

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN WICHTERMAN,)
)
 Claimant,)
)
 v.)
)
 J. H. KELLY, INC.,)
)
 Employer,)
)
 and)
)
 RELIANCE NATIONAL INDEMNITY)
 COMPANY,)
)
 Surety,)
 Defendants.)
 _____)

IC 99-032770

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed: October 24, 2005

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 Coeur d’Alene, Idaho, on April 22, 2005. Claimant appeared *pro se*. Thomas P. Baskin of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on August 24, 2005 and is now ready for decision.

ISSUES

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

1. Whether Claimant’s claim for impairment and disability benefits is time barred by the provisions of Idaho Code § 72-706;

2. Whether the respiratory and gastrointestinal conditions for which Claimant seeks benefits were caused by the occupational exposures of September 1998; and
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Permanent partial impairment (PPI); and
 - c. Disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant contends that he is completely or substantially permanently disabled as a result of workplace chemical exposures that occurred September 17 and 22, 1998. He has been unable to work since the accidents because of pulmonary and gastrointestinal injuries resulting from the accidents.

Defendants do not dispute that Claimant was exposed to chemicals at work on September 17 and 22, 1998. In fact, Defendants accepted the claim, treating the two incidents as one exposure, paying medical and indemnity benefits, including a 5% permanent impairment rating. Defendants assert that Claimant's claim for additional impairment and disability in excess of impairment are time barred by Idaho Code § 72-706. Further, Defendants contend that Claimant is not entitled to any additional medical treatment because there is no credible evidence in the medical records that Claimant's current pulmonary and gastrointestinal complaints are related in any way to his industrial accidents of September 1998.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Defendants' Exhibits 1 through 27 admitted at hearing;
2. The testimony of Claimant taken at hearing; and

3. Industrial Commission legal file.

On June 28, 2005, the Commission entered an Order establishing a post-hearing briefing schedule. Pursuant to that Order, Claimant's opening brief was to be filed on or before July 18, 2005. Defendants' responsive brief was to be filed on or before August 8, 2005. Claimant was given until August 22, 2005 to file a reply brief. Claimant's opening brief, dated July 16, 2005, was mailed to the Commission on July 18 and filed July 20, 2005.

On July 26, 2005, Defendants filed their Motion to Strike Claimant's opening brief together with a Memorandum in Support. The basis for Defendants' motion was that Claimant's brief was not timely filed. Rule 11(A), J.R.P., governs the time for filing of post-hearing briefs. The rule establishes a standard briefing schedule and provides for alternate briefing schedules by Commission order. The rule specifically refers to the *filing* date as the date that briefs are due. "Filing" is defined in Rule 1(B)(1), J.R.P., as:

. . . the actual receipt of a document at the Commission's office at 317 Main Street in Boise, Idaho, before the close of business at 5:00 pm Mountain Time, as shown by the Commission's date stamp, except as otherwise provided by these rules.¹

Filing of a document is not to be confused with service of a document, which involves the transfer of a document or pleading to the other party or parties (Rule 1(B)(2)), and which is considered complete at the time of *mailing*. Rule 4(A), J.R.P. The Referee specifically advised Claimant at the hearing that "[a]nything that is not *received* in our office in a timely fashion will not be considered." Tr., p. 66.

Because Claimant's opening brief was not filed in a timely manner, Defendants' Motion to Strike is granted, and Claimant's opening brief will not be considered by the Referee in her

¹ Rule 3, J.R.P., does provide an exception for facsimile filing of pleadings, but that exception is not applicable, as Claimant did not attempt to file his brief by facsimile.

findings, conclusions, and recommendations.

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

FINDINGS OF FACT

BACKGROUND

1. Claimant is a journeyman pipe fitter. Prior to the industrial exposures at issue in this proceeding, Claimant was dispatched by his local union to Employer. At that time Employer was working on a project for Potlatch Corporation at its Lewiston, Idaho, facility.

2. On September 17, 1998, Claimant was working for Employer on the Potlatch project. When he cut into a pipe, a small amount of steam escaped. When he finished cutting the pipe and knocked the section out, he observed a gray cloud exit from the pipe, and he inhaled some of the vapor. The material in the pipe was dilute lime mud or quicklime.

