BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICK WHITLEY, Claimant, v. MAY TRUCKING COMPANY, Employer, and GREAT WEST CASUALTY COMPANY, Surety, Defendants.	**IC 2012-008344** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** April 29, 2014

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 Boise on October 8, 2013. Claimant was present at the hearing and represented himself, *pro se*. Alan R. Gardner of Boise represented Employer and Surety (referred to collectively as Defendants). The parties presented oral and documentary evidence and four post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on March 11, 2014.

ISSUES

At the hearing, the noticed issues were amended by agreement of the parties to:

1. Whether or not Claimant incurred a compensable occupational disease;

2. Whether Claimant provided proper notice and met the statute of limitations for filing his claim; and

3. Whether and to what extent Claimant is entitled to benefits for medical care.

In their briefing, Defendants also address Claimant's entitlement to benefits for psychological injury pursuant to Idaho Code § 72-451. Claimant does not raise this issue and he strongly objects that he has incurred any psychological condition. Therefore, this issue will not be addressed herein.

CONTENTIONS OF THE PARTIES

Claimant contends that he incurred an occupational disease from chronic exposure to burning polyurethane foam and its by-products (including, but not limited to, isocyanates), as well as burning aluminum, and that he is entitled to benefits therefor. He primarily relies upon the opinion of Grace Ziem, M.D., an occupational and environmental health specialist practicing in Maryland.

Defendants counter that Claimant's claims are not supported by a preponderance of the medical evidence in the record and, therefore, his claim should be denied. They primarily rely upon the opinions of Robert Calhoun, Ph.D. and Donna Wicher, Ph.D., neuropsychologists; Brent Burton, M.D., medical toxicologist/occupational health specialist; and Matthew Call, industrial hygienist.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant taken August 22, 2012;

2. The testimony taken at hearing of Claimant, Jennifer Chocquette, Matthew Call, Pug Millman, Fred Hickman, and Robert Matthews;

3. Claimant's Exhibits A through CC (excepting E, W, X, Y, Z, and AA) admitted at the hearing;

4. Defendants' Exhibits 1 through 39;

5. The post-hearing depositions of:

   a. Robert Calhoun, Ph.D. taken October 21, 2013;

   b. Grace Ziem, M.D. taken via telephone November 6, 2013; and

   c. Donna Wicher, Ph.D. and Brent Burton, M.D. taken November 8, 2013.

After having considered all the above evidence and briefs of the parties, the Commission renders the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

PRE-INDUSTRIAL INJURY VOCATIONAL AND MEDICAL HISTORY

1. Claimant was 42 years of age at the time of the hearing and resided in Vale, Oregon. He has not engaged in gainful employment since late August 2010, due to his deteriorating health.

2. Claimant is a high school graduate with vocational training in welding and auto mechanics, as well as additional job-related training. He has worked primarily in tire and trailer repair businesses. In 1999, he went to work for Employer. In about October 2005,[1] Claimant

[1] At times, Claimant asserted (for example, to physicians) that he began welding in 2003. However, in his briefing he asserts he began in 2005 and argues that his prior assertions cannot be trusted because of his memory problems and his employment records, which confirm he began welding in October 2005.

began performing welding repairs on trailers. Some of these repair jobs required him to weld trailer walls with foam cores made of Dow FrothPak SPF200 Spray Polyurethane Foam (foam) from the inside of the trailer. As he welded the aluminum, he also heated the foam core.

3. Foam contains isocyanates and other chemicals, which can be toxic when inhaled in sufficient amounts. No benchmarks to establish the amounts sufficient to result in permanent injury are in evidence. Claimant asserts his deteriorated health is the result of inhalation over time of the airborne byproducts of burning foam and aluminum, including isocyanate fumes.

4. The parties disagree about the amount of time Claimant spent welding foam-backed aluminum. Claimant asserts he spent 459.75 hours welding aluminum, based on data from work orders, and he estimates 80 percent of that time was spent on foam-backed aluminum, for a total of 367.8 hours over five years, or 73.6 hours per year. Claimant asserts that Defendants may not have disclosed all of the relevant work orders; however, there is insufficient evidence in the record to establish this as fact. Defendants, relying upon time card information, assert Claimant spent less than 133 hours welding aluminum during this period.

5. Claimant wore a paper mask when he welded aluminum. Although he had a respirator, it would not fit under the welding hood, so he did not use it while welding. He covered items that could be damaged by heat with a thin metal shield, mainly when he welded steel. Over time, the shield, as well as long gloves he wore when he welded, became dark and dirty with welding residue.

OSHA COMPLAINT/AIR QUALITY TESTING

6. The Commission has no jurisdiction over OSHA complaints. Workers' compensation benefits are not contingent upon proof of wrongdoing by an employer. The

following facts concerning a workplace safety complaint filed by Jennifer Chocquette (Claimant's significant other), assisted by Claimant, with the Occupational Safety and Health Administration (OSHA), are included primarily to establish details concerning air quality testing conducted at May Trucking in 2011, as well as Claimant's commitment to proving his workplace exposure theory.

7. In or around the first part of January 2011, Claimant and/or Ms. Chocquette contacted Officer Kiely Parker at OSHA. Officer Parker encouraged them to file a complaint alleging safety violations against Employer. Ms. Chocquette did, and OSHA conducted inspections in January and February 2011. Officer Parker participated in investigating the complaint.

8. On April 8, 2011, Employer was issued a citation. It listed six violations of the Code of Federal Regulations (CFR), all of which were required to be abated by May 4, 2011. Four of these violations concerned improper implementation of safety procedures in the use, and the education and evaluation for such use, of respiratory protection. One citation was for failing to require employees to use appropriate hand protection when hands were exposed to hazardous conditions, specifically when applying spray polyurethane foam containing methylenediphenyl diisocyanate (a skin absorption hazard) and when welding on aluminum flooring inside refrigeration trailers.

9. In connection with the OSHA citation, air quality testing indicated no overexposure risk for areas tested and an unlikely exposure risk for areas not tested. In formulating this opinion, no aluminum welding fume test results were considered. The applicable note reads, "Not analyzed by lab. Unlikely overexposure." CE-R15.

10. On April 8, 2011, Matthew Call, industrial hygienist employed by Industrial Hygiene Resources, conducted air quality testing at Employer's request. Mr. Call's results confirmed no overexposure risk for areas tested. "Occupational exposures to volatile organic compounds (VOCs), welding fumes, glass fibers, and dust were documented for the typical job assignments. All exposure levels were documented to be well below OSHA permissible exposure limits (PELs)." CE-J11. Mr. Call did not test the air quality inside a trailer when foam-backed aluminum was being welded.

11. On July 13, 2011, OSHA inspectors again visited Employer's place of business seeking information, apparently in response to Claimant's and Ms. Chocquette's concerns that the testing was not representative of normal work exposures. On July 18, 2011, OSHA wrote to Employer that it had again "received notice of alleged hazards at your worksite." CE-Q142. This time, Employer was required to provide Mr. Call's report, as well as information regarding chemicals and their fumes (including welding fumes, byproducts of foam during aluminum welding, and others), employee exposures to those chemicals, and implementation of the Hazard Communication Program. No further citations were issued.

12. On February 13, 2012, an OSHA representative notified Ms. Choquette, among other things, that it would request Employer to 1) sample welding fumes during large scale repair jobs including work which occurs *inside* trailers, and 2) sample airborne chemicals associated with the burning or decomposition of cured polyurethane foam insulation. Employer "respectfully declined to repeat what [it] felt were adequate tests performed by Industrial Hygiene Resources." CE-Q169. OSHA notified Ms. Chocquette and advised her that no further

action could be taken without a complaint from a current employee, or unless a fatality or catastrophe occurs.

13. No other air quality testing is in evidence.

MEDICAL TREATMENT

14. Claimant's significant other, Jennifer Chocquette, has accompanied Claimant on all, or almost all, of his medical appointments since he began suspecting he was exposed to toxins at work. Ms. Choquette has no specialized medical training. The couple has been together since 2007.

15. In October 2004, Claimant sought treatment for allergy problems he had experienced over the past four years (headaches above his eyes, drainage in the back of his throat, coughing, congestion, fatigue, itchy/watery eyes, and occasional chest tightness), as well as headaches and sinus problems over the last several weeks. He was diagnosed with allergic rhinitis and acute maxillary sinusitis. Medications, including prednisone, helped alleviate his symptoms. He continued to report allergy-like symptoms for several years. In 2007 and 2009, he also had follow-up care for a rash with burning pain to light touch on his torso and other symptoms attributed to shingles. In 2009, a kidney stone caused significant left flank and lower abdominal pain, along with nausea and vomiting. A urinalysis was positive for ketones. Medications relieved Claimant's symptoms.

16. In 2010, Claimant reported feeling unwell over the past several years, with recent worsening, to Steven Brauer, M.D., his family physician. Claimant's symptoms in June 2010 included abdominal pain, gas, bloat, nausea, headache, mental fogginess (memory problems), mild dizziness, skin hypersensitivity and sensory changes, occasional knee pain, and stomach

gurgling. Claimant reported he was not unusually stressed. Dr. Brauer diagnosed likely hyper-acidity and reflux, and multiple other symptoms "possibly related to anxiety," and ordered testing which ruled out Lyme disease, but indicated mildly elevated cholesterol. CE-A21.

17. In July 2010, Claimant reported no improvement in his reflux with Nexium. He also reported sore throat and cough, which he attributed to allergies, and occasional vertigo, as well as his previously reported symptoms. Dr. Brauer noted Claimant's speech was somewhat slow. He diagnosed probable depression and prescribed Lexapro. Dr. Brauer noted the possibility of a neurological problem and planned to obtain a brain MRI if Claimant did not improve. A few weeks later, chart notes indicate Claimant's symptoms improved. His abdominal pain, skin sensitivity, and nausea were almost completely resolved. His vertigo and dizziness had improved. He still had low energy and a low grade headache. He had developed some episodes of tunnel vision, which Dr. Brauer attributed to the Lexapro. Depression was diagnosed, and Claimant's Lexapro was changed to fluoxetine.

