BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID K. GIBSON, Claimant, v. CENTRAL PAVING COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	))))

§ 72-439;

3. Determination of Claimant's average weekly wage; and

4. Whether Claimant is entitled to attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts that he developed an acute occupational disease, deep venous thrombosis (DVT), as a result of his work driving a truck for Employer. Claimant argues that the requirements of Idaho Code § 72-439 are not applicable in his case because of the acute onset of his DVT. He claims that his average weekly wage while employed by Employer was $530.67. Finally, Claimant contends that Defendants acted unreasonably in denying his claim and therefore he is entitled to attorney fees pursuant to Idaho Code § 72-804.

Defendants do not dispute that Claimant suffered a DVT. However, they assert that Claimant's DVT is not an occupational disease as defined by statute because it was not related to his employment. Defendants further argue that the DVT was not compensable because it was non-acute and Claimant had not been exposed to the hazard of the disease for sixty days with the same employer as required by Idaho Code § 72-439.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Michael L. Hezeltine taken at hearing;

2. Claimant's Exhibits 1 through 9 admitted at hearing;

3. Defendants' Exhibits A through G admitted at hearing; and

4. Post-hearing depositions of Michael Weiss, M.D., and Eric S. Jacobsen, M.D.

Defendants' Response Brief included a two-page "Attachment A" that consisted of a monthly calendar for June 2004 and July 2004. The calendar was provided to illustrate

Defendants' argument regarding the timing of the onset of Claimant's DVT-related complaints. Claimant objected to the admission of Attachment A into the record because it was not disclosed in the pre-hearing Rule 10 exchange. Attachment A is admitted for illustrative purposes only.

All objections raised in the post-hearing depositions are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

THE CLAIMANT

1. At the time of hearing, Claimant was 41 years of age, unmarried, and resided in Meridian, Idaho, on his parents' farm where he worked part-time caring for thirty head of cattle.

2. Claimant worked most of his life as a truck driver, mainly doing long-haul work. On June 8, 2004, Claimant went to work for Employer as a truck driver.

3. At the time that he suffered the DVT, Claimant was obese and had elevated levels of triglycerides with low HDLs. He had a ten-year history as a half-pack-a-day smoker. Apart from these issues, Claimant was relatively healthy and had no history of major trauma or surgery, and no previous circulatory problems.

THE WORK

4. Claimant drove Kenworth ten-wheelers with a semi trailer for Employer. All of the vehicles had nine-speed manual transmissions, which, when driven properly, required shifting through five gears to reach a speed of thirty-five miles per hour. The trucks all had standard size day-cabs. Seats were adjustable, but Claimant testified that the seats did not move far enough back for an individual of his size:

> It was really cramped—well, I mean for my size, as big as I am, it's a pretty cramped up position. . . . I mean like the seats don't move back as far as they should, but they—you know, it's a tight—you're in a tight area.

Tr., p. 13. As a result of Claimant's size and the configuration of the truck cab, Claimant sat in close proximity to the steering wheel, and had only limited room to raise his left leg to operate the clutch. Contrary to Employer's policy, Claimant did not use the clutch to shift except when starting and stopping the truck.

5. While Claimant worked for Employer, Employer was performing road construction work in and around Boise and Ada County. Most of Claimant's work involved short-haul trips: loading gravel at the pit, taking it two miles to the work site, dumping the load, reloading the trailer with excavated material and driving three miles to the dump site, then returning to the pit for another load of gravel. With rare exceptions, Claimant worked eight to ten hours per day. Claimant typically did not take a lunch break, and only left his truck for brief, infrequent, restroom visits.

THE DVT

6. On or around July 20, Claimant began to experience what he described as "a constant Charlie horse" in his left leg, behind the knee and down into his calf. Tr., p. 14. Only elevating the leg provided any relief from the discomfort. Claimant continued to work through the week.

7. On Sunday, July 25, Employer was laying some test pavement in downtown Boise, and Claimant clocked ten hours that day. This was the last day Claimant worked for Employer. At the end of the workday, Claimant needed assistance walking to his car.

8. On Monday, July 26, Claimant had pain in his left leg. He did not appear for work that day, or for the remainder of the week, nor did he contact Employer.

