

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES BRENNAN,)
)
 Claimant,)
)
 v.)
)
 SELKIRK PRESS, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2009-025084

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

January 30, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Coeur d’Alene, Idaho on May 19, 2011.¹ Claimant, James Brennan, was present in person and represented by Starr Kelso, of Coeur d’Alene, Idaho. Defendant Employer, Selkirk Press, Inc. (“Selkirk”), and Defendant Surety, State Insurance Fund (“Surety”), were represented by H. James Magnuson, also of Coeur d’Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on November 28, 2011.

ISSUES

The issues to be decided by the Commission from evidence presented in connection with the hearing are:

¹ The transcript of the hearing inaccurately identifies the hearing date as May 19, 2010.

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-448; and

2. Whether Claimant incurred a compensable occupational disease.

CONTENTIONS OF THE PARTIES

Claimant contends that his acute herniated disc at C4-5 constitutes a compensable occupational disease that manifested on September 28, 2009, the same date on which he provided Defendants with notice. He relies upon the testimony of Bret A. Dirks, M.D., his treating neurosurgeon for several spinal surgeries (including a bi-level fusion at C5-6, C6-7 in July 2008), to prove that repetitive motions at work caused his C4-5 herniation, that Claimant's condition constitutes an occupational disease and that the disease did not manifest until September 28, 2009. Key evidence includes a September 10, 2009, MRI of Claimant's cervical spine which indisputably indicates a herniated disc at C4-5.

Defendants counter that Claimant's acute herniation at C4-5 is the result of abnormal movement due to his preexisting C5-6, C6-7 fusion and his preexisting pathology at C4-5. They rely upon the testimony of Jeffrey J. Larson, M.D., who conducted an independent medical examination on December 14, 2010. Key evidence includes a February 13, 2008, MRI, taken two months before Claimant began working at Selkirk, establishing a broad-based protrusion at C4-5.

OBJECTIONS

Claimant objected to the admission of Defendants' Exhibit 9 at the hearing on the grounds that the documents contained therein are irrelevant, duplicative, and lacking foundation and authentication. Specifically, he objected to the Lump Sum Settlement Agreement ("LSA") and claims documents related to Claimant's February 6, 2008, cervical spine injury that he

incurred while working for a different employer. The Referee finds the documents in Exhibit 9, including the LSA, a claim form, and medical records which Claimant agrees are contained in Dr. Dirks' report and are otherwise admissible, bear sufficient indicia of reliability and authenticity. In addition, the injury addressed by the Exhibit 9 documents, its connection (if any) to the injury alleged in the instant matter, and Claimant's waiver of rights with respect to the earlier injury, are directly material to this case. Claimant's objections to Exhibit 9 are overruled; Exhibit 9 is admitted into the record.

All other pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The prehearing deposition testimony of Bret A. Dirks, M.D., taken August 3, 2010;
3. The prehearing deposition testimony of Claimant taken September 29, 2010;
4. Claimant's Exhibits A through D admitted at the hearing;
5. Defendants' Exhibits 1 through 8 and 10 through 13 admitted at the hearing;
6. Defendants' Exhibit 9 admitted, above;
7. The transcript of hearing held on May 19, 2011;
8. The post-hearing deposition testimony of John Zornick taken May 23, 2011; and
9. The post-hearing deposition testimony of Jeffrey J. Larson, M.D., taken June 9, 2011.

After having considered the evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

VOCATIONAL BACKGROUND

1. **Vocational history.** Claimant was 59 years of age and residing in Rathdrum, Idaho at the time of the hearing. He was employed in the printing business from the time he was in junior high school. He took printing classes in junior high, high school and junior college. Through school and work experience, Claimant learned how to set type manually on older machines, as well as how to run modern computerized type-setting machines.

2. From 1979 until he sold it in 2006, Claimant ran his own printing business. He served primarily as the pressman for a period which is not clear from the record. Similarly, neither Claimant's day-to-day duties, nor the types of presses he operated at his business, are evident from the record.

3. Claimant sold his business, in part, because his health was declining. He was unable to do any physical work for significant periods of time, beginning at least as early as 1996, due to migraines, three low back surgeries and multiple strokes in approximately 2003 that paralyzed him for one and one-half years.

4. After selling his business in 2006, Claimant worked as a light welder for ARC Industries for approximately one year. He does not recall any difficulties performing the duties of that job. He then worked at a Christmas store in Spokane, Washington, printing Christmas cards, for a short period. The record does not reflect Claimant's duties in this job or the type of equipment he operated.

5. Thereafter, Claimant was employed by the Idaho State Liquor Dispensary ("ISLD"), from approximately 2007-2008. At ISLD, Claimant sustained a neck injury requiring a bi-level cervical spine fusion surgery in July 2008, as described more fully below.

6. **Claimant's employment at Selkirk.** In April 2008, after leaving ISLD but before undergoing his first cervical spine surgery, Claimant went to work for Selkirk as a press operator and cameraman stripper. He worked at Selkirk until August 14, 2009.²

7. When Selkirk hired Claimant, Claimant had cervical spine pain and radiculopathy secondary to C5-6 and C6-7 herniated discs and spondylosis associated with his injury at ISLD. Selkirk made accommodations to enable Claimant to do his job. John Zornick, sales representative for Selkirk since 1984, testified that these accommodations were memorialized in documents created on April 23, 2009, and November 9, 2010 (*see* CE-C and DE 11, p. 1232). Specifically, Claimant worked only five to seven hours per day. In addition, someone else:

- a. Cut paper for Claimant's large orders and delivered it to him on a cart;
- b. Moved Claimant's completed print jobs to the bindery area;
- c. Changed the cutter blade when necessary;
- d. Moved freight or other heavy objects; and
- e. Performed repairs and other functions that required bending, twisting or head-turning.

8. Claimant did not strongly dispute that Selkirk provided some accommodations. However, he persuasively testified that he bent, twisted and turned his head throughout the work day to do his job.

9. Selkirk, Claimant explained, was smaller than his own printing business – approximately three or four people were responsible for the entire production end of the business. Claimant was mainly responsible for running the large four-color press (the "GTO"), which required almost all adjustments to be made manually:

² Claimant testified that he worked for Selkirk from April 2008 until August 19, 2009; however, a letter from Selkirk to Surety indicates his last day was August 14, 2009. Also, payroll records indicate August 14 was Claimant's last day. The Referee finds Claimant's last day of work at Selkirk was August 14, 2009.

