

2. Whether apportionment for a preexisting condition pursuant to Idaho code 72-406 is appropriate;
3. Whether Claimant is medically stable and, if so, when; and
4. Whether and to what extent claimant is entitled to:
 - a. Temporary disability (TTD),
 - b. Permanent impairment (PPI),
 - c. Permanent disability,
 - d. Retraining,
 - e. Medical care benefits, and
 - f. Attorney fees.

Defendants moved to strike Claimant's reply brief as being overlong under Commission Rules. Without comment on the merits of the varying interpretation of the Rules, Defendants' motion is Denied.

CONTENTIONS OF THE PARTIES

Claimant contends she was exposed to an odor for several hours at work. The odor came from the improper use of chemical, probably sulfuric acid, to unstop a plugged toilet or bathroom floor drain. She suffered injury to her lungs. She has been unable to work around any odor since. She is totally disabled as an odd-lot worker. Defendants' actions give rise to her entitlement to an attorney fee award.

Defendants contend Claimant was not actually injured by the odor. She has failed to prove it caused any lung injury. The symptoms Claimant complains of are a result of longstanding asthma exacerbated by gastroesophageal reflux disease ("GERD"). Her inability to tolerate benign odors demonstrates the existence of a psychological component to her symptoms which is unrelated to the accident. She is not entitled to benefits. Moreover, Idaho Insurance Guaranty Association ("the Fund") is not liable for medical payments previously reimbursed by any third-party payer and is not liable for attorney fees by statute, Idaho Code § 41-3605(7).

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

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, and of toxicologist Stephen Munday, M.D.;
2. Claimant's Exhibits 35 – 57;
3. Defendants' Exhibits 1 – 34;
4. Posthearing depositions of Claimant's father Warren "Dan" Gorringe, Claimant's husband David Knowlton, and former employee Jay Brown;
5. Posthearing depositions of expert witnesses pulmonologist Holly Carveth, M.D.; allergy and immunologist and treating physician Ronald Fullmer, M.D.; neuropsychologist Craig Beaver, Ph.D.; vocational rehabilitation experts Douglas A. Donohue Crum and Barbara Nelson.

After examining the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked for Employer as a unit secretary. On September 12, 2000, she was working at her station when a maintenance man used a chemical to unstop a toilet or bathroom floor drain in a patient's room. The chemical caused a foul odor which Claimant described as an "orange citrusy" smell "like an air freshener." Hospital staff ventilated the area by placing a portable fan in the doorway of the patient's room. Combined with other fans which were always present, the smelly air blew past Claimant's station for the rest of her shift. Claimant recalls that the odor "got stronger and stronger" as the day wore on. Claimant also recalls smelling another odor, like "rotten eggs," coming from the kitchen around lunchtime. This odor was not as strong around her work station. She recalls kitchen personnel telling her that smell was coming up through the drains.

2. After several people complained about the "citrusy" odor, Claimant began calling

supervisors and others to ameliorate the odor. The director of nurses and the infection control nurse conferred and moved a patient from the room where the chemical was used to another part of the hospital.

3. Claimant recalls that she heard at least one person complain that the odor was giving her a headache. Claimant developed her first symptom, a headache, later that day.

4. In a 2003 deposition, Claimant first recalled that she worked from just after 8:00 a.m. until 11:30 p.m. She described in detail taking a meal break about 7:00 p.m. and noticing that her lungs burned as she took deep breaths in the cold outdoor air. By the date of hearing, after reviewing documents, she recalled that she worked only until about 4:00 p.m. She recalls that by the time she finished her shift and got home, she had developed a cough and body aches. She recalls that by the next morning she had a productive cough.

5. Claimant arrived to work her regular shift the day following the exposure. As the day progressed, her symptoms worsened. She arranged to be relieved around lunchtime. She also worked only a partial day on the next day as well.

6. The exposure occurred on a Tuesday. Claimant first sought medical attention on Friday. On September 15, 2000, she visited Laria Thomas, F.N.P. Nurse Thomas recorded Claimant complained of a “cough, sore throat, burning when she takes a breath.” Examination revealed “Posterior pharynx is trace injection. Minimal submandibular lymphadenopathy bilaterally. Clear bilateral breath sounds.” Nurse Thomas prescribed antibiotics, cough syrup and an inhaler. A chest X-ray taken on a follow up visit showed was normal.

7. When Claimant returned to work on Monday, she completed an accident report. At that time, Claimant was told the chemical used to unstop the toilet was sulfuric acid.

A material safety data sheet (“MSDS”) describes hazards associated with a sulfuric acid containing product called Biotron. Claimant doubts whether Employer has produced the MSDS for the actual product she smelled on the date of the exposure.

