BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DELLWIN RUDDELL, Claimant, v. ATK ALLIANT TECHSYSTEMS, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	)	**IC 2007-034055** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** June 25, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston on February 19, 2009. Michael Kessinger represented Claimant. Mark Peterson represented Employer and Surety. The parties presented oral and documentary evidence. They took posthearing depositions and submitted briefs. The case came under advisement on May 26, 2009.

ISSUES

According to the Notice of Hearing, the sole issue to be resolved is:

> Whether Claimant suffers from a compensable occupational disease incurred by his employment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he contracted plantar fasciitis. He worked, standing and walking, on a concrete floor for 12 hours per day. His condition is a compensable occupational disease.

Employer and Surety contend Claimant presents with several risk factors. Claimant failed to show, more likely than not, that his occupation caused his foot pain.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant;

2. Joint Exhibits A – H;

3. Defendants' Exhibits 1 – 18; and

4. Posthearing depositions of Claimant's IME orthopedist John McNulty, M.D., and Defendants' IME physiatrist Rodde Cox, M.D.

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, conclusion of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked for Employer at its ammunition manufacturing factory for 15 years. He worked 12-hour shifts, three one week and four the next. He often volunteered for extra shifts as well. About 90% of his work day involved standing and walking on concrete and occasionally asphalt surfaces. Employer provided work boots. Claimant also wore insoles with arch supports.

2. Claimant noticed his feet had begun to hurt sometime in about 2006.

3. On April 20, 2007, after working five 12-hour shifts, Claimant's feet hurt so much that he sought medical attention. He first sought medical attention on April 24, 2007. He reported bilateral foot and ankle pain, much worse on the left, and increasing through each work week, improving during days off. He recalled no traumatic incident. An examination by his family doctor, Donald Greggain, M.D., found various points of tenderness, but no objective

basis for his pain. Dr. Greggain assessed that Claimant suffered from "[l]ocalized osteoarthritis of the ankle/foot with significant flat arches and terrible foot mechanics." Dr. Greggain noted that Claimant "requests off work for the next few days."

4. Claimant never returned to work for Employer.

5. On April 30, 2007, Dr. Greggain examined Claimant and noted "very severe pes planus and marked supination." He found Claimant's foot pain "inexplicable" and referred him to Timothy Flock, M.D. Dr. Flock took over care of Claimant's feet. Claimant returned to Dr. Greggain for his other longstanding medical issues.

6. Claimant regularly takes prescription medications for fibromyalgia, depression, acid reflux, and chronic migraine headaches, in addition to medication for foot pain.

7. Claimant first visited Dr. Flock on May 2, 2007. After an examination which found no signs of a problem except for specific points of tenderness, he diagnosed Claimant's condition as bilateral plantar fasciitis and Morton's neuroma. X-rays showed minimal degenerative bone spurs.

8. Plantar fasciitis is an inflammation or a stretching or tearing of the fascia connecting the calcaneus to the metatarsal head that supports the arch of the foot.

9. On May 11, 2007, Dr. Greggain completed a report to support Claimant's application for short-term disability benefits. Dr. Greggain marked boxes indicating Claimant's plantar fasciitis and Morton's neuroma arose from "injury" not illness, and that it was not work related.

10. On July 27, 2007, an EMG and nerve conduction velocity study of his legs and feet reported his nerve function to be essentially normal. A slight prolongation of tibial nerves was considered non-clinical.

11. Conservative measures provided partial relief, but the plantar fasciitis remained. In August 2007, nerve conductions studies on his feet were described as normal. Foot surgery was recommended. (Claimant did show a right wrist carpal tunnel syndrome to correlate with newly described hand symptoms.)

12. Dr. Flock performed bilateral nerve releases on Claimant's feet on August 28, 2007. After initial relief, at the time of his September 24 follow-up visit, Claimant's foot symptoms returned on the right On a visit dated October 29, Claimant reported foot pain only on the left. On a November 26 visit, Claimant reported foot pain more on the right, although Dr. Flock's examination elicited tenderness only on the left, not on the right.