3. On September 22, 1998, Claimant was still working for Employer on the Potlatch project. As he was unbolting a pipe flange, Claimant was sprayed with a liquid, some of which may have entered his mouth or have been swallowed. The material could have been white liquor, weak wash, or black liquor, all substances used in the manufacture of paper.

4. Employer did not dispute that the claimed exposures occurred, or that Claimant may have experienced some transient respiratory and gastrointestinal health effects as a result of the exposures. Defendants paid medical and time loss benefits associated with Claimant's injuries through March 7, 2002. In addition, Defendants voluntarily paid Claimant a 5% permanent partial impairment rating.

5. Claimant is neither a reliable historian nor a credible witness. His subjective reports to his numerous treating and evaluating physicians vary widely and cannot be reconciled. Claimant's documented alcohol, tobacco, and marijuana use are at odds with his statements that he neither smoked, nor drank, nor used illegal drugs. Neither are Claimant's reported exposures consistent with his relatively contemporaneous reported complaints. Much of what Claimant reported appears to be a gross misrepresentation at best, and a complete fabrication at worst. The Referee finds that the only reliable evidence in the record of this proceeding are objective medical findings and diagnoses based upon those objective findings.

IMPAIRMENT AND DISABILITY

6. In March 2002, Claimant refused to attend a scheduled independent medical exam (IME). Thereafter, Defendants discontinued payment of time loss benefits pursuant to Idaho Code § 72-434. The last scheduled payment Defendants made to Claimant for income or impairment benefits was paid April 20, 2002. Defendants' Ex. 27, p. 589.

7. Although Idaho Code § 72-434 relieved Defendants of all payment obligations on Claimant's claim, Defendants continued to pay some of Claimant's medical bills.

8. Claimant filed a timely Application for Hearing (Complaint) on December 26, 2002.

9. On February 24, 2003, Claimant's Complaint was dismissed without prejudice upon the request of his then attorney.

10. Claimant filed his second Application for Hearing (Amended Complaint) on October 20, 2003.

11. The fourth anniversary of Claimant's injury occurred either on September 17 or 22, 2002. The fifth anniversary of Claimant's injury occurred on either September 17 or 22, 2003.

MEDICAL BENEFITS/CAUSATION

Respiratory Complaints

12. Claimant's first treatment for the workplace exposures of September 17 and 22, 1998 was on September 24, when he saw William R. England, M.D., at Valley Medical Center. Claimant reported to Dr. England that:

. . . on the 17th he was working around a lime kiln [sic] and feels like he had inhaled some gas there and then 2 days ago at work he had either white or black liquor from a pipe spray out and strike him on the clothes and he inhaled fumes from that. He attributes to these two exposures a cough he has had over the last several days.

Ex. 1, p. 02. On exam, Dr. England observed good respiration, clear chest, oxygen saturation of 98%, and no abnormalities with the nasopharynx, oropharynx, or uvula. He diagnosed irritant bronchitis and prescribed Albuterol and Prednisone, advised Claimant not to smoke, and returned him to full duty.

13. Claimant saw Edward H. Maloney, M.D., at Deer Park Family Care Clinic on October 5, 1998. He complained of cough, burning in his chest, headache, and upset stomach. The only observable symptom that Dr. Maloney noted was some hyper-resonance in his chest on the right. A chest x-ray and pulmonary function test (PFT) on October 5, 1998 were both normal. Dr. Maloney diagnosed irritative bronchitis secondary to chemical exposure.

14. Claimant returned to Dr. Maloney on October 13, complaining that his lungs were worse. Dr. Maloney found no objective evidence of a respiratory problem. Dr. Maloney referred Claimant to Todd Green, M.D., a pulmonologist, for further follow-up.

15. Claimant saw Dr. Green the following day. A PFT performed the same day showed mild obstructive lung defect, a slight bronchodilator response, and normal lung volume and diffusion. Dr. Green posited a diagnosis of acute asthmatic illness related to the chemical exposures. Claimant continued to treat with Dr. Green, and in December 1998, Dr. Green was still of the opinion that Claimant had a mild obstructive lung defect.

