BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

UNTE CHEH, Claimant, v. EG&G OF IDAHO, INC., dba IDAHO NATIONAL ENGINEERING LABORATORY, Employer, and WAUSAU UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	)	**IC 2007-032277** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED JUL 30 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. The Referee submitted his recommendation; the Commissioners, having reviewed the same, have prepared modified findings and conclusions. At Claimant's request based upon his health concerns, a hearing was conducted by telephone on January 15, 2009. Claimant Unte Cheh appeared *pro se*. Monte Whittier represented Defendants. The parties presented oral and documentary evidence. During the briefing period, Claimant—through attorney Starr Kelso who made a limited appearance solely for the purpose of filing that motion—filed a motion to reopen the case for a new hearing. That motion was denied. The parties lodged briefs timely according to the extended briefing deadlines. The case came under advisement on June 15, 2009. It is now ready for decision.

ISSUES

According to the notice of hearing, the issues to be resolved are:

1. Statutory limitations and notice; and

2. Whether and to what extent prior adjudications by other courts may bind the Idaho Industrial Commission under theories including *res judicata*, collateral estoppel, or similar theories.

All other issues are reserved. For purposes of analysis and without prejudice to potential future issues, we assume *arguendo* that Claimant's alleged diseases were actually caused by his high dose (neutron) radiation exposure in Idaho in 1976 to 1978 at Employer's work site ("INEL") and not by his low dose radiation exposure at other facilities in other states.

CONTENTIONS OF THE PARTIES

Claimant contends he suffers from multiple diseases caused by exposure to radiation during his employment by Employer from November 1976 to January 1978. All of his multiple symptoms began before December 1977. Other courts have found he suffered multiple symptoms as a result of radiation exposure, and Idaho Industrial Commission should be bound by those findings under theories of *res judicata*, or U.S. Constitutional doctrines of "full faith and credit" or "privileges and immunities." His claim was timely filed (via "Form 1") on August 9, 2007, and Defendants received timely notice of illness on January 16, 2007 when Claimant attempted to contact INEL and left a message. These are timely because he did not know his illness was caused by his INEL work until he received a letter from the United Steel Workers Union on January 3, 2007. It should not count against him that Dr. Ernest Sternglass told him he was a radiation victim in April 2002, because Dr. Sternglass is a Ph.D. radiation expert and not an M.D. physician. It should not count against him that he filed a federal workers compensation claim for benefits from radiation exposure on March 30, 2005 because he related that to low dose exposure from facilities in other states, not to high dose (neutron) radiation exposure at INEL. It should not count against him that on October 28, 1998 he filed a claim for radiation exposure

which resulted in a negotiated settlement in federal court in Baltimore, Maryland, on September 30, 1999. It should not count against him that he filed for Medicare part B benefits based upon his radiation-caused physical ailments beginning June 15, 2004 and culminating in a favorable decision on September 27, 2007, which decision is the basis for Claimant's *res judicata* argument. The decision dated September 27, 2007 is found at Claimant's exhibits, pp. 52-54. Alternatively, if his notice and claim are deemed untimely, the untimeliness is the result of the failure of the attorney who filed the Form 1 on his behalf, and stated therein notice was given July 3, 2007 or as a result of actions of Defendants such that Idaho Code § 72-604 applies.

Defendants contend Claimant failed to give timely notice of injury or occupational disease as required by statute. Under Idaho Workers' Compensation Law, Claimant forfeited his opportunity for benefits by failing to give notice as required by law. Moreover, Claimant failed to file a timely Complaint. Under Idaho Workers' Compensation Law, Claimant forfeited his opportunity for benefits by failing to file a timely Complaint as required by law. Because other courts did not address the issues raised here, the legal doctrines espoused by Claimant are inapplicable here.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's exhibits 1 through 18;
3. Defendants' exhibits A through M; and
4. The legal file of the IIC adjudication department regarding this matter.