18. Claimant denied at the hearing that he improved with Lexapro.

19. Aluminum toxicity investigation.[2] Frustrated with his care, Claimant began to suspect he was having a reaction to an environmental toxin. Claimant telephoned Dr. Brauer on August 19, 2010 to request a heavy metal blood panel, which Dr. Brauer ordered.[3] Blood tests taken on that day returned reassuring results. A heavy metal panel was also taken, and was sent out for lab analysis.

[2] Claimant admitted at the hearing that he does not believe he has aluminum poisoning. Nevertheless, Dr. Ziem has at least suggested that aluminum fume inhalation may have contributed to Claimant's condition. Also, Claimant's inquiry into this possibility constitutes a significant portion of his quest to obtain a diagnosis.

[3] Claimant advised Dr. Brauer that Ms. Chocquette's physician suggested Claimant may have lead poisoning. Claimant requested that aluminum screening be included.

20. On August 23, 2010, Claimant reported his symptoms to the emergency department at the local hospital, along with concerns of aluminum toxicity/poisoning. Although the physician strongly recommended testing to rule out an oncogenic source, Claimant insisted he was only interested in investigating his suspicion of aluminum poisoning, for cost reasons. The physician advised Claimant to avoid his work environment until he gets a definitive diagnosis and to follow up with his primary care physician.

21. On August 25, 2010, Dr. Brauer advised that Claimant's heavy metal panel returned results indicating detectable levels of arsenic and mercury, as well as an elevated aluminum level (19 mg/L with a reference range of >7). Dr. Brauer explained to Claimant that a serum test is not the best way to measure aluminum in the body, and that he was unable to determine whether or not aluminum poisoning was present. He referred Claimant to Jerry Meng, M.D., a nephrologist, for further workup, if necessary.

22. On August 27, 2010, Claimant reported to Dr. Meng symptoms including chronic alteration of consciousness, chronic but improving dizziness, weakness, vision change, paresthesia, foot swelling/edema, stiffness, bone pain, back pain, joint pain, gait abnormality, numbness/tingling, anxiety, depression, chronic ataxia, and generalized pain. In addition, he reported neuropathic pain in his left shin that he attributed to a 20-year-old fracture and progressively developing neurological symptoms already reported, above, and neuromuscular fatigue, insomnia, and dyspnea on exertion. "These symptoms wax and wane without any mitigating and exacerbating factors, and are quite debilitating." CE-A51. Dr. Meng reviewed Claimant's various lab tests, noting, "He has an aluminum level of 19, which is abnormal for a

non-dialysis patient." *Id*. Claimant also reported working as an aluminum welder for the past ten years.

23. On exam, Dr. Meng noted normal findings except for a lump on Claimant's left leg. Claimant appeared anxious and frightened, with a flat affect. "Abdomen is soft, but there is non-specific voluntary but distractable guarding." CE-A54. Dr. Meng also obtained an analysis of Claimant's kidney stone, which indicated it is composed of 95% calcium oxalate monohydrate. He did not comment on this. The record does not reflect what, if any, meaning this may have in determining the cause of the stone's development.

24. Dr. Meng opined that Claimant may have aluminum poisoning and referred him for additional workup.

> Mr. Whitley's symptoms could certainly be ascribed to labs suggesting possible aluminum toxicity. However, the treatment and further diagnosis for his myriad of symptoms is beyond the scope of my practice. He may need a DFO challenge test to see if he truly has aluminum toxicity, or even a bone biopsy, which may show osteomalacia, which is the usual bone formation abnormality associated with aluminum toxicity. If he does have aluminum toxicity, DFO treatment is probably the course of action. By the preference of the patient's fiancé, I will refer the patient to a clinical toxicologist at the University of Utah, Dr. Martin Caravati.

CE-A55.

25. On August 31, 2010, Claimant presented to the emergency department at University of Utah Medical Center and reported his referral to Dr. Caravati. Claimant was first evaluated by Marion McDevitt, D.O., an emergency medicine physician, and then Dr. Caravati examined him. Claimant presented with a myriad of symptoms, which he reported began about two and a half years previously.

26. Based upon Claimant's symptoms and exam, Dr. McDevitt began investigating a differential diagnosis of aluminum poisoning versus an intercranial mass. She ordered blood tests and a chest x-ray. She also recommended a possible brain MRI and a neurological workup due to Claimant's symptoms, including recent onset of headache and associated general weakness, difficulty walking upstairs, and slight unsteady gait. With respect to aluminum toxicity from welding fumes, Dr. Caravati was doubtful, but he did not rule it out. He agreed that some of Claimant's symptoms were consistent with aluminum poisoning (cognitive abnormalities and encephalopathy), many were not (generalized weakness, skin burning, vertigo, sensitivity to light and sound). Also, "If he was absorbing enough aluminum through inhalation to give him neurologic abnormalities, I would expect pulmonary complaints and findings by this time." CE-A74. "Respiratory complaints, fibrosis and COPD are expected from high dose inhalation exposures to Al." *Id.* Also, Claimant did not show evidence of anemia or osteopenia, which are associated with chronic aluminum toxicity, and his x-rays demonstrated normal bone density. Dr. Caravati noted, however, that no official bone density testing was performed.

27. Dr. Caravati recommended a neurology consultation and a possible brain MRI. He ordered new serum and urine aluminum level testing, which returned normal results. Urinalysis received on October 7, 2010 showed aluminum content of .71 mcg/g, well below any ceiling limits.

28. Claimant returned to Dr. Brauer and provided him with some articles he had procured from the Internet. Dr. Brauer referred Claimant for a bone biopsy, which returned results "well below an abnormal level," meaning they were sufficiently normal. CE-A91. "He has worked as a welder and he is just certain that his illnesses are related to welding. He has

been doing some further research on the Internet and wonders if he may have manganese toxicity. *Id.* At the time, Claimant had been off work for about two months. Dr. Brauer believed Claimant's symptoms were attributable to anxiety and depression. However, since a trial of antidepressants had not alleviated his symptoms, Claimant disagreed. Dr. Brauer noted that Claimant "is sure that there is some neurologic problem going on, probably related to his welding. We will go ahead and arrange for neurologic referral for consultation and opinion regarding the patient's diagnosis." CE-A92.

29. An x-ray ordered by Richard Davis, M.D., an orthopedist, revealed evidence of a bone tumor on Claimant's left tibia. Ultimately, this was diagnosed as a chondromyxoid tumor (benign).

30. On November 15, 2010, Claimant was evaluated by Bertram Berney, M.D., an internist practicing in Portland, Oregon. Claimant was referred to him by a toxicologist at CROET (Oregon Health & Science University's Center for Research on Occupational and Environmental Toxicology) whom Claimant had contacted by telephone in his search for a diagnosis. There is a four-page letter authored by Claimant in Dr. Berney's file detailing his symptoms and medical concerns. Dr. Berney understood that Claimant had been the trailer shop foreman for the past seven years, and was exposed to aluminum welding fumes 25 or more hours per week, welding inside a semi truck; to carbon steel with undercoating, 10 hours per week; and to fiberglass and solvents, two hours per week.[4] He wore a paper mask and gloves when welding, and a respirator when dealing with fiberglass, "which is sometimes involved in the

[4] As set forth, above, the exposure periods Dr. Berney assumed were approximately 15 times greater than Claimant's estimations at the time of the hearing.

trailer." CE-A95. Dr. Berney reviewed Claimant's former test results through records delivered by Claimant, and conducted an exam. According to Dr. Berney:

> We are faced here with a desperate welder and his wife who are convinced that there is something toxic in their environment. They are focusing on the aluminum, but I spent a significant amount of time explaining [*sic*] them that the aluminum is not a particularly toxic heavy metal and that I would not expect neurologic dysfunction as they are describing from exposure to aluminum, especially when body burden is measured and relatively low.

CE-A94. Dr. Berney ordered a brain MRI, performed November 16, 2010, "which is reportedly normal, specifically no findings of heavy metal deposition or demyelinization, aluminum toxicity does not appear to have described imaging findings in the brain." *Id. See* also, DE-150.

31. Dr. Berney opined, "My assessment then is that there is something other than aluminum toxicity going on." CE-A94. "I don't think that we have a cause and effect relationship here between the exposures that Mr. Whitely [*sic*] experienced as [*sic*] aluminum welder and his somewhat unusual symptomatology. He recommended a neurological consultation and a repeat appointment in four to six weeks.

32. On December 2, 2010, Claimant was evaluated by Stephen A. McCurdy, M.D., an occupational medicine practitioner at the University of California Davis Health System. Dr. McCurdy documented Claimant's symptoms and his history as a welder for seven years, among other things. He also noted various test results, including the biopsy test result which Claimant and his fiancé interpreted – erroneously – as positive, even though they had been told it was negative, for aluminum toxicity. According to Dr. McCurdy, Claimant's results "show clearly that his levels are not excessive - - indeed are below what is commonly encountered." CE-A103.

33. As part of his neurological examination, Dr. McCurdy administered Serial 7 testing, mental arithmetic testing, and others. Dr. McCurdy opined that Claimant performed well. "I suspect that his difficulties with memory and concentration are due to distraction and feeling unwell rather than to any disease or damage to his central nervous system." CE-A104. Dr. McCurdy further opined that Claimant does not have aluminum poisoning.