16. At the request of the nurse case manager monitoring his claim, Claimant saw pulmonologist Alan C. Whitehouse, M.D. Dr. Whitehouse saw Claimant four times between January 7 and February 18, 1999. The results of a PFT administered on Claimant's first visit were inconsistent and Dr. Whitehead did not consider the results valid. On Claimant's last visit, Dr. Whitehouse noted that Claimant had no objective findings consistent with his respiratory complaints, and that Claimant had refused blood testing to monitor liver function and test for drug use. Dr. Whitehead wanted the tests because of Claimant's continued gastric complaints and his behavior, which Dr. Whitehead described as "extraordinarily anxious," "jumping around all the time," and "jittery." Ex. 7, pp. 246, 252. Dr. Whitehouse concluded:

At the present time, I can only conclude that there is no evidence that he has of [sic] any lung disease. I think that on the basis of the fact that he had essentially normal pulmonary function before bronchodilator when I first saw him, has a normal chest x-ray and a normal chest exam with a cough that appears to me to be factitious, makes me conclude that there is no clear evidence that he has any disease. I think a psychiatric referral would be appropriate.

Id., at p. 254.

17. In February 1999, Claimant was referred to William Bender, M.D., for treatment of his persistent headaches. Dr. Bender found no organic basis for Claimant's headache complaints and suggested that a behavioral and/or psychiatric evaluation might be helpful.

18. Dr. Green continued to treat Claimant, believing he had a real medical problem and was not malingering.

19. In March 1999, Surety arranged for Claimant to be evaluated by Spokane pulmonologist Richard J. Lambert, M.D. Dr. Lambert examined Claimant and reviewed all of the PFT results for tests conducted prior to the visit. Dr. Lambert also thoroughly reviewed the medical records of Drs. Maloney, Green, Whitehouse and Bender. In his report, Dr. Lambert noted that the headaches had resolved, as had the gastric complaints. He then went on to conclude:

I am somewhat bothered by his persistence of symptoms. He has had a lack of clear-cut physical exam findings from various examiners including two good pulmonologists, and I am also bothered by the minimal changes on PFTs.

His initial PFT indicated normal flow rates. All subsequent PFTs done in Dr. Green's office indicate a poor effort on the patient's part and they are essentially uninterpretable for obstructive airways disease, other than the first one which was a fairly good effort. Certainly these findings could be explained on the basis of poor effort on the [*sic*] Mr. Wichterman's part and do not fit the classic pattern for an asthmatic patient with reversible air obstruction.

At this time I am reluctant to give the claimant a diagnosis of occupational asthma as I think the type of injury he had in terms of the severity of initial insult is not typical for patients who ultimately develop reactive airways disease syndrome.

Ex. 9, p. 286. Dr. Lambert recommended that Claimant undergo some additional testing, including exercise tolerance, maximum exercise study, and if the Claimant would cooperate and give a good effort on PFTs, a methacholine challenge test. Dr. Green agreed with Dr. Lambert's conclusion that prior testing was inconclusive and that additional testing was appropriate.

20. Claimant underwent additional pulmonary function and methacholine challenge testing on April 26, 1999. Results of the PFT were normal, and the methacholine challenge testing was negative to bronchial hyper responsiveness. Dr. Green acknowledged that his earlier diagnosis of reactive airways function disease was now questionable.

21. In September 1999, Claimant was evaluated by Paula Lantsberger, M.D., an occupational medicine specialist. Dr. Lantsberger opined that Claimant's symptoms were

consistent with the described exposure, but that he was stable on his medications—Albuterol, Seravent, Flovent, Vanceril, and propoxyphene with APAP (a narcotic/acetaminophen analgesic), Prilosec, and Prednisone. Dr. Lantsberger required additional pulmonary function testing before she could rate Claimant's impairment. She requested that the testing be done at Dr. Green's clinic where previous testing had been done, but requested that he be tested only after having been off his medications for two weeks prior to the test.