Claimant's friend, Mr. Harris, spoke on record during the telephonic hearing to assist in overcoming certain difficulties in communications arising from the quality of the telephonic

connection. He was not sworn to provide independent testimony, and his comments are not considered testimony. These comments are reviewed only to the extent they assist in clarifying Claimant's actual testimony.

Claimant submitted a copy of the hearing transcript to which he had made changes, additions, and notations. After review, these are accepted as reasonable clarifications of his testimony.

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

FINDINGS OF FACT

Introductory and procedural matters

1. Claimant worked for Employer at its nuclear facility ("INEL") for about 15 months from January 1976 to January 1978. He worked in the INEL loss of fluid test ("LOFT") and power burst facility ("PBF") research reactor areas and in other areas. Dr. Cheh is a Ph.D. nuclear engineer.

2. Claimant noticed various symptoms of illness no later than December 1977. The symptoms Claimant alleges are related to his radiation exposure at INEL include gastrointestinal problems, reduced immune system, diabetes, loss of teeth due to acid reflux, ptosis (drooping eyelids), cataracts, and depression. He did not notify Employer he suffered a work-related illness or injury at that time. Claimant recalls that Employer recommended Claimant visit a psychiatrist. Claimant left his employment at INEL, in an effort to improve his health. There is no contemporaneously made documentary evidence to indicate what symptoms Claimant reported or what medical attention Claimant sought at that time.

3. No event occurred which would qualify as an "accident" as defined by Idaho Code § 72-102(18)(b).

4. In 1995, Claimant was involved in a car accident, and was treated for neck and back injuries. Claimant argued that he experienced gastrointestinal problems after the car accident, and the parties had arbitration. These are symptoms that Claimant claims are related to his radiation exposure at INEL. A doctor's evaluation of Claimant found no bowel dysfunction in 1991, and Claimant did not report any gastrointestinal problems on February 6, 1992. Claimant's physician, Dr. Wylie, attributed Claimant's gastrointestinal problems to the car accident. (C. July 23rd, 52). The arbitrator found that Claimant failed to relate his condition to the car accident.

5. Claimant formally sought benefits from other jurisdictions relating to his radiation exposure in October 1998, June 2004, and March 2005. On April 25, 2002, Claimant reports that Dr. Ernest Sternglass told him his symptoms were similar to radiation victims, and he should contact a radiation specialist. In March 2005, Claimant pursued federal workers compensation benefits. Claimant argued that he suffered mysterious symptoms starting in 1986, while he was employed at a Nuclear Regulatory Commission (NRC) facility. (C. Hr. Exh., 14). Claimant listed the Three Mile Island (TMI) reactor accident site, operating reactors and spent fuel storage sites in New England, as places where his illness occurred. The Office of Worker's Compensation Programs (OWCP) denied Claimant claim for benefits. Claimant argues that his claim was denied because his symptoms were all from high dose (neutron) radiation, and he was only exposed to low dose radiation at the NRC sites. (C. Feb. 6th, 4). However, OWCP found that Claimant failed to provide substantive and probative evidence to establish exposure to radiation sufficient to "any levels that would have caused the claimed sickness" occurred while

he was employed at NRC facilities, and the medical evidence was insufficient to support Claimant's assertions. (C. Jan. 11th, 25).

6. Claimant retired on January 1, 2000 from the Nuclear Regulatory Commission ("NRC") because of medical disability. (C. "File B", 10). Claimant's retirement documents do not state a connection between Claimant's disability and his exposure to radiation during his career in the industry. (C. "File B", 10). Claimant maintains that his medical disability was due to his radiation exposure.

7. On January 3, 2007, Claimant received a general notice from the USW Worker Health Protection Program which informed former INEL workers of a free medical screening examination and of the Energy Employees Occupational Illness Compensation Program ("EEOICP"), a federal workers compensation program. Claimant claims that the date of receipt of this notice should be considered the date on which he first knew his symptoms were caused by his exposure at INEL.

8. A first report of injury or illness ("Form 1"), dated July 6, 2007, was signed by Claimant. On it, he stated Employer was first notified of this claim on January 22, 2007.