8. Claimant recalls she developed voice problems during the week following her first medical visit. This memory is unsubstantiated by medical records. “Hoarseness” first appears in the medical records one month after the exposure.

9. On September 25, 2000, Claimant visited Thomas Pryor, M.D. The only complaint he recorded was a cough. On exam, Claimant was normal except for the cough and bronchitis in her lungs. Her sinuses were normal. Dr. Thomas described bronchitis which Claimant had linked to the exposure. On a September 28, 2000 follow-up visit, Claimant reported she had developed a sore chest from coughing and a sore throat. On examination, Dr. Pryor noted “pretty impressive inflammation” in her sinuses. He provided a release from work. By October 4, Dr. Pryor noted Claimant’s inflammation had “improved profoundly.”

10. On October 4, 2000, Nurse Thomas provided Claimant a release from work retroactive to the date of the exposure.

11. On October 5, 2000, Claimant telephoned Nurse Thomas and reported a second exposure, this time to “some cleaners” at work which, Claimant reported had caused a flare up.

12. On October 13, 2000, Claimant visited Ronald Fullmer, M.D. She complained of shortness of breath and hoarseness. A history taken at that visit noted Claimant began smoking cigarettes “less than” one year earlier. She reported a “burning” in her nasal passages occurred at the time of the September 12, 2000 exposure but had resolved. On examination, Dr. Fullmer noted that Claimant’s vocal distortion became more normal

when she was “off the topic” of the exposure. Her head, eyes, ears, nose, and throat were all objectively normal, as was her breathing.

13. On October 25, 2000, Nurse Thomas prescribed Wellbutrin at Claimant’s request to help her stop smoking.

14. On December 11, 2000, Claimant reported to Nurse Thomas that she experienced two episodes of reactions to food. Claimant inquired about MSG or some sulfa-containing component to the food. She described eye and skin symptoms. These symptoms were not noted in the record of her examination that day. An issue of sulfites in food arose after Claimant began her own internet research. No medical provider has opined that other sulfur-containing chemicals are clinically related to sulfuric acid in a way that might exacerbate symptoms caused by exposure to the latter.

15. By the time of her December 20, 2000 visit to Dr. Fullmer, she had developed new symptoms which she attributed to new triggers. On examination, Dr. Fullmer again found all relevant systems to be objectively normal. He opined, “It seems quite unlikely that she would have persistent inflammation or injury related to the exposure 3½ months ago.” He attributed her symptoms to “anxiety.” Later, Dr. Fullmer opined that Claimant suffered a “minor to mild injury” which lasted “possibly of a prolonged duration of perhaps” four to six weeks. He opined that any injury or symptoms lasted no more than four to six weeks. He opined that her increasing, multiple complaints were not related to the exposure but were possibly related to very mild asthma, secondary gain, or anxiety. He opined her vocal symptoms were “psychogenic.” He rated her as having no restrictions and no PPI.

16. Claimant recalls that the inhaler which was prescribed made her nauseated, dizzy, and gave her a headache. Dr. Fullmer’s record addressed the possibility that a steroid

inhaler could exacerbate some throat discomfort. The steroid inhaler was discontinued.

17. On December 27, 2000, Claimant first visited Richard E. Henry, M.D. From this visit forward, Claimant provided her treating physicians with a history which was materially inconsistent with the medical records generated in September and October 2000.

18. In the weeks and months after the exposure, Claimant continued to develop additional symptoms whenever she came near an ever-expanding list of triggering odors. She developed bouts of hives and body rashes, watery eyes, scratchy throat, sinus swelling and runny nose, dental problems, and other symptoms. She came to link various combinations of symptoms to exposure to cold air, motor vehicle exhaust-both gasoline and diesel, animal dander, pollens, dust, soaps and cleaning products, perfumes and scents in grooming products, the smell of marking pens, industrial chemicals used for farm machinery maintenance, consumption of alcohol and many foods, wood smoke and other people's cigarette smoke, etc. Incongruously, she occasionally smoked cigarettes while driving but reported no breathing or other problems when doing so.

19. Specific allergen testing by pinprick to her back produced negative results for every pollen, dander, and chemical tested.

Prior Medical History

20. In 1988 at age 18, Claimant was examined by Dr. Fullmer. Among her Complaints, she included mild dyspnea. Dr. Fullmer testified he considered differential diagnoses including chronic bronchitis and early asthma, but believed depression was the more likely cause.

21. In 1997 and 1998, Claimant reported a two-year history of intermittent irritability and fatigue. Claimant suspected a thyroid problem.

