals in the workplace while working for Employer was Dr. Jutzy on February 23, 2004. Therefore, the Referee finds Claimant's acinic cell cancer was manifest on July 23, 2003, the day he provided written notification to Employer and initiated the workers' compensation claim process.

Claimant filed a Complaint with the Commission on September 22, 2003. The filing was within the one year statutory period. Thus, the Referee concludes Claimant has complied with the

statutory limitations set forth in Idaho Code § 72-448 for his occupational disease claim.

3. **Medical Benefits.** The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432 (1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

Having previously concluded Claimant suffers from an occupational disease, the Referee finds the medical care required by his physicians to treat his acinic cell cancer to be reasonable. Thus, the Referee concludes Claimant is entitled to the cost of the medical care either provided by or recommended by Dr. Schwarz, Dr. Jutzy, and Dr. Koeplin in the treatment of his acinic cell cancer. These were the physicians directly involved in his cancer treatments. It is impossible to calculate the specific amount because, for the most part, Claimant has simply submitted the payment records of his health insurance companies. Some of these bills cannot be matched to medical records, *e.g.*, care by P. Michael O'Brien, M.D., for several months in early 2003, and include treatment which appears to be outside the scope of the cancer treatments, *e.g.*, a hemorrhoid procedure by Reese A. Verner, M.D., on July 12, 1999. A bill for chiropractic care was also submitted with no accompanying medical record. In addition, the physicians involved in Claimant's cancer care also treated him for conditions other than his cancer, *e.g.*, the left peroneal neurolysis performed by Dr.

Jutzy on December 3, 2001.

4. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C. P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986) (emphasis in original).

Claimant was actually and totally disabled from working during the time he was receiving disability benefits from Employer during 1999. Thus, the Referee concludes Claimant is entitled to temporary total disability (TTD) benefits during this period. The Referee notes there is insufficient

information contained in the record to accurately fix this period. The Referee further notes there is insufficient information in the record to accurately calculate any further periods of benefits or the amount owed. The parties have not adequately argued the issue in their briefs.

### **CONCLUSIONS OF LAW**

1. Claimant has incurred a compensable occupational disease, acinic cell cancer of the nasal sinus. American Protection Insurance Company is liable for Claimant's medical and time-loss benefits.

2. Claimant has complied with the statutory limitations set forth in Idaho Code § 72-448 for his occupational disease claim.

3. Claimant is entitled to the cost of the medical care either provided by or recommended by Dr. Schwarz, Dr. Jutzy, and Dr. Koeplin in the treatment of his acinic cell cancer.

4. Claimant is entitled to temporary total disability (TTD) benefits during the period he was receiving disability benefits from Employer during 1999.

### **RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 11th day of April, 2005.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of April, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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kk

/s/\_\_\_\_\_



recommendation. 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 incurred a compensable occupational disease, acinic cell cancer of the nasal sinus. American Protection Insurance Company is liable for Claimant's medical and time-loss benefits.

2. Claimant has complied with the statutory limitations set forth in Idaho Code § 72-448 for his occupational disease claim.

3. Claimant is entitled to the cost of the medical care either provided by or recommended by Dr. Schwartz, Dr. Jutzy, and Dr. Koeplin in the treatment of his acinic cell cancer.

4. Claimant is entitled to temporary total disability (TTD) benefits during the period he was receiving disability benefits from Employer during 1999.

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

DATED This 22<sup>nd</sup> day of April, 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 22nd day of April, 2005, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following:

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