MEDICAL CARE

9. Claimant first sought medical care for the left lower extremity pain on August 2, after the pain moved up into his upper left extremity and groin. That day, Claimant went to see Dr. Jacobsen, who immediately suspected a DVT. When asked why he waited to seek medical care, Claimant stated that he thought the left leg pain would get better if he didn't work for a few days. Dr. Jacobsen sent Claimant to St. Luke's Meridian Medical Center (SLMMC) for a lower extremity venous duplex exam (Doppler exam), which confirmed Dr. Jacobsen's suspicions. The report of the Doppler exam noted:

> Abnormal lower extremity venous duplex exam reveals an obstruction of the left peroneal veins from low calf extending through the left popliteal vein.
>
> There are multiple obstructed left muscular calf veins in the upper calf.
>
> This process appears acute in nature.
>
> All other deep and superficial veins appear free of obstruction bilaterally.

Claimant's Ex. 9, p. 3. Claimant was admitted to SLMMC and placed on a blood-thinning regimen. Claimant remained hospitalized until August 5.

10. Claimant continued to see Dr. Jacobsen for follow-up stabilization on coumadin, and on-going monitoring through at least March 23, 2005—the date of the last medical record pertaining to Claimant's DVT.

CAUSATION

11. Causation is the pivotal issue in this proceeding, and there are two medical opinions relating to the causation question. Each opinion is discussed at length in the depositions of the two doctors who rendered them. Both opinions are thorough and well reasoned. These two depositions are excellent examples of the effective use of expert witnesses.

Dr. Jacobsen

12. Dr. Jacobsen was Claimant's treating physician. He is a board certified family practice physician with eleven years of experience. Before moving to Idaho in approximately 2001, he practiced in Colby, Kansas—a small town in the northwest part of the state. In the eight years that Dr. Jacobsen practiced in Colby, he had the opportunity to treat twenty to twenty-five patients with DVT.

13. In a letter dated November 15, 2004, Dr. Jacobsen opined that Claimant's DVT was occupationally related:

> Patient's occupation during this time [onset of DVT symptoms] was a trucker. He had spent a significant amount of time in the vehicle in the weeks leading up to this pain where patient was not able to get out and move around on a regular basis. It is in my opinion that this is a cause and affect [sic] relationship that his employment in driving the truck had lead to his development of the deep venous thrombosis. Certainly the risks involved in prolonged sitting in a vehicle doing the type of work that he did involved in trucking could have and most likely did lead to the blood clot that he developed.

Claimant's Ex. 8, p. 5.

14. Dr. Jacobsen had the opportunity to expand on his opinion during the course of his post-hearing deposition. In his experience, patients presenting with DVT fell into three primary occupational categories—truckers, businessmen, and farmers. It was Dr. Jacobsen's experience that these particular occupations exposed workers to hazards that made it more likely they would develop DVT—prolonged immobilization, usually sitting, and dehydration. He conceded that other risk factors, including obesity, high triglycerides, and smoking could all increase an individual's risk of a DVT, but noted that if those factors alone caused DVT, doctors would see a lot more DVT patients than they do. It was the combination of Claimant's individual risk factors, together with the occupational risk of being a truck driver, that caused Claimant's DVT.

Dr. Weiss

15. Dr. Weiss is board certified in physical medicine and rehabilitation and occupational medicine and has practiced extensively in both fields. In his rehabilitation work, Dr. Weiss treated many patients who were immobilized from their injuries, and where the potential for DVT was a serious concern, requiring prophylactic treatment. In his occupational medicine work, Dr. Weiss saw "lots of truck drivers" for routine Department of Transportation physicals. Weiss Depo., p. 8. Dr. Weiss stated, "I have not seen a primary deep vein thrombosis in a truck driver." *Id.*

16. Dr. Weiss was retained by Defendants to conduct a review of Claimant's medical records and offer an opinion as to whether his DVT was occupationally related. In his report, dated May 18, 2005, Dr. Weiss opined that Claimant was at risk for DVT because of his smoking, elevated triglycerides, low HDLs and being overweight. Dr. Weiss noted that there was no medical literature that identified truck driving as a risk factor for DVT, although prolonged sitting and immobilization were recognized risks. In his report, Dr. Weiss was careful to point out that it is the immobilization, and not the sitting position itself that contributed to clot formation and DVT.