THE WITNESS: ...The GTO was a pretty mechanical press, everything had to be mechanically done. There were a few buttons that you could push to turn it on, drop your rollers, but that's pretty much [all of the] automation at that press there.

Tr., pp. 21-22. The smaller machine (the "QM"), a two-color press, was more automated:

BY MR. KELSO:

Q. Was there another press?

A. Yes, there is another press, it was a smaller press, that was more automated. Like I said before, when you put the plate on, you just put it in the clamp and push a button, the plate went on automatically. It was [*sic*] a few more modern aspects to that press than the bigger press.

Id. at 22. At the hearing, Claimant was out of his seat during a large portion of his testimony, miming the activities he performed while completing a print job. He showed how he had to move in order to perform machine adjustments, feed paper, curl and stack paper, mill ink, mount plates and otherwise operate the presses.

10. Before working for Selkirk, Mr. Zornick was a press operator on machines like the GTO and the QM. He described the printing process in detail, but did not specifically address any particular physio-mechanical motions required to complete any step in that process. Mr. Zornick has no supervisory responsibilities at Selkirk's and he did not routinely observe Claimant doing his job.

11. Documentation prepared by a press operator at Selkirk indicates that standing and watching is 80% of the pressman's job. DE 11, p. 1237. However, both Claimant's and Mr. Zornick's testimony illustrated that this is a misleading characterization. When the press is running, the pressman must constantly check the quality of the copy and make adjustments to maintain uniformity.

12. Claimant testified that setting up the GTO press for a run took 45 minutes to three hours. After a run was initiated, he had to check sheets throughout the run and periodically wipe down the plates, remove paper and mill the ink, among other things.

13. In great detail, Claimant described the plate-mounting process, which involves some shoulder-level lifting and manipulation, as well as other movements at other levels, including crawling. He testified that he performed the entire process up to ten times each day.

14. Claimant described how he would have to lean forward, arms extended at about waist height range, to stack sheets of paper to feed into the press or to “roll” papers that curled due to too much water in the ink solution. (*see* Tr., p. 46). In addition, he described how he stacked all of the newly printed items. This work was also done below shoulder height.

15. Further, Claimant needed to “mill” the ink for 30 minutes before each print job, and then periodically during each run. This essentially required him to stir the ink, located at or above his head, with a putty knife. Along those lines, Claimant also needed to “constantly” adjust the ink feeders by reaching forward to a height of six feet, which is over Claimant’s head. By “constant”, Claimant demonstrated that he had to simultaneously keep a watchful eye on the ink consistency and ink feeders, the paper feed and output, and other processes at other locations on the GTO, adjusting each as necessary.

16. Claimant also performed daily prepress stripping, which required him to bend over a four-foot-tall light table for two to three hours each day to place copy and mounting plates and blankets on the press. On February 9, 2009, Claimant sought treatment for low back pain he attributed to working on the light table. There is no evidence he ever complained of neck pain related to that work.

17. On February 11, 2009, Teresa Reed, consultant with the Industrial Commission Rehabilitation Division, prepared a Job Site Evaluation with the assistance of Craig Stevens, M.D., a physiatrist. Among other things, Dr. Stevens opined that Claimant should lift up to 20 pounds no more than occasionally (1-33% of the time), and that he should not perform any overhead reaching activities.

18. Claimant did not report any cervical spine problems to Selkirk, other than his preexisting C5-6, C6-7 condition, while he worked there.

19. On August 14, 2009, Claimant was discharged from his job at Selkirk because he did not demonstrate proficiency in operating the press. Claimant disputes the truth of this assertion, but he acknowledges that this is Selkirk's position.

20. On September 28, 2009, approximately six weeks after he was discharged, Claimant notified Selkirk via telephone that he was filing a workers' compensation claim related to back problems that were worsened by his work at Selkirk. In a note memorializing Claimant's call, Stacey Lukac (of Selkirk) reported that Claimant was alleging back problems:

9/28/09

Received a call from Jim Brennan Today [sic] 9:25am. [sic] He called to inform us that he was filing a workman's comp claim against us, because he was having back problems that were aggravated at work.

As of his last day on 8/14/09 Selkirk Press has never had any reports from Jim Brennan that he was having back problems do [sic] to work.

Jim was hired with a previous industrial injury and after his Surgery [sic] in July of 2008, he was still limited in his abilities and could not fulfill all his responsibilities. There for [sic] we implemented a permanent production flow to accommodate his limitations by removing any of the, [sic] heavy lifting, freight checking, paper cutting and moving of completed jobs to the bindery area when done.

...

DE 11, p. 1255. However, Claimant's First Report of Injury ("FROI"), also dated September 28, 2009, indicates he believed he suffered a "neck strain" affecting his "neck" from "repetitively running [the] press" on June 15, 2009. CE A.

MEDICAL BACKGROUND

21. **Health history.** Claimant underwent low-back surgeries in 1996 (spinal hemilaminectomy with discectomy and osteophyctectomy at L4-5 and L5-S1), 1997 (removal of a recurrent disc at L4-5) and 2003 (partial laminectomy at L3; laminectomies at L4, L5 and S1; and a bi-level fusion from L4 to S1). Bret A. Dirks, M.D., neurosurgeon, performed all three surgeries. None were work-related.

22. Claimant has permanent restrictions on lifting and bending as a result of his low back condition. He also has periodic pain, for which he takes Aleve or Methadone, prescribed by his long-time family physician, Richard Bell, M.D.³

23. Also, in 2003, Claimant suffered three strokes, one of which left him paralyzed on the right side for one and one-half years. Claimant eventually recovered from his strokes with no medical restrictions or limitations, except that he now transposes numbers.

24. From approximately 1996 through 2006, Claimant was additionally treated for (among other things) hypertension, chronic low back pain, diabetes, detached retina, hypotestosteronism, sleep apnea, depression and migraines. Claimant sometimes experienced right arm, leg and/or lip numbness, which he attributed to his migraines even though the numbness occasionally persisted longer than the headache.

25. With respect to his migraines, Claimant was monitored closely and warned by several physicians about certain activities that they flagged as drug-seeking behaviors.

³ Claimant testified that Dr. Bell has been his family physician since 1979; however, his medical records indicate he was referred to Dr. Bell in 1996.

