

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAWNYA KINNEY-DUGGER,)
)
 Claimant,)
)
 v.)
)
 TRI STATE EMPLOYMENT SERVICES/)
 SRT AND STAFFING SERVICES/)
 RESOURCES,)
)
 Employer,)
)
 and)
)
 WAUSAU UNDERWRITERS)
 INSURANCE COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 05-007487

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

Filed November 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on April 28, 2006. Claimant was present and represented by Daniel A. Miller of Boise. Monte R. Whittier, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties then submitted post-hearing briefs, and this matter came under advisement on July 28, 2006.

ISSUES

As agreed to by the parties at hearing, the issues to be resolved are:

1. Whether a stroke suffered by Claimant arose out of and in the course of her employment.

2. Whether Claimant is entitled to an award of attorney fees for Defendants' unreasonable denial of her claim.

CONTENTIONS OF THE PARTIES

Claimant contends that her ischemic stroke was caused by her exposure to turpentine and a cleaner called "Goof-Off" at a Lowe's retail store. Such exposure caused her to have a headache, that developed into a migraine, that resulted in a stroke. Two physicians, including her treating physician, have provided the necessary medical testimony to establish causation. Finally, Defendants had no contrary medical evidence at the time of their denial and Claimant should, therefore, be awarded her attorney fees.

Defendants contend that Claimant's exposure to the chemicals was sporadic at best and that the area where the exposure occurred is open and well ventilated. Their expert toxicologist has opined that such an exposure could not possibly have caused a stroke. Further, they had reasonable grounds to initially deny the claim as the emergency room records for the day following the alleged exposure indicated that the lighting in the store was to blame for Claimant's migraine, not exposure to chemicals.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her mother and father presented at the hearing.
2. Claimant's Exhibits 1-15 admitted at the hearing.
3. Defendants' Exhibits A-Q admitted at the hearing.
4. The post-hearing deposition of Fred R. Stark, M.D., taken by Claimant on May 2, 2006; and that of Robert H. Friedman, M.D., taken by Claimant on May 9, 2006, and that of Daniel L. Sudakin, M.D., taken by Defendants on May 25, 2006.

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

FINDINGS OF FACT

1. Claimant was 33 years of age and a single mother of three children residing in Boise at the time of the hearing.

2. Claimant worked for a business that contracted with Lowe's to set up in-store merchandise displays. On March 24, 2005, Claimant was painting a board approximately the size of a standard piece of plywood to which she was intending on attaching various mailboxes to make a display at Lowe's Nampa store. She had the board on a cart in the indoor-outdoor garden-lumber section of the store. She had the gallon of Latex paint she was using sitting on the concrete floor next to her cart. Sometime between 4:00 and 5:00 o'clock p.m., her boss¹ at the time named "Lindy," last name unknown, bumped into Claimant's cart and spilled the gallon of paint she was using.

3. Claimant suggested that Lindy report the spill to the zone manager and have Lowe's employees take care of it. However, Lindy decided to clean up the spill himself after Claimant refused to help him. Lindy became angry with Claimant and informed her that he would not sign her time sheet unless she helped him; Claimant again refused and went into the main part of the store to get Lindy some paper towels. When she returned to the spill site, Lindy told Claimant she needed to finish painting the board. Lindy went into the main part of the store and returned with some paint thinner. Claimant told Lindy that the paint thinner would just spread the paint so Lindy returned to the store and came back with a gallon of turpentine. Claimant told Lindy she could not be around turpentine, as it would make her ill, although she had no previous experience with turpentine that made her ill. Lindy again told Claimant that she

¹ Lindy did not work for Lowe's but for a separate vending company. He was responsible for signing Claimant's time cards in order for her to get paid. The exact relationship between Lindy and Claimant is unclear from the record, but both worked for separate entities.

had to finish painting the board. Lindy did not believe the turpentine was working so he went back into the store and returned with a 16 ounce aerosol can of a product called “Goof-Off” and, “Then he with both hands had turpentine in one and Goof-Off in the other and was spraying and pouring until they were all used and it was just everywhere.” Hearing Transcript, p. 21. Claimant was about three feet from Lindy as he was applying the turpentine and Goof-Off and could smell the chemicals. The cleanup lasted one and a half hours.