22. The recommended pulmonary function testing was conducted in late October 1999 at Dr. Green's office. The technician reported that Claimant gave a good effort, though he appeared very tense and anxious. Dr. Lantsberger interpreted the results as showing a severe obstructive lung deficit and a severe decrease in diffusing capacity as well as significant bronchodilator response. Based on the results of this testing, Dr. Lantsberger rated Claimant's permanent partial impairment at 51% to 100% of the whole person.

23. Claimant continued to be seen at the Deer Park Family Care Clinic monthly, initially with Dr. Maloney and later with Dr. Stoop. During this interval, Claimant continued to complain of headache, gastrointestinal problems, and respiratory problems as well as depression and other more transient complaints. In March 2001, Dr. Stoop wrote Surety advising that Claimant's pulmonary condition was fixed and stable, and that he was capable of being employed at light duty and sedentary jobs.

24. Claimant returned to Dr. Green on April 17, 2001. Dr. Green noted that the results of the cardiopulmonary exercise study he had ordered in May 1999 were normal. Dr. Green ordered additional pulmonary function testing, which was conducted that day. The technician who performed the study interpreted the results as showing severe obstructive lung deficit, but Dr. Green believed the test results were suspicious for suboptimal effort. Dr. Green

recommended full pulmonary function testing in an attempt to fully understand the nature and extent of Claimant's respiratory problems. These studies were conducted on April 25. Due to sub-optimal patient effort, Dr. Green was unable to comment on the presence or absence of obstructive airways disease. He did note that lung volume and diffusion studies were entirely normal. Claimant did not return to Dr. Green until February 28, 2002. Results of PFTs conducted on that date did not demonstrate obstructive airways disease. Dr. Green's ambivalence about Claimant's condition is apparent in his note:

[Claimant's] case is complex to say the least. He obviously has chronic anxiety at the present time. He has multi-system complaints. From a respiratory standpoint, I am convinced that hyperventilation accounts for at least part of his dyspnea. Since 1999, I have not demonstrated any definite objective finding. Specifically, I have not been able to demonstrate obstructive airways disease during that interval that would support diagnosis of asthma. On the other hand, he has multiple symptoms that are very suggestive of that diagnosis, including his sensitivity to specific triggers which I find interesting. I am also interested in Dr. Stoop's report that he heard wheezes to exam January 30th. That is the first report of that finding in this man to my knowledge. He does not strike me necessarily as a malingerer. I agree with him that he needs mental health assistance at this time for anxiety and depressed mood.

[Claimant] will complete the current Prednisone therapy. At his request, I will make further effort to help him with his case. I have explained to him that there needs to be objective findings that are reproducible. These could be best demonstrated with him off his respiratory medications

Ex. 6, pp. 236-237. Dr. Green also queried whether Claimant had had any follow up regarding his gastrointestinal problems, and ordered an air contrast upper GI study.

25. The pulmonary testing that Dr. Green recommended was conducted April 19, 2002. The technician noted suboptimal patient effort and this was confirmed by review of the flow volume data. No significant obstructive defect was identified and Claimant had no response to the bronchodilator. A methacholine challenge test was not conducted because of Claimant's inconsistent effort.

26. Claimant's last visit with Dr. Green was on June 6, 2002. Dr. Green advised Claimant that in light of the most recent PFT and aborted methacholine challenge he could do nothing more for Claimant and advised him to follow up with Dr. Stoop:

I am not able to assist him with his claim for either work related injury or disability. I suggested to him that the present respiratory medications are reasonable so long as he finds them helpful. I again told him that he has the option of getting another opinion from a pulmonologist.

Id., at p. 241.

27. Claimant underwent yet another pulmonary evaluation in April 2003 at the request of his then attorney. The testing was conducted by John K. Naylor, M.D. at Northwest Pulmonary. After repeated testing and an evaluation of Claimant, Dr. Naylor reached the following conclusions:

I discussed with [Claimant] that at this point there's no evidence of any objective lung disease, either in my evaluation or Dr. Green's evaluation or in his past PFT's [sic]; that there is a pattern of apparent poor effort on his PFT's [sic] in several labs, including ours; that his symptoms do not fit his physical exam as far as his lungs go. I stated to him that in this setting, my usual conclusion of this is that it either represents anxiety or malingering; but I clearly stated I did not make an implication of either one. He expressed frustration in that fact that he had multiple symptoms and that people had not been able to find an objective cause.