Specifically, in 1996, Claimant was told to find a primary physician and to stop going to the emergency room whenever he needed pain medication. Claimant had been to the emergency department at Kootenai Medical Center (“KMC”) six times in seven months for that purpose. Chart notes reflect that, on one visit, Claimant left after receiving narcotic pain medication, and before he was even examined. Another time, he told hospital staff that he had a ride home, but he was observed driving himself away from the hospital.

26. As directed by KMC staff, Claimant established care with Dr. Bell, who noted repeatedly over the years that he was tapering Claimant off of narcotics, specifically Methadone, that Claimant agreed with this plan, and that Claimant had received his last prescription. However, Claimant always asked for more, and Dr. Bell always complied. In April 2008, Dr. Bell discovered Claimant had obtained narcotics from six different physicians at five different pharmacies over the previous three-and-a-half months or so. As a result, he wrote Claimant a letter advising he would no longer prescribe pain medications for him. However, after meeting with Claimant, Dr. Bell changed his mind. He felt Claimant had not schemed to obtain pain medications. Claimant’s medical records clearly establish a history of narcotic dependence. Under Dr. Bell’s supervision, Claimant’s narcotic use appears well-controlled currently.

27. While Claimant worked at ISLD, from approximately 2007-2008, he had neck pain and symptoms, including right arm numbness, which came and went. Dr. Bell noted pain without explanation in Claimant’s right thumb, left elbow and left knee (March 2007); right middle trigger finger and left shoulder pain (June 2007); left-sided neck pain attributed to muscular tightness (August 2007); neck stiffness (September 2007); and left-sided neck pain with occasional “zingers” (December 2007). On January 2, 2008, Dr. Bell reported:

Jim's had neck pain. It has been bothering him more and more. It's most bothersome on the left. He does have some numbness that goes down his right upper extremity. He gets his neck to "pop" when that occurs, then the numbness goes away. If he can't get his neck to pop, then the numbness persists until he's able to do that. He has set an appointment up with his neurosurgeon, Dr. Dirks, but that appointment is several weeks off. He needs a refill of Methadone. He needs the Methadone for his migraines and has also been using it recently for his neck pain and upper back pain.

DE 2, p. 209. Dr. Bell advised Claimant to see Dr. Dirks and to just wait and watch his symptoms since his numbness had always resolved on its own. He also refilled Claimant's Methadone.

28. On January 23, 2008, Claimant complained of worsening neck and upper back pain, with radiation into the back of his left arm and intermittent numbness in his left hand. Claimant reported that when he cracked his neck, he developed a migraine and needed more Methadone. The chart note indicates Claimant was taking 1-2 Methadone pills (5 mg.) per day. Claimant declined any imaging or nerve conduction testing at that time because he did not have insurance.

29. **Cervical spine injury at ISLD.** On February 6, 2008, Claimant sustained a neck injury while shoveling snow at ISLD. Claimant's neck pain and radiculopathy, previously evident bilaterally but more significant on the left, worsened. He obtained immediate medical treatment at KMC.

30. An MRI taken February 13, 2008, identified multi-level degenerative disc disease and focal C6-7 left foraminal disc protrusion consistent with Claimant's left arm radiculopathy symptoms. The MRI report also identified pathology at C4-5 including right ventral cord abutment:

FINDINGS: ... The C4-5 disc level demonstrates mild anterior spondylotic change and facet degenerative change with shallow disc

displacement or disc bulge and mild ventral thecal sac effacement. Minimal bilateral uncovertebral joint hypertrophic change without high-grade foraminal encroachment. ...

CONCLUSION: ... C4-5 broad-based central and right paracentral disc protrusion with right ventral cord abutment. ...

DE 7, p. 45.

31. Claimant underwent a course of physical therapy, where it was noted that he had pain and weakness in his right upper extremity, as well as his left. (*See*, for example, DE 9, p. 1122-1123).

32. Conservative treatment methods failed and, on July 23, 2008, Claimant underwent a bilateral cervical discectomy and fusion at C5-6, C6-7. Claimant returned to light-duty work on August 25, 2008.

33. Claimant's fusion at C5-6, C6-7 eventually improved his left-sided symptoms. However, Claimant testified that he recalled experiencing right-sided symptoms after his surgery, as early as fall 2008. On February 11, 2009, he reported "episodic pain and numbness extending into the right arm pointing to the anterior and lateral aspect of the upper portion of the right arm" to J. Craig Stevens, M.D., a physiatrist, during an independent medical evaluation ("IME") related to the ISLD injury. DE 12, p. 1259. Dr. Stevens further noted, "He admits that his earlier symptoms were left-sided and it was left-sided radicular pain for which he sought treatment in the post-injury timeframe." *Id.* Dr. Stevens went on to assess an impairment rating taking into account Claimant's "persistent features of cervical radiculopathy." DE 12, p. 1260. Dr. Stevens did not opine that Claimant's right-sided symptoms were related to anything other than the ISLD injury.

34. On February 18, 2009, Claimant reached maximum medical improvement ("MMI") following his C5-6, C6-7 surgery.

35. Claimant alleged that treatment for his cervical injury at ISLD was compensable under ISLD's workers' compensation insurance. He filed a claim and, ultimately, a complaint. That controversy was resolved via a lump sum agreement ("LSA") approved by the Commission on June 12, 2009. The LSA, executed by Claimant on May 29, 2009, provides that he is forever settling his claims against ISLD and its surety with respect to the cervical spine injuries he sustained due to his February 2008 snow shoveling accident. *See* DE 9, p. 1116. Claimant also agreed that his cervical condition may be progressive and, nevertheless, he wished to enter into a full and final settlement of his claims against his prior employer and surety. *Id.*

36. **Alleged cervical spine injury at Selkirk.** On August 11, 2009, three days before he was discharged from Selkirk, Claimant called for an increase in his Methadone prescription, citing neck pain. There is no evidence that Claimant ever reported any neck pain or right arm radiculopathy between February 12 and August 11, 2009.⁴ If Claimant experienced such symptoms during this period, it was apparently unchanged from what he testified that he experienced in fall 2008 and that he reported to Dr. Stevens on February 11, 2009.