> His symptoms are multisystem in origin. His attention has been focused on aluminum poisoning based on his occupational exposures and a misunderstanding of the results of his bone biopsy. Based on my experience and confirmation that his results are in fact in the normal range, I am confident that his illness is not caused by aluminum.

CE-A103. Dr. McCurdy recommended an imaging study of Claimant's abdomen to investigate a possible mass he detected on exam. He also recommended a neurological consultation.

34. Claimant then sought a bone marrow biopsy from Benjamin Bridges, M.D., a hematologist/oncologist (January 7, 2011). By this time, Claimant was reporting fatigue, insomnia, difficulty with vision, chronic congestion, multiple skin rashes, nausea, vomiting, stomach pain, bloating, diarrhea, bone pain, muscle aches, excessive/frequent urination, numbness, trembling, and shaking. Dr. Bridges noted, among other things, some small cherry hemangiomas on Claimant's chest, as well as an acne-like rash. He advised Claimant that aluminum poisoning is "extremely rare." CE-A116. Regarding his prior bone biopsy, "The patient and his significant other…do not feel this was an adequate test as he did not undergo tetracycline labeling prior to the procedure." CE-A115.

35. Dr. Bridges performed the requested bone marrow biopsy with tetracycline labeling. The results were negative for aluminum toxicity.

36. Isocyanate poisoning investigation. On February 10, 2011, before he received the bone marrow biopsy results, Claimant was evaluated by Debra Bogossian, M.D., an internist, apparently on his own referral. He reported ringing in his ears, wheezing, palpitations, episodes of rapid heartbeat, and other symptoms. He also reported, for the first time, his concern that isocyanate inhalation may be the source of his health problems. In addition, Ms. Choquette reported her concern that Claimant may have porphyria related to aluminum toxicity. Dr. Bogossian ordered blood testing, which ruled out a number of conditions, as well as any indication for oncological or hematological follow up. However, there was not enough information to completely rule out acute porphyria. Dr. Bogossian opined that depression and anxiety were likely contributing to Claimant's symptoms.

37. On March 21, 2011, Claimant underwent an abdominal ultrasound to investigate bloating, altered bowl habits, and lumps Claimant had palpated in the upper quadrants. Claimant's gallbladder and bile ducts were normal. He had mild fatty infiltration of the liver, without ascites. No definite abnormality was visualized to correspond to the lumps felt by Claimant.

38. On April 12, 2011, Claimant was evaluated by Fred Stark, M.D., an allergist/immunologist. He described Claimant as powerfully built, strapping, mildly obese, and healthy-appearing. He did not believe Claimant's various symptoms were related. He found no evidence for porphyria, and opined the abdominal lump identified by Claimant was just a fatty tumor based on his abdominal ultrasound findings. In summarizing Claimant's case after reviewing his prior test results, Dr. Stark diagnosed mild fatty infiltration into the liver, hypertension (160/104), sternocostoclavicular hyperostosis (chronic inflammation of the

sternoclavicular joint), mild airways disease, somatization, stress, and anxious depression (not clinical), among other things. His primary diagnoses of Claimant's overall condition were: 1. Psychosomatic disorder, 2. Depression, and 3. Reactive hypertension.

> I will review the possibility of other exposures, but the absence of good clear-cut inhalation disease, absence of heavy metal complications, all must be added together to suggest that there is not a firm basis for the relationship of many of his symptoms to the welding problem. The agitated depression may stand in the way of good recovery and getting "back on his feet" and counseling and consideration for medications for anxious depression should be considered in the purview of things to help him get back on his feet and continue pursuing further evaluation.

CE-A139.

39. On April 22, 2011, Claimant returned to Dr. Stark. They discussed Dr. Stark's opinions, including the possibility that Claimant has irritable bowel syndrome. He spoke to Claimant by himself and tried to encourage Claimant "to move forward and resume physical activity and to work…." CE-A140. He later similarly encouraged Claimant's fiancée. He continued to diagnose psychogenic disorder and depression.

40. On May 2, 2011, Claimant presented to Cody Heiner, M.D., an occupational medicine physician. Dr. Heiner observed, "He appears anxious and has difficulty speaking at times. He appears to have a habit of forcefully swallowing mid-sentence when he becomes nervous. He has a tremor of the right arm which is absent when he is distracted with a question." CE-A142. Claimant's neurological exam was normal. Dr. Heiner recommended neuropsychological testing.

41. Claimant returned to Dr. Heiner on May 23, 2011, this time with concerns about changes in the shape and appearance of his stool. He presented photographs on his phone for review, and Dr. Heiner noted the shape was somewhat odd, describing it as "long and almost

geometric in shape with square angles." CE-A146. Claimant and Ms. Chocquette brought small stacks of information for Dr. Heiner to review. Again, Claimant appeared very anxious with pressured speech at times. "He again has a tremor in the right arm which is absent with distraction such as while he is speaking or while I am asking him a question that requires some thought." *Id.* Dr. Heiner opined that there is no objective evidence to support Claimant's concerns of an industrial disease.

> He is not having any significant pulmonary symptoms such as wheezing or cough which could related to isocyanate exposure. His gastrointestinal symptoms are apparently the most bothersome at this time. I recommended that he seek care through a gastroenterologist outside of the workers compensation claim. Also, again recommend that he undergo full neuropsychologic testing. Further plans could be made once the neuropsychologic evaluation is available.

CE-A146.

42. On June 10, 2011, Claimant underwent colonscopy. A benign 4 mm polyp was visualized and removed.

43. On July 26, 2011, Claimant was evaluated by John East, M.D., Ms. Chocquette's treating pulmonologist at the time of her lung transplant. Dr. East performed a pulmonary function test. Based on those results and Claimant's history, he opined that Claimant's shortness of breath may be psychogenically related to anxiety. He suspected Claimant's previous antidepressant trial was inadequate and recommended another. He also recommended a methacholine challenge test.

44. On September 21, 2011, Claimant underwent more pulmonary function testing, including a methacholine challenge. Spirometry testing showed mild obstruction, and Claimant's flow volume loop suggested very mild expiratory airways disease. His methacholine challenge was negative.

45. On September 23, 2011, Claimant was evaluated by Mohsin Syed, M.D., an internist. Claimant reported he had been diagnosed with conversion disorder by Dr. Calhoun. Claimant has since stated he understands he does not have a diagnosis of conversion disorder, but Dr. Calhoun discussed this with him. In any event, Claimant sought a referral to Si Steinberg, M.D., a psychiatrist, which Dr. Syed provided. Apparently, Claimant did not follow up.

46. Based on Claimant's history and exam, Dr. Syed assessed arthralgia, jaw pain and questionable fibromyalgia; questionable history of osteoma; irritable bowel syndrome, stable; conversion disorder; and hypertension. He noted in connection with his wellness examination that Claimant denied any memory issues. Dr. Syed recommended an autoimmune blood panel and that Claimant record his blood pressure twice per day in a relaxed environment. He also planned to obtain Dr. Davis' records regarding Claimant's osteoma.

47. Claimant returned to Dr. Syed on November 10, 2011. He had been having a lot of numbness and hyperalgesia and some tremors. His blood test results indicated deficiency in vitamins B12 and D, high lipids, and positive ANA and double-stranded DNA antibodies consistent with systemic lupus erythematosus. Dr. Syed prescribed vitamins, diet, exercise, and repeat testing in one month regarding the results positive for lupus. He also offered a flu shot, which Claimant declined.

48. On December 5, 2011, Claimant presented to Dr. Syed with a rash and severe testicle pain and redness. Dr. Syed suspected an allergic reaction to the vitamins he had prescribed and epididymitis. He prescribed a quinolone antibiotic and an antihistamine, and advised Claimant to cease his vitamins for two weeks to see if the rash would clear/reappear after

restarting them. Imaging subsequently demonstrated normal appearance of the testes, ruling out torsion and other structural abnormalities. On December 9, Claimant reported improvement in his scrotal symptoms, but he had developed bilateral lower back pain, worse on the left, and a burning sensation in his penis on urination. He also had mild tremors in his hands and a tremulous tick in his neck "various times throughout the course of his exam." CE-A200. Dr. Syed ordered a bladder scan and referred Claimant to Glen Zausmer, D.O, a urologist.

49. Due to the ambiguity in Claimant's presentation, Dr. Zausman felt further testing was appropriate. He ordered a CT scan of Claimant's abdomen/pelvis and blood work (PSA, CBC, and BMP). With the PSA still pending, Dr. Zausmer diagnosed a 2-3 mm calcification in the left ureter. "It is my feeling that the small, distal nonobstructing stone is a clinical distractor, i.e. it is not the issue that prompted him to complain of scrotal itching and discomfort, but due diligence is indicated in deference to the factors noted above." CE-A204. Subsequently, the PSA returned unremarkable results "strongly militating against an inflammatory process (at least involving the prostate)." CE-A212.

50. On December 16, 2011, Dr. Syed advised Claimant that his recent blood testing failed to confirm his September 2011 positive lupus results. Dr. Syed recommended a repeat panel in three months and restarted Claimant's vitamin therapy. Claimant reported increased sensitivity to sunlight, which Dr. Syed attributed to his antibiotic use.

51. Claimant continued to have left flank symptoms and he developed other symptoms, including nausea and vomiting, prompting an emergency room visit on December 28, 2011 and surgical removal of the calcification previously identified by Dr. Zausman on January

18, 2012. Following complications with removing the stent, Claimant's recovery was unremarkable.

52. On January 27, 2012, Claimant was referred for a rheumatology evaluation to investigate test results showing elevation in Claimant's double-stranded DNA autoantibodies (suspicious for lupus). Claimant reported that he scheduled an appointment for April 2012, but he did not follow up because, on limited funds, he preferred to follow up on the industrial exposure possibility.