Ex. 17, pp. 446-447. On learning Dr. Naylor's opinion, Claimant inquired whether he had signed a release to make the test results available to his attorney. Dr. Naylor advised him that he had, but that he had signed no other releases. Claimant was adamant that he did not want the results of his testing to be released to anyone other than his attorney.

28. Claimant continued to treat with Dr. Stoop at Deer Park Family Care Clinic through the spring of 2004. While Dr. Stoop initially was of the opinion that Claimant had suffered significant respiratory injury as a result of the 1998 chemical exposures, his opinion changed as he continued to treat Claimant. In an April 20, 2004 letter to Claimant's then

attorney, Dr. Stoop wrote:

[Claimant] had an occupational exposure several years ago that on a more probable than not basis created a transient pulmonary condition similar to asthma. To date, there is no objective evidence that any residual pulmonary condition remains and multiple efforts to quantify this have been attempted. The results of these tests are either normal or the effort put forth by the patient is so poor that no conclusions can be drawn from the test. His current prognosis is excellent given that there are no measurable deficits or objective findings consistent with an ongoing bronchospastic condition. He continues to use medication as needed for symptom relief.

Ex. 4, p. 139.

Gastrointestinal Complaints

29. In addition to all of the pulmonary testing, Claimant underwent extensive evaluation and testing regarding his gastrointestinal complaints. As with the pulmonary testing, none of the test results demonstrate any objective evidence of any permanent gastrointestinal injury.

30. In May 1999, Claimant underwent an esophagogastroduodenoscopy performed by Stephen Burgert, M.D. The results of the endoscopy were limited by Claimant's lack of cooperation, but apart from some mild erythema in the esophagus, distal gastric body and gastric antrum, the results were normal. No erosions or ulcerations were identified. Dr. Burgert suspected esophagitis and gastritis and recommended treatment for GERD (gastroesophageal reflux disease) commonly known as acid reflux disease.

31. On April 10, 2002, Claimant underwent an air contrast barium upper GI x-ray series. The findings were succinct: "Gastroesophageal reflux. Examination is otherwise unremarkable." Ex. 6, p. 240.

32. Claimant underwent further testing in April 2004. A colonoscopy was normal except for hemorrhoids and two small polyps. An edoscopy performed the same day revealed

only a small hiatal hernia. Dr. Bower, who performed the upper and lower GI studies noted on May 20 that none of his findings were related to Claimant's 1998 industrial accident at Potlatch.

IME

33. In July 2004, at Defendants' request, Brent T. Burton, M.D., a specialist in toxicology and occupational medicine, conducted an independent medical exam (IME) on Claimant. In addition to a complete medical record review, Dr. Burton ordered additional testing and examined Claimant. The PFTs that Dr. Burton ordered were uninterpretable due to poor effort by Claimant. Other testing, including blood chemistry, was unremarkable.

34. With regard to Claimant's pulmonary complaints, Dr. Burton opined:

Although [Claimant] has consulted numerous physicians and received a variety of treatments for his subjective complaints during the past six years, no examiner has documented evidence of occupational asthma or any other pulmonary disorder stemming from an occupational exposure that occurred during September 1998. There have been no radiographic findings indicative of pneumonitis, fibrosis, or any other pulmonary abnormality. Multiple pulmonary function tests have been conducted. However, the results have largely been uninterpretable due to [Claimant's] consistent efforts to produce an invalid appraisal of his pulmonary status. On only one occasion was an examiner able to obtain an effort that reveals normal lung function. At that time, his FVC and FEV1 fell clearly within the normal range. However, at the same time, a methacholine challenge could not be performed due to [Claimant's] failure to "give a full effort." His inconsistent efforts and observed behaviors led the pulmonary physicians in this case—including Dr. Green, Dr. Whitehouse, and Dr. Naylor—to form the conclusion that [Claimant] presented no objective data upon which a diagnosable pulmonary condition could be established.