4. Claimant was in the area of the spill for about three hours then went into the store to work on the display. She then returned to the spill site for another three hours. She testified that she felt fine before the paint spill but within 10 minutes became nauseous and dizzy but Lindy still would not let her leave the area until she finished her project. Within 30 minutes of the spill, Claimant began to develop a headache that did not go away. Claimant got away from the spill site on occasion by going to the bathroom and to get water. She went out to her car for about 10 minutes before a Lowe’s employee inexplicably made her go back inside. Claimant’s shift ended at 10:00 o’clock p.m. and she drove to her home in Ontario, Oregon. By that time, her headache had turned into a migraine.² Claimant took two aspirin, e-mailed her boyfriend, and went to bed.

5. Claimant was able to sleep some but woke up at about 7:00 o’clock a.m. with a “very, very bad headache,” felt nauseous, and as if her eyes were going to explode. Hearing Transcript, p. 28. She called her boyfriend, Christian, and then:

Q. (By Mr. Miller): Did something occur that prompted Christian or you to say man, I’ve got to get off the phone, I need to get ahold of my dad?

A. Yes.

Q. What happened?

A. I was talking to him and felt like the right side of my body curled up and my vision flashed in a strange way and then I said I need to get off the

² Claimant had experienced migraines one to three times a year, but there had been years when she did not have any.

phone, but I didn't hear a response. I said it again and I heard no response, so I hung up. Then my phone rang again and he asked why I hung up and I said I couldn't hear his voice, because at the time it was to the right side, my right ear, but when I answered this time, it was on my left and I could hear him and I said something is wrong with the right side of my body. He said hang up the phone and call your dad, so I hung up the phone and –

Hearing Transcript, pp. 29-30.

6. Claimant was eventually able to contact her father, who took her to Holy Rosary Hospital in Ontario where she came under the care of Fred R. Stark, M.D., who is board certified in Internal Medicine, Infectious Diseases, and Allergy Immunology. Dr. Stark initially misdiagnosed Claimant with acute porphyria based on a history obtained from Claimant's mother. By April 13, 2005, it was established that Claimant did not suffer acute porphyria, but rather a left occipital infarct of the brain (stroke) with right peripheral vision loss. Dr. Stark noted, "We are concerned that because of the prolonged exposure to "goof-off" and turpentine both used for paint stripping without the use of an appropriate inhaler mask the patient may have suffered vascular spasm that may have lead indirectly, because of her history of migraine to the development of this infarction." Defendants' Exhibit K, p. 137.

7. Claimant has experienced some improvement in her condition, but still has no right eye vision, some memory issues, and right-sided weakness.

DISCUSSION AND FURTHER FINDINGS

There is no question that Claimant suffered a stroke on March 25, 2005. The question is whether her stroke is work-related. As is common in workers' compensation cases, there is a bona-fide difference in medical opinions regarding causation.

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, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence

for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor’s opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217-218 (2001).

8. Dr. Stark was Claimant’s treating physician for a period of time after she first suffered her stroke. He relates the stroke to her exposure to turpentine and Goof-Off, although his understanding of the extent and circumstances of Claimant’s exposure is inconsistent with Claimant’s testimony regarding the same. For instance, in his March 25, 2005, office note, Dr. Stark makes no mention of a chemical exposure. Then, at some unknown later date, someone (presumably Dr. Stark) wrote in that Claimant had been using varnish stripper without a protective mask. Then in his March 28, 2005, Discharge Summary³, Dr. Stark notes, “She worked 14 hours in an unprotected environment with large amounts of paint stripper or varnish stripped [*sic*] being utilized in a setting where she was working with contractors doing work for Home Depot.” Claimant’s Exhibit 4, p. 16. In his deposition, Dr. Stark testified:

Q. (By Mr. Whittier): What is your understanding as to her exposure to these chemicals?

A. Well, my understanding was she was on the job and in the area. And the material was being used to strip a fairly large area. So that it was a job – She was there on the job, she said, for 12 hours.

Q. Would it make any difference in your opinion if the evidence that’s been submitted is that she was not actually using these chemicals; she was not using turpentine or Goof Off, but it was being used in the area in which she was working?