17. Based on his review of Claimant's medical records, and conversations with Surety regarding Claimant's actual work requirements, Dr. Weiss determined:

> In [Claimant's] case, I have inquired and found that the truck that he drove was a standard transmission vehicle. This means that he was required to use his left leg to operate the clutch and his leg was not in fact immobile. His truck driving in his specific job would not have created a risk factor with immobility. Additionally, he was able to take breaks and move around and certainly was not in the cab of the truck for 8-12 hours at a stretch, again, making extrapolation from literature on prolonged sitting during air travel to his driving activity invalid. While Dr. Jacobsen is certainly entitled to his opinion, I do not feel that it is supported by the literature and is particularly invalid in [Claimant's] case.

Claimant's Ex. 7, p. 2.

18. Dr. Weiss also had the opportunity to expand upon his opinion and analysis in his post-hearing deposition. Dr. Weiss testified that he did an extensive literature review and located only two sources of information relevant to an occupational relationship between truck drivers and DVT. One study concerned the effect of air travel on the occurrence of DVT. It showed an increased risk, especially for older passengers, of developing DVT as a result of long periods of immobilization on transcontinental and transoceanic flights. Dr. Weiss specifically noted what the study did not show:

- The studies left unanswered the question whether prolonged flights were a cause of DVT in and of themselves or only when other risk factors were present;
- The studies could not identify whether DVT occurred at significant rates in flights of four hours or less and findings were limited to flights of much longer duration.

Dr. Weiss pointed out that one of the particular problems with air travel is that the seats are small:

> Now, again, in an airplane when the chairs are fairly small, there's more of a chance—especially if you're kind of a big person, too; remember obesity is a risk factor—there's more of a chance of the rear of the seat or the lip of the seat pushing against the rear of your calves or knees, and occluding the blood vessels causing a secondary injury that way, and that can be a problem, too.

Weiss Depo., pp. 14-15. A second source of information came from a symposium sponsored by the Federal Highway Administration on the topic of pulmonary diseases in truck drivers. The risk of DVT to long-haul truckers was part of the discussion, particularly in the context of prolonged immobilization of lower extremities for the same reasons discussed in the air travel studies.

19. Dr. Weiss also discussed the particular circumstances of Claimant's case as

support for his opinion. In particular, he noted that Claimant would be required to frequently use his left leg to depress the clutch, especially if he were doing short hauls. This movement is sufficient, Dr. Weiss opined, to create adequate circulation in the lower extremities. Additionally, because of the nature of the short-haul construction work, Claimant was able to get out of the truck and move around several times a day. Unlike a long-haul trucker, he was not sitting in the cab of a truck for eight to twelve hours at a time.

DISCUSSION AND FURTHER FINDINGS

OCCUPATIONAL DISEASE

20. In order to prevail in this proceeding, Claimant must prove both that he has an occupational disease and that it is compensable. An occupational disease is defined 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, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.

Idaho Code § 72-102(21)(a). Defendants assert that Claimant's DVT is not an occupational disease because according to Dr. Weiss, truck driving has never been specifically identified as a risk factor for DVT, and there is no empirical evidence or medical literature that identifies DVT as an occupational disease of truckers. Defendants' argument reads far more into the definition of an occupational disease than can be found in the statutes or case law. With the exception of those enumerated in Idaho Code § 72-438, there is no official list of established occupational diseases. Neither is it a requirement that an occupational disease be recognized as such in the medical literature. If either were the case, there would be little need for the definition set forth in Idaho Code § 102(21)(a). This definition allows for not only the possibility, but the likelihood, that empirical evidence will lag behind anecdotal evidence of new occupational diseases in a dynamic global workplace. To the extent that truck drivers experience prolonged periods of

immobilization, then they are at increased risk of DVTs because of the nature of their employment. This is the very essence of the statutory definition of an occupational disease.

COMPENSABILITY

21. In order for an occupational disease to be compensable, the requirements of Idaho Code § 72-439 must be met:

> (1) An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.
> (2) An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.
> (3) Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefore.

Causation

22. The first of these requirements relates to causation. While the definition of occupational disease establishes the general connection between a particular occupation and a particular disease, a Claimant must still establish that his disease was caused by his occupation. This connection must be established by medical evidence. *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

Dr. Jacobsen and Dr. Weiss agree that prolonged immobilization is a known risk factor for developing DVT. Defendants, relying on the testimony of Dr. Weiss, argue that although DVT may *occur* in truck drivers, truck driving does not cause primary deep vein thrombosis. Dr. Weiss defined primary DVT as a blockage "that wasn't related to something else," such as trauma or individual risk factors. Tr., p. 8. The statutes and case law do not speak in terms of "primary" causation as Dr. Weiss defines it. In fact, it is hard to imagine an occupational disease that is traceable to one and only one cause. To use Dr. Weiss' examples, not every felter suffers from mercury poisoning, and not every miner develops silicosis. Clearly other factors are at play

when a worker contracts an occupational disease. Some individuals may be predisposed to develop certain diseases because of their genetic makeup or their lifestyle. Individuals who are obese, have high triglyceride levels, and smoke may be more likely to experience a DVT than an individual without those characteristics. Then again, an individual who never smoked, is of normal weight, and has normal triglyceride levels, may be at increased risk for DVT because of some other factor or factors. A pre-existing disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983).