53. After Dr. Syed left the area, Claimant established care with Mark Christenson, M.D., an internist, on February 17, 2012. Apparently, Claimant had still not restarted his vitamin therapy; Dr. Christenson recommended that he do so. He noted Claimant's thickened appendix, but doubted it was contributing to Claimant's symptoms because it had been imaged repeatedly and had not changed, nor shown signs of inflammation. He sought Claimant's pulmonary function test records, noting "His lungs … certainly sounded okay today." CE-A227.

54. Dr. Christenson anticipated obtaining the results of Claimant's rheumatology workup. "Certainly inflammatory markers have been very low here and I do not think he has active inflammation. The question has been whether he might have a degree of lupus." *Id.* Dr. Christenson also noted that, although Claimant carries a conversion disorder diagnosis, there may be other diseases going on. "I think we need to do a reasonable job at searching for real disease processes, but certainly not go overboard with inappropriate testing for every sign and symptom, this is [*sic*] careful balance. I think it is reasonable to look for rheumatologic type diseases and otherwise, to try and treat him symptomatically with safe treatments." *Id.*

55. As stated, above, Claimant never obtained a rheumatology consultation. Also, Claimant testified, somewhat confusingly, that Dr. Christenson mistakenly assumed Claimant had been diagnosed with conversion disorder. He also testified that he told physicians that Dr. Calhoun had diagnosed him with conversion disorder, a diagnosis which Dr. Calhoun's records do not support (see below). Apparently, Claimant mistakenly reported to some physicians that Dr. Calhoun had given him this diagnosis.

56. On March 27, 2012, Claimant was evaluated by Grace Ziem, M.D., an occupational and environmental health physician practicing in Maryland. Dr. Ziem obtained her medical degree from the University of Kansas College of Medicine in 1967, her master of public health degree from Johns Hopkins School of Public Health in 1970, and her master of public science and doctorate of public health from Harvard School of Public Health in, apparently, the mid-70s. She subsequently took courses in basic toxicology, pulmonary toxicology, toxicokinetics, and occupational medicine. She has taught clinical skills, epidemiology, and occupational health policy at Johns Hopkins University School of Public Health, and continues to teach occupational medicine to medical students at the University of Maryland School of Medicine. In the late 1980s and early 1990s, Dr. Ziem was a speaker at various events on topics relevant to evaluation of chemical injuries in patients. She also authored scholarly articles and educational materials, among other things. Dr. Ziem opened a private practice in 1982, which she still maintains. Her practice focuses primarily upon the evaluation and treatment of patients with chronic illness following various chemical and other toxic exposures.

57. Claimant read about Dr. Ziem on the Internet and contacted her to arrange an appointment. Initially, Dr. Ziem conducted physical and neurologic exams; neurocognitive,

neurophysiologic, and peak flow testing; and assessments of Claimant's disability and symptom exacerbation in response to various pollutants. She also took a complete history from Claimant and reviewed his medical records.

58. Dr. Ziem diagnosed reactive airway disease, toxic encephalopathy, and "other systemic effects of his exposure to isocyanates and probably also to aluminum vapors." CE-A233. Although this was his only in-person visit with Dr. Ziem, he continued to treat with her via telephonic follow-ups and the assistance of Paul Gering, M.D., a local internist, through the time of hearing. Her testing and causation opinions are addressed more fully, below, in the legal conclusions section. Information from her subsequent chart notes is included, below, in this chronology.

59. On May 2, 2012, Claimant consulted with Dr. Ziem via telephone. Her related chart note is handwritten, and much of it is illegible. It appears that she diagnosed amoeba, nonoccupational, and that Claimant reported he had also had a lot of spray paint exposure, that he could not afford his prescriptions, and that he was still having various symptoms.

60. On September 5, 2012, Claimant established care with Dr. Gering. He reviewed Claimant's history and accepted Dr. Ziem's diagnoses, including nonoccupational amoeba, as well as toxic progressive encephalopathy and reactive airways disease due to industrial exposure to welding byproducts. Claimant provided Dr. Gering with a CD containing his medical records and advised that he was taking a "neuro sensitization protocol compound" provided by Dr. Ziem. Dr. Gering noted that Dr. East had not actually diagnosed reactive airways disease. Claimant sought a referral to National Jewish Hospital "secondary to his workman's compensation case."

CE-A278. "I do not believe that his insurance will cover this, so we will have to negotiate treatment goals; which is really proving his case vs [*sic*] treating his problem." *Id.*

61. Based upon abdominal CT scan results, Dr. Gering diagnosed non-alcoholic steatohepatitis (fatty liver) and, after consulting with a local surgeon, determined not to refer Claimant for a biopsy. He did recommend repeat colonoscopy, fasting lipid panel, ANA panel, and vitamin B and D level testing; possible treatment for hypertension; and a flu shot later in the fall.

62. Claimant returned to Dr. Gering on October 15, 2012. He was no longer taking his "specialty" medications prescribed by Dr. Ziem, as his insurance would not cover them. He was doing about the same. "He wants to be seen at the National Jewish Hospital. Apparently they are the only place that can prove that his lung problems are secondary to his chemical exposure." CE-A280. Claimant also reported right-sided pain thought to be associated with fatty liver disease and an abnormal appendix. Dr. Gering noted that Claimant's last set of liver function tests were within normal limits. Similarly, a recent fasting lipid panel showed his hyperlipidemia had resolved, an ANA panel showed Claimant's histones were no longer elevated, and his vitamin B testing indicated he was no longer deficient in this nutrient. Claimant's vitamin D level was worse, however. Claimant declined Dr. Ziem's recommendation for follow-up amoeba testing through Dr. Gering due to finances. He reported sinus congestion, joint swelling with any use of a particular joint, and popping in his right knee.

63. On exam, Claimant's nasal passages were swollen to the point of occlusion on the left, and the right side was mildy erythematous with moderate nasal discharge. His respiration effort was normal, "without use of accessory muscles of respiration or pursed lip breathing," and

he had a normal percussive exam. CE-A287. Claimant's knee popping was reproduced on exam with flexion extension resulting in the patella partially dislocating and then popping back into the femoral groove. Otherwise, his knee exam was normal.

64. Without explanation, Dr. Gering noted that Claimant's chronic sinusitis and his irritable bowel syndrome (IBS) were both secondary to isocyanate exposure. He recommended a sinus wash kit and noted that Rob Gibson, M.D., a gastroenterologist, was managing Claimant's IBS.

65. On November 28, 2012, Claimant had another telephonic consultation with Dr. Ziem. He reported multiple joint problems, arising in 2009, as well as memory problems, reporting that he needs to tape record conversations to remember them. He also reported purplish, burning testicles and urinary frequency, among other things. Dr. Ziem noted Claimant wanted documentation and, also, AB or patch testing. Dr. Ziem wrote prescriptions for antibody testing (IgE and IgM) because she suspected an allergy to isocyanates. In the alternative, she prescribed patch testing. She also recommended reasonable accommodations for Claimant's cognitive/short term memory changes, including the ability to tape record his medical visits.

66. On December 3, 2012, Claimant advised Dr. Gering that his symptoms were worse. Testing for isocyanate sensitivity was discussed, among other things. Cod liver oil was prescribed for Claimant's vitamin D deficiency.

67. Dr. Ziem conducted another telephone consultation on January 3, 2013. Her chart notes are hand-written and difficult to discern in terms of meaning.

68. Claimant saw Dr. Gering again on February 4, 2013. Finances continued to limit his treatment options. He still had not retested for amoeba and had not resumed his medications

prescribed by Dr. Ziem. The sinus wash kit was not working because, Claimant believed, he had a nasal obstruction on the left. He was still trying to obtain workers' compensation benefits. He had been diagnosed by Dr. Wicher with somatization disorder (see below). He was having increased knee pain. He still had joint pain, but was not taking any medications due to concerns about side effects with his condition. Dr. Gering recommended medication for hypertension, but Claimant declined because Dr. Ziem advised him to take nothing but fish oil for his elevated blood pressure.

69. On March 7, 2013, Claimant reported to Dr. Gering testicular burning and discoloration of his scrotum (red to purple), waxing and waning in a three-week cycle, and a rash in his groin area, left worse than right. He thought Vaseline helped the rash. Claimant also reported swelling in his knees with walking, preventing him from even shopping in stores, and other symptoms. Claimant was also concerned about brain imaging that he thought evidenced some abnormality. Dr. Gering opined the brain imaging looked normal. Dr. Gering ordered bilateral knee x-rays and recommended a urology consultation.

70. Dr. Ziem noted on March 28, 2013, among other things, that Claimant's IgG test results were significantly elevated, and that Dr. Gering had ordered an IgG isocyante test.

71. On April 15, 2013, Claimant presented to Dr. Gering with multiple symptoms, including right flank pain that Claimant felt was due to a kidney stone. Urinalysis was normal, but Dr. Gering opined there was a remote chance Claimant could, nevertheless, have a kidney stone. Claimant had a new rash on his arms, legs and back. He had a fuzzy feeling, like he had been on a carnival ride too many times. Shower steam was inducing intense coughing episodes. His testicular problems were improving. He believed his thinking problems were worse since he

had run out of vitamin B12. He reported Dr. Ziem thought his joint pain may be due to calcium oxylate crystals, so Dr. Gering ordered a synovial fluid test. It does not appear that Claimant followed up on this testing.

72. In April 2013, Claimant reported bilateral knee pain and swelling with activity for the past two years. Claimant's knee and tibia problems were evaluated by Bradley Heninger, P.A., orthopedic physician assistant to Richard Davis, M.D., on April 29 and May 3, 2013. Knee x-rays were unremarkable. Blood testing was negative for an inflammatory arthritic process, but Claimant's uric acid level was high. A repeat MRI of Claimant's tibia revealed his chondromyxoid tumor had grown. Mr. Heninger diagnosed probable gout and referred Claimant to Jeffry Menzner, M.D., orthopedic surgeon, for follow-up regarding the tibial lesion.