A. When you say “used,” what do you mean by used? I mean, somebody could be applying it. If you’re in the floor area, you’re exposed to it. Turpentine being, you know, heavy stuff. Like carbon tetrachloride will hang in

³ Although Claimant was discharged on March 28, 2005, Dr. Stark did not dictate his Discharge Summary until June 11, 2005, due to his recovery from gall bladder surgery.

an area all over the place. So you could be 50 yards from where they're applying it, and you've still got the same concentration.

Q. That's the question I'm asking you. She was not using this. Another employee was using it. And she was in and out of the area. And it's in a partial open area.

A. Right. All these factors were, I think, well addressed by the toxicologist. The problem you have is, again, with a patient who's predisposed, how much of an exposure does it take? I don't know and you don't know, and I'm sure the company doesn't know what her exposure was. But over many hours, the possibility is that she had lots of exposure. Because the stuff hangs in the area. It's heavy.

Q. Well, would it continue to hang in the area even though it's in a well-ventilated area?

MR. MILLER: Well, we'll assume it's well ventilated, but there's an argument that it's not well ventilated.

THE WITNESS: You fellows have to fight that out. There's no question that there's a dose-response curve. The higher the dose, the greater the exposure, the greater the likelihood that she's going to have toxicity. The first sign of toxicity with turpentine would be dizziness, headache, maybe a little bit of confusion. It's like taking an anesthetic. And she reported those symptoms. Now, I didn't have those symptoms at the time she came in the emergency room. But it's my understanding that she had those symptoms and she reports them. So I'm assuming she had enough to get into the – She had enough to have a brain effect which would have been sufficient to trigger the worst migraine that she's ever had before.

Dr. Stark Deposition, pp. 24-26.

9. Claimant retained Robert H. Friedman, M.D., a board certified physiatrist, to review her medical records and render a causation opinion. Dr. Friedman is the medical director at the Elks Rehabilitation Hospital and has treated over 1,000 stroke patients in the 10 to 12 years he ran the stroke treatment program at the Elks. He understood that Claimant was in an area of a paint spill that was being cleaned up with turpentine, became ill, and developed a headache and went home early. She woke up in the middle of the night with a bad headache and went to the emergency room. Regarding causation, Dr. Friedman testified:

Q. (By Mr. Miller): Would you tell us, for the record, your opinion on a more probable than not basis the cause of Ms. Dugger's stroke?

A. In my opinion, on a more probable than not basis, Ms. Dugger's stroke was caused by a headache that she developed as a result of exposure to the turpentine and the – oh, I can never –

Q. Goof Off?

A. Well. It's Goof Off, but it's actually n-Propanol, which is Propyl-Alcohol, which is the agent in Goof Off that is most easily inhaled and absorbed. It's very flammable, but that's not the word I'm looking for. It evaporates extremely easily and is aerosolized very easily.

Those two things, based on their product safety sheets, their Material Safety Data Sheets, induce headaches. She went home with a headache. And in my opinion, that headache induced a migraine with vasospasm that caused her to have a stroke.

. . .

Q. All right. The recorded statement [Claimant's] that you were provided indicates that this was kind of an outdoor/indoor environment in the garden area.

Assuming that the area was well ventilated, Ms. Dugger testified that she could smell the chemicals, and that she became sick, nauseous, and then developed a headache.

Assuming that history, Dr. Friedman, does that add to your opinion that the chemicals triggered her headache?

A. It supports it. The part we can't really do is quantify how much she actually absorbs when she inhales it. But that she became symptomatic with symptoms that the product safety sheet and the World Health Organization describes, indicates to me that there was a substantial – or a better word would be sufficient exposure to these chemicals to induce those symptoms, which is nausea and headache.

Dr. Friedman Deposition, pp. 11-12, and 15.

10. Defendants retained Daniel L. Sudakin, M.D., to review Claimant's medical records and other information and render an opinion regarding causation. Dr. Sudakin is an assistant professor in the Department of Environmental and Molecular Toxicology at Oregon State University in Corvallis, Oregon. He sees patients in his office and also has a medicolegal consulting practice. He is board certified in public health and preventive medicine and in the subspecialty of medical toxicology. Dr. Sudakin described turpentine as a naturally derived hydrocarbon and Goof Off as a chemical known as N-propanol that is very similar to ethanol. Turpentine is a nonvolatile chemical meaning that it will stay on the surface if spilled and N-

propanol is much more volatile and would come off the ground like rubbing alcohol. In an open area, the risk of harm from exposure to turpentine would be very low because of its low volatility and there would be room for the chemical to move to a different area. Dr. Sudakin does not believe a harmful level of concentration could be reached with turpentine unless there was actual aerosolization in an enclosed environment.