23. For the reasons discussed herein, the Referee finds Dr. Jacobsen's opinion on causation to be the more persuasive of the two medical opinions. While Defendants disparage Dr. Jacobsen's anecdotal evidence and experience, he has actually worked with and treated a number of individuals in occupations similar to Claimant who presented with DVT. Dr. Weiss, on the other hand, has extensive experience in prophylactic treatment to prevent DVT in profoundly immobile individuals. Treating paralytic patients prophylactically is not comparable to treating truckers who need treatment for an existing DVT. Dr. Weiss testified in his deposition that he had extensive experience providing DOT exams for commercial truckers. As Dr. Weiss himself testified, these exams are simple and fairly superficial. Performing licensing exams on truck drivers is not comparable to actually treating truck drivers who present with DVT. Dr. Weiss is well qualified in his field, but his work does not regularly bring him into contact with individuals in Claimant's situation. Here, Dr. Jacobsen's anecdotal experience is far more persuasive than is Dr. Weiss' more tangential experience.

Dr. Weiss made several assumptions about Claimant's work situation that were not borne out by the record. First, Dr. Weiss assumed that Claimant would be required to use his left leg frequently to operate the clutch while driving, and this movement would be sufficient to keep blood flowing back up out of Claimant's legs and into his trunk. In fact, Claimant only used the clutch when starting and stopping, and the actual movement required to depress the clutch was minimal. Dr. Jacobsen testified that much more activity—getting out of the vehicle and walking around for fifteen minutes—was required to assure adequate blood flow out of the legs. Second, Dr. Weiss based his opinion in part on information from Employer that Claimant had ample opportunity during the workday to exit the truck and walk around. Actual practice varied significantly from Employer's ideal, and Claimant had very few opportunities to leave his vehicle and move around, seldom stopping for lunch, and having only two or three minutes to make a restroom stop a couple of times per day.

Just as persuasive in the case at bar is the explanation Dr. Weiss gives as to why DVTs are a particular risk for air travelers—particularly for large individuals, the edge of the seat pushes against the back of the legs or knees, occluding the blood vessels. Dr. Weiss actually described this positionally-caused occlusion as an injury. Claimant's unrefuted testimony that he was unable to move the seat back far enough to accommodate his height, placed him in a situation virtually identical to that described by Dr. Weiss as a common cause of DVT.

Acute/Non-Acute Occupational Disease

24. As set out in Idaho Code § 72-439, in order for a non-acute occupational disease to be compensable, the employee must have been exposed to the hazard for sixty days with the same employer. Here, there is no dispute that Claimant did not work for Employer for sixty days prior to his developing the DVT. Defendants contend that Claimant's DVT was not acute and

thus the inquiry should end here with a determination of noncompensability. Claimant argues, however, that his occupational disease was acute, so the sixty-day requirement of Idaho Code § 72-439 is not applicable in his case.

As noted by Defendants in their briefing, "acute" and "non-acute" are not defined in the workers' compensation code. However, the Idaho courts have had the opportunity to define "acute," particularly with regard to interpreting Idaho Code § 72-439:

> The applicable dictionary definition of the term "acute" is "having a sudden onset, sharp rise, and short course." Webster's New Collegiate Dictionary 13 (1981 ed.). Similarly, the medical world defines an "acute" disease in terms of a short and sharp course: "Of short and sharp course, not chronic; said of a disease." Stedman's Medical Dictionary 20 (4th Lawyers ed. 1976).

Bint v. Creative Forest Products, 108 Idaho 116, 118, 697 P.2d 818, 820 (1985). Defendants contend that Claimant's DVT developed over his fifteen-year work life as a truck driver, and cite as support Dr. Jacobsen's testimony at deposition:

> Q. [By Whittier] Okay. So when you use the term "acute" as it relates to [Claimant], you're saying it's a recent onset?
> A. The clot is a recent onset.
> Q. Okay. But his –
> A. His disposition to develop a clot could have been increasing over time to that event.
> Q. As well as his work history contributing to that –
> A. Could have.
> Q. --onset of events?
> A. Could have, yeah.