Ex. 24, pp. 558-559. Defendants specifically asked Dr. Burton to address the seeming contradiction that both Drs. Stoop and Green were willing to continue Claimant on medication for his respiratory complaints despite the fact that neither could find objective evidence of respiratory disease or injury. Dr. Burton responded:

Despite [Claimant's] continued presentation of respiratory complaints, he has been receiving a variety of medications. His examiners have consistently noted that a diagnosis has not been established, and there are no objective findings that

correspond with his symptoms or justify medical treatment. In the absence of a diagnosable condition, a rationale for continued medical treatment has not been established.

Id., at p. 561.

35. With regard to his gastrointestinal complaints, Dr. Burton found that Claimant had verifiable diagnoses of esophagitis and GERD, but he could not relate these conditions to the 1998 chemical exposures:

. . . it is implausible that [Claimant] developed GERD, which was noted during May 1999, as a result of any workplace exposures. The amount of any material potentially ingested was not significant, dilute, and any potential effects would have rapidly resolved and would not be observable by May 1999. Any proposed treatment or potential impairment due to these conditions is totally unrelated to an occupational exposure of September 1998.

Id., at p. 559.

DISCUSSION AND FURTHER FINDINGS

IMPAIRMENT AND DISABILITY

36. Idaho Code § 72-706 establishes time limits within which a Claimant must file an application for hearing (Complaint) or waive certain benefits. In relevant part, the statute provides:

LIMITATION ON TIME ON APPLICATION FOR HEARING.

(2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.

(3) When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.

The general import of subsection (2) is that where compensation has been paid to a Claimant, the

Claimant has five years from the date of the accident within which to file a Complaint seeking additional benefits. Subsection (3) applies to a narrow class of cases in which a Claimant was receiving a scheduled benefit payment that spans the fourth anniversary of the claim, with the result that under certain circumstances a Claimant's right to file a complaint may extend beyond the fifth anniversary of the date of injury. See, *Salas v. J.R. Simplot Co.*, 138 Idaho 212, 61 P.3d 569 (2002).

As noted in Finding 11, the fourth anniversary of Claimant's injury occurred either on September 17 or September 22, 2002.² While Defendants were still paying some medical bills, Claimant was not receiving any scheduled income benefits at that time. Thus, subsection (3) of Idaho Code § 72-706 is not applicable on the facts of this case, and subsection (2) of the statute, requiring that a complaint be filed within five years of the date of the accident, is applicable. The fifth anniversary of Claimant's injury occurred on either September 17 or September 22, 2003. Idaho Code § 72-706(2) is clear that it is the *filing* date of a complaint that is relevant in determining the timeliness of a complaint under the statute. As discussed previously with regard to an evidentiary motion, "filing" means that the document was received in the offices of the Industrial Commission. The filing of a document is evidenced by a dated filing stamp, which appears on the Complaint at issue as October 20, 2003.

The Referee finds that Claimant's Complaint was filed more than five years after September 22, 1998, the date of Claimant's second exposure, the date most favorable to Claimant. Claimant's claim for impairment and disability is thus barred by the explicit

² The portion of Defendants' brief that discusses Idaho Code § 72-706 includes dates containing the wrong years for the fourth and fifth anniversary of this claim (See, Defendants' Post-Hearing Brief, pp. 16 and 17 wherein Defendants identify the fourth anniversary of the claim occurring in September 2003 and the fifth anniversary occurring in September 2004). Despite the use of incorrect dates, Defendants' analysis and argument are legally correct.

limitations set forth in Idaho Code § 72-706.

CAUSATION/MEDICAL CARE

37. The same statutory provision that bars Claimant's claim for impairment and disability benefits specifically excludes medical benefits paid pursuant to Idaho Code § 72-432(1) from its coverage. Idaho Code § 72-706(5). However, Claimant must still prove his entitlement to the requested medical care.

