

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KEITH CLEARY, )  
 )  
 Claimant, ) **IC 2004-526775**  
 v. )  
 )  
 BECHTEL BWXT IDAHO LLC, ) **FINDINGS OF FACT,**  
 ) **CONCLUSIONS OF LAW,**  
 Employer, ) **AND RECOMMENDATION**  
 and )  
 )  
 EMPLOYERS INSURANCE OF WAUSAU, ) FILED MAY 14 2007  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**INTRODUCTION**

The Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls, on October 12, 2006. Michael R. McBride represented Claimant. Monte R. Whittier represented Defendants. The parties took posthearing depositions and submitted briefs. The case came under advisement on February 26, 2007 and is now ready for decision.

**ISSUES**

After due notice to the parties, the issues were identified as:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether and to what extent Claimant is entitled to the following benefits:
  - (a) temporary disability;
  - (b) permanent partial impairment (PPI);
  - (c) permanent disability in excess of impairment (PPD);

- (d) medical care;
- (e) attorney fees; and

4. Whether Claimant's condition is compensable under Idaho Code § 72-451.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he suffered Post-Traumatic Stress Disorder ("PTSD") as a result of work stress related to an extraordinary project he supervised at Idaho National Engineering Laboratories ("INL"). He suddenly fell to the floor shortly after successful completion of the project. He is totally and permanently disabled as a result of his psychological injury.

Defendants contend Claimant did not suffer an accident causing injury as required by Idaho Workers' Compensation Law. This case should be considered a "mental-mental" claim for which compensation is precluded by Idaho Code § 72-451.

### **EVIDENCE CONSIDERED**

The record in this case consists of the following:

1. Oral testimony at hearing by Claimant, co-worker Rod Harper, and supervisor Brad Swanson;
2. Claimant's exhibits 1-13;
3. Defendants' exhibits A-Z, AA, BB;
4. The record was held open for the submission of two additional exhibits, Claimant's timecards and Claimant's medical bills. The timecards were submitted and are admitted, but the medical bills were not and are not;
5. The posthearing depositions of Claimant's wife, neurosurgeon Lawrence Fink, M.D., and neuropsychologist Robert Calhoun, Ph.D.

Objections made in the depositions of Drs. Fink and Calhoun are overruled.

A post-hearing deposition of Claimant was also taken. Defendants' objection to that deposition is sustained. Claimant's post-hearing deposition, dated November 6, 2006, is stricken from the record. After having fully considered all of the above evidence,

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## **FINDINGS OF FACT**

### **The Event**

1. Claimant worked for Employer in a supervisory capacity. He was assigned to manage a “dry-air transfer” of spent nuclear fuel rods (the “Event”). This was the first time, at least in recent memory, that such a transfer had been attempted. Safety was a priority. A mishap during the transfer could have been catastrophic not only to the INL site, but also to the greater Idaho Falls area.

2. Claimant and his team worked, planned, and practiced for about six months before the Event. They worked long hours. Claimant became obsessed with the project.

3. On March 29, 2004, the Event occurred. The transfer was successfully completed without mishap. (Several subsequent medical records inaccurately identify it as March 19, 2004.)

4. One to two hours later, Claimant collapsed to the floor at work. He was not physically injured during the fall. He suddenly lost muscle tone temporarily, but did not lose consciousness. (the “Collapse.”)

5. Whenever he tried to return to work during the next few weeks, he suffered “spells” which involved dramatic loss of muscle tone and inability to mentally focus.

### **Medical Care**

6. Immediately after the Collapse, Claimant was treated by Roger S. Brunt, M.D. Claimant complained of generalized weakness and denied a loss of consciousness or injury. Dr. Brunt diagnosed “vasovagal syncope.”

7. The physician at Employer's occupational medical program, Cay E. Berg, M.D., examined Claimant two days after the collapse and recommended, based upon family history, that he undergo a cardiac workup. Later, Paul Johns, M.D., was the physician monitoring Claimant's condition and attempts to return to work.

8. On April 23, 2004, emergency room treating physician Eric Maughan, M.D., witnessed one of Claimant's "spells." He diagnosed "near syncope" and "palpitations." Except for a slight increase in blood pressure, monitors showed no cardiovascular changes.

9. Cardiologist John Chambers, M.D., performed additional cardiovascular testing, including cardiac catheterization, which revealed ischemia and ventricular ectopy. A tilt-table test for syncope was positive.

10. An EEG was performed on April 23, 2004. Claimant had up to seven "spells" during it. Stephen Vincent, M.D., ruled out epilepsy and considered the possibility of hyperventilation or pseudoseizures. The EEG was "completely within normal limits."