73. On May 30, 2013, Dr. Menzner took a biopsy of Claimant's tibial lesion. In consultation with Christopher Fletcher, M.D., pathologist and professor of pathology at Harvard Medical School, the attending pathologist diagnosed a chondromyxoid tumor, which is benign. According to Dr. Fletcher, "The proximal tibial metaphysis is one of the commonest locations for tumours of this type. These lesions have a significant risk of local recurrence unless completely excised." CE-A313.

74. On July 17, 2013, Claimant again saw Dr. Gering. Claimant had not been straining his urine for kidney stones, as Dr. Gering previously recommended. He still had right flank pain, nausea, and other symptoms. He was again taking vitamin B12 and medications prescribed by Dr. Ziem, and he felt like he had more energy, fewer headaches, and could think better. Although Claimant's blood pressure was "way too high," he still refused to take any medication for it. Dr. Gering planned to arrange a referral to Gordon Baker, M.D., an

allergist/immunologist practicing in Seattle. As per Dr. Ziem, Dr. Baker is the only physician in the Northwest with enough experience to manage Claimant's care.

75. In August 2013, Claimant underwent an appendectomy. The appendix was subsequently analyzed by Dr. Fletcher. He opined that the appendix evidenced "a process referred to variably as 'fibrous obliteration,' 'neural hyperplasia' or 'neuroma.' CE-CC. "This latter phenomenon is seen in around 30% of resected appendices and is thought to be reactive in nature. There are no convincing features of an acute/active inflammatory process in the specimen." *Id.*

NEUROPSYCHOLOGICAL EVALUATIONS

76. Robert Calhoun, Ph.D. On June 3, 2011, in referral from Dr. Heiner, Dr. Calhoun interviewed Claimant and Jennifer Chocquette, to whom Claimant referred as his "common law wife,"[5] and administered extensive testing[6] to assess Claimant's neuropsychological functioning level. Dr. Calhoun obtained a Ph.D. in clinical psychology from Washington State University in 1992. From 1991-1992, he completed a clinical internship in neuropsychology and pain psychology at the University of Washington School of Medicine. Dr. Calhoun came to Boise in 1992, beginning his practice with St. Alphonsus Regional Medical Center. He currently serves as the director of its brain injury rehabilitation program.

[5] In Idaho, only common law marriages that were created before January 1, 1996 are legally recognized. Claimant and Ms. Chocquette have been a couple residing in Idaho since 2007. They are sometimes referred to as "married" in physician notes.

[6] Dr. Calhoun administered the Wechsler Adult Intelligence Scale – Revised, Wechsler Memory Scale – Revised (logical and visual memory portions only), Wide Range Achievement Test – 3, Rey Auditory Verbal Learning Test, Wisconsin Card Sorting Test, Category Test, Trail Making Test, Controlled Oral Word Association Test, Ruff Figural Fluency Test, Mesulam Cancellation Test, Rey Complex Figure Test, Hooper Visual Organization Test, Shipley Institute of Living Scale, Validity Indicator Profile, Rey 15 Item Memory Test, Grooved Pegboard Test, Finger Tapping Test, Minnesota Multiphasic Personality Inventory – 2, Millon Clinical Multiaxial Inventory – III, the Beck Depression Inventory, State-trait Anger Expression Inventory – 2, and the Pain and Impairment Relationship Scale.

77. Claimant reported that he had onset of insensitivity in 2006, with a rash, asthma, and sinusitis, due to exposure to toxic chemicals while welding. Then, he developed kidney stones and diffuse joint and tibia pain in 2009. Currently, Claimant reported bilateral upper extremity tremors (worse in his right hand), gait instability, diffuse joint pain, bilateral leg pain, skin sensitivity, memory impairment, and a constant feeling of intoxication, like he has had three or four beers. He also reported that he had broken his left tibia as a child, and that he has a fatty liver. He was taking no medications, and did not smoke. He had tried Prozac and Zoloft, without significant improvement in his symptoms.

78. Ms. Chocquette reported that Claimant is frequently physically uncomfortable and in pain. She said that his body jerks a lot, that he does not move well, and that he has labored breathing.

79. Dr. Calhoun noted the symptoms Claimant reported to Dr. Heiner on May 2, 2011, and that his neurological exam was normal.

80. Dr. Calhoun observed, among other things, that Claimant was attentive, alert, and fully oriented. Claimant was able to express himself well. He appeared to be physically comfortable. "When engaged in testing, he did not show the flinching in his upper body and upper extremities as often as when he was not engaged in activity." CE-A152. He did not show any form of tremor when using his hands manipulating blocks or drawing. "In fact, his drawings are absent of any form of tremor." CE-A-156. Claimant remained motivated over the course of the testing, and his test results were valid. No malingering was detected.

81. Dr. Calhoun opined that Claimant's psychological testing was all within normal limits. "…[H]is brain looks very healthy…." CE-A157.

> [Claimant's] profile does not suggest organic brain dysfunction consistent with prolonged neurotoxin exposure….the patient's concentration capacity is solidly within the average range of functioning. Higher-level mental control was within the average range of functioning. Verbal short-term memory ranges from average to high average. Visual short-term memory ranges from superior to average. There is no evidence of expressive or receptive language dysfunction. Higher-level executive control functions are within the high average range of functioning."

CE-A156. He further opined that Claimant was mildly to moderately depressed, and that Claimant was likely more depressed than he knew. In addition, Claimant's testing suggested he:

- Is highly somatically preoccupied and at high risk for somatoform disorder;
- Is highly anxious and tends to ruminate over his problems;
- Does not easily trust others;
- Is not comfortable, and not comfortable in his own environment;
- Holds traditional masculine views, making it difficult for him to relate to his own more vulnerable emotions;
- Possesses minimal coping skills;
- Is experiencing lassitude and malaise;
- Attempted to present himself in a psychologically stalwart and infallible manner;
- Likes to be in control of himself and his environment;
- Is at risk for anxiety when order and control escape him;
- Is somewhat at risk for overestimating his abilities and talents;
- Can be very sensitive in response to criticism, even if it is meant constructively;
- Does not have problems with acute or chronic anger, but expends a great amount of energy controlling his anger.

CE-A155.

82. Dr. Calhoun opined that Claimant has difficulty accepting the possibility that his symptoms could be explained by psychological factors. "He appears bound and determined to prove that he suffers significant toxin exposure. Thus, he may be somewhat resistant to entering into psychological treatment to address his current symptoms." CE-A156. Also, given Claimant's psychological defensiveness, "he is not likely to benefit from antidepressants currently." *Id.* Dr. Calhoun recommended psychological therapy to address the psychological contributions to his symptomatology. He thought Claimant may be more open to antidepressant/anxiolytic medication if prescribed by someone with whom he had developed a rapport. He also recommended a rehabilitation program, so that Claimant could address his issues through a rehabilitation model.

83. On August 15, 2011, Claimant met with Dr. Calhoun to discuss the test results and Dr. Calhoun's opinions.

> I did explain to the patient how depression, anxiety, fear, and somatoform tendencies can enhance his cognitive cloudiness that he subjectively reports as well as his general body twitching. The patient did become somewhat defensive feeling as though the chemical exposure caused his problems. I once again reiterated to the patient that he does not show signs of organic brain dysfunction. I explained to the patient how the somatization of stress can result in various physical sensations, symptoms, and neurocognitive inefficiency.

CE-A185. Dr. Calhoun offered to treat Claimant for depression, anxiety, somatoform tendencies, and conversion-like symptoms, and recommended a follow-up visit in two to three weeks. There are no records of any further treatment or evaluation by Dr. Calhoun after this visit.

84. Donna Wicher, Ph.D. Claimant was evaluated by Dr. Wicher, clinical psychologist, at Surety's request, on December 13, 2012. Dr. Wicher obtained her Ph.D. from

University of Kentucky, then returned to Portland where she completed an internship at Oregon Health and Science University and did her residency at what is now called Northwest Occupational Medical Center. Thereafter, in 1985, she went into private practice in Portland, which she still maintained at the time of the hearing.

85. Dr. Wicher described the scope of her practice:

> I'm a medical psychologist. My qualifications are that I have, from the time of my internship at the medical school, examined and treated patients who have medical conditions and have been seen for various medical symptoms. I am certainly capable of reading the reports and records that are available for any patient and determining whether or not there is evidence that someone has suffered an exposure.
> …
> But to order a medical test, you need to have a medical license, at least in Oregon, to do so. A psychologist may refer someone to a physician if they think that it would be appropriate to have such tests done, but we simply cannot order those ourselves.

Wicher Dep., pp. 26-27. "I'm capable of reading reports and comprehending what the reports say." *Id.* at 27.

86. In preparing her opinions, Dr. Wicher reviewed Claimant's medical records, interviewed Claimant,[7] and administered testing.[8] Claimant reported, among other things, that he began developing both physical and psychological difficulties by 2006, maybe earlier. His initial symptoms included a skin rash, nasal issues, and breathing problems. His rash went away with medication, but recurred several times. His breathing problems were determined not serious. In 2009, he developed fatigue, exhaustion, problems with memory and concentration, jaw-popping,

[7] Claimant tape recorded the evaluation. A transcription of that recording was admitted into evidence by Defendants, as Defendants' Exhibit 35 (DE-412 through 447).