11. Regarding the Goof-Off, Dr. Sudakin compares it to rubbing alcohol. He believes it unlikely that a harmful level of concentration of Goof-Off could be achieved in the open area where Claimant was working.

12. Dr. Sudakin could not find anything in the medical records regarding Claimant's hospitalization indicating exposure to chemicals, only to lights. Dr. Sudakin disagrees with Drs. Stark and Friedman regarding causation:

Well, there are several reasons. One of which is, I was not able to identify any other reports in the scientific literature wherein turpentine or N-propanol had been identified as migraine triggers.

Another issue that I have with respect to that is that the issue of odors as a trigger of migraine is actually not very strongly supported by the scientific literature.

Dr. Sudakin Deposition, p. 21.

13. Dr. Sudakin also faults Drs. Stark and Friedman for labeling turpentine and Goof-Off as vasoconstrictors when in fact they are vasodilators, which would increase rather than decrease the blood getting to the brain. Therefore, instead of causing a stroke, a vasodilator would have just the opposite effect.

14. Dr. Sudakin, unlike Drs. Stark and Friedman does not discount Claimant's smoking history as a factor even though she claimed to have quit smoking two or so months before this incident. He opined that quitting smoking so near the event in question is too soon to have any effect and smoking is a risk factor for stroke.

15. Dr. Sudakin agrees that the Material Safety Data Sheets for turpentine and Goof-Off indicate that overexposure can cause headaches, but the sheets do not indicate the level of that exposure. He also agrees that headaches can trigger migraines in some cases and that migraines can cause a vasoconstrictive effect. He further acknowledges that there is no way to ever know the exact level of exposure Claimant experienced.

16. This is a close and difficult case. Drs. Stark and Friedman opine that the chemicals triggered a headache that triggered a migraine that triggered a stroke. Dr. Sudakin opines that other factors triggered Claimant's migraine but seems to ignore her headache that he believes can trigger a migraine "in some cases." He also acknowledges that chemicals can affect different people in different ways. All of the physicians involved with this claim are qualified to render expert opinions.

17. This Referee and the parties, including Claimant herself, viewed the area where the paint spill occurred. The Referee was impressed by how wide-open and well ventilated the area was; it was far from "enclosed." It must also be noted that Claimant was not personally involved with the paint spill cleanup, but was merely in the area. She was in and out of the store many times. She testified that it was not so much the odor of the chemicals in the air in general that bothered her, but the odor emanating from Lindy's clothing, who, according to Claimant was "saturated" with Goof-Off and turpentine.

18. After carefully reviewing, and re-reviewing, the record in this matter, the Referee is not convinced that Claimant suffered a toxic exposure to turpentine and Goof-Off that led to her stroke. The opinions of Drs. Stark and Friedman appear to be based on a level of exposure that is simply not supported by the record. She was not, as Dr. Stark opined, stripping paint for 12 hours. While it may be impossible to quantify an exposure after the fact, as here, nonetheless,

it would not make sense for Claimant, who erroneously believed she was hypersensitive to certain chemicals and who knew in advance that the smell of the turpentine would give her a headache, to stay in the area of the spill. Her explanation that she did so on orders from Lindy and that he threatened to not sign her time cards if she did not do as he told her is not persuasive. Claimant could easily have moved her cart out of the area of the spill and continued painting. That should not have mattered to Lindy as Claimant was not helping him clean up the spill in any event. Further, Claimant's testimony that it took Lindy an hour and a half to clean up the spill is questionable. Lindy, who was not an employee of Lowe's, would no doubt have caught the attention of store employees, as the site of the spill appeared to be in a relatively high-traffic area. For whatever reason, Lindy did not testify so his version of events remains unknown.

