

2. Whether Claimant suffers from a compensable occupational disease;
3. Whether Claimant's claim is barred by application of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994);
4. Whether and to what extent Claimant is entitled to benefits for:
 - (a) Total temporary disability (TTD),
 - (b) Permanent partial impairment (PPI),
 - (c) Permanent disability in excess of PPI (up to and including total permanent disability), and
 - (d) Medical care;
5. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
6. Whether ISIF is liable under Idaho Code § 72-332; and
7. *Carey* apportionment.

CONTENTIONS OF THE PARTIES

Claimant contends he contracted occupational asthma. He worked as a welder and was exposed to fumes. He is totally and permanently disabled.

Employer and Surety contend Claimant suffered minimal exposure which did not cause his condition. His condition was preexisting. They raise a *Nelson* defense. Further, Claimant's asthma is not compensable as a result of statutory requirements of notice and duration of exposure. Claimant suffers no compensable permanent impairment. All other benefits have been paid. If compensably impaired, Claimant's disability is minimal, perhaps not exceeding PPI. A major dispute centers around Claimant's limitations and restrictions.

ISIF contends they have no liability because Claimant is not totally and permanently disabled, but if so, Idaho Code § 72-332 precludes liability.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, his wife, and a former supervisor;
2. Joint Exhibits A – Z including a B1, J1, and M1, and AA - GG; and

3. Posthearing depositions of otolaryngologist Jeffrey Mennion, M.D., internist and allergist Emil J. Bardana, Jr., M.D., physiatrist Christian G. Gussner, M.D., psychologist Michael McClay, Ph.D., and vocational experts Douglas Crum and Terry Montague.

All objections raised in the depositions are overruled.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

Introduction and Exposure

1. Claimant worked at Employer's mine as a welder/mechanic. Employer's welding shop was large and well ventilated. Additionally, a portable air mover and a portable high-velocity fan was available. The welders wore respirators. In May 2003, Claimant noticed difficulty breathing due to smoke and fumes. He requested a respirator. The shop was nearly out of them. Claimant estimated he went without a respirator for about 30 days. He may have found a respirator for a day or so here and there during these 30 days. He also used a painter's particle mask occasionally during this 30-day period.

2. The lead man filed a request for more respirators. He filed a second request. He recalled that the shop was out of respirators from early May to about the third week in May. He recalled Claimant only worked one day without a respirator, but Claimant may have been called in to work shifts when this lead man was not.

3. According to a June 20, 2003 recorded statement, Claimant last worked for Employer about May 17, 2003. The precise date is not relevant to any dispositive issue.

4. In May 2003, Claimant was 41 years old. He stands about 6' 1" and weighs a little over 300 pounds. He was educated through ninth grade. He does not have a G.E.D. In the 1980s, he received vo-tech training to work as a certified welder. He has worked as

a welder and a mechanic, an ironworker, and an oil-field roustabout. He has worked in construction and as an equipment operator.

5. Claimant's wife has received Social Security Disability benefits since 2001 following a back injury. It involved a workers' compensation claim that was settled. She testified that Claimant's activity at home has reduced since his exposure in May 2003.

6. Since May 2003, Claimant's wife observed Claimant having frequent nosebleeds and complaints of headache. She observed these only occasionally before the exposure. She has also observed a change in Claimant's sleep patterns.

7. On November 24, 2003, Claimant applied for Social Security disability. He enumerated a long list of physical problems to support his claim for disability. An examiner recorded Claimant could sit, stand, or walk up to six hours of any eight-hour work day for any one of these activities. His claim was denied. He appealed that denial or refiled for disability on May 26, 2004. On an application dated November 4, 2005, Claimant reported he could not stand, sit, or walk more than 15 consecutive minutes for any one of these activities. Kevin Hill, M.D., performed an examination for Social Security purposes on January 13, 2006. Despite Claimant's reported limitations, he opined Claimant could sit or stand up to six hours of an eight-hour day for either activity. Social Security ultimately approved Claimant's disability claim. Social Security criteria are substantially different than criteria under Idaho Workers' Compensation Law.

8. Following a back injury in 1987, Claimant took steps to retire as disabled. Ultimately, after about three years, he was retrained at welding school.

Initial Medical Care

9. Claimant called in sick from work on May 18, 2003. On May 19, 2003, Claimant visited his family doctor, Clay Campbell, M.D. Claimant complained of a cough

with tightness in his upper chest which he attributed to three to four weeks of welding at work without a respirator. On examination, Claimant's air passages and lungs were clear; his oxygen saturation was 88%. A chest X-ray was normal. Dr. Campbell prescribed an inhaler and sent a letter advising respiratory protection. Dr. Campbell recorded Claimant's weight at 267 pounds.

10. An EMT report apparently dated May 23, 2003, recorded that Claimant complained of breathing difficulty and coughing up "flem" (sic). His initial oxygen saturation was monitored at 95% and with oxygen rose to 99% in 10 minutes.