37. On August 20, 2009, about one week after he was discharged from Selkirk, Claimant was examined for neck pain and right arm radiculopathy by Dr. Bell. Dr. Bell noted Claimant's impending loss of his medical insurance coverage as the impetus for the appointment. He also noted that Claimant's symptoms were consistent with pathology at C6:

Jim has had pain and muscle spasm in the right side of his neck and upper back. He has radiating pain and numbness down the upper part of his shoulder and in to the dorsolateral portion of his right forearm down to his thumb. *It roughly follows a C6 nerve root distribution.* The numbness and some tingling come and go. It is gradually getting to the place that it

⁴ Dr. Bell treated Claimant for a number of conditions during the first half of 2009. In February, Claimant sought treatment for sacroiliac joint pain due to working on the light table at Selkirk. On June 15, 2009, he reported right low back and buttock pain. On June 16, 2009, he called Dr. Bell for a low back x-ray. On June 22, 2009, someone from Dr. Bell's office called Claimant with test results. On June 26, 2009, Claimant underwent a testosterone injection at Dr. Bell's office. On July 30, Claimant called to discuss taking a leave, apparently from work.

is occurring more frequently and lasting longer. His insurance is going to be running out by the end of the month and he is anxious to get it checked if possible before that. He does need a refill of Methadone. He is having to take 2-3 Methadone per day because of the increased pain. He has been laid off his printing job up in Sandpoint.

DE 2, p. 114 (emphasis added). Dr. Bell referred Claimant to Dr. Dirks for evaluation.

38. On September 8, 2009, Dr. Dirks examined Claimant for neck pain and pain in his right shoulder with numbness and tingling. He reported Claimant's symptoms began "a few months ago" when he began dropping tools at work:

...A few months ago, he started having increasing pain in his right shoulder with numbness that would progress down his upper arm, kind of skip his forearm and then go into his fourth and fifth fingers. He has no weakness per se, but he did notice he was dropping tools at work where he operates a printing press.

DE 4, p. 846. Also, Dr. Dirks reported Claimant told him he had been laid off due to a restructuring of the company, as opposed to being discharged because his employer did not believe his job performance was adequate.

39. A cervical MRI conducted September 10, 2009, demonstrated progression of Claimant's preexisting broad-based protrusion at C4-5. Mild to severe biforaminal stenosis and a new synovial cyst in the left facet joint were identified:

C4-C5 disc level demonstrates mild anterior spondylotic change with prominent facet degenerative change. Small synovial cyst within the left facet joint. Broad-based disc protrusion or disc bulge with mild to severe biforaminal stenoses. The broad-based disc protrusion and uncovertebral joint hypertrophic Postcontrast [*sic*] data sets demonstrate no abnormal enhancement.

DE 4, p. 844. It is undisputed that this MRI demonstrates Claimant's C4-5 condition deteriorated significantly following his prior MRI, taken in February 2008.

40. Dr. Dirks recommended physical therapy, which Claimant attended for several sessions from September 17 through October 20, 2009. On October 9, 2009, Claimant's physical

therapist noted that he still had pain, but it had improved and was tolerable. Later that day, Claimant called the clinic and reported that his symptoms were much worse following treatment. The tingling into his right upper extremity was *now* constant and he obtained no relief from Aleve. Only Methadone helped. These symptoms persisted until Claimant was released from physical therapy.

41. On October 13, 2009, Dr. Dirks recommended an anterior cervical fusion at C4-5, with removal of the old plate at the lower levels to incorporate those levels into a new, tri-level fusion. On exam, Dr. Dirks found, "his strength still shows some weakness in the deltoid and biceps muscles...[and]...a little bit of triceps weakness." DE 9, p. 1209. He added, "This is from previously. His incision has healed well. X-rays taken today shows [*sic*] good fusion at C5-6 and C6-7, and shows [*sic*] an *off-set at C4-5 with movement at this level.*" *Id.* (emphasis added). He opined that Claimant's C4-5 condition was due to both his work and his preexisting condition:

James Brennan returns today and he has had more difficulty with his neck in the past few months. We have tried nonsurgical therapy. Unfortunately, he has failed that. This is an adjacent level to his previous surgery, a workman's compensation injury at C5-6 and C6-7. I believe this is a continuation of that previous injury. He had injured his neck while working at the printing shop this year as well.

Id.

42. On October 29, 2009, Dr. Dirks authored a progress note in anticipation of Claimant's upcoming surgery in which he again attributed Claimant's C4-5 disc pathology to his previous cervical spine surgery, as well as some undefined problem at work. "...[W]e talked about that this is related to his previous surgery and his ongoing problem that he has had at work, which created the herniated disk at C4-5." DE 4, p. 843. On the same day, Dr. Dirks wrote to

the Surety. Again, he clearly attributed the C4-5 condition to Claimant's prior cervical injury and vaguely indicated that work was also a contributing factor:

He now has a new problem at C4-5 which has developed over the past year with him continuing to work at his current job. He has adjacent level disk degeneration related to the previous surgery as well. He is planning to have a C4-5 Anterior Cervical Discectomy and Fusion and removal of old hardware. This is clearly related to the Workman's Compensation injury from a previous period. He will plan to discuss this with the Workman's Compensation Insurance.

DE 4, p. 842.

INDEPENDENT MEDICAL EVALUATION

43. **Jeffrey J. Larson, M.D.** Dr. Larson, a neurosurgeon, conducted an independent medical examination ("IME") at Defendants' request on December 14, 2010 (approximately 13 months following Claimant's C4-5 surgery). In preparation for that examination, Dr. Larson reviewed Claimant's medical records. He also reviewed Claimant's imaging films and a written job description prepared by Selkirk, and took an oral history from Claimant. However, he did not review Dr. Stevens' IME report corresponding to Claimant's February 6, 2008, injury at ISLD.

44. Notably, Claimant reported to Dr. Larson that his C4-5 neck pain began when he sustained an accident, or a series of accidents, at work on or about June 15, 2009. "He says that he was [*sic*] worked at Selkirk Press and says that he strained his neck while kneeling and lifting papers to put in a press." DE 1, p. 1. After reviewing his notes, Dr. Larson added:

...So when asking about what caused this, what happened, there's an incident that he described on June 15, 2009 when he says he strained his neck while kneeling and lifting papers to put in the press, and I remember him showing me how that happens. And but [*sic*] that he felt that there were two or three events that he thinks caused it. No further comments on those events. Usually dealing with lifting

paper or putting into a press. There was one episode pulling a wrench when he popped his neck....

Larson Dep., p. 12.

45. Dr. Larson diagnosed degenerative conditions and chronic pain related to Claimant's cervical and lumbar spine, as well as narcotic dependency.