19. While the MSDS labels of turpentine and Goof-Off list headaches, dizziness and nausea as possible side effects of over-exposure, Dr. Sudakin credibly testified that the level of exposure necessary to experience those side effects could not have been reached in the open-air environment surrounding the spill. Dr. Friedman testified that he was unaware of a certain exposure level one would have to reach to trigger a headache.

20. Claimant argues that Dr. Stark ruled out other triggering factors for a migraine. However, as Dr. Friedman testified, migraines can come on without any triggering factors. Even so, Claimant had only just quit smoking and had a self-proclaimed history of migraines. Further, Claimant worked 14 hours on the day of the spill. In her recorded statement given on May 9, 2005, Claimant indicated, "And, of course, I got a headache from it and I didn't feel very good cause I had worked so long and I didn't get, didn't get, have enough breaks, you know, to get food, water, anything. I just was overworked, complete [*sic*] tired." Claimant's Exhibit 15,

p. 148. If smoking, stress, a history of migraines, and hunger are triggering events to the development of a migraine, then Claimant had at least four of the triggers

21. This case is analogous to, but distinguishable from, *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). There, the claimant ingested two “Pain-Off” tablets for a headache. He had never used Pain-Off before and had been in good health. Within minutes of taking the Pain-Off, he began experiencing severe stomach cramps. A co-worker took Claimant to an emergency room where he was diagnosed with a medication reaction, treated, and released. Claimant’s condition deteriorated the following day and the next day Claimant returned to the emergency room after having suffered a complete kidney shutdown. He was hospitalized and placed on dialysis; his condition eventually improved. There were no samples of the Pain-Off to test. The Commission found that Claimant’s medical reaction to the Pain Off was compensable, but his kidney failure was not. This finding was based on a lack of expert medical testimony relating Claimant’s kidney failure to the ingestion of Pain Off to a reasonable degree of medical probability. In a 3-2 decision, the Court reversed the Commission. The Court concluded that although there were no “magic words” relating Claimant’s ingestion of Pain Off to his renal failure, his treating physician testified that he “did not know of anything higher” on his list of speculation that would have caused it. *Id.* at p. 413. Also pertinent to the Court’s decision was the timing of the onset of symptoms and that other causes had, to a certain extent, been ruled out.

22. Here, the temporal sequence of events is not as compelling as in *Jensen*. Claimant had a history of migraines, she worked long hours on the date of the accident, she was in an open area, the onset of a migraine does not require any specific trigger, she did not mention any chemical exposure during her hospital stay, and there is a difference of medical opinion regarding whether the two chemicals involved could have contributed to Claimant’s stroke.

When applying the common sense approach the Court utilized in *Jensen* to the facts of this case, it is apparent that there are too many inconsistencies in the record to support a finding in Claimant's favor.

23. The Referee is aware that the Idaho Supreme Court has repeatedly held that the Workers' Compensation Act should be construed liberally in favor of claimants. While true, this rule of liberal construction has generally only been applied when the Court has been called upon to interpret conflicting or ambiguous statutes; that is not the case here. *See, Alexander v. Harcon, Inc.*, 135 Idaho 785, 787, 992 P.2d 780, 782 (2000).

24. Claimant has failed to prove by a preponderance of the evidence that her exposure to chemical fumes caused or contributed to the stroke she suffered on March 25, 2005.

25. Based on the foregoing finding, it follows that Claimant is not entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that her exposure to chemical fumes caused or contributed to the stroke she suffered on March 25, 2005.

2. Claimant is not entitled to an award of attorney fees.

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

DATED this __25th__ day of __October__, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th__ day of __November____, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DANIEL A MILLER
209 W MAIN ST
BOISE ID 83702-7263

MONTE R WHITTIER
PO BOX 6358
BOISE ID 83707-6358

_____/s/_____

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IC 05-007487

ORDER

Filed November 7, 2006

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 has failed to prove that her exposure to chemical fumes caused or contributed to the stroke she suffered on March 25, 2005.
2. Claimant is not entitled to an award of attorney fees.

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

DATED this __7th__ day of __November____, 2006.

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 __7th__ day of __November____, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DANIEL A MILLER
209 W MAIN ST
BOISE ID 83702-7263

MONTE R WHITTIER
PO BOX 6358
BOISE ID 83707-6358

____/s/_____

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