9. Claimant—through an attorney who signed on Claimant's behalf—filed a Form 1 dated August 8, 2007, with the Idaho Industrial Commission on August 9, 2007.

10. The attorney did not appear at or after the time Claimant filed his Complaint. Indeed, the evidence shows that Claimant's attorney/client relationship terminated as of March 21, 2008.

11. Claimant filed his Complaint in this matter *pro se*, on May 13, 2008. On the same day, the Commission sent Claimant a packet of information including relevant rules and

procedures and informed Claimant he was responsible for prosecuting his claim and urging him to obtain the services of an attorney.

Medical data and opinions

12. Claimant submitted extensive documentation at various times during the course of this claim. Nevertheless, the medical records submitted do not fully account for the myriad of medical attention Claimant has sought and received over the years. Thus, it is impossible to verify what various medical providers did or did not record or tell Claimant about whether his symptoms were related to work and radiation exposure. It is impossible to verify when Claimant was first told by any physician he had symptoms of radiation exposure. The record does show the following:

13. During 1975-1997, Claimant published several articles while working for Employer. These articles discussed INEL loss of fluid test ("LOFT") and power burst facility ("PBF") research reactor areas and other related areas.

14. Claimant published an article entitled "The Plight of American Radiation Victims" in which he attributed the following to NRC head nurse Mrs. Mary Pifer, "Unte, With your kind of illness, no one will sell health insurance to you if you leave NRC for whatever reason. You are injured on NRC duty. File a WC claim now before it is too late . . ." By context, this comment could have been made no later than 1992.

15. On November 10, 1994, Rodney V. Burbach, M.D., stated, "He is so consumed with his complaints, I doubt he can do much work. . . . Mr. Cheh is obsessed, depressed, and disabled. I see no identifiable time in the future when he can work productively."

16. Claimant pursued a federal workers' compensation claim based on his radiation exposure. On December 31, 1998, Claimant requested an investigation of the handling of his

case before the federal office of workers' compensation program. (C. Jan 14th, 59). Claimant stated that he worked as a senior engineer/specialist in nuclear reactor R&D/design and safety with various employers through 1967 to 1982.

17. On November 6, 2001, John Wylie, M.D., verified Claimant had been under his psychiatric care since 1994 and that Claimant's physical symptom exacerbations were related to work stress. "There is no question in my mind, and there has never been a question in the past, that Dr. Cheh's psychiatric and physical symptoms are in direct response to work stress." On September 19, 2006, Dr. Wylie reported, "More recently, he has been diagnosed with extensive dental problems, which he has been told is a result of nausea and vomiting secondary to radiation injury."

18. On December 22, 2004, J. Alberto Martinez, M.D. reported, "It is known that both cataracts and dry eyes can be a side effect of radiation."

19. On November 2005, Scott Fitzgerald Daly, M.D., reported, "[tongue lesions are] . . . consistent with his provided history of full-body radiation exposure some years ago."

20. On January 25, 2006, Harry Huang, M.D., reported, "His cataracts and dry eyes are well known to be side effects of radiation and are consistent with Dr. Cheh's history of Radiation Exposure."

21. On February 17, 2006, Daniel Lahr, M.D., reported, "Given his history of full-body radiation exposure I believe that it is reasonable to assume that this [right ankle] lesion is secondary to that exposure."

22. In January 2007, Ernest Chiodo, M.D., opined Claimant's various physical and psychological symptoms were related to his work for Employer and later for NRC.