Jacobsen Depo., p. 32. This argument does not bear serious consideration. It confuses the actual onset of a disease with all of the other factors that accumulate over a lifetime and may predispose or contribute to an individual's developing a particular disease. For example, the risks that predispose an individual to heart disease accumulate over a lifetime, but when an apparently healthy individual drops dead from a massive first heart attack, there is no doubt that the onset of the attack was acute, not chronic. Conversely, an individual with a twenty-year history of heart

attacks, angioplasty, and by-pass surgery who dies from congestive heart failure would be considered by most people to have had chronic heart disease.

Dr. Jacobsen clearly opined in his deposition that the onset of Claimant's DVT was acute. He explained that it was possible to tell from the Doppler images that the clot was of recent origin. Dr. Jacobsen's testimony in this regard is supported by the Doppler results interpreted by Phillipe Masser, M.D., who specifically noted that the clot was acute.

25. The Referee finds that there is substantial persuasive evidence that the onset of Claimant's DVT was acute, and therefore, the sixty day requirement of Idaho Code § 72-439 is not applicable in this proceeding, and Claimant's occupationally-related DVT is a compensable occupational disease.

AVERAGE WEEKLY WAGE

26. Claimant's average weekly wage is calculated to be $497.11. This is based on 303 hours of work at the rate of $11.25 per hour ($3,408.75). Claimant worked 48 days ($3408.75 ÷ 48 x 7 = $497.11). Claimant's Ex. 6, p. 18.

ATTORNEY FEES

27. Claimant seeks an award of attorney fees pursuant to Idaho Code § 72-804, arguing that Defendants failed to investigate his claim in a timely and reasonably thorough manner. Defendants did not address the attorney fees issue in their briefing.

Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee

> or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

28. An award of attorney fees is appropriate in this case. Claimant provided Defendants with Dr. Jacobsen's November 15, 2004 letter opining that Claimant's DVT was caused by his work as a truck driver for Employer. Claimant's recorded statement, taken December 2, 2004, together with Dr. Jacobsen's opinion, clearly established a supportable claim for benefits. Despite a lack of *any* medical evidence to justify the continued denial, Defendants continued to deny Claimant's claim, and neglected to notify him of its decision. Defendants made no attempt to support their denial with medical evidence until they sought a record review from Dr. Weiss in May 2005, just two weeks prior to the hearing in this matter. Defendants are certainly within their purview to dispute causation and deny benefits, but they do so at their peril when they make no attempt to support their denial with medical evidence. The Referee finds that Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant's deep venous thrombosis is an occupational disease as that term is defined by Idaho Code § 72-102(21)(a);

2. Claimant's deep venous thrombosis was caused by his work as a driver for Employer;

3. Claimant's deep venous thrombosis was acute, and not chronic;

4. Claimant's deep venous thrombosis was a compensable occupational disease pursuant to Idaho Code § 72-439;

5. Claimant's average weekly wage is $497.11;

6. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

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 22 day of December, 2005.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DARIN G MONROE	MONTE WHITTIER
PO BOX 854	PO BOX 6358
BOISE ID 83701-0854	BOISE ID 83707-6358

djb /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID K. GIBSON, Claimant, v. CENTRAL PAVING COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 04-010002** **ORDER** Filed: January 6, 2006

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 deep venous thrombosis is an occupational disease as that term is defined by Idaho Code § 72-102(21)(a);

2. Claimant's deep venous thrombosis was caused by his work as a driver for Employer;

3. Claimant's deep venous thrombosis was acute, and not chronic;

4. Claimant's deep venous thrombosis is a compensable occupational disease pursuant to Idaho Code § 72-439;

5. Claimant's average weekly wage is $497.11;

6. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum setting forth the amount and basis for attorney fees requested in this case, a copy of the fee agreement executed by Claimant and his attorney, and an affidavit in support of the claim for fees. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced response, Claimant's counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 6th day of January, 2006.

INDUSTRIAL COMMISSION

Dissent without comment_____
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 6th day of January, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DARIN G MONROE
PO BOX 854
BOISE ID 83701-0854

MONTE WHITTIER
PO BOX 6358
BOISE ID 83707-6358

djb /s/_____