46. Relying upon evidence of Claimant's January 23, 2008, visit with Dr. Bell in which C7 radiculopathy was identified, Dr. Larson opined that Claimant's cervical pathology, including his preexisting C5-6, C6-7 conditions, were not work-related because his C7 radiculopathy preexisted his February 8, 2008, industrial accident. He further explained at his deposition that Claimant's February 21, 2008, MRI and Dr. Bell's April 3, 2008, chart note both evidence Claimant was experiencing right arm radiculopathy well in advance of June 15, 2009.

47. Contrarily, however, Dr. Larson also opined that Claimant did suffer an injury as a result of the paper-lifting accident he described. "Mr. Brennan's description of the June 15, 2009, event resembled nothing more than a strain." DE 2, p. 7. It is clear from Dr. Larson's IME report and testimony, however, that he did not believe that such strain was responsible for Claimant's symptoms requiring surgical intervention at C4-5. "Mr. Brennan's current condition relates to his degenerative disc disease and not any occupational disease." DE 2, p. 6.

48. At his deposition, Dr. Larson further opined that any occupational disease would have likely developed over a long period of time, estimating ten years or so, even with his fusion, which would accelerate the process. He explained that nothing about Claimant's job operating a press would lead to an occupational disease because it did not require axial loading, chronic axial loading or activities implicating general cervical wear and tear. Dr. Larson testified that he is familiar with occupations that are associated with cervical disc disease, including construction jobs wherein the worker balances heavy items on his hardhat, and professional football jobs.

49. Dr. Larson admitted that he did not know exactly what movements Claimant engaged in each day, or for how long. He did testify, however, that he was not convinced that Claimant had engaged in repetitive movements involving axial loading or other activities that would challenge the normal range of cervical spine motion, so he was unpersuaded that Claimant had sustained an occupational disease (*see* Larson Dep., pp. 17, 36). In using the normal range of cervical spine motion as a benchmark, Dr. Larson apparently did not take into account Claimant's permanent restriction from reaching at or above head-level assessed by Dr. Stevens in February 2009.

50. Claimant testified at the hearing that Dr. Larson did not perform a Spurling Test or a deep tendon reflex test on Claimant, as he purported in his IME report. At his deposition, Dr. Larson confirmed that he did perform these tests and opined that Claimant must have lied at the hearing.

CLAIMANT'S CREDIBILITY

51. Dr. Dirks, who has treated Claimant for over a decade, testified that Claimant is in no way trying to game the system and that his work ethic is laudable. "Here is a guy that keeps wanting to go back to work. And now it's time to say no, don't go back to work. It doesn't make any sense for us." Dirks Dep., p. 20. Further, Claimant's demeanor and testimony at the hearing evidenced no intent to mislead. However, Claimant's statements are frequently inconsistent, both internally and with documentary evidence in the record, particularly regarding the onset of his relevant symptomatology and details regarding his past medical treatment. In addition, Claimant's medical records indicate that he may have deceived KMC staff to obtain narcotic medications and that, on one occasion, he sought Dr. Bell's office to provide misleading information to his wife about his Methadone use, should she inquire. And then, there's Dr.

Larson's unequivocal opinion that Claimant must have lied when he said Dr. Larson performed neither the Spurling Test nor the deep tendon reflex test during his IME.⁵ Therefore, Claimant's credibility has been brought into question. Relevant evidence regarding Claimant's credibility with respect to his reports of symptom onset is discussed, below.

52. **Documentary evidence.** Documents in the record establish that Claimant had a history of neck pain, right upper extremity symptoms and C4-5 pathology prior to his employment at Selkirk:

- a. Claimant had unexplained right thumb pain in March 2007, right middle trigger finger in June 2007, and neck pain with intermittent right arm numbness in January 2008 (three months before he began working at Selkirk).
- b. Dr. Dirks's admission note related to his C5-6, C6-7 fusion surgery confirms that Claimant had bilateral arm pain, worse on the left, at the time of his accident at ISLD on February 6, 2008. *See* DE 4, p. 858. "His primary concern was ongoing neck pain and pain's [*sic*] radiating into both of his arms. The left was worse than the right. The pain radiates down the back side of his arm and down into his thumb, index, and middle fingers bilaterally." *Id.*
- c. Claimant's February 21, 2008, MRI reveals a broad-based protrusion at C4-5 abutting his right ventral cord.
- d. On April 3, 2008, Claimant reported right-sided symptoms to Dr. Dirks. "He states that he has pain in his left triceps that is intermittent, as well as on his right side...". DE 4, p. 867.

⁵ Claimant testified that he knows what it is like to undergo these tests and is convinced that Dr. Larson did not administer them. However, the Referee is unconvinced that Dr. Larson intentionally fabricated the relevant results in his report. Likewise, there is insufficient evidence to conclude that Claimant's accusation is intentionally false. This disagreement has no effect upon the Referee's view of either witness's credibility.

53. Documents also demonstrate that these symptoms persisted after his cervical spine fusion in July 2008. Claimant was released to light duty work on August 25, 2008, with no lifting in excess of 20 pounds. He then reported neck and right arm symptoms to Dr. Stevens in February 2009, which Dr. Stevens took into consideration in developing his PPI rating related to Claimant's settled cervical spine claim. Dr. Stevens issued a full restriction on overhead reaching.

54. Although Claimant had several medical appointments and communications with Dr. Bell over the next few months, including some on and around June 15, 2009, he never mentioned any neck or right arm symptoms.

55. The next reference to neck pain appears on August 11, 2009, when Claimant called in for an early refill of his Methadone, generally citing neck pain.

56. On August 14, 2009, Claimant was discharged from Selkirk. There is no indication in the medical records that Claimant missed any work due to his neck and right upper extremity symptoms in 2009.

57. On August 20, 2009, Claimant reported to Dr. Bell pain and muscle spasm in the right side of his neck and upper back with radiating pain and increasing intermittent tingling and numbness down the upper part of his shoulder and into the dorsolateral portion of his right forearm down to his thumb. Claimant explained that he wanted to get these symptoms checked out before his insurance expired at the end of the month. Dr. Bell found Claimant's symptoms consistent with C6 nerve root pathology.

58. On September 8, 2009, Claimant reported to Dr. Dirks, on his initial visit, that over the past few months, he had neck pain and increasing right shoulder pain with numbness and tingling down his upper arm, skipping his forearm but continuing into his fourth and fifth

fingers. There is no reference to any inciting event for Claimant's symptoms. Dr. Dirks did not comment on which nerve root distribution coincided with Claimant's complaints.