DISCUSSION AND FURTHER FINDINGS

23. **Notice and Disablement.** This matter arises as an occupational disease claim. No accident occurred or was alleged. Thus, Idaho Code § 72-448 is the applicable statute for determining whether Claimant timely notified Employer of his occupational disease. When Claimant terminated his employment in 1978, the statute required notice to be given within one year of first suffering "incapacity, disablement or death" from radioactive exposure and when he "knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment." Idaho Code § 72-448(2) (1978). Today, and since 1997, the notice requirement provides a sixty-day limitation running from the date of first manifestation. Idaho Code § 72-448 (2009). The law to be applied to a case is the law in effect at the time that the cause of action arose. Alexander v. Harcon, Inc., 133 Idaho 785, 992 P.2d 780 (2000); *citing*, Drake v. State Indus. Spec. Indem. Fund, 128 Idaho 880, 882, 920 P.2d 397, 399 (1996); Frisbie v. Sunshine Mining Co., 93 Idaho 169, 172, 457 P.2d 408, 411 (1969); Peterson v. Federal Mining & Smelting Co., 67 Idaho 111, 114-15, 170 P.2d 611, 613 (1946). The right to compensation accrues and the rights of the party become fixed upon the occurrence of the event which gives rise to the cause of action. *See*, Drake v. State indus. Spec. Indem., *Supra*. In an occupational disease claim, the date of manifestation is the event which gives rise to the cause of action, and determines which version of the statute applies. Alexander v. Harcon, *Supra.* The date of manifestation is when the employee first learns that a condition is the result of an occupational disease. *See*, Miller v. Amalgamated Sugar Co., 105 Idaho 725, 672 P.2d 1055 (1983).

24. Claimant asserts that he first knew, on January 3, 2007, of the relationship between his work at INEL and his symptoms when he received the notice of medical screening

from USW. The USW letter did not discuss symptoms of radiation exposure. The USW letter did not inform Claimant his symptoms were caused by radiation exposure. The letter was intended to reach all workers at the INEL site from 1949 to the present, and did not address Claimant's individual situation. At most, it raised in Claimant's mind the idea that there might be another avenue for obtaining benefits. Nothing about the USW letter can be reasonably construed to establish the date of manifestation. Claimant's assertion that he did not know until 2007 that his symptoms might be related to radiation exposure, is inconsistent with his pursuit of benefits for radiation exposure form other parties for a number of years prior to January of 2007.

25. The record lacks full documentation of Claimant's medical record and the opinions of the many doctors by whom he has been treated. The record contains inconsistent statements from Claimant about his symptoms, and when they first occurred. There is evidence that Claimant exhibited health problems in December 1977, and that Employer encouraged him to seek medical treatment. Claimant has stated that he was experiencing symptoms indicative of radiation exposure in 1977, and, conversely, that his symptoms from radiation exposure did not occur until later points in time. Claimant is a highly educated individual, who was active in publishing cutting edge research in nuclear science while at INEL. Claimant had been told by NRC's head nurse in 1992 and by one or more physicians at least as early as 1994 that his symptoms were related to his work in the nuclear industry, and his exposure to radiation. Dr. Sternglass was unequivocal on April 25, 2002 when he told Claimant, "You are a radiation victim." Claimant sought benefits, alleging his symptoms were caused by radiation exposure, from various sources starting at least as early as 1998. Based on the evidence before the Commission, the date of manifestation may reasonably be as early as January 6, 1978, when Claimant left INEL due to health concerns. The date of manifestation probably occurred no later

than 1998, when Claimant formally began pursuing benefits relating to his radiation exposure, but could have occurred no later than February 2006, when Claimant received Dr. Lehr's report. Assuming, that Claimant was injuriously exposed to radiation while employed at the INEL, we find it unlikely in the extreme that Claimant was unaware of the nature and extent of such exposure at the time of his employment. Claimant is not unsophisticated. Indeed, he holds a Ph.D. in the field of nuclear engineering, and published cutting-edge articles in his area of expertise.