13. On Dr. Flock's examination of January 18, 2008, Claimant exhibited tenderness on the right, but not on the left.

14. On April 15, 2008, Dr. Flock performed another surgery on Claimant's right foot.

15. On May 27, 2008, Dr. Flock responded to a questionnaire from Claimant's attorney by checking the "Yes" box to the question, "Was Mr. Ruddell's bilateral plantar fasciitis caused by his work activities at ATK?" The question was prefaced by a recitation of a limited history. Dr. Flock recorded, "I discussed his working on hard surfaces is a risk factor."

16. In March 2008, Claimant complained of right hip pain, and X-rays showed degenerative joint disease there. At least by an April 2008 visit, Claimant's right knee became symptomatic. By a May 2008 visit, both knees were involved. About one year later, Dr. Flock performed a partial right knee replacement on May 29, 2009.

17. On July 25, 2008, Rodde Cox, M.D., evaluated Claimant at Defendants' request. He reviewed records dated back to 1990. On examination, he noted "obvious" flat feet deformity as well as heel valgus, diffuse tenderness, and a bilaterally positive Tinel's sign.

He noted that although there was no evidence of symptom magnification behavior, Claimant's subjective complaints were not consistent with the objective findings. Dr. Cox noted Claimant did not report an injury and opined many factors other than Claimant's work "likely would have contributed to the diagnosis of plantar fasciitis." He declined to opine about medical stability or permanent impairment because he could not opine that Claimant's condition was related to work.

18. In deposition, Dr. Cox opined that risk factors for plantar fasciitis include degeneration or wear and tear, overuse (as by an athlete), standing or walking on hard surfaces, biomechanical issues such as gait or flat feet or tight ligaments, and other diseases like diabetes, rheumatoid arthritis or ankylosing spondylitis, etc. For Claimant, his risk factors include the fact that he is an avid outdoorsman. In this regard, Dr. Cox noted that hiking/backpacking across uneven surfaces, and up hills, might reasonably be expected to expose Claimant to a greater risk of developing plantar fasciitis since these activities subject the plantar fascia to greater stresses than standing/walking on flat surfaces.

19. An IME at Claimant's request was performed by John McNulty, M.D., on December 2, 2008. Dr. McNulty's report does not indicate he saw any medical records dated prior to April 2007 in formulating his opinions. On examination, Dr. McNulty noted foot tenderness, an antalgic gait, and "marked bilateral pes planus." He opined Claimant's condition was more likely than not caused by his work. He opined Claimant was medically stable and rated Claimant with a 7% whole person impairment, based upon the *Guides, 5th ed.*

20. In deposition, Dr. McNulty characterized plantar fasciitis as "an extremely common condition." He relied upon the *Guides, 6th ed.*, as a source for identifying risk factors for plantar fasciitis. He recited the risk factors as standing and walking on hard surfaces,

obesity, and ankle dorsiflexion less than 10 degrees. Of these, Dr. McNulty opined that only the first factor was applicable to Claimant's condition. He testified he was "primarily basing [his] opinion on" the fact that Claimant's feet became excruciatingly painful after a week of five 12-hour shifts at work. He opined from experience that plantar fasciitis can also be caused by injury or by rheumatoid arthritis or other inflammatory arthropathy. Although Dr. McNulty conceded that Claimant's walking as an avid outdoorsman could have contributed to the development of plantar fasciitis, he opined that since Claimant was walking more at work, work—not hiking—was the likely cause. Moreover, Dr. McNulty related that he himself hunted often and never experienced plantar fasciitis as a result. Dr. McNulty considered it "possible, not probable" that Claimant contracted plantar fasciitis in 2006 following a backpacking trip, and the condition was exacerbated at work to become disabling in April 2007.