59. On September 28, 2009, after meeting with Dr. Dirks and discussing his September 13 MRI findings, Claimant filed his FROI in which he stated that he had neck pain from repetitively running the press.

60. On December 4, 2010, Claimant reported to Dr. Larson during his IME that he had symptom onset with a series of accidents at work on or about June 15, 2009.

61. **Claimant's testimony.** Claimant's testimony portrays a history consistent with his December 2010 report to Dr. Larson, but inconsistent with the records of his initial medical visits regarding his "new" symptoms:

- a. On September 29, 2010, Claimant testified at his deposition that his relevant cervical symptoms began worsening, and he began dropping tools, in spring 2009:

Q. You know, in the spring of 2009, was your neck getting better, worse, staying the same?

A. It was getting better.

Q. Okay. And how long did it continue to get better?

A. Let's see. It was - - I didn't have a problem with it probably for three months, two, three months.

Q. When did you first have another problem with your neck?

A. Well, I noticed in the spring, I was starting to - - my right arm was starting to get weak and I was - - noticed I was dropping tools more often than I probably should have as a press person, so that was a weakness in my hand.

Claimant's Dep., pp. 34-35. He contradicted that testimony at the hearing when he explained that his symptoms began sometime in fall 2008:

Q. And after you got back and your condition was doing okay after the surgery, when did it [*sic*] start dropping things and having problems with your arms that you talked about?

A. About three months, two or three months after I got back I noticed the pain in my neck.

Q. Like starting in January or February? Surgery was late July so –

A. It was in the fall, it was in the fall.

Q. After being back to work for about three months?

A. About three months, yes.

Q. And it continued on. Is that when you had problems with your hands, and whatnot?

A. Yes, I noticed that -- especially when I was dropping the wrench. I've worked on equipment all my life and, you know, I just noticed that when I started dropping a wrench, I didn't realize I dropped it until I heard it. So then I noticed things, something was going down hill [*sic*].

Tr., pp. 63-64. Claimant again offered contradictory testimony at the hearing, when he testified that his symptoms appeared with a paper-loading event on June 15, 2009:

Q. Now, on the Form One, Exhibit A, it indicates that -- under date of injury or illness there is a date on there 6/15/09 and last day of work was 8/14/09, employer notified 9/28/09. I talked to you about those things. Where did the 6/15/09 date come from, what is that?

A. Well, there was one day I was kneeling

down in front of the press putting the paper in, and I was right here and I was kneeling down and I was picking up paper, twisting, reaching in front, and Wesley was over in the bindery area when I was doing this. I made a noise, or I did something, and my neck really started to bother me. She came over and she said, "Jim, are you okay?" And I said, "Well, yeah, it's just my neck is starting to bother me." I mean, because I was loading all that paper that day. And so I just said that's -- that date is when that happened.

Tr., pp. 62-63. He also identified a subsequent event, two or three weeks later (on or before July 5, 2009):

Q. And were there other instances where –

A. Yeah, it happened about –

Q. You've got to wait until I finish.

A. Oh, I'm sorry.

Q. -- where similar situations occurred?

A. Yes, another one happened when I was on the small -- the QM, and I was putting ink in the press and I was constantly milling it above my head. She could see that it was bothering my neck, and she came over again, and she said, "Do you need to go home?"

Q. Was that before or after June here?

A. It was probably after, because that June –

Q. June 15th?

A. June 15th, yeah. It was within two or three weeks it occurred.

Id. at 63.

62. In addition, Dr. Larson wrote in his IME report in February 2009 that Claimant suspected his C4-5 injury may have been precipitated by his injury at ISLD and that his attorney believed his prior claim may have been closed too soon. Although Claimant testified that this discussion is presented out of context, it is clear that Claimant was aware of legal strategies pertaining to his case prior to this IME. Claimant's changing representations of the details surrounding his symptom onset must be viewed against the totality of the evidence, including the development of his knowledge of legal strategies.

63. Claimant is likeable and there is insufficient evidence to conclude that he has been intentionally untruthful in these proceedings. However, he is not a credible witness with respect to the timing or circumstances of onset of his symptoms leading to his C4-5 spinal fusion surgery or the dates on which he received treatment for any given condition. Claimant's otherwise credible medical treatment records in these regards are more persuasive than Claimant's statements made in connection with these proceedings.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *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, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

OCCUPATIONAL DISEASE

The Idaho Workers' Compensation Law defines an "occupational disease" as "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). Further, Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where “such disease is actually incurred in the employer’s employment.”⁶

In proving causation, Idaho case law recognizes compensability for “aggravation” of an underlying disease, but only when such aggravation results from an industrial accident. *See*, for example, *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 712 P.2d 559 (1985); *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994); and *Konvalinka v. Bonneville County*, 140 Idaho 477, 478-479, 95 P.3d 628, 629-630 (2004). An “accident” is “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.” I.C. § 72-102 (18) (b). Proof of hard work, pain at work, or a series of “mini-traumas” is insufficient to establish an industrial accident. *See Konvalinka* and *Nelson* (a series of mini-traumas is insufficient to prove an accident); *Nycum* (hard work does not constitute an accident); and *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003) and *McGee v. J. D. Lumber*, 135 Idaho 328, 17 P.3d 272 (2000) (proof of pain is insufficient to establish an accident).

Medical testimony to a reasonable degree of medical probability is required to prove a causal connection between the medical condition and the occupational exposure which allegedly caused it. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (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).

64. In summary, a claimant with an occupational disease claim must demonstrate that he was afflicted by a disease that was actually incurred in his relevant employment; and, if

⁶ For non-acute conditions, an employee must also prove that he was exposed to the hazard of the occupational disease for at least 60 days at the defendant employer’s. Here, it is unnecessary to specifically determine whether Claimant’s herniated disc was acute or non-acute because it is undisputed that Claimant meets this exposure period.

causation rests upon proof that the occupational disease constitutes a permanent aggravation of a preexisting condition, then that the disease was triggered by a workplace accident. If this causation criteria is met, then the claimant must also prove that the hazards of such disease actually exist and are characteristic of and peculiar to the claimant's employment. In the present case, Claimant's occupational disease claim for C4-5 herniation must be examined in light of the above elements.