Generally, dates of manifestation are found to have occurred on a specific date, but Claimant has failed to adduce persuasive evidence that his date of manifestation occurred, as he has alleged, only after January 2007. However, we think the record establishes that Claimant's date of manifestation occurred no earlier than 1978, and no later than February 2006. If we assume that Claimant's occupational disease became manifest at some point in time subsequent to the 1997 amendments to Idaho Code § 72-448, then Claimant had 60 days following the date of first manifestation within which to give notice to Employer, and one year within following the date of first manifestation within which to file his claim with Employer. On the other hand, if we assume that Claimant's date of manifestation occurred prior to the 1997 amendments to Idaho Code § 72-448, then Claimant was allowed to give written notice at any time, and file his claim within one year following the date upon which he first suffered incapacity, disability or death from such exposure <u>and</u> knew or in the exercise of reasonable diligence should have known that his occupational disease was caused by his employment. The difficulty lies in determining when, between 1978 and February 2006, Claimant's date of manifestation actually falls.

Fortunately, it is not critical to the evaluation of this case to understand precisely when, between 1978 and February 2006, Claimant's occupational disease became manifest. Regardless

of which version of Idaho Code 72-448 applies, it is clear that Claimant's occupational disease claim is barred by the applicable statute of limitation.

If Claimant's occupational disease manifested prior to July 1, 1997, then the former version if Idaho Code § 72-448 is controlling. Since Claimant became disabled as early as 1994, all that needs to be determined is to ascertain the date upon which Claimant's knew, or in the exercise of reasonable diligence should have know, that his condition was related to his work in Idaho. From the foregoing, there is little difficulty ascertaining that in view of his education, and past actions in pursuing radiation claims, Claimant knew, or should have known, that his condition was casually related to exposure at the INEL facility more than one year prior to the date of the filing of the instant claim. Under the former version of the statute, the claim is time barred.

On the other hand, if we assume that Claimant's occupational disease did not become manifest until after the effective date of the current version of Idaho Code § 72-448, it is still clear that the claim is time barred. Under the current version of Idaho Code § 72-448, Claimant is required to file his claim within one year subsequent to the date of first manifestation. Even if Claimant's date of manifestation is as late as February 2006, it is still clear that the claim was filed more than one year subsequent to the date of first manifestation, and is therefore, time barred. The record establishes that Claimant made his claim with Employer on July 6, 2007.

26. Even if an accident had been alleged, Claimant failed to provide timely notice of accident and injury as required by Idaho Code §§ 72-701 through -706. In briefing, Claimant suggests he remains entitled to medical benefits on the theory that medical benefits have no statute of limitations. Here, Claimant misunderstands and inappositely mixes differing statutes. Medical benefits, once these have been determined compensable, are not cut off automatically by

the five-year limitation applicable to income benefits. However, whether arising as a result of accident and injury or as a result of occupational disease, medical benefits must still be timely claimed under the statutory notice requirements. Claimant is not entitled to medical benefits because he failed to give timely notice of his claim for them.

27. Claimant failed to show that any exception to the notice requirement applies. Employer was clearly prejudiced by Claimant's untimely notice. The exception specified in Idaho Code § 72-704 does not apply because: (1) Employer did not have actual knowledge that Claimant may have suffered from an occupational disease, and (2) Employer was certainly prejudiced by Claimant's delay in asserting a claim. Moreover, Claimant bears the burden of establishing the absence of prejudice in such a situation. *Jackson v. JST Manufacturing*, 142 Idaho 836, 136 P.3d 307 (2006). He failed to do so here.

28. ***Res judicata* and related doctrines.** On September 27, 2007, a federal court ruled Claimant was eligible for Medicare benefits. Claimant asserts this ruling requires the Commission to order Defendants to pay Claimant's medical benefits. The Commission acknowledges and honors the doctrine of *res judicata* where it applies. *Res judicata* does not apply here. *Res judicata* requires that all parties be afforded the opportunity to participate in litigating the issue presented. Defendants were not a party to Claimant's claim for Medicare benefits. Moreover, the law and standards applicable to the receipt of Medicare benefits are different from the law and standards applicable to the receipt of occupational disease benefits under Idaho Workers' Compensation Law.

29. Claimant asserted he was entitled to protection under the U.S. Constitution's doctrines of "full faith and credit" and "privileges and immunities." Again, the Commission

acknowledges and honors those doctrines where they apply. Claimant failed to show how these doctrines apply to his claim for Idaho workers' compensation benefits.