11. On May 28, 2003, Claimant's complaint of cough now included having coughed up blood for the previous three to four weeks. On May 23, he complained of coughing up only "black and dark green sputum." Claimant attributed the blood to "severe sore throats" in the mornings. Examination was normal except for some throat tenderness.

12. On May 29, 2003, Dr. Bennion began treating Claimant. Dr. Bennion noted, "his nose today is actually fairly clear. I do not see any evidence of tailings but he has been off work for awhile. His oral cavity is clear." Dr. Bennion ordered a laryngoscopy which was performed on June 2, 2003. The scope was introduced through Claimant's nose. It showed abrasions on Claimant's vocal cords. Due to the inflammation seen, Dr. Bennion took Claimant off work and began antibiotic treatment. (Claimant required additional treatment when the antibiotics killed the "good" bacteria in his system and allowed one strain of "bad" bacteria to cause colitis.) Dr. Bennion noted Claimant's condition looked too severe to be a reflux problem. Claimant was later diagnosed with gastroesophageal reflux disorder (GERD).

13. Dr. Bennion also ordered a pulmonary function test. It was normal. On June 12, 2003, Dr. Bennion released Claimant to return to work where there was no risk of chemical exposure.

RECOMMENDATION - 5

14. On June 18, 2003, Claimant visited pulmonologist Jeffrey Abel, M.D. A pulmonary function test was normal except for “a minimal reduction in his mid flows suggestive of possible mild bronchial disease.” A methacholine challenge test was positive at 14 milligrams per milliliter (mg/ml). Dr. Abel diagnosed hyperactive airways disease (asthma) without opining about its cause.

15. By Dr. Bennion’s June 18, 2003 examination, Claimant experienced “significant improvement” and his chords had “somewhat normalized.” A July 17, 2003 chest X-ray was normal. Another laryngoscopy was performed, this time with a biopsy. Biopsied tissue showed “squamous hyperplasia and mild chronic inflammation consistent with reflux esophagitis.”

16. On July 25, 2003, Dr. Bennion restricted Claimant from all work. After examination on July 31, 2003, Dr. Bennion noted, “he continues to be short of breath, out of character with the degree of asthma that we are seeing on the function tests.”

17. An August 31, 2003 sleep study showed mild sleep apnea.

18. By September 4, 2003, Dr. Bennion found Claimant’s larynx to be normal or consistent with mild reflux laryngitis. He opined that he expected Claimant could return to light duty work by September 16, avoiding dusty environments. Claimant visited Dr. Bennion on November 13, 2003, and did not see him again for an extended period.

Prior Medical Care

19. Just days before the alleged onset of symptoms from the alleged exposure, Claimant telephoned Dr. Campbell on May 14, 2003, for a prescription refill for a rash on his leg. Claimant had last visited Dr. Campbell in March for follow-up care for high blood pressure. In a February visit, Claimant reported nosebleeds which he associated with his high blood pressure medication. Nosebleeds had been a concern in an earlier visit and

telephone contact as well. In a January visit, Claimant reported lingering irritation in his left eye after a foreign object, possibly a welding fragment, struck his eye.

20. Before the alleged exposure, Claimant had complained of shortness of breath and a cough as recently as May 17, 2002, almost exactly one year earlier.

21. Almost exactly one year before that, on May 4, 2001, a chest X-ray for shortness of breath and chest tightness was shown to be normal. Also on that date he complained of a six-month history of shortness of breath and chest tightness which he attributed to ineffective respirators at work. A pulmonary function test showed no abnormalities. It stated he “may not benefit from continued bronchodilator therapy.”

22. On April 24, 1998, Claimant visited Dr. Campbell for, in part, bronchitis. His weight on that date was 257 pounds.

Subsequent Medical Care

23. After May 28, 2003, Claimant continued to visit or telephone Dr. Campbell for unrelated concerns. Dr. Campbell’s next relevant note is dated July 5, 2004. Claimant reported his “lungs are doing better” and described treatment by other doctors. On examination, Dr. Campbell noted Claimant’s lungs and respiratory passages were clear. Claimant weighed 301 pounds.

24. A January 30, 2004 neurological examination (including a brain MRI) by Scott Petty, M.D., found no neurological abnormalities relating to Claimant’s claims of headaches.

25. On April 29, 2004, pulmonologist William Armour, M.D., questioned the cause of Claimant’s asthma and whether it was industrially related without opining to a reasonable degree of medical probability. He opined Claimant was not physically restricted, but expressed uncertainty about the impact of Claimant’s asthma on his ability to work.

26. A lump beside Claimant's throat was first noticed shortly after the alleged exposure. It grew gradually until Dr. Bennion removed it August 3, 2006.

Medical Experts' Opinions

27. On July 28, 2005, pulmonologist James Pearl, M.D., evaluated Claimant at the request of Employer and Surety. He opined Claimant's diagnosis was uncertain, but whatever "significant lung disease" Claimant had was "most likely related to his occupation." He opined Claimant was stable, without any PPI related to the respiratory system, and should not work in a "dirty" environment.