65. **Causation.** There is persuasive evidence in the record from Drs. Bell, Dirks, Larson and Stevens that Claimant experienced right-sided radiculopathy prior to his employment at Selkirk. There is also persuasive evidence, most notably from Claimant's February 21, 2008, and September 10, 2009, MRIs, that he developed a synovial cyst in his facet joint and greater encroachment onto his spinal cord at C4-5 during the time period between those MRIs, all but about three-and-a-half months of which Claimant worked at Selkirk.

66. Dr. Larson attributed the change in Claimant's condition between his MRIs to preexisting degeneration, as well as his C5-6, C6-7 cervical fusion. Dr. Larson noted that Claimant's February 2008 MRI demonstrated evidence for his right-sided symptoms at that pre-Selkirk point in time.

67. Dr. Dirks, however, attributed Claimant's worsened C4-5 condition to *both* his preexisting conditions *and* his repetitive activities at work:

Q. Let's see, I am looking at your chart note of October 13th, 2009. One of the interesting things about this particular case is given the fact that he had the prior surgery in July of 2008 and then now this subsequent disk herniation. It's important to understand the dynamics of what was going on in his body that led to the herniation of the disk further.

And can you for the Commission give us a general discussion or explanation of the dynamics

that go on when a person has a fusion at the levels that Jim did in July of 2008 at the C5,C6, C6,7 levels?

A. Mr. Brennan had the surgery done a year prior at C5,6 and 6,7. At that time there was some early degenerative changes noted at C4,5. So there is no question he had some preexisting degeneration at the C4,5 level at the time of the surgery in 2008. However, we do not do -- we being spine surgeons or good spine surgeons, do not do surgery prophylactically at levels that have early degenerative changes unless there is something that's obviously compressive in nature and creating symptomatology. So we do know that over time the adjacent levels to a fusion site have the propensity to have further disk degeneration. So we have to always counsel patients, this is a fusion, possibly can lead to more surgeries down the road. That's always part of my risk analysis for them. And Mr. Brennan did well for several months after the surgery and then over time things broke down. I think that if you look at my chart note on October 13th I state this adjacent level -- how did I say it -- this is an adjacent level to his previous surgery. Workman's compensation injury at C5,6 and C6,7. I believe this is a continuation of that previous injury. He had injured his neck while working at the printing shop this year as well. So clearly he has disk degeneration at C4,5 if we go back to that time frame. And while at work in the printing shop doing repetitive activities, as has been described to me, this exacerbated and created increased disk degeneration as well. I think you can blame both things, the previous surgery at 5,6, and 6,7 as well as the ongoing work-related injury with the repetitive motion. So can you -- I think that's pretty clear. I don't think you can make an argument that this is all preexisting condition. I don't think you can make an argument that this is all related to a workers [sic] compensation injury at Selkirk Printing. I think it's a combination thereof. And how you assign that percentage value of which one is which, quite honestly it's a guess. So you can say it's 50/50, fine. And I am not trying to be flippant about it,

but I think that to try assign and say, well, this is 90 percent and this is 10, or vice versa or whatever, I don't think that's possible based upon what you see on his pictures. He clearly had a new acute herniation that was seen on the MRI in 2009 when comparing to the previous 2008 MRI. So I would attribute again that finding to the previous surgery but also to the ongoing work-related injury.

Dirks Dep., pp. 9-11 (emphases added).

68. Dr. Dirks opined that synovial cysts, such as the one identified in Claimant's C4-5 facet joint on his September 2009 MRI report, are uncommon and are caused by abnormal movement. He identified abnormal movement at Claimant's C4-5 disc in September 2009 and opined it may be due to his prior fusion surgery:

Q. And in general do we know what specifically causes synovial cysts in facets in the cervical area?

A. Well, the cyst is made as a result of abnormal movement within the facet joint as a result of the -- as a result [*sic*] the degeneration at that particular joint. And the cyst is a fluid filled structure with degenerative tissue in it as well, which is indicative of injury, if you will.

Q. And just focusing on a few words in that response with regards to the cyst being in response to abnormal movement in the facet. Can you explain that what means, how that operates?

A. Well, a couple things. He had the previous surgery at 5,6, 6,7, which we know, we've mentioned numerous times now, that is going to put extra stress on the level above, at 4,5. And that potentially could create that facet degeneration in the synovial cyst movement. Also it's -- the increased motion at 4,5 is not a normal thing. You should have some movement there because there is a joint. But you should not have abnormal movement. And I took an x-ray I think prior to the surgery which showed I thought there was more movement than there should have been at that particular level. You are allowed a millimeter or two. And I think it

showed more than that of movement at the 4,5. So whether the previous surgery at 5,6 and 6,7 created that extra abnormal movement, or whether it was a result of the degeneration of the facet joint, which the synovial cyst is a manifestation thereof, I don't know.

Dirks Dep., pp. 14-15.

69. Further, Dr. Dirks testified that Claimant's acute herniation could have developed over time, or it could have been the result of a more instant event. He could not opine "on a more likely than not basis," but ventured, "if I had to guess, I would say it was a progression over time." Dirks Dep., p. 16. Dr. Larson agreed, testifying that it would take in the neighborhood of ten years for Claimant's cervical pathology to develop.

70. Dr. Dirks was unaware of any accident which may have caused the acute herniation, and was also unaware of any of Claimant's activities outside of work. Dr. Dirks's primary impression of Claimant is that over the past 15 years or so, his condition has continued to deteriorate:

A. ...The only thing I do know about Mr. Brennan [*sic*] he has had previous surgery done on his back a couple times and he has had the previous surgery on his neck. And he has been debilitated fairly markedly. And I was actually surprised that he was able to go back and work at a printing job like that because of his ongoing pain complaints. I have known Jim for 13, 14, 15 years⁷, something like that. And clearly you could see him - - I have seen him go down hill [*sic*] over time from his abilities to do physical activity.

Dirks Dep., pp. 17-18.

71. "[R]epetitive lifting [of] paper, crawling under the printing press, putting blankets on the press, putting ink on the press, [and] continuously moving hands at eye level with the

⁷ Dr. Dirks previously treated Claimant for other spine conditions, including two back surgeries, in addition to his cervical spine conditions which are the subject of his workers' compensation claims referenced herein.

neck in various extended and flexed positions in any degree,” as suggested by Claimant’s counsel, are the actual repetitive work activities that Dr. Dirks believes led to Claimant’s worsened condition. Dirks Dep., p. 13. As discussed, above, Dr. Dirks was unaware of the exact frequency with which Claimant worked with outstretched arms, and the record is unclear on this point. Further, Dr. Dirks did not explain how long a person would need to work with outstretched arms (at any level) to develop cervical symptoms.