[8] Dr. Wicher administered the Wechsler Adult Intelligence Scale B Fourth Edition (WAIS-IV), the Wechsler Memory Scale B Third Edition (WMS-III), the Sentence Repetition Test, the Rey Auditory Verbal Learning Test, (RAVLT), the Rey-Osterrieth Complex Figure Test (CFT), the Hooper Visual Organization Test (HVOT), the Trail Making Test, the Symbol Digit Modalities Test (SDMT), the Reitan-Indiana Aphasia Screening Test, the Controlled Oral Word Association Test, COWA), and the Minnesota Multiphasic Personality Inventory-2-Restructured Form (MMPI-2-RF).

wisdom tooth extraction, kidney stones, high ketones, severe knee pain, and vertigo and nausea in the morning. In 2010, Claimant's nausea increased and he began having a drunk-like dizzy feeling, abdominal pain, and chest pain associated with increased dizziness and drunken feeling. Currently, he was experiencing a number of symptoms. Claimant first obtained treatment for what he thought was aluminum poisoning in August 2010. He has no history of mental health problems or treatment.

87. Claimant reported good relationships with his immediate family members. As a child, he was active in outdoor pursuits. His school performance varied according to his opinion of the teacher, and he earned Cs in most of his classes. He participated in a vocational program during the last two years of high school, earning a 3.5 grade point average, either overall or just in his last two years, he did not remember which.

88. During the interview, which Claimant recorded, Dr. Wicher observed no gross defects in memory or concentration. His thought processes and judgment appeared intact, and his speech patterns were consistent with his educational and cultural background.

> It was … notable that Mr. Whitley did not show observable signs of impairment during the current evaluation. He was able to recount the progression of his symptoms without any clear problems with his recall for the sequence and approximate timeframes and was even able to recall that he had neglected to tell another examiner, whom he had seen on the day prior to this evaluation, some information that he related to this examiner.

DE-408.

89. Claimant described his daily routine, which included checking news and playing games on the Internet, showering, and doing some light house work. He does not use the stove because he forgets to turn it off. He denied any stressors, other than those associated with his toxic exposure, lack of employment and income, and the instant case.

90. Claimant's test results are summarized as follows:

· Attention, memory, and new learning. Claimant performed adequately. For example, he was in the low average range on the Sentence Repetition Test, which primarily tests attention. He was in the average range on some recall portions of the both the CFT and the RAVLT. He performed one standard deviation above the mean on the immediate recall of the original list test. On five learning tests on the RAVLT, Claimant scored in the average range on four, and one standard deviation above the mean on one.

· Perceptial reasoning and visual organization. Claimant performed without difficulty. He was in the high average range on the Perceptial Reasoning Index of the WAIS-IV, and within normal limits on the HVOT. He performed a the 100th percentile on the copy portion of the CFT.

· Processing speed and complex visual tracking. Claimant's results were mixed. He was in the low average range on the Processing Speed Index of the WAIS-IV, and he performed more than one standard deviation below the mean on the written and oral administrations of the SMDT. "By contrast, he completed Part A of the Trail Making Test in 26 seconds, performing at the 70th percentile for individuals ranging in age from forty to forty-nine. He completed Part B in 50 seconds, performing between the 80th and 90th percentiles for individuals in the same age range." DE-405.

· Expressive abilities. Claimant performed without difficulty, except on the BNT, a test of confrontation naming, on which he performed more than one standard deviation below the mean. By contrast, he performed in the normal range on the COWA (verbal fluency), and in the average range on the Verbal Comprenension Index of the WAIS-IV. He made only one error on the Reitan-Indiana Aphasia Screening Test.

· Effort. Claimant's test results on the TOMM suggest that he gave inconsistent effort, and "that his other test results must be interpreted with some caution, as they could under-represent his actual abilities." DE-405. However, his results on the MMPI-2-RF, the 21-Item Test, and some internal measures of consistency on the WMS-III did not indicate an inconsistent response pattern.

· Comprehension and relative response. Claimant's MMPI-2-RF protocol indicated that he comprehended and responded relevantly.

91. Both Dr. Wicher and Dr. Calhoun administered the COWA and Part A of the Trail Making Test. Claimant's results on the earlier administration (Dr. Calhoun's) showed some impairment, but no impairment on Dr. Wicher's administration.

> If he had suffered a brain injury as a consequence of any work related exposure, he would not have been expected to have shown such significant recovery in test

> performances between the time when he was seen by Dr. Calhoun and the current evaluation, given that by the time he saw Dr. Calhoun, he had already been off work for nearly one year and any improvement would have been made long before the time of Dr. Calhoun's evaluation. Consequently, the variability in test performances would have been due to factors other than any alleged exposure.

DE-408.

92. Dr. Wicher acknowledged the broad discrepancy between Dr. Ziem's cognitive testing results, which indicated Claimant "had significant reduction of attention span and concentration on digit span recall, as well as reduction of ability to perform serial sevens and significant impairment of short-term memory." DE-408. Dr. Wicher was unable to compare Dr. Ziem's results with her own or Dr. Calhoun's because "Dr. Ziem's report did not describe the specific tests administered and what normative data was used in evaluating Mr. Whitley's test results." *Id.* At her deposition, Dr. Wicher again explained that Dr. Ziem's testing was only a rough screening, was not standardized, and incorporated no effort testing and, therefore, her results were not reliable.

93. Dr. Wicher ultimately diagnosed Claimant with somatoform disorder, undifferentiated, ("somatic symptom disorder" as per the recently published DSM-V) and unrelated to Claimant's workplace. She based her opinion, in part, on Claimant's test responses (MMPI-2-RF and earlier MMPI-2), which indicated "a strong tendency to convert emotional concerns into physical symptoms and to develop increased physical complaints in response to stress or tension," and his medical records, which fail to establish a medical diagnosis that would account for all of Claimant's symptoms. DE-408. Although her report describes her reasoning in much greater detail, she opined that "psychological factors unrelated to his work exposure are playing the most significant role in his current symptom picture." DE-407. Dr. Wicher also

cited the medical records of four of Claimant's treating physicians who suspected somatization and/or psychological processes.

94. Dr. Wicher also opined that secondary gain factors are "almost unavoidable in compensation situations and Mr. Whitley is currently experiencing secondary gain in the forms of relief from work pressures, potential financial compensation, attention from health care providers and others, and the meeting of underlying dependency needs, all of which inadvertently tends to reinforce disability and dependency behaviors." DE-410.

INDEPENDENT MEDICAL EVALUATION

95. Brent Burton, M.D. Dr. Burton, who specializes in toxicology and occupational medicine in private practice in Beaverton, Oregon, evaluated Claimant on December 12, 2012. Dr. Burton obtained his medical degree from the University of Utah in 1978, then completed an internship and moved to Portland, Oregon, where he trained in emergency medicine at OHSU. Following his training, he became a faculty member at OHSU and, later, the medical director at Oregon Poison Center. He focused on occupational toxicology and, toward this end, obtained a master's degree in public health from the University of Washington in 1989. Dr. Burton then returned to OHSU, where he was appointed the medical director of the occupational health program. He left in 1997 to enter private practice, which has become principally a consulting practice. "…I only see occupational cases that involve potential toxic exposure or some other type of exposure that occur [*sic*] in the workplace." Burton Dep., p. 6.

96. Prior to preparing his IME report, Dr. Burton reviewed Claimant's medical records, interviewed Claimant, and performed an examination. Both Claimant and Dr. Burton recorded the interview. By the time of his deposition, he had also reviewed the transcripts of the

depositions of Drs. Ziem and Calhoun, and the hearing testimony of Mr. Call (industrial hygienist).

97. Claimant reported six primary symptoms: the feeling that he is drunk and "not really awake"; feeling as if he runs out of air, especially with exercise, and a dry cough; pain with any motion in his knee, ankle wrist, and jaw, without redness or swelling; constant tremor in his hands, right more than left, with a jerking sensation that also involves his legs; diminished night vision; and loss of memory (forgetting items on the stove and where he left things).

98. Dr. Burton's examination revealed unremarkable findings. He ordered pulmonary function testing (including methacholine challenge), which was negative. "In the absence of airway reactivity, the methacholine challenge rules out a diagnosis of asthma. So if he does not have asthma, logically he can not have occupational asthma." Burton Dep., p. 20. Dr. Burton explained that "the classic irritant response is something we all understand because most people have sprayed ammonia on a window or some other similarly irritating substance, and upon that kind of exposure one develops immediate, very significant burning of the eyes, tearing, nasal discharge and often a cough. And if we were looking at whether some significant symptoms occurred in the context of performing that kind of activity, say welding or whatever other activity we want to look at, if those kind [*sic*] of symptoms are not reported, then it's very unlikely that an exposure to an irritant substance has occurred in any significance." *Id.* at pp. 42-43.

99. Dr. Burton also ordered blood testing and urinalysis testing, which showed (among other things) reactions to multiple allergens (mold, cat, dog, grass, dust mite, and trees, for example).[9] However, RAST testing for isocyanates, TDI, HDI, and MDI were all completely

[9] Dr. Burton's history indicates Claimant and Ms. Chocquette have two cats and a dog and that pain medications make breathing difficult.

negative. "He does not have any immunologic reactivity from isocyanate. So that basically rules out an isocyanate caused problem." Burton Dep., p. 20.

100. Aside from his own findings, Dr. Burton opined that "no physician … has presented any data upon which a conclusion can be made that Mr. Whitley has experienced an exposure that is responsible for developing acute symptoms or the development of any medical condition." Burton Dep., p. 16. Specifically regarding Dr. Ziem's opinions stated at her deposition, Dr. Burton saw nothing "that would provide any medical evidence of either exposure or exposure-related disease or injury." *Id.* at 21.