Prior Medical Records

21. The evidence does not indicate that a 1990 foot injury is in any way related to his current condition or complaints.

22. A May 1995 note indicates Claimant reported foot pain and other pain which he associated with fibromyalgia.

23. Bilateral pes planus was noted by IME physicians on June 17, 1997.

DISCUSSION AND FURTHER FINDINGS OF FACT

24. **Credibility.** Claimant exhibited a credible demeanor. He presented his testimony with a calm, low-key attitude. His testimony did not seem embellished or hysterical. His posture and gestures did not demonstrate exaggerated indicia of pain. The fact that Claimant worked for Employer for over 15 years is, in itself, a factor in determining credibility.

25. However, upon careful review and correlation, there exist several instances

of inconsistency between his testimonial recollection and medical records made contemporaneously with his doctor visits. Where inconsistencies arise, greater weight is afforded the contemporaneously recorded medical information.

26. **Occupational disease.** The Idaho Workers' Compensation Law recognizes two distinct avenues for obtaining compensation: (1) accident and injury and (2) occupational disease. "Occupational disease" is defined to mean "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. . ." Idaho Code § 72-102(22)(a). Right to compensation for occupational disease is declared by Idaho Code § 72-437. A list of recognized occupational diseases is set forth at Idaho Code § 72-438. By statute and by case law this list is not exclusive. Idaho Code § 72-438; Kinney v. Tupperware Co., 117 Idaho 765, 792 P.2d 330 (1990); Bowman v. Twin Falls Const. Co., Inc., 99 Idaho 312, 518 P.2d 770 (1978), *overruled in part on other grounds*, DeMain v. Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999). Plantar fasciitis has been recognized by the Commission as a compensable occupational disease. Griesemer v. Bonner County School District # 82, 98 IIC 0960, IC No. 95-950500 (1998).

27. **Causation.** "An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment." Idaho Code § 72-439(1). "[I]ncurred means "'arising out of and in the course of' employment." Idaho Code § 72-102(22)(b). Thus, as in an accident/injury case, one who claims workers' compensation benefits for an occupational disease must show that he developed a disease while performing the work that he was employed to perform, and that there is a causal connection between the conditions under which claimant performed his work and the resulting disease. A

disease which cannot be traced to the worker's employment as a contributing proximate cause, and which come from a hazard to which the worker would have been equally exposed outside of the work place, is not compensable. *See*, Kiger v. Idaho Corporation, 380 P.2d 208, 85 Idaho 424 (1963); Kessler on behalf of Kessler v. Payette County, 129 Idaho 855, 934 P.2d 28 (1998); Jensen v. Pocatello, 135 Idaho 406, 18 P.3d 211 (2000).

Proof of a possible causal link is not sufficient to satisfy claimant's 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). "Magic words" are not necessary to find medical opinions have been adequately expressed. Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000).

28. Claimant offers evidence from treating surgeon Dr. Flock. However, without more, a check mark in a box is of scant weight. Also, whatever inference may be taken is undercut by two things: (1) Dr. Flock's own statement on that document characterizes Claimant's work merely as "a risk factor," and (2) The question for which the check mark constituted the answer was prefaced by an incomplete and selective version, from Claimant's attorney, of portions of the facts surrounding the development of Claimant's plantar fasciitis. Dr. Flock never explicitly expressed an opinion about causation in his regular medical records which document his treatment of Claimant's condition. Claimant's treating family physician, Dr. Greggain, provided the opposite scant weight of two checked boxes for Claimant's short-term disability application. Dr. Greggain's check marks were not undercut by a temporizing handwritten statement of his own nor by a preface from Claimant's attorney consisting of a leading summarization of some facts.

29. Just as treating physicians have expressed conflicting opinions, IME physicians—one hired by each side of the issue—have expressed conflicting opinions.