72. Dr. Dirks’s opinion regarding Claimant’s repetitive paper-lifting, crawling under the printing press, and putting blankets on the press is troublesome because he does not establish baseline frequencies at which these activities should become injurious, nor does he attempt to quantify the frequency with which Claimant engaged in any activities or measure Claimant’s exertion against any known standards. Without such foundational information, it is difficult to understand how he arrived at the conclusion that Claimant’s relevant work activities were “repetitive” such that they would speed injury to Claimant’s neck. That evidence is particularly important in a case like this, where Claimant did not engage in the same set of restrictive repetitive motions over and over all day long but, instead, a number of separate sets of motions which he repeated throughout the day as necessary, and where he had no prior medical restrictions on these activities.

73. Dr. Dirks’s opinion that Claimant’s ink-milling duties likely hastened his neck problems, however, is persuasive. Since at least February 11, 2009, Claimant was medically restricted from overhead reaching to prevent further injury to his cervical spine. Yet, he was required to reach at or above head-level repeatedly throughout each press run to mill ink in the press. In addition, Dr. Larson does not explain why he believes Claimant’s activities in excess of

his restrictions did not hasten wear and tear on his neck. It is likely, based upon the evidence in the record, that milling the ink at Selkirk accelerated Claimant's C4-5 condition.

74. Claimant has established that his ink-milling activity at work likely hastened his need for surgery to repair his C4-5 disc herniation. However, given the undisputed evidence of preexisting C4-5 cervical pathology and increased on-going susceptibility and weakness due to his prior cervical fusion surgery, Claimant has failed to prove that his activities at Selkirk would have caused his C4-5 herniation in the absence of his preexisting pathology. As a result, the Referee finds Claimant's work activities at Selkirk did not solely cause, but did permanently aggravate, his preexisting C4-5 broad-based disc protrusion.

75. The Commission need not address Claimant's contention that in addition to causing/contributing to the C4-5 disc injury his work activities were also characteristic of and peculiar to Claimant's employment since, as developed below, we find that the occupational disease claim fails by reason of the rule of *Nelson v. Ponsness Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

76. Preliminarily, the Commission recognizes that neither party has specifically raised *Nelson* as an issue in this occupational disease case. Indeed, reference to the rule is altogether absent from the briefs of the parties. Nevertheless, the Commission feels compelled to address the applicability of the *Nelson* rule to the facts of this case. The second noticed issue is whether Claimant suffers from a compensable occupational disease. Claimant must satisfy the various elements of an occupational disease in order for the disease to be found compensable. The rule of *Nelson* deals with the compensability of an occupational disease, and establishes that the aggravation of a pre-existing condition is not compensable except where the aggravation is caused by an accident. *Koch v. Micron Technology*, 136 Idaho 885, 42 P.3d 678 (2002). The

Commission finds that consideration of the *Nelson* doctrine is subsumed within, and anticipated by, a fair reading of the noticed issues.

77. Pursuant to *Nelson*, the work related aggravation of a pre-existing condition is not compensable unless that aggravation is accomplished by the mechanism of an accident. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005), modifies the rule of *Nelson* where it is alleged that the preexisting condition is, itself, an occupational disease. Specifically, where an occupational disease claim is defended on the basis that Claimant suffered from a preexisting occupational disease that was aggravated by the repetitive demands of Claimant's work, it must be shown that there was actually a prior manifestation of the preexisting disease.

For an occupational disease to be a preexisting condition under the holding in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), there must have been a prior manifestation of the disease. Nelson sought benefits for the aggravation in 1988 and 1989 of her carpal tunnel syndrome that had been first diagnosed by a physician in 1980. *Id.* at 130-31, 879 P.2d at 592-94.

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005).

Here, however, it is clear that the pre-existing condition is not an "occupational disease," but rather the sequelae of a prior industrial accident, i.e., the ISLD accident of 2008. This case is more like *DeMain*, *supra*, where Claimant had suffered an earlier work related accident, which was subsequently "lighted up" by repetitive trauma while working for another employer. Denial of the repetitive trauma claim was required by *Nelson*. As a result, *DeMain* provides the relevant guidance. Claimant must establish that the aggravation of his preexisting cervical symptoms originated with a workplace accident, or suffer denial under *Nelson*.

78. Claimant does not argue that he suffered a workplace accident at Selkirk. However, Claimant testified that he recalled one or more occasions on or around June 15, 2009,

when others noticed he was in pain while he was working. As determined above, Claimant is not a credible witness with respect to the onset of his relevant symptoms, so his recollections of these events, to the extent that they may otherwise establish an accident occurred, carry no weight. There is also evidence from Dr. Larson's IME in December 2010 that Claimant reported experiencing a "pop" while using a wrench at Selkirk. This evidence is likewise discounted because it is not corroborated by any other reliable evidence.

79. Claimant's medical treatment records do not indicate that either Claimant or any physician attributed his worsened condition (i.e., his herniated disc at C4-5) to any particular event at Selkirk. Dr. Dirks attributes it to repetitive motion activities at Selkirk. However, the evidence in this case is insufficient to establish Claimant's neck injury was caused by a repetitive motion injury. In addition, as held in *Konvalinka* and *Nelson*, a series of mini-traumas, such as may possibly be extrapolated from the evidence of Claimant's work activities in the record, is inadequate to establish an accident. This is particularly so where, as here, there is insufficient evidence to reasonably locate a point in time when Claimant's symptoms first became acute.

80. Claimant has failed to prove his C4-5 herniated disc, a permanent aggravation of his preexisting broad-based protrusion, resulted from a workplace accident. Therefore, his claim is barred.

81. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he suffered a workplace accident; therefore, his claim is barred.

2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 18th day of January, 2012.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2012, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816

sjw

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES BRENNAN,)	
)	
Claimant,)	IC 2009-025084
)	
v.)	ORDER
)	
SELKIRK PRESS, INC.,)	January 30, 2012
)	
Employer,)	
)	
and)	
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
)	
Defendants.)	
)	

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with her 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 has failed to prove that he suffered a workplace accident; therefore, his claim is barred.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 30th day of January, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

Participated, but did not sign
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816

sjw

/s/