11. Also on April 23, 2004, a brain MRI showed no relevant abnormality. Dr. Chambers' discharge summary did not specifically identify a cause for Claimant's "spells." He referred Claimant to the University of Utah Hospital for a workup.

12. Claimant remained at the U of U Hospital from April 23 through 27, 2004. An admission note records that Claimant reported a similar episode when in the navy in 1980 which was attributed to "heat stress." Upon admission, he was seen by multiple physicians and many tests were performed. The discharge diagnosis was "conversion disorder." Because his "spells" were intermittent, he was not considered a candidate for their inpatient program.

13. Beginning May 6, 2004, Claimant began counseling sessions. These have persisted intermittently with various counselors and have included hypnotherapy. These have

supplemented a regimen of psychotropic prescription medications.

14. On May 10, 2004, Reed Ward, D.O., noted Claimant's spells had decreased. He released Claimant to return to work. Claimant returned with worsening symptoms on May 21, 2004. Dr. Ward took Claimant off work again.

15. In June 2004, Claimant began treating with psychiatrist Ronald Zohner, M.D. In March 2005, Alan Zohner, Ph.D., opined for the Social Security Administration that Claimant was incapable of successful, gainful employment due to his conversion disorder.

16. On June 22, 2004, Claimant visited neurologist Erich Garland, M.D., upon referral from Dr. Ward. Dr. Garland tentatively diagnosed a migraine variant. He considered a possible conversion disorder but considered it less likely given a lack of history of psychiatric disease. In October 2004, Dr. Garland ordered an EEG and brain MRI. These were normal. A cervical MR angiogram and intracranial MR angiogram were nondiagnostic.

17. In August 2004, psychiatrist Richard New, M.D., recorded that Claimant denied PTSD symptoms. The record does not indicate what questions were asked or how they were answered upon which Dr. New based this record.

18. Claimant visited Florida neurosurgeon Lawrence Fink, M.D., on September 21, 2004. Claimant reported a history of episodic paralysis with headaches and visual loss, which began with the Collapse. Dr. Fink initially suspected a variant of migraine. He did not formally begin treating Claimant, but occasionally received updated records for evaluation. On July 27, 2006, Dr. Fink again visited with Claimant and opined Claimant suffered from PTSD. Dr. Fink further opined PTSD is "a physical injury as defined by the Idaho Code § 72-451(1)." Dr. Fink's curriculum vitae does not indicate specific training in the practice of law in Idaho or elsewhere.

19. Claimant moved to Florida. He began treating with Jose Callueng, M.D., Claimant underwent diagnostic studies on May 9, 2006. These included a C-spine MRI, a chest X-ray, and an echocardiogram. These show no condition which could be linked to the Collapse. Dr. Callueng referred Claimant to a neurologist and an osteopath. Their evaluations did not add to any understanding of Claimant's condition.

20. On September 18, 2006, Gary Crawley, M.D., opined Claimant was "chronically anxious," that he suffered "extreme impairment," that he would be disabled for the foreseeable future and will never return to work in the nuclear industry. There is no foundation given upon which these opinions can be evaluated.

21. Neuropsychologist Robert Calhoun, Ph.D., evaluated Claimant's medical records at Defendants' request. He did not meet Claimant. He agreed with the consensus of the records of the medical providers, except for Drs. Fink and Garland, and opined Claimant suffered from conversion disorder and not from PTSD.

#### **Prior Medical Records**

22. On November 29, 2002, cardiologist John Chambers, M.D., performed an EKG. On December 19, 2002, Dr. Chambers saw evidence of ischemia, but related Claimant's continued symptoms to gastroesophageal reflux disease.

#### **Other Employment and Non-Medical Factors**

23. Claimant received a performance review for calendar year 2003 on February 25, 2004. It was entirely positive regarding Claimant's managerial and other skills.

24. Before working at the site, Claimant retired after 20 years from the U.S. Navy. While in the navy and afterward, Claimant has worked in nuclear-related positions. He has strong managerial and supervisory skills which would transfer to other occupations. No other

non-medical factors are relevant to a disability analysis.

### **Discussion and Further Findings**

25. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

26. Claimant is a credible witness. He has a demonstrated history of excellent work.

27. **Accident.** Claimant bears the initial burden of demonstrating a prima facie case. *See, Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code § 72-102(18)(b). The Event that allegedly precipitated the Collapse does not meet the definition of an accident. The project proceeded forward for about six months. No mishap occurred during the dry-air transfer.

28. **Injury.** "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body." Idaho Code § 72-102(18)(c).