30. **Other issues.** Claimant's multiple submissions to the Commission during the course of hearing and briefing included many extraneous comments, claims, and accusations, some of which may be ameliorated by the following explanations:

31. Claimant repeatedly filed motions for "partial summary judgment." In fact, he received a full hearing on the bifurcated issues which were the primary issues in his request for partial summary judgment. Bifurcation provided Claimant a hearing date much earlier than if all potential issues had been subjected to the discovery process. Hopefully, it also saved Claimant the stress associated with a more extended discovery process.

32. Claimant has alleged malpractice and conspiracy on the part of attorney Paul Rippel. The Commission does not have jurisdiction to adjudicate these claims. Nevertheless, Claimant recorded that he first contacted Mr. Rippel in June 2007. The Commission finds that relevant statutes of limitation had expired long before Claimant first contacted Mr. Rippel.

33. Claimant has alleged a conspiracy by Commission employees to deny him contact with various other Commission employees. He carried this allegation to the Department of Insurance. The Department of Insurance replied in writing to Claimant explaining to him why he could not talk to just everybody within the Commission after he had filed a Complaint. Commission employees appropriately and considerately assisted Claimant in his many telephone calls with two exceptions: (1) They declined to inappropriately speak directly with him when it was believed he was represented by an attorney; and (2) They declined to speak directly with him after he had filed a Complaint for Idaho workers' compensation benefits.

34. As to the first exception, Mr. Rippel filed a Form 1 on Claimant's behalf. Until the Commission received affirmation from Mr. Rippel that he had, in fact, terminated the attorney/client relationship with Claimant on March 21, 2008, it would have been inappropriate for any Commission employee to directly advise Claimant if he were represented by an attorney.

35. Also, JRP Rule 14 relates to the withdrawal of an attorney making a general appearance after a Complaint has been filed. No other written policy or requirement relating to the withdrawal of an attorney is known to exist. Claimant requested a copy of the Commission's approval allowing Mr. Rippel's withdrawal from representation. As the Referee explained to Claimant, because Mr. Rippel did not appear at or after the Complaint was filed, no such approval was required. Once Mr. Rippel had orally confirmed he no longer represented Claimant, Commission employees resumed communication with Claimant until the date he filed his Complaint.

36. As to the second exception, the Commission's Judicial Rules of Practice and Procedure ("JRP"), Rule 5, prohibits Commissioners and Referees from having *ex parte* contact with a party after a Complaint has been filed. Similarly, as explained by the Department of Insurance, once the Complaint had been filed, the Commission's role as an impartial court would prohibit other employees within the Commission from providing undue advice or assistance. It was entirely appropriate for Claimant to hold all communications only with the Referee's assistant, Dena. To the extent that Claimant's allegations may be construed to be a motion to have Dena fired, that motion is DENIED.

37. In sum, Claimant has been filing claims for benefits for his radiation exposure since 1998. He has filed a federal workers compensation claim and filed for benefits under the federal act (EEOICP) that was specifically promulgated in 2000 for workers like him. He finally

got around to notifying Defendants no earlier than January 2007. Claimant's claim for Idaho workers' compensation benefits should be dismissed for failure of timely notice.

CONCLUSIONS OF LAW

1. Claimant's claim should be dismissed for failure to notify Defendants within the statutory time limit;

2. All other issues are rendered moot by the failure of timely notice.

ORDER

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

1. Claimant has failed to meet the statutory and notice requirements of Idaho Code §§ 72-448 and 72-437 and §§ 72-701 through 72-706.

2. Claimant has failed to show that prior adjudications by other courts bind the Idaho Industrial Commission.

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

DATED this 30TH day of JULY, 2009.

INDUSTRIAL COMMISSION

/S/_____
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 30TH day of JULY, 2009 a true and correct copy of **Findings of Fact, Conclusions of Law, and Order** was served by regular United States Mail upon each of the following persons:

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