38. The burden of proof in an industrial accident case is on the claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

39. Defendants concede that Claimant may have experienced some transient respiratory effects from the admitted exposure. Defendants fulfilled their obligation to provide medical care following the exposure, and for an extended period thereafter, even after Claimant's refusal to attend an IME justified a termination of such benefits.

Defendants now argue that Claimant has failed to carry his burden of proving that his ongoing respiratory and gastrointestinal complaints are causally related to the occupational exposure that occurred nearly six years ago. The Referee agrees. In fact, Claimant has provided

no medical evidence in support of his claim for continued medical benefits. Claimant's testimony, even if credible, is insufficient to meet the requirement that causation be proven by expert medical testimony.

To their credit, Defendants offered Claimant's complete medical record into evidence, including records of Dr. Lantsberger, which are favorable toward Claimant. Dr. Lantsberger's opinion is, however, completely eclipsed by the overwhelming weight of the other credible medical evidence. None of Claimant's treating physicians, including his family practice physicians and four pulmonary specialists, have ultimately been able to conclude that Claimant's pulmonary complaints have any connection to his occupational exposure. Neither have the two IME physicians that examined and evaluated Claimant. While initially his treating physicians believed Claimant and did their utmost to identify and treat his symptoms, eventually they all came to the same conclusion—that there was no objective evidence of injury or impairment that would account for Claimant's subjective complaints.

Similarly, none of the physicians who treated Claimant for his gastrointestinal complaints were able to identify any pathology that would account for his symptoms. While he was diagnosed with GERD and esophagitis, no physician was able to connect these conditions in any way to his occupational exposure.

40. Dr. Burton's IME report is particularly helpful in evaluating the voluminous medical record because he performed a remarkably thorough review of Claimant's post-accident medical history. His July 8, 2004, report runs to 27 pages, exclusive of the appended test results. Dr. Burton's report is notable in that it is the first time in Claimant's course of care that any medical professional was able to review, analyze, and synthesize Claimant's complex treatment history in a comprehensive manner. Dr. Burton's thorough review highlights both the

unreliability of Claimant as a witness and historian, and the paucity of objective evidence of any pathology to explain Claimant's symptoms, much less any pathology that can be connected to Claimant's occupational exposure. Finally, Dr. Burton addressed the issue of Claimant's continued use of inhalant medication, despite the lack of any diagnosis that would justify its use. Both Dr. Green and Dr. Stoop concluded that Claimant could continue to use his prescriptions for his respiratory complaints because they had no long-term negative effects and Claimant seemed to think that the medications helped him. Dr. Burton disagreed with this approach, suggesting that the use of prescription drugs in the absence of any pathology was inappropriate. There is no need to second-guess either approach, however, as it is clear that no one has attributed Claimant's complaints to the occupational exposure. Claimant may continue to use his prescription medications if his physicians will continue to prescribe them. Defendants, however, are under no obligation to pay for them.

41. Claimant has failed to carry his burden of proving that it is more likely than not that his current respiratory and gastrointestinal complaints were the result of his limited occupational exposure of September 1998.

CONCLUSIONS OF LAW

1. Claimant's claim for income benefits including impairment and disability is time barred pursuant to Idaho Code § 72-706;
2. Claimant has failed to carry his burden of proving a legally sufficient causal connection between his current respiratory and gastrointestinal complaints and his undisputed occupational chemical exposure and has no entitlement to further medical care.

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 6th day of October, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

JOHN C WICHTERMAN
PO BOX 163
DEER PARK WA 99006

THOMAS P BASKIN
PO BOX 6756
BOISE ID 83707-6756

djb

/s/ _____

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IC 99-032770

ORDER

Filed: October 24, 2005

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 recommendation of the Referee. The Commission concurs with this 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's claim for income benefits including impairment and disability is time barred pursuant to Idaho Code § 72-706;

2. Claimant has failed to carry his burden of proving a legally sufficient causal connection between his current respiratory and gastrointestinal complaints and his undisputed occupational chemical exposure and has no entitlement to further medical care.

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

DATED this 24th day of October, 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 24th day of October, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

JOHN C WICHTERMAN
PO BOX 163
DEER PARK WA 99006

THOMAS P BASKIN
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