22. According to her reports to doctors, Claimant began smoking sometime between August 25, 1998 and April 13, 1999. Claimant inconsistently reported her smoking habits after the exposure.

23. On May 28, 1999, Claimant visited Nurse Thomas and complained of eye and nose symptoms related to mowing the lawn. Nurse Thomas diagnosed allergic rhinitis.

Physicians' Opinions

24. In deposition, treating physician Ronald Fullmer, M.D., opined Claimant's symptoms were inconsistent with exposure to inhaled sulfuric acid. He considered GERD to be the more likely cause. He considered differential diagnoses of mild asthma and anxiety to be more likely than reactive airways dysfunction syndrome ("RADS"). He opined that the onset of increasing symptoms in the weeks after the exposure was more likely evidence of a psychological component. He held to his opinions expressed in his medical records in 2000. Dr. Fullmer explained his reasons underlying his opinions. Giving the Claimant the benefit of any possible doubt, he opined Claimant became medically stable from any possible inhalation injury within six weeks of the exposure.

25. Nurse Thomas was sympathetic with the diagnosis of RADS, but declined to express an opinion.

26. Holly Carveth, M.D., is a pulmonologist. She first examined Claimant on January 9, 2001. She opined Claimant suffered from RADS as a result of the inhalation exposure. She opined Claimant also suffered from Irritable Larynx Syndrome. She opined Claimant's vocal cord dysfunction was related to anxiety and acid reflux. She opined the acid reflux was exacerbated by Claimant's cough which was caused by the inhalation exposure. Dr. Carveth's opinions would not be changed if the chemical to which Claimant was exposed

was something other than sulfuric acid. Dr. Carveth opined that the presence of the fans concentrated the irritant which Claimant inhaled during the exposure.

27. William W. Wallace, M.D., specializes in allergy immunology. On September 30, 2005, he conducted allergen testing by pinprick on Claimant's back. He opined she exhibited no allergic reaction to any of the potential allergens for which he tested: pollens, dander, etc. He opined she had no allergies related to possible sulfuric acid exposure. He denied the existence of a potential link between sulfites and Claimant's reported reactions to foods.

28. On September 30, 2005, Stephen W. Munday, M.D., evaluated Claimant at Defendants' request. Dr. Munday specializes in occupational environmental medicine and toxicology. He opined Claimant does not suffer from RADS. Dr. Munday is well familiar with the criteria required for a diagnosis of RADS and has discussed it with the doctor that first described and named the condition. Claimant's history does not meet the criteria for a diagnosis of RADS. Dr. Munday opined Claimant's symptoms which developed more than a few days after the exposure are not related to the exposure. Noting that Claimant reported throat and lung symptoms but not eye and nose symptoms, Dr. Munday opined these reported symptoms were inconsistent with an inhalation exposure and were consistent with a diagnosis of GERD. He opined that the multiple tests Claimant has undergone do not show it probable that Claimant suffers from asthma.

29. In August 2007, Craig W. Beaver, Ph.D., performed a neuropsychological IME at Defendants' request. He performed tests over a two-day visit with Claimant. He opined inhalation exposure was not the predominate cause of Claimant's symptoms initially and was not a probable cause of her later-appearing symptoms. He attributed her later-appearing symptoms as probably psychologically, not physically, caused. He opined that asthma was

known to be related to somatization and that Claimant developed a “conditioned relationship” of exhibiting symptoms as a result of emotional distress, anxiety, and depression, all of which stemmed from a naïve personality.

DISCUSSION AND FURTHER FINDINGS OF FACT

30. **Credibility – Claimant.** Claimant’s demeanor was most notable for her vocal distortion when she became emotional. From the outset of the hearing, she spoke with a tight, high-pitched voice. This came and went during questioning but was most clearly brought on when she described emotionally charged events which brought her near tears. Claimant became tearful and exhibited vocal distortion when describing events that brought her sorrow and when describing events which brought her frustration. This demeanor exhibited more than a few times during her testimony at hearing. It was most notably absent at times when she became argumentative with the cross-examiner.

31. Claimant’s testimony demonstrates she casually shifted from recalled fact to speculation without being aware she had done so. In her attempts to answer questions, it is impossible to separate actual memory from her supposed guesses at what might have happened.

32. Materially significant portions of her testimony were internally inconsistent among her 2003 deposition, her 2004 deposition, and her 2008 hearing testimony. This is not to say that Claimant deliberately lied. On the contrary, she appeared to attempt honesty at all times. However, over time her memory has become so confabulated with the story of her illness that no part of her memory of these events or her symptoms can be accepted at face value.