28. On October 6, 2005, Dr. Bennion opined Claimant suffered a 15% PPI rating.

29. On August 7, 2006, Dr. Bardana evaluated Claimant at the request of Employer and Surety. He examined Claimant and ordered tests, including tests for allergens. He opined Claimant suffered from GERD which had irritated Claimant's esophagus and larynx. Pulmonary function studies were normal. A positive methacholine challenge test at 4 mg/ml was significant. He stressed his opinion that a positive methacholine challenge test may indicate one of any number of problems and is not specifically diagnostic of asthma. At a later date, he opined Claimant has "non-allergic, non-occupational asthma." He opined Claimant's asthma was exacerbated by the GERD. The asthma may have been transitorily irritated by the alleged welding exposure, but the absence of medical records to show irritation of eyes or nasal passages made this unlikely. The alleged exposure could not relate to the laryngeal inflammation seen. He opined Claimant was medically stable with no respiratory PPI or work restrictions, assuming reasonable occupational hygiene and normal respiratory protection. He opined Claimant's claims of headaches, GERD, sleep apnea, and nosebleeds have no causal relationship with Claimant's work. He opined Claimant's continuing complaints of shortness of breath were related to deconditioning and obesity,

not to the alleged exposure.

30. On November 1, 2006, Dr. Gussner evaluated Claimant at the request of Employer and Surety. He opined Claimant has a ratable low back impairment unrelated to the alleged exposure. He concurred with Dr. Bardana's opinion of zero PPI related to Claimant's respiratory system.

DISCUSSION AND FURTHER FINDINGS OF FACT

31. **Credibility.** Claimant is a pleasant storyteller, prone to hyperbole. At hearing, he related certain events in detail, including re-creations of dialog. While his *invention to detail* would be well appreciated in a hunting or fishing camp, it was not helpful in establishing credibility under oath. He demonstrated a casual willingness to spin or shade his testimony to his benefit and to try to evade attempts on cross-examination to explore inaccuracies. Moreover, the activity demonstrated on the surveillance video thoroughly impeached his claims of disability and his treating doctors' restrictions. Claimant was shown repeatedly climbing ladders and working with sheets of corrugated roofing material while bending, kneeling, etc. Except for due caution related to the slipperiness of snow on the roof, Claimant showed no hesitation performing this medium work. These motions were significantly inconsistent with Claimant's claims to his doctors, to Social Security, and to this Commission. Most importantly, the video shows him performing this work with wood smoke from his chimney wafting around him as he worked. He exhibited no discernable respiratory difficulties during the videotaped portions of the approximately three hours he worked installing this roof. He exhibited no effort to avoid the smoky environment. Finally, Claimant made some effort to claim total disability following his low back injury in 1987. Having had time to refine and expand his claims of disability, he has inordinately focused on perceived limitations without regard for the reality of what he can do. By demeanor and by testimonial content, Claimant lacked credibility as a witness.

RECOMMENDATION - 9

32. **Compensability.** A claimant must prove his condition likely was caused by his work. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

33. Medical testimony supporting Claimant's claim is largely based upon Claimant's representations about severity and timing of symptoms. This basis has been impeached. Medical records show breathing problems and nosebleeds preceded the alleged exposure; significant complaints of headaches first appeared long after. Lingering respiratory claims are belied by his work on the smoky rooftop. Claimant failed to show he suffered any lingering condition as a result of the alleged exposure.

34. **PPI.** "Permanent impairment" is defined by statute. Idaho Code §§ 72-422, -224. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975). Here, Dr. Bennion's impairment rating is unsupported by the AMA Guides or Claimant's actual condition as demonstrated by the video. Dr. Bardana's opinions carry more weight. Claimant did not suffer any permanent impairment as a result of the alleged exposure.

35. Without permanent impairment, no permanent disability can be established or awarded. Testimony of vocational experts is moot.

36. **Other Issues.** As a result of the foregoing findings, all other issues, including notice, compensability, affirmative defenses, and extent of benefits are moot.

CONCLUSIONS OF LAW

1. Claimant failed to show he likely suffered any ill effects as a result of the alleged exposure. His testimony and evidence based upon his representations cannot be considered competent indications that he sustained temporary or permanent ill effects.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 9TH day of MAY, 2008.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

3. The Complaints against Employer and ISIF are dismissed with prejudice.

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

DATED this 19TH day of MAY, 2008.

INDUSTRIAL COMMISSION

/S/ _____

James F. Kile, Chairman

/S/ _____

R. D. Maynard, Commissioner

/S/ _____

Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19TH day of MAY, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Albert Matsuura
P.O. Box 2196
Pocatello, ID 83206-2196

Thomas P. Baskin
P.O. Box 6756
Boise, ID 83707

Thomas B. High
P.O. Box 366
Twin Falls, ID 83303-0366

db

/S/ _____

ORDER - 2