101. Dr. Burton generally described his diagnostic methodology. "What I specifically try to avoid is jumping in to what they believed [*sic*] recent exposure was and trying to tie that to, to a medical condition. I want the big picture and then we form a differential diagnosis and then sort through that with objective data to come to the correct diagnosis." Burton Dep., p. 12. Beginning with the history, Dr. Burton first does an exposure assessment, which is followed by a review of medical data "to confirm if there is a diagnosable medical condition." *Id.* at 22. Next, if there is an exposure and a diagnosable condition, Dr. Burton asks whether a causal relationship exists. Last, he analyzes the differential diagnoses, given the constellation of symptoms presented, to determine whether there exists some non-exposure-related explanation. In Claimant's case, Dr. Burton opined that "there's no demonstrable exposure that can potentially, even potentially be linked to a medical condition." Burton Dep., p. 23. Further, "there's no diagnosable medical condition here. There are a lot of theories and such. But … there's no medical diagnosis." *Id.* "So the third part of the analysis is there can't be a relationship if there's no exposure and no documented disease." *Id.*

102. Dr. Burton ultimately opined that Claimant's symptoms do not correspond with objective findings and that they "represent psychological dysfunction and undetermined psychosocial factors and/or disability behaviors." DE-378. Dr. Burton assessed uncontrolled hypertension, exogenous obesity, allergic rhinoconjunctivitis, and a history of kidney stones, unrelated to any industrial exposures. "In summary, Mr. Whitley does not have a diagnosable occupational disease or illness." DE-380.

103. Specifically regarding aluminum poisoning, Dr. Burton was adamant that Claimant, who has normally functioning kidneys, was never at risk and, therefore, no testing for this condition was ever indicated.

> It should first be noted that aluminum intoxication is only a clinical entity among patients with renal failure who are receiving dialysis. Because Mr. Whitley has normal renal function and is not a dialysis patient, it is implausible that he would develop aluminum intoxication, regardless of the intensity or duration of a workplace exposure to aluminum. Also, anyone who takes an over-the-counter antacid is exposed to much higher concentrations of aluminum than Mr. Whitley could possibly have encountered at his workplace.

DE-379.

104. As to isocyanate poisoning, Dr. Burton opined:

> Persons exposed to airborne isocyanates without adequate respiratory protection may develop an immunologic sensitivity to the isocyanate components. After sensitization has occurred – usually after several years of spraying isocyanates – the manifestations of symptoms are respiratory and comprise cough, shortness of breath, and wheezing as manifestations of occupational asthma. However, … [Claimant's pulmonary function test results] conclusively rule out a diagnosis of asthma. Mr. Whitley also underwent testing to evaluate possible reactivity to the isocyanates found in urethane foam and paint and he tested negative to all three isocyanate materials. These data conclusively rule out any consideration of a diagnosis of sensitization to isocyanates or a diagnosis of occupational asthma.

DE-379-80.

DR. BRAUER

105. On March 22, 2013, Dr. Brauer responded to Defendants' request for his opinion. Based upon his treatment of Claimant, Dr. Brauer "felt that organic causes for his symptoms had been ruled out and that his symptoms were most likely caused by a somatization related to anxiety and depression." DE-449. He went on to disclose that he does not have the expertise to render an opinion as whether Claimant had suffered manganese or isocyanate toxicity.

CLAIMANT'S CREDIBILITY

106. After observing Claimant at the hearing and the telephonic deposition of Dr. Ziem, and reviewing the evidence of record, the Referee finds Claimant is a credible witness inasmuch as he is sincere in his belief that he has suffered industrial inhalation injuries. However, his testimony is, at times, contradictory. In addition, his consistent rejection of treatments for non-industrial conditions in favor of evaluations that may turn up evidence to support his industrial cause theory have both confounded his symptomatic presentation and prolonged his suffering. Claimant asserts that he just wants to find out what is wrong with him, but his actions indicate a strong commitment to advocate his case, as well.

DISCUSSION AND FURTHER FINDINGS

107. The provisions of the 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). However, the Commission is not required to construe facts 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).

CAUSATION

108. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

109. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id*.

110. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc*., 124 Idaho 946, 866 P.2d 969 (1993).

111. Claimant asserts that he has suffered various injuries and symptoms due to exposure to airborne toxins he inhaled while welding polyurethane-backed aluminum at May Trucking. Defendants argue that Claimant has failed to prove his case.

112. Claimant relies upon the medical opinions of Dr. Ziem. In developing her opinions, Dr. Ziem testified that she looked at Claimant's whole picture, including not only his symptoms, but also the chemicals to which he was exposed, the conditions of the exposure, her exam findings (physical, neurocognitive, and neurological), his medical history (records), and his lab testing.

113. Dr. Ziem opined that Claimant meets the criteria for occupational disease because:

- He was completely healthy prior to the above described exposures;
- The types of symptoms he developed were typical of those known to be caused by his exposures to isocyanates and very possibly aluminum;
- His symptoms were worse with exposure and better away from exposure on repeated occasions; and, to a lesser extent,
- Other workers who performed work like Claimant developed respiratory and/or neurologic effects, while employees who did not perform these tasks did not develop these conditions.

See, CE-A233-234.

114. Specifically, to a reasonable degree of medical probability, Dr. Ziem opined that Claimant has the following conditions due to inhalation of toxins at May Trucking:

- Occupational asthma: Dr. Ziem considers Claimant to have reactive airways disease. "Excessive and repeated exposure to lung irritants are known to cause reactive airway disease. I consider the patient to have reactive airway disease. Sometimes it's called occupational asthma." Ziem Dep., p. 59.
- Toxic encephalopathy: As a result of Claimant's performance on her neurocognitive testing, including the Serial 7s and Digit Span Recall tests, as well as at least

some of the neurophysiological tests identified on Exhibit B to her deposition transcript, Dr. Ziem has diagnosed Claimant with toxic encephalopathy.

· Kidney tubular damage, hematuria, knee pain: Dr. Ziem opined that these are likely caused by excess oxalates, the metabolites of diethylene glycol, due to industrial inhalation exposure.

· Enlarged/fatty liver: Dr. Ziem attributes this condition to repeated high exposure to fluorinated compounds. "I wouldn't expect it from one exposure, but repeated high exposure." Ziem Dep., p. 60. "…I consider that to be secondary to the exposure to the polyurethane foam, in various forms; welding on it, grinding on it, and spraying it." *Id.* at 60-61.

115. Dr. Ziem is clearly qualified to render an opinion in this case. The foundations for her causation opinions, however, are at odds with the weight of credible evidence in the record as addressed, below.

116. Insufficient evidence of industrial exposure. There is no dispute that the record lacks air quality testing results that would establish the amount of isocyanates, aluminum fumes, or diethylene glycol, if any, that Claimant inhaled while welding in every situation. The air quality testing that was performed indicated no toxic levels for any substance tested.

117. Dr. Ziem asserts that specific information regarding the amounts of toxins Claimant inhaled is unnecessary to determine that Claimant suffered toxic exposure. She testified that "the legal exposure for isocyanates is five parts per billion. And one cannot spray isocyanates in an enclosed space and keep exposure below five parts per billion." Ziem Dep., p. 67. Further, Dr. Ziem opined that a paper mask would not protect Claimant. Dr. Burton, on the

other hand, opined that "the exposure assessment falls short of an exposure that would…present a concern about toxicity." Burton Dep., p. 25.

118. The legal exposure limit asserted by Dr. Ziem is unrebutted, and is accepted as fact. However, Dr. Ziem's assumptions about the frequency, intensity, and duration of Claimant's exposures to airborne chemicals at work are only as accurate as her understanding of Claimant's reports. These reports were vague, in part because Claimant welded on an as-needed basis rather than continuously, sometimes inside a trailer and sometimes outside the trailer. Claimant told Dr. Ziem that his exposure began in 2003; whereas, he later asserted (and it was determined, above) that his exposure began in 2005. Dr. Ziem did not address either Claimant's specific estimation that he had welded foam-backed aluminum for approximately 368 hours during his entire tenure at May Trucking, or Defendant's estimation that he had welded 133 hours during this period.

119. Even if Claimant's reports were accepted as accurate, and Dr. Ziem is correct that he was exposed to concentrations in excess of the legal limit, her testimony is still insufficient to establish Claimant was exposed to concentrations that, more likely than not, would result in permanent injury to the body. As Dr. Ziem testified, such benchmarks have not been established yet:

> I've authored and coauthored a number of articles on exposure limits, which are inadequate and unfortunately not science-based. They don't allow for the exposure of chemical mixtures. They were not developed with adequate literature reviews, and other problems with them that is probably clear from reading the titles of the articles in the curriculum vitae.
>
> In other words, we don't - - unfortunately, we don't have valid exposure limits that will protect workers in the workplace, and that's a great disappointment to occupational physicians. It seems *we have to be more diligent about a careful workup, all because we can't just turn to a magic set of numbers*, because we

> don't have a scientific basis at this time for a set of numbers that are safe for workers.

Ziem Dep., pp. 10-11 (emphasis added).

120. Dr. Ziem depends upon Claimant's medical findings to determine the etiology of his conditions because no limits between safe and unsafe exposure levels have been established. For the reasons set forth, below, her medical opinions also fail to establish a nexus between any of Claimant's conditions and his work at May Trucking. Evidence in the record establishes that:

121. Claimant was not materially "completely healthy" prior to exposure. Prior to 2005, Claimant did not seek treatment for kidney stones, symptoms related to encephalopathy, joint pain, or liver problems. However, Claimant does have a long history of respiratory/allergy problems that Dr. Ziem does not address. In 2004, he reported that he had seasonal allergy symptoms for the last four years, worse in the fall, including headaches above his eyes, drainage in the back of his throat, coughing, congestion, fatigue, itchy/watery eyes, and occasional chest tightness. Claimant's symptoms improved with medications. Claimant continued to seek treatment periodically for allergy symptoms before 2010.