33. Concerning her symptoms, treatment, and conversations with her medical providers, Claimant’s testimony is materially inconsistent with that of the physicians who treated or examined her. To the extent inconsistency arises, medical records and the

physician's memory and testimony is given greater weight.

34. **Other Witnesses.** Claimant's recollection of conversations with various co-workers is materially inconsistent with the memories of the co-workers. Again, where relevant to dispositive issues, the testimony of co-workers is given greater weight.

35. A parade of family members and co-workers testified that before the date of the exposure, Claimant was without symptoms and was a hard worker. They testified that afterward, Claimant exhibited breathing, vocal, or other symptoms. Testimony concerning these points is credible.

36. **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). The exposure itself is problematic. An unknown chemical of unknown strength was blown by fans a distance of over 15 feet down a hallway past the place where Claimant sat. The best evidence of record suggests the chemical irritant was likely sulfuric acid. Claimant provided only hearsay testimony that at least one person other than herself reported a headache that day. No other co-workers were reportedly harmed in any way. Claimant reported that she smelled two separate odors, one coming from the patient's room and the other coming from the kitchen. Moreover, records show that Claimant reported she experienced symptomatic reactions on two other occasions – October 4 and October 30 – to the smell of cleansers which were being used by co-workers. These cleansers were not shown to be in any way toxic. These subsequent episodes were merely the first of the myriad smells Claimant asserts she became sensitized to.

37. Reactive Airways Dysfunction Syndrome, (“RADS”) was first described in 1985. RADS is a subset or form of asthma. Among the clinical criteria required for a RADS diagnosis are the “documented absence of preceding respiratory complaints . . . very high concentrations [of chemical irritant, and] . . . onset of symptoms occurred within 24 hours after the exposure and persisted for at least three months.” Each of these factors is equivocal or absent according to the medical records of treating physicians.

38. Dr. Munday’s thorough report and testimony was persuasive. No external chemical, whether sulfuric acid or another irritant, could likely have caused Claimant’s lung and throat symptoms without first significantly burning her eyes and nose. The medical records nearest the exposure noted that Claimant’s most significant complaint was a cough. Referring to the day of the exposure, there is a passing reference to a burning sensation in Claimant’s nose but no mention of eye irritation. By context, if either her eyes or nasal passages had been significantly burned, there would likely have been a more prominent mention of it, and the examination would likely have revealed injury to those organs. He explained how GERD was more consistent than chemical inhalation. Dr. Munday also explained why GERD was the likely cause of Claimant’s cough and burning sensation in her lungs and throat.

39. The opinions of treating physician Dr. Fullmer and expert toxicologist Dr. Munday are consistent with each other. Together, they establish that Claimant’s exposure on September 12, 2000 did not cause any symptoms or condition which would have reasonably required medical care.

40. However, this set of facts exposes a troubling proposition. Claimant genuinely believed she had been exposed to a toxin. An actual event made this belief reasonable.

Employer was unable to immediately identify the chemical to which she had been exposed. The policy of “sure and certain relief” for injured workers suggests that a worker in this circumstance should not be strictly liable for the cost of initial diagnosis and treatment if she is wrong about such an event being the cause of her symptoms. Throughout the rest of September and October 2000, Nurse Thomas, Dr. Pryor, and Dr. Fullmer all provided reasonable medical care related to the exposure, even though the event was ultimately determined not to have caused Claimant’s condition. Dr. Fullmer acted cautiously in opining at the time of treatment that Claimant’s symptoms were probably related to the exposure. Dr. Fullmer’s abundance of caution in his initial assessments of Claimant are sufficient to allow Claimant medical benefits for that initial six-week period.

41. Claimant is not entitled to temporary total or partial disability benefits because this was found to be a noncompensable claim. While the Commission is awarding medical care for the initial six-week period, we have found Claimant is entitled to medical care as an expense of investigating the compensability of the claim.

CONCLUSIONS OF LAW

1. Claimant failed to show that the symptoms for which she sought medical attention probably were related to the exposure to odor she experienced on September 12, 2000.

2. Claimant’s medical treatment for the six weeks following the September 12, 2000 exposure was a reasonably related precautionary to exposure by an unknown airborne irritant and therefore, Claimant is entitled to medical benefits for that period only.

3. Claimant failed to show she was entitled to temporary disability benefits or any other workers’ compensation benefits.

4. 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 16TH day of October, 2009.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

3. Claimant failed to show she was entitled to temporary disability benefits or any other workers' compensation benefits.

4. All other issues are moot.

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

DATED this 3RD day of NOVEMBER, 2009.

INDUSTRIAL COMMISSION

Unavailable for signature

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 3RD day of NOVEMBER, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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