30. Dr. McNulty expressed his opinion in writing and in deposition sufficient to make a *prima facie* argument for compensable causation. However, the record does not show that Dr. McNulty had the benefit of medical records prior to April 2007 when expressing his written opinion. The record does show he relied upon the *Guides* for a description of risk factors and found only one of the three—standing and walking on hard surfaces—to be applicable to Claimant. The *Guides*, fully titled *Guides to the Evaluation of Permanent Impairment,* 6th ed., is not encyclopedic nor diagnostic; Rather, it is a tool for rating a claimant's impairment; Its enumeration of three risk factors does not suggest that these are the only factors nor the major factors. The record does show that Dr. McNulty substituted his own hunting experiences and practices for Claimant's description of Claimant's outdoor activity. The record does show Dr. McNulty "primarily" based his opinion upon the timing of Claimant's disablement which arose after five 12-hour shifts and not upon the timing of onset of symptoms. Yet, in deposition, Dr. McNulty interjected comments stating that coincidental timing does not equate with causation.

31. Dr. Cox opined that the medical record did not show, more likely than not, that Claimant's condition was caused by his work as opposed to several other risk factors applicable to Claimant. Dr. Cox did not go so far as to opine that any one or all of these other risk factors were the likely cause of Claimant's condition. Dr. Cox's opinions suffer similarly from exposition of a predisposing selection of facts from Defendants when his opinions were sought. Dr. Cox expressed reservations about whether plantar fasciitis constitutes an occupational disease under Idaho Law. However, whether Dr. Cox fully

apprehends the legal definition of an occupational disease is not pertinent to the medical opinion developed in his testimony. In his testimony, Dr. Cox clearly stated his opinion that after considering the manifold possible causes of plantar fasciitis it cannot be said that the standing and walking requirements of Claimant's job are the probable cause of his condition.

32. From the Commission's viewpoint, important questions about the cause of Claimant's plantar fasciitis remain. The onset of foot pain may have coincided with a 40-mile backpack trip Claimant described taking in 2006. It may have arisen from Claimant spending "every weekend"—and these are three- and four-day weekends—hunting, fishing, and hiking. It may have arisen from a combination of walking at work and outdoors, either of which, by itself, may not have given rise to the condition. Dr. Greggain's examination findings of flat feet and terrible foot mechanics may have, by themselves, been the cause of Claimant's condition.

33. More subtly, Claimant's earlier medical records from the mid-1990s show a longstanding bout of upper extremity complaints. Diagnosed as "tendinitis" they represented complaints of pain with use coupled with the absence of objective signs or positive findings with diagnostic imaging. Also, Claimant's other medical ills, fibromyalgia, migraines, irritable bowel syndrome, stomach reflux, etc., and a suggestion in the 1997 evaluation of psychiatrist, Thomas Schemmel, M.D., that Claimant exhibits a "strong pattern of physical response to stress," show that Dr. Cox's more complete evaluation of potential causes should be given more weight than Dr. McNulty's limited focus on Claimant's work.

34. Claimant failed to show, more likely than not, that his condition was actually incurred as a result of his work activity of standing and walking.

CONCLUSION OF LAW

Claimant failed to show he likely incurred plantar fasciitis as a result of his work.

RECOMMENDATION

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

DATED this _9th___ day of June, 2009.

INDUSTRIAL COMMISSION

__/s/_____
Douglas A. Donohue, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __25th_ day of ___June_____, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Michael T. Kessinger
P.O. Box 287
Lewiston, ID 83501

Mark C. Peterson
P.O. Box 829
Boise, ID 83701

db __/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DELLWIN RUDDELL, Claimant, v. ATK ALLIANT TECHSYSTEMS, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	)	**IC 2007-034055** **ORDER** June 25, 2009

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 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 suffers a compensable occupational disease incurred by his employment.

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

DATED this __25th_ day of ____June_____, 2009.

INDUSTRIAL COMMISSION

_____
R. D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25th__ day of ____June_____, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Michael T. Kessinger
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