122. Claimant's symptoms did not necessarily worsen with exposure or improve when the exposure ceased. It appears from the record that Claimant's symptoms are, for the most part, the same or worse since he left May Trucking in August 2010. Specifically regarding occupational asthma, the record fails to establish either that he has asthma, or that his respiratory symptoms have improved since leaving May Trucking. Given Claimant's history of allergy problems before his employment at May Trucking, his positive allergy testing for nonoccupational allergens in 2012, and his persisting and/or worsening respiratory complaints

after leaving his employment, the evidence of record does not establish that Claimant's sinus problems are related to his work at May Trucking.

123. Coworkers' toxic exposure is not proven. Among other things, Claimant reported to Dr. Ziem that other employees who worked with foam at May Trucking had gotten sick and missed work, and that one had died after manifesting neurological symptoms and fatigue. He also reported that one coworker developed tremors, and that only individuals who worked on the trailers developed these symptoms. In turn, Dr. Ziem relied upon this information in developing her causation opinion.

124. There is insufficient evidence in the record to establish that any of Claimant's coworkers were affected by toxic exposures at work, or that Dr. Ziem examined any of them. Therefore, to the extent Dr. Ziem relied upon this information, her opinion lacks foundation.

125. Claimant's symptoms are not pathognomonic for toxic exposure. Dr. Ziem opined that Claimant's symptoms are typical of those known to be caused by exposures to isocyanates, diethylene glycol, and, possibly, to aluminum. As noted by several other physicians, though, Claimant's symptoms are vague and involve every system in his body. Dr. Ziem has isolated certain symptoms that are consistent with her diagnosis and has excluded others which are not. Yet, her testimony fails to establish that any of Claimant's symptoms are so characteristic of toxic exposure that they are diagnostic in nature (pathognomonic.) It cannot be concluded from the diagnosis of a broken arm that the victim must have fallen out of a tree. Similarly, the fact that some of Claimant's symptoms are consistent with toxic chemical exposure is insufficient to establish that Claimant's symptoms arose due to such exposure.

126. Blood testing ordered by Dr. Burton in December 2012 failed to establish Claimant is sensitive to isocyanates. Dr. Ziem explained that, after six months, she would not expect to see antibodies to isocyanates because, in her experience, such exposure "induces chronic inflammation by initiating the nitric oxide/peroxynitrite vicious cycle…." Ziem Dep., p. 42. Dr. Burton, on the other hand, testified that acquired isocyanate sensitivity would result in permanent measureable levels of IgE antibodies, thus specifically ruling out isocyanate-related causes. Neither opinion establishes evidence of isocyanate sensitivity.

127. Dr. Ziem's testing revealed Claimant has extremely low IgA levels, signaling reduced immunoglobulins, which means Claimant has more trouble fighting off pathogens. Her testing also revealed he had reduced B12, amoeba, and an allergy to casein. Dr. Ziem testified that some of these findings are consistent with exposure to isocyanates. However, her opinions are insufficient to overcome the weight of medical evidence establishing that Claimant has not likely suffered any injury from isocyanates.

128. Claimant's conditions are not likely due to toxic exposure. Dr. Ziem has opined that Claimant suffered toxic encephalopathy, industrial asthma, and oxalate-induced joint pain and kidney stones due to exposure to airborne toxins at work. She posits that Claimant's industrial exposure initiated a chemical reaction in his body that is responsible for these ongoing conditions. The weight of the medical evidence, however, fails to establish by a preponderance that toxic exposure caused any of them.

129. *Industrial asthma.* Dr. Ziem erroneously believed that Claimant had a positive methacholine challenge test. In fact, he had two negative methacholine challenge tests. On those bases, Drs. East and Burton opined that Claimant does not have any significant respiratory

condition. The weight of the medical evidence establishes that Claimant likely has mild reactive airways disease, but he does not have industrial asthma or any respiratory condition consistent with injury due to inhalation of toxic chemicals.

130. It is undisputed that disease processes resulting from inhalation of toxic chemicals either follow or coincide with industrial asthma. For example:

· "If he was absorbing enough aluminum through inhalation to give him neurologic abnormalities, I would expect pulmonary complaints and findings by this time." CE-A74 (Dr. Caravati).

· "And if we were looking at whether some significant symptoms occurred in the context of performing that kind of activity, say welding or whatever other activity we want to look at, if those kind [*sic*] of symptoms are not reported, then it's very unlikely that an exposure to an irritant substance has occurred in any significance." Burton Dep., p. 20.

Although Dr. Ziem did not specifically endorse this point, she relied on the fact that Claimant had suffered industrial asthma in forming her opinions. Further, she did not assert that other disease processes related to toxic chemical inhalation were likely to exist in the absence of industrial asthma.

131. Therefore, the finding, above, that Claimant likely has not suffered respiratory disease from inhaling toxic chemicals precludes findings that he has likely suffered any other related injuries. The record also contains additional medical evidence establishing that Claimant probably does not have industrially-induced toxic encephalopathy, oxalate crystal injuries, or fatty liver.

132. *Toxic encephalopathy.* Dr. Ziem's diagnosis of toxic encephalopathy runs contrary to the findings of Drs. Calhoun and Wicher following extensive neuropsychological testing. She relied upon her own neurocognitive test results (Serial 7s, Digit Span Recall), to the exclusion of those obtained by Drs. Calhoun and Wicher, to conclude that Claimant's short-term memory was significantly impaired. She does not address why Claimant performed well on similar testing administered by Dr. McCurdy in 2010.

133. Dr. Ziem's neuropsychological testing was not standardized, so Claimant's results could not be objectively evaluated. Further, those tests did not attempt to assess Claimant's effort, and they were not nearly as comprehensive as those administered by the neuropsychologists of record.

134. Dr. Ziem also relied upon neurophysiological test results demonstrating that Claimant's response times are significantly slower than would be expected, that his sensory responses were abnormal, that his postural sway/balancing test results were abnormal, and that he had a tremor. It appears from Exhibit B to Dr. Ziem's deposition that many or all of the neurophysiological tests Dr. Ziem administered were standardized. However, it does not appear that any effort testing was administered. Along those lines, it also does not appear that Dr. Ziem considered evidence in the record from the notes of physicians, including Dr. Calhoun and others, that Claimant's tremor is more likely related to a non-neurologic source.

135. Dr. Ziem's observations and test results are insufficient to overcome the weight of credible medical opinions establishing it unlikely that Claimant has any neurophysiological impairment.

136. *Oxalate-related conditions.* Dr. Ziem opined that Claimant's body has retained calcium oxalate crystals as a result of toxic exposure. She asserts that these crystals are responsible for Claimant's joint pain, hematuria, and kidney stones. In support of Dr. Ziem's opinion, a lab analysis establishes that Claimant had a kidney stone composed of calcium oxalate monohydrate.

137. On the other hand, neither Claimant's nephrologist (Dr. Meng), nor any other physician has placed any particular importance on the composition of Claimant's kidney stone. And Dr. Ziem did not opine that kidney stones of calcium oxalate monohydrate are more often found in individuals with isocyanate exposure than in the normal population of kidney stone sufferers. Further, blood testing in 2013 confirmed elevated levels of uric acid. Based on these tests, Dr. Davis' physician assistant diagnosed gout.

138. Dr. Ziem rejected gout as a likely cause of Claimant's joint pain because Claimant's description of a feeling like broken glass in his knee is more descriptive of pain associated with excess oxalate deposits than with pain from gout. The record does not divulge how Dr. Ziem would know the difference. The weight of evidence fails to establish by a preponderance that Claimant's joint pain is due to either calcium oxalate monohydrate crystals or isocyanate exposure.

139. As to Claimant's kidney stones and hematuria, Dr. Burton finds no medical basis for a causal connection with isocyanate inhalation. He called the theory Dr. Ziem advanced regading the series of chemical reactions initiated by the inhalation of isocyanates and resulting in the crystals "ridiculous." Burton Dep., p. 22. As Claimant asserts, this criticism may be too

harsh. Even so, the weight of evidence in the record fails to support her causation opinion in this regard.

140. *Fatty liver.* The record establishes Claimant does have a diagnosis of mildly fatty liver. No physician has opined that this condition is due to an industrial exposure, other than Dr. Ziem. Dr. Ziem's explanation of the connection between Claimant's fatty liver and industrial isocyanates falls short because it presumes "repeated high exposure," which has not been defined and, therefore, has not been established by a preponderance of evidence. Ziem Dep., p. 60.

141. Claimant has failed to establish by a preponderance of evidence that he sustained an industrial disease from exposures to airborne chemicals related to isocyanates, aluminum, or diethylene glycol, at May Trucking.

142. All other issues are moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove by a preponderance of evidence that he suffered an industrial disease related to exposures to airborne chemicals at May Trucking. As a result, his Complaint should be dismissed with prejudice.

2. All other issues are moot.

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RECOMMENDATION

Based upon the foregoing findings of fact and conclusion of law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED in Boise, Idaho, on the ___21st_____ day of _____April_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
LaDawn Marsters, Referee

ATTEST

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th_____ day of ____April_____, 2014, 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:

RICK L WHITLEY
1410 WHITLEY LN
VALE OR 97918-5433

ALAN R GARDNER
GARDNER LAW OFFICE
PO BOX 2528
BOISE ID 83701-2528

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICK WHITLEY, Claimant, v. MAY TRUCKING COMPANY, Employer, and GREAT WEST CASUALTY COMPANY, Surety, Defendants.	**IC 2012-008344** **ORDER** April 29, 2014

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters 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 by a preponderance of evidence that he suffered an industrial disease related to exposures to airborne chemicals at May Trucking. As a result, his Complaint should be dismissed with prejudice.

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 _29th_____ day of ____April_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th____ day of __April_____, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICK L WHITLEY
1410 WHITLEY LN
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sjw _/s/_____