29. Claimant bears the burden of proving it likely he suffers from PTSD. PTSD is defined and evaluated in accordance with the Diagnostic and Statistical Manual of Mental Disorders, fourth edition ("DSM-IV"), published by the American Psychiatric Association.

To meet the diagnostic criteria for PTSD, an “extreme traumatic stressor” is required. DSM-IV TR identifies examples of the magnitude of trauma required to cause a person to suffer PTSD. Dr. Fink opined the entire project was the stressor. He compared Claimant’s condition to post-partum depression and to Parkinson’s disease. He cogently identified the theory under which he opined Claimant’s condition was “physical.” However, he admitted, “It’s not within our realm of science to do so [measure the physical brain dysfunction] in a living person.”

30. The overwhelming consensus of medical opinion in this matter shows Claimant does not suffer from PTSD. Moreover, there has been no showing that PTSD results in violence to the physical structure of the body. Dr. Fink’s testimony reveals only theory; no objective evidence shows physical changes occurred to cause, or result from, PTSD. Even if this supposed cascade of neurochemicals in the brain were demonstrated, it is a semantic strain to equate it with “violence to the physical structure of the body.” Claimant failed to show he suffered an injury as required by Idaho Workers’ Compensation Law.

31. Although Claimant does not suffer from PTSD, he may suffer from conversion disorder or some other psychological illness. Still, there is no objective evidence to demonstrate that his condition – by whatever name – is a physical injury as defined by law. *See, Cox v. Denny’s Restaurants*, 112 Idaho 321, 732 P.2d 290 (1987). In Cox, Claimant alleged PTSD but was found to suffer a histrionic personality disorder and a situational adjustment disorder instead. The Commission found Ms. Cox did not have a physical disorder. The Idaho Supreme Court affirmed. The Court did not reach the question of whether stress-related disorders which are caused by employment are compensable. Since the Cox decision, the Idaho Legislature has defined compensability with Idaho Code § 72-451.

32. **Idaho Code § 72-451.** Generally, with some exceptions, “psychological injuries, disorders or conditions shall not be compensated” under Idaho Workers’ Compensation Law. Generally, with some exceptions, an “accident and physical injury” is required by subsection (1). As set forth above, the Event does not meet the definition of “accident” and the Collapse does not meet the definition of “injury” under Idaho Code § 72-102. Idaho Code § 72-451(1) further states:

[A] psychological mishap or event may constitute an accident where: (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event.”

33. The Event was not a “sudden and extraordinary event” as required by criterion (iii). The statute does not allow a six-month period of somewhat heightened work demands to constitute the basis for an accident. It does not allow a two or three day procedure which is successfully completed without mishap to constitute the basis for an accident. All evidence of Claimant’s Collapse supports that it was unexpected, undesigned and unlooked for. It certainly was itself a mishap or untoward event. It occurred at work. No other stressors outside of work have been shown to be connected. It can be precisely located in place and time. However, because it is a psychological mishap, it must meet the additional criteria of this section.

34. As set forth above in the section labeled “Injury,” Claimant did not suffer a “resultant physical injury.” Theories of brain dysfunction without demonstrable brain injury are inadequate. Claimant failed to produce evidence of physical injury. Thus, under Idaho Code § 72-451, he failed to show he suffered a compensable accident and injury as required by law.

### CONCLUSIONS OF LAW

1. Claimant failed to show he suffered a compensable accident;
2. Claimant failed to show he suffered an injury caused by any event arising from or in the course of employment;
3. All other issues are moot.

### RECOMMENDATION

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

DATED this 4<sup>TH</sup> day of May, 2007.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the 14<sup>TH</sup> day of May, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Michael R. McBride  
1495 East 17<sup>th</sup> Street  
Idaho Falls, ID 83404-6236

Monte R. Whittier  
P.O. Box 6358  
Boise, ID 83707

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/S/ \_\_\_\_\_

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KEITH CLEARY, )  
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 Claimant, ) **IC 2004-526775**  
 v. )  
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 BECHTEL BWXT IDAHO LLC, ) **ORDER**  
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 Employer, )  
 and ) **FILED MAY 14 2007**  
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 EMPLOYERS INSURANCE OF WAUSAU, )  
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 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

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

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

1. Claimant failed to show he suffered a compensable accident;
2. Claimant failed to show he suffered an injury caused by any event arising from or in the course of employment;
3. Claimant failed to show he suffered a compensable accident and injury pursuant to Idaho Code § 72-451.

4. All other issues are moot.

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

DATED this 14<sup>TH</sup> day of MAY, 2007.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
James F. Kile, Chairman

/S/ \_\_\_\_\_  
R. D. Maynard, Commissioner

/S/ \_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

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I hereby certify that on 14<sup>TH</sup> day of MAY , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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